MEMORANDUM DECISION

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IN THE COURT OF APPEALS OF INDIANA

Monte G. Faulkner,
Appellant-Defendant,

v.

State of Indiana,
Appellee-Plaintiff.

May 2, 2022

Court of Appeals Case No. 21A-CR-1662

Appeal from the Howard Circuit Court

The Honorable Lynn Murray, Judge

Trial Court Cause No. 34C01-2006-FA-1542

Molter, Judge.

[1] Monte G. Faulkner brings this discretionary interlocutory appeal to challenge the trial court's denial of his motion for severance of charges. The State

charged Faulkner with two counts of battery and eight counts of sex offenses against his daughters and stepdaughters, all minors at the time of Faulkner's alleged offenses. Faulkner contends he was entitled to severance of charges as a matter of right, and alternatively, as a matter of discretion. Finding no error or abuse of discretion in the trial court's ruling, we affirm the trial court and remand this case to the trial court for further proceedings.

Facts and Procedural History

[2] Faulkner and K.G., his former wife, have two children, Ka.G. (born December 2004) and L.F. (born April 2013). Faulkner is currently married to H.F., who has two daughters, Ma.S. (born November 2006) and My.S. (born November 2008). The State alleges Faulkner sexually assaulted and battered his daughters and stepdaughters ten times, committing two crimes in 2013, one in 2016, and the remaining seven crimes between January 2019 and April 2020. All alleged events occurred in three homes in Kokomo, Indiana.

[3] In particular, the State alleges that in October 2013, when Ma.S. was six years old, Faulkner was bathing her and kept looking at her "private parts." Appellant's Conf. App. Vol. 2 at 15. Minutes later, Faulkner entered Ma.S.'s bedroom, dragged her onto the floor, and forced her to perform oral sex. He then allegedly put Ma.S. onto her bed and engaged in both oral and vaginal sex, ultimately causing her to bleed.

[4] A few years later, in January 2016, the State alleges Faulkner and H.F. socialized with K.G. and her husband at K.G.'s home. Because Faulkner and

H.F. were drunk, they accepted K.G.'s invitation to stay at her home for the night. Ka.G., who was twelve years old at the time, was awakened by Faulkner, who was standing at the side of her bed with his head under her blanket while he touched her stomach with his hand and went "all the way down." *Id.* at 48. Faulkner allegedly lifted Ka.G.'s underwear and "almost touched her private area," but Ka.G. protected herself by turning away and covering herself. *Id.*; Appellant's App. Vol. 2 at 2, 49.

[5] Between January 2019 and April 2020, the State alleges Faulkner would often come into Ma.S.'s bedroom, who was twelve or thirteen at the time, and at least twice he put his hands down her pants. During one incident in November 2019, Faulkner walked into Ma.S.'s room and tried to touch her, but she pushed him away. Faulkner then allegedly put Ma.S. into a chokehold, grabbed her hair, and dragged her across the floor before eventually releasing her. When Ma.S. ran toward her room, Faulkner allegedly grabbed her again, dragged her to his bedroom, and touched her breasts with his hands and mouth.

[6] The State further alleges Faulkner often entered the bedroom when My.S. and Ma.S. slept together. One evening, when My.S. was eleven or twelve years old, Faulkner allegedly came into the bedroom and put his hand down My.S.'s pants. Around the same time, Faulkner allegedly entered the bedroom where L.F. was lying in bed with Ma.S., and he tried to pull L.F.'s pants down, but he ultimately retreated after Ma.S. yelled at him to stop.

[7] The State charged Faulkner with ten counts. Seven counts alleged that Faulkner assaulted Ma.S.: Class A felony child molesting (Count 1); what was then Class A felony sexual deviate conduct (Count 2); Level 4 child molesting and two counts of Level 4 attempted child molesting (Counts 3–5); and two counts of Level 6 felony battery (Counts 6 and 7). Counts 8–10 charged Faulker with Level 4 attempted child molesting, respectively naming My.S., L.F., and Ka.G. as the alleged victims.

[8] Faulkner moved to sever the charges, but the trial court denied his motion and denied his motion to correct error. The trial court then certified for a discretionary interlocutory appeal its order denying the severance request, and our court accepted jurisdiction over the appeal.

Discussion and Decision

[9] Faulkner seeks severance of the charges into four trials with one trial for each alleged victim. Our review is guided by the Indiana Supreme Court's decision in *Pierce v. State*, 29 N.E.3d 1258 (Ind. 2015). "The degree of deference owed to a trial court's ruling on a motion for severance depends on the basis for joinder." *Id*. at 1264. When offenses are joined solely because they are of the same or similar character, "the defendant shall have a right to a severance of the offenses," *see* Ind. Code § 35-34-1-11(a), a "trial court has no discretion to deny such a motion," and "we will review its decision de novo." *See Pierce*, 29 N.E.3d at 1264. But if the offenses are joined because the defendant's underlying acts are connected, we review the trial court's decision for an abuse of discretion. *See id*.

I. Severance as a Matter of Right

[10] Faulker first argues he was entitled as a matter of right to separate trials for each victim. Indiana law provides:

> (a) Two (2) or more offenses may be joined in the same indictment or information, with each offense stated in a separate count, when the offenses:
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> (1) are of the same or similar character, even if not part of a single scheme or plan; or
>
> (2) are based on the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan.

Ind. Code § 35-34-1-9(a). But when "a) . . . two (2) or more offenses have been joined for trial in the same indictment or information solely on the ground that they are of the same or similar character, the defendant shall have a right to a severance of the offenses." Ind. Code § 35-34-1-11(a). As *Pierce* noted, subsection (9)(a)(1) refers to the nature of the charged offenses; subsection (9)(a)(2) refers to the operative facts underlying those charges. 29 N.E.3d at 1265.

[11] "To determine whether offenses warrant joinder under subsection (9)(a)(2), we ask whether the operative facts establish a pattern of activity beyond mere satisfaction of the statutory elements. It is well-settled that a common *modus operandi* and motive can sufficiently link crimes committed on different victims." *Id*. at 1266. As examples of common *modus operandi*, *Pierce* cited

Craig v. State, where the defendant molested two girls in a comparable way by asking them "to take a 'taste test,' covering their eyes with tape, inserting his penis into their mouths, and instructing them to suck on it." *Pierce*, 29 N.E.3d at 1266 (quoting *Craig v. State*, 730 N.E.2d 1262, 1264–65 (Ind. 2000)). The defendant's common desire—to satisfy his sexual desire—also connected the crimes. *Craig*, 730 N.E.2d at 1265. Because these similarities established that the same person molested each victim, the defendant had no absolute right to severance. *Id*.

[12] In *Philson v. State*, we found that crimes were connected even though the defendant committed different crimes in distinct locations in a home; he molested his younger brother in a bathroom and raped his older sister in a closet in the same house. 849 N.E.2d 14, 16 (Ind. Ct. App. 2008). We found that the crimes were connected because both crimes were "against [the defendant's] siblings in the same house over the same period, 2005–2006." *Id.*

[13] "Offenses can also be linked by a defendant's efforts to take advantage of his special relationship with the victims." *Pierce*, 29 N.E.3d at 1266; *see e.g.*, *Booker v. State,* 790 N.E.2d 491, 495 (Ind. Ct. App. 2003) (finding child molestation charges were linked where the defendant was hired to care for the two victims); *Turnpaugh v. State,* 521 N.E.2d 690, 692 (Ind. 1988) (finding child molestation charges were connected where the victims were two young sisters who were overnight guests of the defendant). In *Heinzman v. State*, a child caseworker met two teenage boys through his job and later forced one boy to perform oral sex, and the caseworker inappropriately touched the other boy. 895 N.E.2d 716,

719 (Ind. Ct. App. 2008). As *Pierce* observed, "[t]he defendant [in *Heinzman*] had no right to separate trials because the offenses were joined on the basis that he 'abused his position as a caseworker to perpetuate his child molesting scheme.'" *Pierce*, 29 N.E.3d at 1266 (quoting *Heinzman,* 895 N.E.2d at 721).

[14] The ten counts against Faulkner share more than criminal categories. By allegedly sexually assaulting his stepdaughters and daughters, and by battering Ma.S., Faulkner exploited "his special relationship with the victims." *See Pierce*, 29 N.E.3d at 1266. His alleged *modus operandi* was similar in each case, accosting the girls either in their bedrooms or near their bedrooms and usually reaching under their blankets. In each case, he allegedly touched their genitalia or tried to do so. And for each allegation, Faulkner's alleged motive is the same—to satisfy his sexual desires. Even in the two allegations where Faulkner battered Ma.S., the motive was to satisfy his sexual desires. He allegedly walked into Ma.S.'s room and tried to touch her, but she pushed him away, so he choked her, grabbed her hair, and dragged her to his bedroom (Counts 6 and 7), and he eventually touched her breasts with his hands and mouth (Count 3).

[15] We therefore decline to require separate trials as a matter of right where Faulkner allegedly committed similar crimes, in the same ways, against similar victims. Because Faulkner's allegedly criminal acts were sufficiently connected, he was not entitled to severance as a matter of right.

II. Severance as a Matter of Discretion

[16] Severance of Faulkner's charges is also unnecessary to promote a fair determination of his guilt or innocence. When a trial court determines that severance of charges is not a matter of right, it is still required to sever the charges if it

> determines that severance is appropriate to promote a fair determination of the defendant's guilt or innocence of each offense considering:
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> (1) the number of offenses charged;
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> (2) the complexity of the evidence to be offered; and
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> (3) whether the trier of fact will be able to distinguish the evidence and apply the law intelligently as to each offense.

Ind. Code 35-34-1-11(a). But where, as here, the offenses have been joined because a defendant's underlying acts are connected, we review the trial court's ruling on a motion to sever charges for an abuse of discretion. *See Pierce*, 29 N.E.3d at 1264.

[17] Faulkner admits the evidence here is not complex, but he argues severance is necessary for a fair determination of his guilt or innocence because the trier of fact will be unable to distinguish the evidence and apply the law intelligently as to each offense. He reasons that there are multiple alleged victims, and the allegations are "vague," "vastly different," and arise from separate

investigations by different law enforcement agencies. *See* Appellant's Br. at 16–17.

[18] In *Piercefield v. State*, 877 N.E.2d 1213 (Ind. Ct. App. 2007), *trans. denied*, the State charged the defendant with three counts of sexual offenses against two victims, with one offense involving oral sex and the other two offenses involving fondling. *Id*. at 1218. We found that the trier of fact had no difficulty distinguishing the evidence between the different counts and victims because the evidence was not complex "and consisted primarily of the children's testimony." *Id*. In *Philson*, the State filed five charges against the defendant, three counts for molesting his brother and two counts for raping his sister. 899 N.E.2d at 15–16. We found the trial court did not abuse its discretion in denying the motion to sever the charges because there were only two alleged victims and because the "[t]he evidence regarding each victim was easily distinguishable at trial and was largely based upon each victim's testimony." *Id*. at 17–18.

[19] Assuming this matter proceeds to trial, the trier of fact likely will be able to "distinguish the evidence and apply the law intelligently as to each offense." *See* Ind. Code § 35-34-1-11(a)(3). To be sure, Faulkner faces ten counts involving four victims. But as was true in *Philson*, the State's evidence here will largely consist of testimony from the children, and Faulkner does not point to any complexity in that anticipated testimony which makes a trial without severance unfair. *See Piercefield*, 877 N.E.2d at 1218; *Philson*, 899 N.E.2d at 17–

18. Thus, the trial court did not abuse its discretion in denying Faulkner's motion for severance.

[20] Finally, we reject Faulkner's attempt to conflate the severance issue with Evidence Rule 404(b). He argues, "[i]t is obvious that the State has joined the counts in order to have the trier of fact make the forbidden inference and consider prior bad acts and uncharged incidents unrelated to each other in order to skew the jury in their favor." Appellant's Br. at 17–18. But that assumes the incidents are unrelated and that evidence of one alleged crime would be inadmissible in the trial of another alleged crime. We cannot assume that at this stage, especially since Faulkner does not cite any authority or analyze the admissibility of any particular evidence. At this stage, we are only considering the joinder of actual charges, not the admissibility of extrinsic bad acts or uncharged crimes at trial. *See Gibbs v. State*, 538 N.E.2d 937, 939 n.1 (Ind. 1989). Because the trial court did not abuse its discretion when denying the motion for severance, we must affirm.

[21] Affirmed and remanded.

Riley, J., and Robb, J., concur.