

**THE STATE OF NEW HAMPSHIRE**

**BELKNAP, SS.**

**SUPERIOR COURT**

The State of New Hampshire

v.

Rodney Martinez

Nos. 04-S-026, 238-241

**ORDER**

The defendant, Rodney Martinez, stands indicted on three counts of aggravated felonious sexual assault (“AFSA”) contrary to RSA 632-A:2, II, a class A felony and two counts of felonious sexual assault (“FSA”) contrary to RSA 632-A:3, a class B felony. The state moves to consolidate the cases against the defendant into one trial. The defendant objects. The court heard argument on the motion on September 23, 2004. Because the court lacks confidence that a decision to consolidate will be defended on appeal, the state’s motion is DENIED.

**State’s Facts**

In 2003, the defendant lived in Laconia with his wife, Nikki Martinez, and their two small children. At the time, the defendant was a juvenile probation officer with the State of New Hampshire. The complaining witness, S.D. was a ten-year-old girl who lived next door. S.D. often visited the defendant’s home to play and care for the defendant’s children. The visits generally took place in the afternoons. Usually, the defendant arrived home before his wife, so he and S.D. were alone in the house. Mrs. Martinez made a habit of calling the house before coming home to check whether anyone in the family needed anything.

On November 8, 2003, Mrs. Martinez came home early and unexpectedly. She had not made her usual call. When she arrived, neither the defendant nor S.D. was downstairs. Mrs. Mar-

tinez walked upstairs to her bedroom and found the defendant and S.D. lying beside each other on the bed. S.D. jumped from the bed and was upset. The defendant denied that anything inappropriate was happening. S.D. stated that she hadn't done anything and asked Mrs. Martinez not to tell her mother.

Mrs. Martinez took S.D. aside, out of the defendant's presence. S.D. informed Mrs. Martinez that the defendant was rubbing S.D.'s leg. Mrs. Martinez told S.D.'s mother about the incident. S.D. then disclosed that the defendant had been caressing her body and touching her vagina. S.D. also stated that the defendant was telling her how pretty she was. Deputy Denise Miller of the Belknap County Sheriff's Office interviewed S.D., and S.D. reported details of the event discovered by Mrs. Martinez. The defendant was subsequently indicted on January 15, 2004 for AFSA. *See* Indictment No. 04-S-026.

In March of 2004, S.D. disclosed that the touching had occurred on other occasions before November 8, 2003. The authorities conducted a further interview. S.D. disclosed that the defendant began touching her breasts and vagina when she was in third grade. This touching allegedly continued into her fourth grade year. S.D. also disclosed that the defendant placed her hand on his penis. All of the incidents occurred in the defendant's home between January 2002 and October 2003. As a result of the additional disclosures, the grand jury issued additional indictments on charges of AFSA and FSA. *See* Indictment Nos. 04-S-238, 239, 240 and 241. The instant motion to consolidate followed.

### **Analysis**

The parties agree that the governing standard is that set forth in *State v. Ramos*, 149 N.H. 118 (2003). Under *Ramos*, separate accusations of criminal conduct may be joined if they are related. "[R]elated' offenses are those that are based on the same conduct, upon a single criminal episode or upon a common plan." *State v. Ramos*, 149 N.H. at 128.

The state asserts that the incidents of alleged sexual assault here are related. In particular the state asserts that three of the offenses involve the exact same type of conduct, the touching of a child's vagina. The other two offenses involve the touching of a child's breasts. All five allege touching for sexual gratification. The state argues that the victim in all five instances is the same, that all the incidents occurred at the same location, and all arise from the victim's relationship with the defendant. The state also argues that the alleged incidents of AFSA and FSA were part of a common plan of regular molestation of the victim. Specifically each incident occurred when the child was in the defendant's home and was alone with the defendant. The state asserts that the defendant's plan was to entice the child to his bedroom and then molest her. In each instance, the circumstances were the same. In addition the state asserts that without the discovery of the incident that led to Indictment No. 04-S-026, the child would not have disclosed the other incidents. The state argues that the first discovered incident is inextricably linked to all of the other cases because, without the first discovery, the other instances of alleged abuse would not have been discovered. Thus, according to the state, each case is bound in the chain of disclosure.

The defendant objects on the grounds that consolidation violates his constitutional rights under Part 1 Article 15 of the New Hampshire Constitution and the Fifth and Fourteenth amendments to the United States Constitution. The defendant also argues that the court cannot find that the cases are related on these facts. Citing the recently issued case of *State v. Cossette*, \_\_\_ N. H. \_\_\_ (August 31, 2004), the defendant asserts that the indictments are unrelated because the alleged events were spread out over time and accordingly not part of a single criminal episode, the conduct varies among the indictments, and the state cannot establish a common plan. The defendant also asserts that joinder would be highly prejudicial—the jury would not be able to make a fair determination of his guilt or innocence. *See Ramos*, 149 N.H. at 128.

The court is inclined to accept the state's claim that the indictments are related. It also does not believe that consolidation would unfairly prejudice the defendant because the events surrounding the disclosure would probably be admissible in all the cases. Nevertheless, the court is constrained to deny the state's motion in the interest of judicial economy.

*Ramos* represented a substantial departure in the law on consolidation. *See State v. Mason*, 150 N.H. 53, 60 (2003) (reversing convictions for cases joined before the issuance of *Ramos* when the attorney general conceded that, under the subsequently decided *Ramos* standard, the offenses were "unrelated"). From the standpoint of a trial judge, the *Ramos* standard is difficult to apply—it cries out for appellate clarification. The supreme court could have clarified the application of the standard in *Cossette*—a case with facts remarkably similar to the instant cases. There, the defendant was indicted on six counts of AFSA and one count of FSA. All indictments involved the same victim and the underlying events occurred over a course of time. The trial court agreed with the state's argument that the offenses are related under *Ramos* and granted consolidation. Unfortunately, the attorney general deprived the supreme court of the opportunity to clarify the application of the *Ramos* standard, and thereby deprived trial judges of needed guidance, when it conceded the point on appeal. *See Cossette*, \_\_\_ N.H. at \_\_\_ (slip op. at 2) ("On appeal, the State concedes that the charges against the defendant were unrelated and, therefore, under *State v. Ramos*, 149 N.H. 118 (2003), the defendant was entitled to severance of the unrelated charges.").

In the face of that appellate concession on a case that was remarkably similar to the instant case on the facts, the court asked the county attorney to ascertain whether the attorney general was prepared to support on appeal a finding that the offenses are related as claimed by the

state on the instant facts. The county attorney cooperated and made the requested query. Unfortunately, the attorney general was not able to offer this assurance.

The court understands that the attorney general cannot commit to a position if an intervening case changes the law. The attorney general should be able, however, to indicate whether or not she would support, on appeal, the state's position that the instant offenses are related on the facts as asserted by the state. This court further understands that the supreme court may disagree with the state's position and reverse a trial court that adopted it. Any outcome would be welcome, given the critical need for guidance in how to apply the unclear standards in this area. The attorney general's apparent unwillingness to take on this issue and obtain that guidance makes rendering a decision in favor of consolidation counterproductive. If the defendant is convicted, it is probable that the attorney general will once again concede the issue on appeal, guaranteeing a reversal without further clarification of the law. *State v. Cossette, supra; see also State v. Ayer*, 150 N.H. 14, 29 (2003) ("The defendant's affirmative objection to a mistrial without prejudice—the remedy to which he was entitled and which the trial court was prepared to afford—may have been a waiver. We are foreclosed from considering the issue of waiver in this case, however, because the State conceded at oral argument that the defendant's objection should not be construed as a waiver."); *State v. Porter*, 144 N.H. 96, 102 (1999) ("Finally, we turn to the defendant's assertion that the trial court erred in sentencing him to extended terms under RSA 651:6, (I)(c) when it based the enhancement upon previously served concurrent sentences. The State agrees with this position and concedes that the defendant's sentences should be vacated. In light of this concession, on the record before us in this case, we need not reach the merits of the defendant's argument. We vacate the defendant's sentences and remand for resentencing."). Nei-

ther party would benefit from the need for an extra trial if, as is likely, the attorney general will take an appellate position that makes the trial court's *Ramos* analysis an exercise in futility.

Based on the foregoing, the court concludes that consolidation would be counterproductive to the interests of all parties and contrary to the interest of judicial economy, even if it were appropriate on the merits. According, the state's motion to consolidate is DENIED.

**So ORDERED.**

A handwritten signature in black ink that reads "Larry M. Smukler". The signature is written in a cursive, flowing style.

**Date: October 13, 2004**

**LARRY M. SMUKLER  
PRESIDING JUSTICE**