NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2010 KA 0514

STATE OF LOUISIANA

VERSUS

KIM J. BERNUCHAUX

Judgment Rendered: September 10, 2010

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Appealed from the
23rd Judicial District Court
In and for the Parish of Assumption
State of Louisiana
Case No. 09-94

The Honorable Thomas J. Kliebert, Jr., Judge Presiding

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Ricky L. Babin
District Attorney
Donald D. Candell
Assistant District Attorney
Gonzales, Louisiana

Counsel for Appellee
State of Louisiana

Prentice L. White
Baton Rouge, Louisiana

Counsel for Defendant/Appellant
Kim J. Bernuchaux

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BEFORE: CARTER, C.J., GAIDRY AND WELCH, JJ.

GAIDRY, J.

The defendant, Kim Bernuchaux, was charged by amended grand jury indictment with six counts of indecent behavior with a juvenile, violations of La. R.S. 14:81. He pleaded not guilty on all counts and, following a jury trial, was found guilty as charged. On counts 1, 3, and 4, he was sentenced on each count to seven years at hard labor. On counts 2, 5, and 6 he was sentenced to 25 years at hard labor. All sentences were ordered to be served consecutively, and counts 2, 5, and 6 were ordered to be served without the benefit of probation, parole or suspension of sentence. Defendant now appeals, asserting the following issues for review:

1. Did the district court abuse its discretion when it allowed the State to bring [defendant] to trial on six separate sex offenses regarding six children who were either related to one another or who had strong friendships with one another prior to the trial?

2. Was the district court's ruling to allow the State to introduce the audio/videotape of the boys' testimony an abuse of its discretion when the record reflects that neither the State nor the court had authorized the production of said tape for trial purposes pursuant to [La.] R.S. 15:440.2?

Finding no error, we affirm the convictions and sentences.

FACTS

On July 29, 2007, Leslie Breaux called the Assumption Parish Sheriff's office and advised detectives that her son, T.B., age thirteen, had informed her that while he was sleeping at defendant's residence, defendant put his hands in his pants and touched his penis and buttocks. An investigation ensued, and the child reiterated the allegations to a child forensic interviewer at the Children's Advocacy Center. The interview with T.B. was audiotaped and videotaped.

In the course of the investigation, detectives discovered five other children making similar allegations against defendant. The investigation revealed that defendant would invite boys who did not have a stable home to live with him. He would allegedly sleep in the same bed as these prepubescent boys, who would awaken to discover defendant fondling them. It was also asserted that he would regularly ask to see their penises to determine if they were "hard." Additionally, it was claimed that defendant would require the boys to allow him to bathe them and he would touch them during their baths. Defendant allegedly engaged in the described behavior with different children starting around 1989 and continuing until 2007.

DENIAL OF MOTION TO SEVER

In his first assignment of error, defendant argues that the trial court erred in denying his motion to sever offenses. Specifically, defendant contends the offenses should have been severed because the jury was provoked to convict him because of the nature of the charges and the similarity of the ages and familial circumstances of the children.

Pursuant to La. C.Cr.P. art. 493, two or more offenses may be charged in the same indictment in a separate count for each offense if the offenses are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan. However, if it appears that a party is prejudiced by the joinder, the court may order separate trials, grant a severance of offenses, or provide whatever other relief justice requires. La. C.Cr.P. art. 495.1.

In ruling on a motion for severance, the trial court should consider a variety of factors in determining whether prejudice may result from the joinder: (1) whether the jury would be confused by the various counts; (2)

whether the jury would be able to segregate the various charges and the evidence; (3) whether the defendant could be confounded in presenting his various defenses; (4) whether the crimes charged would be used by the jury to infer a criminal disposition; and (5) whether, considering the nature of the offenses, the charging of several crimes would make the jury hostile. A severance need not be granted if the prejudice can effectively be avoided by other safeguards. In many instances, the trial judge can mitigate any prejudice resulting from joinder of offenses by providing clear instructions to the jury. The state can further curtail any prejudice with an orderly presentation of evidence. A motion for severance is addressed to the sound discretion of the trial court, and its ruling should not be disturbed on appeal absent a showing of an abuse of discretion. A defendant in any case bears a heavy burden of proof when alleging prejudicial joinder of offenses as grounds for a motion to sever. Factual, rather than conclusory, allegations are required. *State v. Allen,* 95-1515, pp. 5-6 (La. App. 1st Cir. 6/28/96), 677 So.2d 709, 713, *writ denied,* 97-0025 (La. 10/3/97), 701 So.2d 192.

Louisiana Code of Evidence article 412.2(A) states:

> When an accused is charged with a crime involving sexually assaultive behavior, or with acts that constitute a sex offense involving a victim who was under the age of seventeen at the time of the offense, evidence of the accused's commission of another crime, wrong, or act involving sexually assaultive behavior or acts which indicate a lustful disposition toward children may be admissible and may be considered for its bearing on any matter to which it is relevant subject to the balancing test provided in Article 403.

In *State v. Roca,* 03-1076 (La. App. 5th Cir. 1/13/04), 866 So.2d 867, *writ denied,* 04-0583 (La. 7/2/04), 877 So.2d 143, the appellate court found a severance was not warranted where the defendant was charged with aggravated rape, aggravated rape of a juvenile, aggravated oral sexual battery of a juvenile, and molestation of a juvenile, involving different

victims, the defendant's biological daughter and his girlfriend's daughter. The court stated that the evidence of each offense would have been admissible under La. C.E. art. 412.2 as other crimes evidence at the trial of the other offense to show the defendant's propensity to sexually abuse young females under his supervision and care. *Roca,* 03-1076 at pp. 10-11, 866 So.2d at 874.

Similarly in the instant matter, evidence of each count would have been admissible as other crimes evidence under La. C.E. 412.2 at the trial of the other offenses to show defendant's "lustful disposition" toward prepubescent boys. The record reflects that, as to each of the six victims, defendant's identity as the perpetrator and the similar character of the offenses remained unchanged. *See State v. Dickinson,* 370 So.2d 557, 559-60 (La. 1979) (where the trial court's denial of a motion to sever was upheld in a case that involved the kidnapping and attempted rape of one victim and then, a year later, the kidnapping and attempted rape of another victim); *State v. Mitchell,* 356 So.2d 974, 978-80 (La. 1978), *cert. denied,* 439 U.S. 926, 99 S.Ct. 310, 58 L.Ed.2d 319 (1978) (where the trial court's denial of a motion to sever was upheld in a case involving three rape victims over a five-month period).

Any potential prejudice by the joinder was effectively avoided by other safeguards. With proper jury charging, the jury could easily keep the evidence in each offense separate in its deliberations. *See State v. Celestine,* 452 So.2d 676, 680-81 (La. 1984); *see also State v. Crochet,* 05-0123, pp. 7-8 (La. 6/23/06), 931 So.2d 1083, 1087-88 (per curiam). Accordingly, the trial court did not abuse its discretion in denying defendant's motion to sever offenses.

This assignment of error is without merit.

ADMISSIBILITY OF VIDEOTAPES

In his second assignment of error, defendant contends that the court erred in admitting audiotapes and videotapes of interviews conducted with each of the complainants because the recordings were not "certified" by the district court, the district attorney, or the Department of Social Service and were therefore introduced into evidence without giving proper notice to defendant.

Louisiana Revised Statutes 15:440.1 provides:

> It is declared to be in the best interest of the state that protected persons be spared from crimes of violence, and that persons who commit such crimes be prosecuted with a minimum of additional intrusion into the lives of such protected persons.

Louisiana Revised Statutes 15:440.2 provides, in pertinent part:

> A. (1) A court with original criminal jurisdiction or juvenile jurisdiction may, on its own motion or on motion of the district attorney, a parish welfare unit or agency, or the Department of Social Services, require that a statement of a protected person who may have been a witness to or victim of a crime be recorded on videotape.
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> . . .
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> (3) Such videotape shall be available for introduction as evidence in a juvenile proceeding or adult criminal proceeding.
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> B. For purposes of this Part, "videotape" means the visual recording on a magnetic tape, film, videotape, compact disc, digital versatile disc, digital video disc, or by other electronic means together with the associated oral record.
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> . . .
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> C. For purposes of this Part "protected person" means any person who is a victim of a crime or a witness in a criminal proceeding and who is . . . (1) Under the age of seventeen years.

Louisiana Revised Statutes 15:440.3 provides that "[t]he videotape authorized by this Subpart is hereby admissible in evidence as an exception to the hearsay rule."

Louisiana Revised Statutes 15:440.4(A) provides:

A. A videotape of a protected person may be offered in evidence either for or against a defendant. To render such a videotape competent evidence, it must be satisfactorily proved:

(1) That such electronic recording was voluntarily made by the protected person.

(2) That no relative of the protected person was present in the room where the recording was made.

(3) That such recording was not made of answers to interrogatories calculated to lead the protected person to make any particular statement.

(4) That the recording is accurate, has not been altered, and reflects what the protected person said.

(5) That the taking of the protected person's statement was supervised by a physician, a social worker, a law enforcement officer, a licensed psychologist, a licensed professional counselor, or an authorized representative of the Department of Social Services.[1]

Finally, La. R.S. 15:440.5(A) provides, in pertinent part:

The videotape of an oral statement of the protected person made before the proceeding begins may be admissible into evidence if:

(1) No attorney for either party was present when the statement was made;

(2) The recording is both visual and oral and is recorded on film or videotape or by other electronic means;

(3) The recording is accurate, has not been altered, and reflects what the witness or victim said;

(4) The statement was not made in response to questioning calculated to lead the protected person to make a particular statement;

(5) Every voice on the recording is identified;

(6) The person conducting or supervising the interview of the protected person in the recording is present at the proceeding and available to testify or be cross-examined by either party;

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[1] We note that La. R.S. 15:440.4(A)(5) did not become effective until January 1, 2010.

(7) The defendant or the attorney for the defendant is afforded an opportunity to view the recording before it is offered into evidence; and

(8) The protected person is available to testify.

Thus, the videotape of an oral statement of a "protected person" made before the proceeding may be admissible if the criteria of La. R.S. 15:440.5 are met. Defendant does not argue that the tapes in this case failed to meet any of the listed criteria. Rather, he contends that, as the tapes were not recorded pursuant to a motion by the court, the district attorney, or the Department of Social Service, they are unauthorized and hence inadmissible. While La. R.S. 15:440.2 provides that a videotape of a statement of a sexually or physically abused juvenile may be required on motion of the listed entities, the statute does not mandate that such a motion be made. *State v. Guidroz*, 498 So.2d 108, 110 (La. App. 5th Cir. 1986). Furthermore, the record reflects that defense counsel had ample opportunity to view and did, in fact, view the tapes prior to trial. In addition to offering the tapes into evidence, the state also called the victims as witnesses and defendant had ample opportunity to cross-examine each one.

The record establishes that the state complied with the requirements of La. R.S. 15:440.4 and 15:440.5 and that the court properly admitted the tapes into evidence. This assignment of error is without merit.

REVIEW FOR ERROR

Defendant requests that we examine the record for error under La. C.Cr.P. art. 920(2). This court routinely reviews the record for such errors, whether or not such a request is made by a defendant. Under article 920(2), we are limited in our review to errors discoverable by a mere inspection of the pleadings and proceedings without inspection of the evidence. After a careful review of the record in these proceedings, we have found no

reversible errors. *See State v. Price,* 05-2514, pp. 18-22 (La. App. 1st Cir. 12/28/06), 952 So.2d 112, 123-25 (*en banc*), *writ denied,* 07-0130 (La. 2/22/08), 976 So.2d 1277.

CONCLUSION

Having found no merit in defendant's assignments of error, the convictions and sentences are affirmed.

PROTECTIVE ORDER

Louisiana Children's Code article 328 requires that a videotape of a child's statement that is part of the court record be preserved under a protective order of the court to protect the privacy of the child. Accordingly, it is hereby ordered that the videotaped and audiotaped statements of the victims be placed under a protective order in accordance with the provisions of La. Ch.C. art. 328. *See State v. Ledet*, 96-0142, p. 19 (La. App. 1st Cir. 11/8/96), 694 So.2d 336, 347, *writ denied*, 96-3029 (La. 9/19/97), 701 So.2d 163.

CONVICTIONS AND SENTENCES AFFIRMED; PROTECTIVE ORDER ISSUED.