STATE OF LOUISIANA	*	**NO. 2016-KA-0370**
VERSUS	*	**COURT OF APPEAL**
MICHAEL THOMASSIE	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
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BONIN, J., CONCURS WITH REASONS.

I concur but write separately to underscore the wholly inadmissible and irrelevant nature of the text-messages between Mr. Thomassie and Anna Henry, which were erroneously admitted by the trial judge over strenuous defense objection, and to emphasize that the erroneous admission requires reversal.

I

It is noteworthy that the prosecution sought to introduce the text-messages under the Articles governing confessions and inculpatory statements of the defendant. *See* La. C.Cr.P. arts. 716, 722, 767, 768. But a statement by Mr. Thomassie that he prefers his adult girlfriend to depilate her pubic hair is neither a confession that he raped the victim in this case, H.P. nor an inculpatory statement. *See State v. Brumfield*, 329 So. 2d 181, 187 (La. 1976) ("[A] confession admits commission of the crime…."); *State v. Williams*, 98-0806, p. 4 (La. App. 4 Cir. 3/24/99), 732 So. 2d 105, 108 (An "'inculpatory statement' refers to an out-of-court admission of incriminating facts made by the defendant after the crime has been committed" and "is one that admits a fact tending to establish guilt or from which guilt can be inferred.") (citing *State v. Bodley*, 394 So. 2d 584, 589 (La. 1981)). Ms. Henry is an adult woman with no relation to the victim in this case. The text-messages neither relate to the charged crime nor do they constitute facts

or circumstances from which guilt can be inferred. Thus, the prosecution's stated justification for admitting this evidence is unavailing.

Two other proposed stand-by justifications for the exceptional admission of this evidence are Article 404 B(1) and Article 412.2 of the Louisiana Code of Evidence. But neither of these Articles applies to the text-message exchange between Mr. Thomassie and his adult girlfriend.

First, Louisiana law prohibits the use of evidence of other wrongs or acts when they are admitted for the sole purpose of showing that the defendant committed the charged crime because he has a propensity to commit such crimes or because he is a man of criminal character. *See State v. Garcia*, 09-1578, p. 53 (La. 11/16/12), 108 So. 3d 1, 38; *see also* La. C.E. art. 404 B(1). Such evidence is generally inadmissible is because the other acts "involve[] substantial risk of grave prejudice to a defendant." *State v. Prieur*, 277 So. 2d 126, 128 (1973). There are, however, limited exceptions upon which evidence of other acts may be admitted. The prosecution must establish that the evidence will be admitted for an independent reason, such as to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident." La. C.E. art. 404 B(1). Before evidence can be admitted for one of the enumerated purposes in Article 404 B(1), the prosecution must also show that the other acts evidence has "substantial relevant independent from showing defendant's criminal character in that it tends to prove a material fact genuinely at issue." *Garcia*, 09-1578, p. 54, 108 So. 3d at 38. And, as always, the probative value of the evidence must outweigh its prejudicial effect. *See* La. C.E. art. 403.

Second, a more generous or expansive rule of admission of evidence applies when the defendant 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. *See* La. C.E. art. 412.2. Subject to the balancing test

under La. C.E. art. 403, "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…." La. C.E. art. 412.2 A.

I address the latter exception first. While it is true that Mr. Thomassie was charged with an act "that constitute[s] a sex offense involving a victim who was under the age of seventeen at the time," I discern no authority which would have supported the use of the exceptions under Article 412.2. Text-messages expressing a preference for a shorn pubic area on an adult woman who is sexually intimate with the defendant constitute neither "sexually assaultive behavior" nor "acts which indicate a lustful disposition toward children." *Cf. State v. Layton*, 14-1910 (La. 3/17/15), 168 So. 3d 358 (evidence that defendant fondled a woman's breasts at knifepoint constituted "sexually assaultive behavior" even though act was not statutorily proscribed in Louisiana); *State v. Wright*, 11-0141 (La. 12/6/11), 79 So. 3d 309 (in prosecution for aggravated incest of teenage son, evidence of defendant's marriage to fourteen-year-old female was admissible to show lustful disposition toward adolescents); *State v. Cox*, 15-0124 (La. App. 4 Cir. 7/15/15), 174 So. 3d 131 (in prosecution for sexual abuse of four juveniles, evidence of uncharged sexual abuse of minor victims in other jurisdictions was relevant and admissible under La. C.E. art. 412.2); *State v. Farrier*, 14-0623 (La. App. 4 Cir. 3/25/15), 162 So. 3d 1233 (in prosecution for sexual battery of minor, recorded jailhouse calls where defendant admitted watching child pornography, that he could not fight "this," and that he hoped for leniency as "a first offender," were admissible to show his lustful disposition towards children). Thus, the exceptions under La. C.E. art. 412.2 were not available to the prosecution in this case.

As to the admissibility of the text-messages as potential "other crimes, wrongs, or acts," I emphasize that if the prosecution seeks to introduce evidence

under one of the enumerated purposes under La. C.E. art. 404 B, the evidence "must have substantial relevance…in that *it tends to prove a material fact genuinely at issue*." *Garcia*, at p. 54, 108 So. 3d at 38 (emphasis added).

In order to convict a defendant of the aggravated rape of a child under thirteen, the prosecution needed to prove beyond a reasonable doubt that 1) the defendant engaged in anal, oral, or vaginal intercourse with the victim, and 2) that the victim was under thirteen-years-old at the time of the offense. *See* La. R.S. 14:42 A(4). Mr. Thomassie categorically denied the charge. Leaving aside the issue of whether the content in the text-messages even qualifies as "other crimes" evidence, the evidence does not fall under any of the permitted purposes in Article 404 B.

Aggravated rape does not require a showing of specific intent; rather the "criminal intent necessary to sustain a conviction is established by the very doing of the act." *State v. Mills*, 00-2525, p. 7 (La. App. 4 Cir. 12/27/01), 806 So. 2d 59; *see also* La. R.S. 14:42. Moreover, motive and intent in an aggravated rape prosecution "are self-proving from the commission of the act itself, and are not material issues genuinely contested at trial." *State v. Kennedy*, 00-1554, p. 12 (La. 4/3/01), 803 So. 2d 916, 924. Absence of mistake or accident are likewise excluded as genuine issues. *See id*., at. pp. 12-13, 803 So. 2d at 924 ("[N]o rational jury could entertain the possibility, that the defendant's penis accidentally found its way into his victim's vagina or that it did so unaccompanied by lascivious intent."). Finally, the text-messages between Mr. Thomassie and Ms. Henry do not prove in any way whatsoever that the defendant had the opportunity, preparation, or plan to commit aggravated rape.

The prosecutor argued that the text-messages were "essentially evidence of guilt" and responded in the affirmative when the trial judge asked if the texts were being introduced "to show the defendant's alleged predisposition." This reasoning

flies in the face of long-standing and established jurisprudence. *See Prieur*; La. C.E. art. 404 A. *See also Old Chief v. U.S.*, 519 U.S. 172, 181 ("Propensity evidence" presents a "risk that a jury will convict for crimes other than those charged—or that, uncertain of guilt, it will convict anyway because a bad person deserves punishment—[this] creates a prejudicial effect that outweighs ordinary relevance."). The text-messages do not meet any exceptions to the general prohibition on character evidence, nor are they relevant to the charged crime. *See State v. Scales*, 93-2003, p. 9 (La. 5/22/95), 655 So. 2d 1326, 1333 (Evidence sought to be admitted must "bear[] a *rational connection* to the fact which is at issue in the case.") (emphasis added).

The text-messages are simply not probative and are thus inadmissible. It was error to allow the jury to consider them.

II

As noted by the majority, the erroneous admission of evidence is subject to harmless error analysis. *See State v. Johnson*, 94-1379, (La. 11/27/95), 664 So. 2d 94. Notably, when the state presents inadmissible evidence and the trial judge erroneously allows the inadmissible evidence, however, "the prosecutor has a very heavy burden to demonstrate in the appellate court that the error was harmless beyond a reasonable doubt." *State v. Bell*, 99-3278, p. 6 (La. 12/8/00), 776 So. 2d 418, 422. "The prosecutor generally can overcome this heavy burden only with physical evidence directly connecting the accused with the charged crime, or with strong and corroborated circumstantial evidence." *Id*.

There are several factors that courts consistently take into account when conducting an analysis of whether the introduction of inadmissible evidence was harmless. Generally, a reviewing court will assess the strength of the state's case

against the defendant,[1] whether the jury's verdict was unanimous or not,[2] whether the prosecutor relied on the erroneously-admitted evidence in closing argument,[3] and whether the trial court instructed the jury on the limited purpose for which the evidence was admitted.[4] *See generally Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986) (listing factors for courts to consider when conducting harmless error analysis in Confrontation Clause errors).

The prosecution's case against Mr. Thommasie consisted, in pertinent part, of testimony from H.P. and her mother, D.C., which as noted by the majority, contained numerous inconsistencies. *See State v. McArthur*, 97-2918, p. 4 (La. 10/20/98), 719 So. 2d 1037, 1043 (given "numerous inconsistencies" in victim's testimony, court could not say that erroneous admission of other crimes evidence did not contribute to the verdict). No physical evidence connected Mr. Thomassie to the crime. *Cf. State v. Danastasio*, 12-1157, p. 21 (La. App. 4 Cir. 1/30/14), 133 So. 3d 224, 237 (erroneous admission of other crimes evidence harmless error in light of DNA evidence). Moreover, the prosecutor, in her closing rebuttal

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[1] *See, e.g., State v. McArthur*, 97-2918, p. 4 (La. 10/20/98), 719 So. 2d 1037, 1043 (given "numerous inconsistencies" in victim's testimony, court could not say that erroneous admission of other crimes evidence did not contribute to the verdict); *cf. State v. Everett*, 11-0714, p. 42 (La. App. 4 Cir. 6/13/12), 96 So. 3d 605, 634 (even if evidence was improperly admitted, its admission was harmless error because of overwhelming evidence of guilt presented at trial).

[2] *See, e.g., State v. Lewis*, 12-1021, p. 16 (La. 3/19/13), 112 So. 3d 796, 805 (in context of denial of right to exercise back strike, non-unanimous verdict one of the factors to consider in harmless error analysis); *State v. Frith*, 13-1133, p. 13 (La. App. 4 Cir. 10/22/14), 151 So. 3d 946, 954 (same).

[3] *See, e.g., State v. Bell*, 99-3278, p. 8 (La. 12/8/00), 776 So. 2d 418, 423 (court could not conclude that the jury's guilty verdict was surely unattributable to the erroneous admission of evidence, "especially since the prosecutor exploited the inadmissible evidence in rebuttal closing argument."); *State v. Whittaker*, 449 So. 2d 611, 613 (La. App 1st Cir. 1984) (state "strenuously" relied on inadmissible other crimes evidence as admission of defendant's guilt, especially in closing argument; therefore, error was not harmless); *cf. State v. Smith*, 11-0091, pp. 29-30 (La. App. 4 Cir. 7/11/12), 96 So. 3d 678, 695 (prosecutor's reference in closing argument to defendant's drug use in murder trial was not improper because evidence was admissible to show opportunity and identity).

[4] *See, e.g., State v. Beaulieu*, 12-0735, p. 25 (La. App. 4 Cir. 8/7/13), 122 So. 3d 1050, 1065 (other crimes evidence surely not attributable to the verdict where, in part, judge charged jury prior to deliberations that the evidence served a "limited purpose"); *State v. Pollard*, 98-1376, p. 11 (La. App. 4 Cir. 2/9/00), 760 So. 2d 362, 368 (no evidence that trial court instructed jury as to limited purpose of other crimes evidence before allowing its admission).

argument, stressed to the jury that the text messages between Mr. Thomassie and Ms. Henry should be "alarming" to them and "one of the most important things" for them to consider in assessing "just what kind of real good guy [defendant] is…." *See Bell*, at p. 8, 776 So. 2d at 423; *State v. Whittaker*, 449 So. 2d 611, 613 (La. App 1st Cir. 1984) (state "strenuously" relied on inadmissible other crimes evidence as admission of defendant's guilt, especially in closing argument). And, as the majority points out, the jury convicted Mr. Thomassie by a ten-to-two, non-unanimous verdict. *See generally State v. Lewis*, 12-1021, p. 16 (La. 3/19/13), 112 So. 3d 796, 805 (non-unanimous verdict one of the factors to consider in harmless error analysis when defendant denied right to back strike juror); *State v. Frith*, 13-1133, p. 13 (La. App. 4 Cir. 10/22/14), 151 So. 3d 946, 954 (same).

Evidence should be excluded when its prejudicial effect outweighs its probative nature. *See* La. C.E. art. 403. "Prejudicial" limits the introduction of other crimes evidence only when it is unduly and unfairly prejudicial. *See State v. Henderson*, 12-2422, p. 2 (La. 1/4/13), 107 So. 3d 566, 568. And "unfair prejudice" as to a criminal defendant, "speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense." *Id*. (citing *State v. Rose*, 06-0402, p. 13 (La. 2/22/07), 949 So. 2d 1236, 1244). The *only* plausible reason for the admission of evidence in this case was to encourage the jury to infer guilt by suggesting that Mr. Thomassie's preferences, as texted, confirmed his desire for a prepubescent girl. [5] The text messages had no bearing on the charged crime nor did they have any independent relevance. I thus do not find that the prosecution has met its heavy burden to show that the erroneous admission of prejudicial evidence was harmless beyond a reasonable doubt.

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[5] I do not, however, discount that the prosecutor was really inviting the jurors to become incensed that Mr. Thomassie, who was facing trial for such a serious and infamous charge, would so cavalierly be engaging in sexually arousing communications with his adult girlfriend.

It was overreach and I therefore agree with the majority that we cannot find that "the verdict actually rendered by this jury was surely unattributable to the error." *State v. Magee*, 11-0574, p. 46 (La. 9/28/12), 103 So. 3d 285, 318 (citing *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993)). *See also Johnson*, at p. 19, 664 So. 2d at 102-03 (Victory, J., dissenting) (where defense hinged on defendant's credibility, erroneous introduction of other crimes evidence not harmless beyond a reasonable doubt).