

STATE OF LOUISIANA

NO. 18-K-412

VERSUS

FIFTH CIRCUIT

IRWIN GOMEZ-COLON

COURT OF APPEAL

STATE OF LOUISIANA

December 07, 2018

---

Susan Buchholz

First Deputy Clerk

IN RE IRWIN GOMEZ-COLON

---

**APPLYING FOR SUPERVISORY WRIT FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT, PARISH OF JEFFERSON, STATE OF LOUISIANA, DIRECTED TO THE HONORABLE JOHN J. MOLAISON, JR., DIVISION "G", NUMBER 17-2493**

---

Panel composed of Judges Fredericka Homberg Wicker,  
Stephen J. Windhorst, and Hans J. Liljeberg

**WRIT GRANTED IN PART; DENIED IN PART; REMANDED**

Relator, Irwin Gomez-Colon, seeks review of the trial court's ruling granting the State's "Notice of Intent to Introduce Other Crimes Evidence Pursuant to L.C.E. [sic] Articles 412.2 and 404(B)(1)." For the following reasons, we grant in part and deny in part this writ application, reverse that portion of the trial court's ruling granting the State's notice of intent under La. C.E. art. 412.2, and remand for further proceedings.

Relator is charged with second degree murder in violation of La. R.S. 14:30.1. The State alleged that the crime occurred on or about April 22, 2017. Second degree murder is defined as the killing of a human being when the offender: (1) has a specific intent to kill or to inflict great bodily harm; or (2) is engaged in the perpetration or attempted perpetration of one of several enumerated felonies, including, aggravated rape, first degree rape, forcible rape, or second degree rape, even though he has no intent to kill or to inflict great bodily harm. La. R.S. 14:30.1. In proving the statutory elements of the offense charged at trial, the State is also required to prove defendant's identity as the perpetrator. State v. Draughn, 05-1825 (La. 01/17/07), 950 So.2d 583, 593, cert. denied, 552 U.S. 1012, 128 S.Ct. 537, 169 L.Ed.2d 377 (2007).

The State filed its notice of intent seeking to admit evidence of relator's other similar wrongs, acts, or crimes involving sexually assaultive behavior pursuant to La. C.E. art. 412.2. The State attached three prior incidents where relator was alleged to have committed aggravated sexual assault, aggravated rape, and sexual battery in different jurisdictions over a span of several years with each of the acts occurring in the month of April. The State contended that it will present *res gestae*

evidence that the defendant raped the victim in addition to murdering the victim. The State argued that the homicide involved “sexually assaultive behavior” under La. C.E. art. 412.2. Alternatively, the State sought admission of the evidence under La. C.E. art. 404 B(1). In response, relator argued that La. C.E. art. 412.2 did not apply because this was not a sex offense case. He contended that the three prior incidents are based on alleged sex offenses; whereas in this case, there is no evidence that the victim was raped prior to her death and the State did not charge him with murder during the commission of a rape. Additionally, relator contended that the prior incidents were not independently relevant or admissible as *modus operandi*, identity, or any other reason enumerated under La. C.E. art. 404 B. After a hearing, the trial court granted the State’s notice of intent to introduce the three prior alleged sex offenses under La. C.E. art. 412.2 and La. C.E. art. 404 B(1).

Absent an abuse of discretion, a trial court’s ruling on the admissibility of evidence pursuant to La. C.E. art. 404 B(1) will not be disturbed. State v. Le, 13-314 (La. App. 5 Cir. 12/12/13), 131 So.3d 306, 317; State v. Merritt, 04-204 (La. App. 5 Cir. 06/29/04), 877 So.2d 1079, 1085, writ denied, 04-1849 (La. 11/24/04), 888 So.2d 228. The same abuse of discretion standard is applied to rulings on the admission of other crimes evidence and evidence under La. C.E. art. 412.2. State v. Wright, 11-0141 (La. 12/06/11), 79 So.3d 309, 316.

Trial court’s ruling under La. C.E. art. 412.2:

La. C.E. art. 412.2 provides, in pertinent part, as follows:

- A. *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. (Emphasis added.)*

In the bill of information, the State charged relator with second degree murder of the victim, without alleging that the crime involved sexually assaultive behavior. Because defendant is not “*charged with a crime involving sexually assaultive behavior,*” we find that the evidence is not admissible under La. C.E. art. 412.2. Under the circumstances of this case, the trial court abused its discretion in granting the State’s notice of intent under La. C.E. art. 412.2. Accordingly, that portion of the trial court’s judgment granting the State’s notice of intent under La. C.E. art. 412.2 is reversed.

Trial court’s ruling under La. C.E. art. 404 B:

The State sought to introduce the three prior alleged sex offenses committed by relator. The State argued that the victim’s injuries and the evidence on the scene of the crime were substantially similar to the injuries of the victims in the prior sexual offenses and the evidence collected from those scenes. The State argued that these prior sex offenses were admissible under La. C.E. art. 404 B for the purposes of *modus operandi*, intent, plan, identity, and knowledge. The trial court found that the prior sex offenses were admissible under La. C.E. art. 404 B for the purposes of knowledge, intent, and system.

Upon review of the writ application, exhibits, and trial transcript, we find the trial court did not abuse its discretion in finding that the three prior alleged sex offenses are admissible under La. C.E. art. 404 B. The State proved by a preponderance of the evidence that relator committed the other acts. State v. Taylor, 16-1124 (La. 12/01/16), 217 So.3d 283. The similarity of victims, method of choosing the victim, the use of strangulation, the month the crime was perpetrated each year, and the fact that relator left his DNA at each scene support the trial court's ruling that the prior acts are admissible to show identity, knowledge, *modus operandi*, or system under La. C.E. art. 404 B. We further find the probative value of the evidence outweighs its prejudicial effect. The prior bad acts evidence is not unfairly prejudicial because defendant is not on trial for those offenses, which did not result in convictions, but only for the instant murder charge to which the trial court can give a limiting instruction.

Accordingly, we grant in part and deny in part this writ application, reverse that portion of the trial court's ruling granting the State's notice of intent under La. C.E. art. 412.2 for the reasons stated herein, and remand this matter for further proceedings.

Gretna, Louisiana, this 7th day of December, 2018.

**SJW**  
**HJL**

STATE OF LOUISIANA

NO. 18-K-412

VERSUS

FIFTH CIRCUIT

IRWIN GOMEZ-COLON

COURT OF APPEAL

STATE OF LOUISIANA

**WICKER, J., CONCURS WITH REASONS**

**I agree with the writer's thorough analysis in this matter. Respectfully, however, it is my opinion that the panel properly should deny this writ entirely. While the trial court erred in relying upon La. R.E. 412.2 to admit the evidence in question, the evidence is properly admissible under La. R.E. 404(B). It is from the ruling, not reasons for ruling that the party seeks supervisory review. Therefore, the trial court's ruling was correct, albeit for reasons different than those relied upon by the trial judge.**

**FHW**

SUSAN M. CHEHARDY  
CHIEF JUDGE

FREDERICKA H. WICKER  
JUDE G. GRAVOIS  
MARC E. JOHNSON  
ROBERT A. CHAISSON  
STEPHEN J. WINDHORST  
HANS J. LILJEBERG  
JOHN J. MOLAISSON, JR.

JUDGES



FIFTH CIRCUIT  
101 DERBIGNY STREET (70053)  
POST OFFICE BOX 489  
GRETNA, LOUISIANA 70054  
www.fifthcircuit.org

CHERYL Q. LANDRIEU  
CLERK OF COURT

MARY E. LEGNON  
CHIEF DEPUTY CLERK

SUSAN BUCHHOLZ  
FIRST DEPUTY CLERK

MELISSA C. LEDET  
DIRECTOR OF CENTRAL STAFF

(504) 376-1400  
(504) 376-1498 FAX

**NOTICE OF DISPOSITION CERTIFICATE OF DELIVERY**

I CERTIFY THAT A COPY OF THE DISPOSITION IN THE FOREGOING MATTER HAS BEEN TRANSMITTED IN ACCORDANCE WITH **UNIFORM RULES - COURT OF APPEAL, RULE 4-6** THIS DAY **12/07/2018** TO THE TRIAL JUDGE, THE TRIAL COURT CLERK OF COURT, AND AT LEAST ONE OF THE COUNSEL OF RECORD FOR EACH PARTY, AND TO EACH PARTY NOT REPRESENTED BY

CHERYL Q. LANDRIEU  
CLERK OF COURT

**18-K-412**

**E-NOTIFIED**

Terry M. Boudreaux (Respondent)

**MAILED**

Alex D. Lambert (Relator)  
Attorney at Law  
848 Second Street  
Third Floor  
Gretna, LA 70053