NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2009 KA 2077

STATE OF LOUISIANA

VERSUS

DALLAS TRAHAN, JR.

Judgment Rendered: JUN 0 4 2010

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Appealed from the
Thirty-Second Judicial District Court
In and for the Parish of Terrebonne
State of Louisiana
Case Number 464,472
Honorable Randall L. Bethancourt, Presiding

* * * * * *

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* * * * * *

BEFORE: CARTER, C.J., GUIDRY, AND PETTIGREW, JJ.

Pettigrew J. Concurs.

GUIDRY, J.

The defendant, Dallas Trahan, Jr., was charged by grand jury indictment with two counts of aggravated rape, violations of La. R.S. 14:42A(4). The defendant entered a plea of not guilty. After a trial by jury, the defendant was found guilty as charged on both counts. The defendant was sentenced to life imprisonment at hard labor without the benefit of probation or suspension of sentence on both counts, to be served consecutively. The defendant now appeals, assigning as error the trial court's denial of his challenges for cause of prospective jurors Mark Marchand, Faye Daigle, Sherri Roach, and Amy Billiot, and the admission of other crimes evidence. The defendant filed a pro se supplemental brief wherein he argues that the trial court erred in denying his motion to suppress evidence. For the following reasons, we affirm the convictions and sentences.

STATEMENT OF FACTS

While the specific dates are uncertain, the instant offenses were alleged to have occurred between January 1, 2003 and January 31, 2006, in Terrebonne Parish. The defendant is the father of the child victims in this case, H.T. and K.T., as a result of his relationship with and marriage to his second wife, K.D., the victims' mother.[1] The defendant obtained custody of the victims after he and K.D. divorced. K.T. is the defendant's biological child while the defendant adopted H.T., who was six months old when the defendant met K.D. H.T.'s date of birth is July 4, 1996, and she was eleven years old and in the fifth grade at the time of trial, February 19-22, 2008. During her trial testimony, H.T. recalled watching pornographic movies with the defendant and her younger sister, K.T.

H.T. testified that one night after watching such movies, the defendant removed all of her clothing. She also stated, "[h]e tried putting stuff in me and he

[1] Herein, we refer to the victims by initials only. See La. R.S. 46:1844W(3).

started rubbing against me." The defendant was not wearing any clothes at the time. H.T. further indicated that the defendant rubbed her private part with his private part and put his private part in her private part. She stated that the defendant was lying on top of her at the time and that his private part did not go all the way in. H.T. stated that the defendant did the same thing to K.T. as he did to her.

H.T. recalled an episode wherein the defendant "started moving his private up and down real fast, and something came out...." She stated that the defendant made her and K.T. lick and swallow the white stuff from his private part. H.T. also testified that the defendant took nude photographs of her and K.T., as well as a picture of his private part on top of her private part.

K.T. was ten years of age at the time of the trial and her date of birth is October 31, 1997. K.T. remembered an occasion when the defendant had a fight with his fiancée, Sherry Rodrigue, who was living with them, but had left the house after the fight. The defendant told K.T. and H.T. to take their clothes off and lie on his bed. K.T. testified that the defendant was not wearing any clothes when he started touching K.T. and her sister "in" their "private parts" with "[h]is private part." She stated, "[h]e tried to stick his private part in mine" adding, "[i]t hurt." K.T. told the defendant to stop, and he complied. She also testified that the defendant made her touch his private part with her mouth and made her sister lick something white that came out of his private part. The defendant also wanted her to lick the substance, but she refused. She saw the white substance come from the defendant's private part and watched her sister lick it. K.T. further testified that during one incident, the defendant attempted to put his private part in her buttocks while she was in the bathroom. Specifically, the defendant told her to go into the bathroom and further instructed her to lie over the side of the bathtub. The defendant stood behind her and tried to put his private part in her buttocks.

COUNSELED ASSIGNMENT OF ERROR NUMBER ONE

In his first counseled assignment of error, the defendant contends that the trial court should have granted his challenges for cause of prospective jurors Mark Marchand, Faye Daigle, Sherri Roach, Stacey Bauer, and Amy Billiot. The defendant notes that he asked that these jurors be excused because they could not follow the law and/or they were incapable of giving their full attention to the case.

As to Marchand, the defendant specifically notes that he knew the prosecutor and several police officers. The defendant further notes that Marchand was self-employed and was concerned that serving on a jury would cause him financial loss. Marchand also expressed his dislike of defense attorneys.

The defendant notes that Daigle was challenged because she remotely knew the prosecutor and was related to an assistant district attorney and a sheriff's deputy. The defendant further notes that Daigle's store had been broken into and she was pleased with the way the police handled it. Further, Daigle served on the board of a local domestic violence shelter as a fundraiser.

As to prospective juror Roach, the defendant notes that she had a professional relationship with the district attorney's investigator, believed that inconsistencies in the victims' testimony did not negate the possibility of some level of truthfulness, and that she would hold the defense to a higher burden of proof because children were involved.

The defendant notes that Bauer had concerns about obtaining a babysitter, and that she believed the defendant had to prove he was innocent because she sided with children. The defendant further notes that upon re-questioning, Bauer stated that she believed the defendant was more guilty than not. She also stated that it would be difficult to put her feelings aside, but she would accept the law.

Billiot said Dr. Sangisetty, a potential witness, was her children's pediatrician, and Billiot described her as an excellent doctor. Further, Billiot's

brother had been molested as a child. Billiot also had babysitter concerns. She stated that she could put her brother's molestation aside and decide the case based on the testimony, but indicated that she may require the defense to prove the defendant's innocence.

The defendant argues that the trial court committed reversible error in not excusing the above-listed challenged prospective jurors. The defendant contends that none of these jurors were qualified to serve in this case because they all expressed sincere negative opinions and/or doubts as to their ability to follow the law and to be fair.

The State or the defendant may challenge a juror for cause on the ground that the juror is not impartial, whatever the cause of his partiality, or on the ground that the juror will not accept the law as given to him by the court. La. C. Cr. P. art. 797(2) & 797(4). For a defendant to prove reversible error warranting reversal of both his conviction and sentence, he need only show the following: (1) erroneous denial of a challenge for cause; and (2) use of all his peremptory challenges. Prejudice is presumed when a defendant's challenge for cause is erroneously denied and the defendant exhausts all his peremptory challenges.[2] An erroneous ruling depriving an accused of a peremptory challenge violates his substantial rights and constitutes reversible error. State v. Taylor, 03-1834, pp. 5-6 (La. 5/25/04), 875 So. 2d 58, 62.

A challenge for cause should be granted, even when a prospective juror declares his ability to remain impartial, if the prospective juror's responses as a whole reveal facts from which bias, prejudice, or inability to render judgment

[2] The rule is now different at the federal level. See U.S. v. Martinez-Salazar, 528 U.S. 304, 317, 120 S.Ct. 774, 782, 145 L.Ed.2d 792 (2000) (exhaustion of peremptory challenges does not trigger automatic presumption of prejudice arising from trial court's erroneous denial of a cause challenge).

according to the law may reasonably be inferred. However, the trial court is vested with broad discretion in ruling on a challenge for cause; its ruling will not be disturbed on appeal absent a showing of an abuse of discretion. State v. Henderson, 99-1945, p. 9 (La. App. 1st Cir. 6/23/00), 762 So. 2d 747, 754, writ denied, 00-2223 (La. 6/15/01), 793 So. 2d 1235. A trial judge's refusal to excuse a prospective juror for cause is not an abuse of his discretion, notwithstanding that the juror has voiced an opinion seemingly prejudicial to the defense, when subsequently, on further inquiry or instruction, he has demonstrated a willingness and ability to decide the case impartially according to the law and the evidence. State v. Taylor, 03-1834 at p. 6, 875 So.2d at 63.

In accordance with La. C. Cr. P. art. 799, the defendant was entitled to twelve peremptory challenges. In this case, the defendant exhausted his peremptory challenges. Thus, an erroneous denial of a challenge for cause in this case is presumptively prejudicial.

As noted by the defendant, prospective juror Marchand raised his hand to indicate that he knew the Assistant District Attorney Bud Barnes because he represented Marchand for a traffic violation about fifteen years before the trial. Marchand added that Barnes did a good job. When asked if he thought this would cause him to be biased in favor of the State, Marchand stated it would not. Marchand also stated that he thought he could be fair and impartial, but added that he knew the defendant because he dated one of Marchand's cousins.

Marchand further knew Corey Johnson, a police officer with the Houma Police Department, and Kerry Bergeron with the Terrebonne Parish Sheriff's Office. He stated that he was friends with several police officers and that it might cause him a problem. He saw them once or twice a month and some of them weekly or every two or three days. Marchand stated that he did not think he would be subject to ridicule if he sided with the defense and that he would not

automatically side with the State because of his friendships. He stated that he heard about other cases where "people get off for a technicality," but confirmed that he had not read anything about the instant case. When asked if he could decide the case based not on preconceived notions but on the evidence and be fair and impartial, he stated, "Yes, I guess I could. I'm not sure, it depends on what the evidence would show and all, but." The trial judge then abruptly stated, "Fair enough." When the trial court asked the prospective jurors to indicate any personal or business concerns, Marchand stated that he was self-employed and would not be paid if he did not work.

When Barnes (the State) began addressing the prospective jurors, he presented lengthy commentary regarding Marchand's relationship with members of law enforcement and the duty of prospective jurors to put aside sympathies and base their decision on the evidence. Barnes commended Marchand's response quoted above wherein he stated, "it depends on the evidence," reiterating that it was the correct basis for a decision. Marchand confirmed that he could follow the law.

When the defense attorney addressed the prospective juror, Marchand, in pertinent part, stated:

> I think that I can look at the evidence and see what the evidence states, and see if he is guilty or if he is innocent, but I can't stand when a little technicality comes, about there's all kind of evidence on the board, and a defense lawyer comes up with some kind of stupid technicality, and a man gets off for doing a crime like that.

Marchand added that he did not mean for the defense attorney to take his comment personally, but that is how he feels about defense lawyers. When asked about his work concerns, Marchand confirmed that an extended trial would cause him financial burden.

Daigle indicated she knew Barnes "only in passing" as they both worked downtown, but that this would not cause her a problem in being fair and impartial.

She saw and/or had contact with police officers on a regular basis and had friends in various police departments. She specifically stated "that would not influence my decisions of what I make in this courtroom." Daigle also stated that Assistant District Attorney Ellen Doskey is her husband's first cousin, that she had not seen her in a month or talked about the case with her, and that the relationship would not cause her problems in being fair or in having any discussions about the case. When questioned in regard to relatives in the law enforcement agencies, Daigle stated that her nephew, Corey Voisin, worked for the sheriff's office, that she did not see him often, and that it would not cause her to be unfair. She repeatedly indicated that she could be fair and impartial. Also, Daigle's store was vandalized and she was happy with the way the case was handled. She stated that it did not pertain to anything in this case and responded negatively when asked if it would sway her. Daigle also informed the court that she knew the defense paralegal or investigator as a customer, but that it was inconsequential as it would "not change anything."

Finally, Daigle stated that her position as a fundraiser on a domestic-violence shelter board, held five years before the trial, would not influence her decision and that she did not have any personal contact with the victims during her service on the board. Daigle also stated as follows, "I would be very fair. Just because I know a lot of legal people doesn't mean I wouldn't be totally open-minded to what's going on in this courtroom."

Roach stated that she knew Dana Davis, a potential witness, on a professional level, but added that she would not be persuaded. She specifically stated that she could listen to her testimony and make a decision. She did not think she would be influenced by the fact that she knew Davis. When the defense asked the prospective jurors if they would hold it against him if he had to cross-examine a child, Roach stated:

> You said, and I don't know if that's something we're supposed to discuss or anything, earlier talking about inconsistencies. I have no idea how old these children are, but that would be a factor. I don't know [how] long ago this happened. That also would be a factor. I think that just because what they're saying is inconsistent – maybe there are some inconsistencies doesn't mean that maybe there's not some truth there, so.

The defense attorney acknowledged that he would not be asking the jury to find the defendant not guilty solely based on inconsistencies, but to consider them in assessing the weight of the evidence for a finding of proof beyond a reasonable doubt. Roach stated, "[y]es," she would be able to do so, adding that the involvement of children was a bigger burden on the defense than the State. All of the jurors agreed that their decisions would not be based on sympathy or prejudice.

When the second panel was questioned regarding personal or business concerns, Bauer indicated that her only concern was that she did not have a back-up babysitter to relieve her mother if her mother had to tend to another family member. Regarding the burden of proof, Bauer stated:

> I do believe that you would have to prove it more that he's innocent, than what the State is going to prove him as guilty. Just because of having a daughter, I side more with the child than what I'm going to side with the guy that you're going to try to defend.

The defense attorney then provided a lengthy commentary, including the burden of proof applied to the State's evidence and that the defense need not prove anything. After the defense challenged Bauer, the State argued that she may have been confused when she gave the response in question, noting that prospective jurors are not lawyers.

The trial court brought Bauer back for further questioning. Bauer initially repeated her above quoted sentiment. After further questioning by the trial court as to whether she would hold the defendant guilty or innocent before the State presented any evidence, she stated, "[w]ithout hearing anything I'm going to have to say not guilty, I haven't heard anything." Bauer also stated, "I'm sure there's

going to be probably graphic evidence that's going to make me sick to my stomach." She again stated that she would require the defendant to prove his innocence and that it would be hard to be completely impartial. She conceded that she would try to be impartial, would base her decision on the evidence alone, and would accept the law, including the fact that the defendant did not have the burden of proving anything and would not hold it against the defendant if he did not testify.

Upon questioning by the State, Bauer confirmed that she could put her feelings aside regarding children and base her decision on the evidence. She indicated that she would have a problem with the evidence if it did not convince her of guilt beyond a reasonable doubt and would make a decision on that basis and not on sympathy. The State reiterated that it was its burden to prove the defendant guilty and that the defendant was not required by law to prove his innocence and Bauer indicated that she understood and could follow the law.

When the defense questioned Bauer, she stated, in pertinent part, "Right now, what I've come to is I have to put my personal feeling of this aside and go by whatever is presented, as far as evidence, to decide guilty or not guilty." Upon further questioning by the defense attorney she stated that she had been instructed to put sympathy aside adding, "that's what I have to do."

As noted by the defendant, Billiot stated that she knew a potential witness, Dr. Sangisetty, her children's pediatrician. She indicated that she would not have any preconceived notions regarding the doctor's testimony and would decide the case based on the testimony. Billiot responded negatively when asked if the molestation of her brother when he was younger would cause her problems in this case. She confirmed that she could put that instance aside and base her decision on the evidence presented. She also stated that she had concerns about her children after school care, but stated that she would try to make arrangements for childcare.

Billiot was further questioned by the defense regarding the affect of her brother's molestation. She indicated that it was difficult to make a prediction, but she did not think it would cause problems with this case. She noted that she had children and confirmed that she wanted the defense to prove the defendant innocent when specifically asked by the defense counsel, "[s]o do you think because of that and your life experiences that you would, in your heart of hearts, really want me to prove to you that Dallas did not do it?" After the defense stated the law as to the State's burden and the defendant's lack of a burden, Billiot stated, "I'd like to think that I could put the things aside and, you know, innocent until proven guilty." The defense attorney discussed the order of the trial and noted that "people are going to stick to their stories." The defense attorney then asked if he would be held to a burden of proving the defendant's innocence, and Billiot responded, "Yes." When the defense challenged Billiot for cause, the State argued that her second response regarding the burden was a result of the framing of the defense's question. The trial court stated she seemed clear and articulate and did not dismiss her for cause.

Based on our thorough review of the responses at issue, we find that the trial court did not abuse its broad discretion in denying the challenges for cause at issue. The potential jurors at issue were very open and forthcoming with any information that they thought may be noteworthy. Despite the concern raised by some responses, these prospective jurors demonstrated a willingness and ability to decide the case impartially according to the law and the evidence. Specifically, Marchand indicated that he would base his decision on the evidence and did not state that his financial concerns would cause him to disregard the law or evidence. Daigle confidently and repeatedly conveyed her ability to be fair and impartial. By thorough measures, Bauer was successfully rehabilitated. In Billiot's own words she stated that the defendant was "innocent until proven guilty." After this

response, the defense re-framed the question and obtained a positive response as to whether the defendant had to prove he was innocent after the State presented its witnesses. Nevertheless, based on Billiot's responses as a whole, we are convinced that she would follow the law as instructed and not hold the defendant to a burden of proof. We find that the responses of the prospective jurors in question, when considered as a whole, did not reveal facts from which bias, prejudice, or inability to render judgment according to the law could reasonably be inferred. This assignment of error lacks merit.

COUNSELED ASSIGNMENT OF ERROR NUMBER TWO

In the second counseled assignment of error, the defendant contends that the trial court failed to weigh or test other alleged acts of sexual misconduct offered by the State before admitting the evidence. The defendant argues that the evidence consisted of supposition and unproven contentions and did not support the State's claims.

Detective Robert Moore testified about a complaint he investigated that was made against the defendant in Lafayette in 2003. The defendant gave a statement during the investigation denying molesting his stepdaughter, S.S., but added that if anything happened, it was because he was on medications. The defendant notes that this alleged incident was not related to the instant offenses and that no prosecution resulted from that investigation. Regarding the complaint, the defendant notes that S.S. was allowed to testify that the defendant touched her inappropriately underneath her clothing when she was about eleven years old, although she previously recanted the allegation more than once. The defendant further notes that the State was allowed to introduce testimony regarding a pornographic picture of an alleged pre-pubescent girl (between eight and ten years old) that was placed on the internet and found in the defendant's computer, although the investigator who identified the girl, Detective Thomas Conner, did

not know how many times the picture was downloaded, or if the defendant had any contact with the victim. Finally, the defendant notes that the State introduced testimony by Rebecca Hyson-Simpkins about her consensual sexual relationship with the defendant many years earlier when she was fifteen years of age and the defendant was twenty years of age.

The defendant contends that the consensual sex with Hyson-Simpkins occurred in 1988, before La. C.E. art. 412.2 was enacted in 2001. Thus, the defendant argues that the evidence presented by Hyson-Simpkins should have been barred because the application of Article 412.2 is prohibited by the ex post facto clauses of the Louisiana and United States Constitutions.

The defendant further argues that half of the evidence presented was not relevant to the instant offenses and was never subjected to any burden of proof. The defendant contends that the evidence was an assault on his character. The defendant alternatively argues that the law does not mandate such inflammatory and emotional evidence go before a jury, noting that Article 412.2 says that certain evidence *may* be admissible. The defendant also notes that pursuant to La. C.E. art. 403, the evidence must be relevant and probative.

The defendant argues that the mass and variety of the other crimes evidence created a substantial, if not definite, risk of luring jurors into deciding the case based on the defendant's criminal disposition as opposed to specific evidence of the instant offenses. Contending that the evidence was speculative, uncorroborated, and more sensational than factual, the defendant concludes that the weight and relevance of the evidence at issue did not support its admissibility. The defendant concludes that the evidence at issue was not proven clearly and convincingly, and that the presentation of the evidence of alleged other crimes denied him a fair trial.

Evidence of other crimes, wrongs, or acts is generally inadmissible to impeach the character of the accused. La. C.E. art. 404B; see State v. Talbert, 416 So. 2d 97, 99 (La. 1982); State v. Prieur, 277 So. 2d 126, 128 (La. 1973). However, such evidence may be admissible to prove motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident. La. C.E. art. 404B(1). The State bears the burden of proving that the defendant committed the other crimes, wrongs, or acts. State v. Rose, 06-0402, p. 12 (La. 2/22/07), 949 So. 2d 1236, 1243.[3]

Louisiana Code of Evidence article 412.2 provides:

> 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.
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> B. In a case in which the state intends to offer evidence under the provisions of this Article, the prosecution shall, upon request of the accused, provide reasonable notice in advance of trial of the nature of any such evidence it intends to introduce at trial for such purposes.
>
> C. This Article shall not be construed to limit the admission or consideration of evidence under any other rule.

To the extent that the defendant argues that the admissibility of the evidence should have been determined after a pretrial hearing, we note that Article 412.2 does not require the trial court to hold a pretrial hearing prior to admitting the evidence. State v. Williams, 02-1030, p. 6 (La. 10/15/02), 830 So. 2d 984, 987.

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[3] The burden of proof in a pretrial hearing held in accordance with Prieur shall be identical to the burden of proof required by Federal Rules of Evidence Article IV, Rule 404. La. C.E. art. 1104. The burden of proof required by Federal Rules of Evidence Article IV, Rule 404, is satisfied upon a showing of sufficient evidence to support a finding by the jury that the defendant committed the other crime, wrong, or act. See Huddleston v. U.S., 485 U.S. 681, 685, 108 S.Ct. 1496, 1499, 99 L.Ed.2d 771 (1988). The Louisiana Supreme Court has yet to address the issue of the burden of proof required for the admission of other crimes evidence in light of the repeal of La. C.E. art. 1103 and the addition of La. C.E. art. 1104. However, numerous Louisiana appellate courts, including this court, have held that the burden of proof is now less than "clear and convincing." See State v. Williams, 99-2576, p. 7 n.4 (La. App. 1st Cir. 9/22/00), 769 So. 2d 730, 734 n.4.

The only requirement contained within the statute is that the evidence be deemed admissible pursuant to Article 403. In accordance with Article 403, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or waste of time.

Article 412.2 was a legislative response to earlier decisions from the Louisiana Supreme Court refusing to recognize a "lustful disposition" exception to the prohibition of other crimes evidence under La. C.E. art. 404. The language of Article 412.2 closely follows Fed. R. Evid. 413. Thus, the jurisprudence interpreting the federal rule is highly instructive. See State v. Wright, 98-0601, p. 7 (La. App. 1st Cir. 2/19/99), 730 So. 2d 485, 489, writs denied, 99-0802 (La. 10/29/99), 748 So. 2d 1157 & 00-0895 (La. 11/17/00), 773 So. 2d 732. The federal courts have determined that Fed. R. Evid. 413 is based upon the premise that evidence of other sexual assaults is highly relevant to prove the propensity to commit like crimes and often justifies the risk of unfair prejudice. See U.S. v. Guardia, 135 F.3d 1326, 1328-30 (10th Cir. 1998). Generally, a trial court's ruling on the admissibility of evidence of other crimes will not be overturned absent an abuse of discretion. State v. Galliano, 02-2849, pp. 3-4 (La. 1/10/03), 839 So. 2d 932, 934 (per curiam).

Article I, § 10 of the United States Constitution and La. Const. art. I, § 23 prohibit ex post facto application of the criminal law by the State. State v. Everett, 00-2998, p. 13 (La. 5/14/02), 816 So. 2d 1272, 1280. The United States Supreme Court has identified four categories of law that violate the ex post facto prohibition: 1) any law that makes an action criminal that was innocent when done before the passing of the law; 2) any law that aggravates a crime or makes it greater than it was when committed; 3) any law that changes the punishment and inflicts greater punishment than the law provided when the crime was committed;

and 4) any law that alters the legal rules of evidence and requires less or different testimony than was required at the time the offense was committed, in order to obtain a conviction. Rogers v. Tennessee, 532 U.S. 451, 456, 121 S.Ct. 1693, 1697, 149 L.Ed.2d 697 (2001). In State ex rel. Olivieri v. State, 00-0172, pp. 14-16 (La. 2/21/01), 779 So. 2d 735, 744, cert. denied, 533 U.S. 936, 121 S.Ct. 2566, 150 L.Ed.2d 730 (2001), the Louisiana Supreme Court held that in determining whether there has been an ex post facto violation, the analysis should focus on whether the new law redefines criminal conduct or increases the penalty by which the conduct is punished, and not whether the defendant has simply been disadvantaged.

The Louisiana Supreme Court has not decided whether the retroactive application of Article 412.2 is a violation of the ex post facto clause. In footnote two of State v. Morgan, 02-3196 (La. 1/21/04), 863 So. 2d 520 (per curiam), the Supreme Court noted that the retroactive applicability of Article 412.2 "remains an open question." Morgan, 02-3196 at p. 2 n.2, 863 So. 2d at 521-22, n.2. The third circuit has held that its retroactive application does not constitute an ex post facto violation. State v. Willis, 05-218, p. 22 (La. App. 3d Cir. 11/2/05), 915 So. 2d 365, 383, writ denied, 06-0186 (La. 6/23/06), 930 So. 2d 973, cert. denied, 549 U.S. 1052, 127 S.Ct. 668, 166 L.Ed.2d 514 (2006). The third circuit found that Article 412.2 does not alter the amount of proof required in the defendant's case as it merely pertains to the type of evidence that may be introduced. Citing Willis, the fifth circuit ruled similarly in State v. Greene, 06-667, pp. 7-8 (La. App. 5th Cir. 1/30/07), 951 So. 2d 1226, 1231-32, writ denied, 07-0546 (La. 10/26/07), 966 So. 2d 571. Prior to the enactment of Article 412.2, the type of evidence at issue was admissible if it fell within an exception under La. C.E. art. 404B. Article 412.2 removed that restriction. Willis, 05-218 at p. 22, 915 So. 2d at 383.

Likewise, we find that the fact the past sexual act occurred prior to the effective date of Article 412.2 is inconsequential. Article 412.2 expanded the type of evidence that may be introduced in the prosecution of certain sex offenses without altering the quantum of evidence required for a conviction. The article does not redefine criminal conduct or increase the penalty by which it is punished. Thus, the ex post facto laws would not prohibit the application of Article 412.2 to the present case.

In State v. Buckenberger, 07-1422, pp. 10-11 (La. App. 1st Cir. 2/8/08), 984 So. 2d 751, 757, writ denied, 08-0877 (La. 11/21/08), 996 So. 2d 1104, the defendant was convicted of attempted second degree murder, attempted forcible rape, second degree kidnapping, and two counts of public intimidation for attempting to run over the victim with his car and attempting to rape her in his car. This court found that evidence of the defendant's commission of other crimes involving sexually assaultive behavior against two prior victims was admissible, as the high probative value of the evidence regarding defendant's propensity to use force to rape women in and near vehicles was not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay or waste of time.

Similarly, in the instant case, we find that the evidence of the defendant's commission of crimes involving sexually assaultive behavior against his stepdaughter, against Hyson-Simpkins, who was a minor (while the defendant was a twenty-year-old adult) at the time of his admitted sexual relationship with her, and evidence of the defendant's possession of a photograph consisting of child pornography on his computer, was admissible at trial. The highly probative value of the evidence in regard to the defendant's propensity to indulge in inappropriate sexual behavior regarding children substantially outweighed the danger of unfair prejudice, confusion of the issues, misleading the jury, or considerations of undue

delay or waste of time. We further find that the evidence of the other acts was clear and convincing.

Based on the foregoing assessment, the trial court did not err in admitting the testimony and evidence in question. Assignment of error number two is without merit.

PRO SE ASSIGNMENT OF ERROR

In the sole pro se assignment of error, the defendant contends that the trial court erred in denying his motion to suppress evidence seized in violation of his constitutional rights. The defendant notes that one computer was seized from his person, and three home computers were voluntarily transferred to the police by his girlfriend Rodrigue. The defendant specifically contends that computers were illegally seized without valid consent from his person and home and that the fruits of the search of those computers should have been suppressed. The defendant contends that the subsequent acquisition of a warrant to search the computers did not cure the illegal seizure of them.

The defendant specifically notes that Rodrigue did not purchase or own the computers and did not have the right or consent to transfer possession of them. The defendant also notes that Detective Cher Pitre was informed that only the desktop computer possibly belonged to Rodrigue and that the rest of the computers belonged to the defendant. The defendant argues that Detective Pitre had notice that the defendant had an expectation of privacy in the computers and that seizure of them required a valid warrant. The defendant further argues that consent to search from Rodrigue does not curtail his right to object to and challenge the legality of the search and seizure of his computers from his residence and person. The defendant contends that Detective Pitre could not have reasonably believed that Rodrigue had authority to consent to the search and seizure of his computers merely because she lived at the residence.

The Fourth Amendment to the United States Constitution and Article I, § 5 of the Louisiana Constitution prohibit unreasonable searches and seizures. It is well settled that a search warrant is required unless one of the narrowly drawn exceptions to that requirement is present. A valid consent to search is such an exception. U.S. v. Matlock, 415 U.S. 164, 171, 94 S.Ct. 988, 993, 39 L.Ed.2d 242 (1974). The consent to search is valid when it is freely and voluntarily given by a person who possesses common authority or other sufficient relationship to the premises or effects sought to be inspected. Common authority is based on "mutual use of the property by persons generally having joint access or control for most purposes." Matlock, 415 U.S. at 171 n.7, 94 S.Ct. at 993 n.7. A warrantless search may be valid even if consent was given by one without authority, if facts available to officers at the time of entry justified the officers' reasonable, albeit erroneous, belief that the one consenting to the search had authority over the premises. Illinois v. Rodriguez, 497 U.S. 177, 185-89, 110 S.Ct. 2793, 2799-2802, 111 L.Ed.2d 148 (1990). The trial court's ruling on a motion to suppress is entitled to great weight. State v. Horton, 01-2529, p. 9 (La. 6/21/02), 820 So. 2d 556, 562. To determine whether the trial court's denial of the motion to suppress is correct, the appellate court may consider evidence adduced at the suppression hearing as well as evidence presented at trial. State v. Leger, 05-0011, p. 10 (La. 7/10/06), 936 So. 2d 108, 122, cert. denied, 549 U.S. 1221, 127 S.Ct. 1279, 167 L.Ed.2d 100 (2007).

At the motion to suppress hearing herein, the defendant argued, as on appeal, that the evidence in question was illegally seized and that the subsequent search was fruit of a poisonous tree. The State argued that the computers were not seized as Rodrigue, presuming that she was in control of the property at the time, voluntarily relinquished the computers to the police. The State further noted that the police subsequently obtained a warrant to search the computers.

Detective Pitre testified that Rodrigue relinquished three computers to the police, consisting of a desktop and two laptops. Another laptop was obtained from the defendant at the time of his arrest pursuant to an outstanding arrest warrant. Detective Pitre testified that Rodrigue lived at the residence, had control over the computers, and voluntarily consented to the transfer. The computer obtained at the defendant's arrest was located in his knapsack pursuant to a search of the bag for weapons upon the defendant's arrest. Detective Pitre testified that the defendant consented to the transfer of possession and signed an evidence release form dated February 3, 2006. On March 3, 2006, Detective Pitre obtained a search warrant for all of the computers.

The defendant testified at the hearing. He stated that he was working offshore at the time of his arrest. Two officers arrived by helicopter and entered his office. The defendant stated that he was informed that he was being brought in and that the officers also needed to bring his girlfriend's computer, camera, and any other electronic device. The defendant further stated that an officer packed his computer and camera into his bag and searched his person before handcuffing him and escorting him to the helicopter. The defendant stated that when he signed the evidence release form, he thought it was an inventory list and that he did not voluntarily consent to the seizure of the items. The defendant further testified that he purchased all of the computers. The defendant stated that one of the home computers was being repaired by the manufacturer when the police collected the others. Rodrigue took the computer to the police after it was returned from the manufacturer. The defendant stated that he purchased the desktop computer for business purposes. The defendant admitted that Rodrigue had access to the desktop for her personal use, but reiterated that it was not her computer. The defendant stated that Rodrigue did not have the right to transfer possession of the computers.

In denying the motion to suppress, the trial court found that after the computers were in police custody, a search warrant was properly obtained and executed. The trial court concluded that the defendant's rights were not violated before the search warrant was obtained and validly executed.

During the trial, Rodrigue testified that she and the defendant were engaged to be married and living together at the time of the offenses and that the defendant was the sole financial provider for the household. The defendant and Rodrigue shared a joint bank account wherein the defendant's payroll checks were deposited and while the defendant worked, she paid the bills from the joint account. Rodrigue also testified that she often used the computer when the defendant was away at work. When questioned regarding the computers that the couple owned, Rodrigue stated, "he had his Alienware. I had a desktop. And we had two HP laptops." The defendant left one of the laptops in the home for her use when he purchased an upgraded laptop. He later purchased the desktop as a gift to Rodrigue. Rodrigue further testified that she voluntarily consented to the search of the home and the seizure of the computers and voluntarily delivered the computer that was being repaired to the police. Rodrigue further testified that she considered everything they owned to be their property together. She further concluded that she had control and access over the computers that she released to the police.

Detective Pitre's trial testimony, consistent with her testimony at the motion to suppress hearing, indicated that the defendant was in possession of a knapsack at the time of his arrest. The knapsack was searched for weapons. The computer was inside the knapsack at the time. She further testified that the defendant consented to the seizure of the computer and the other items in the knapsack and signed an evidence release form. The computers were searched after the search warrant was obtained.

Based on her testimony, Rodrigue had access to the computers in question. Rodrigue had common authority to consent to the search and seizure of the computers based on joint access or control. See U.S. v. Richard, 994 F.2d 244, 250 (5th Cir. 1993). We find that the defendant failed to rebut the valid consent to the search given by a person the detectives reasonably believed had authority to permit the search and seizure. Regarding the computer seized from the defendant at the time of the arrest, the evidence presented by the State indicated that the evidence was seized pursuant to a lawful search incident to an arrest on the outstanding arrest warrant.[4] See State v. Hill, 97-2551, p. 8 (La. 11/6/98), 725 So. 2d 1282, 1286. The officers herein obtained a valid search warrant before searching the computers in question for evidence. Based on the foregoing circumstances, we find no abuse of discretion in the trial court's denial of the motion to suppress evidence. This sole pro se assignment of error lacks merit.

CONCLUSION

Based on our review of the proceedings and evidence presented, we find no error in the trial court's rulings regarding the jury selection, the admissibility of other crimes evidence and the denial of the motion to suppress. Accordingly, we affirm defendant's convictions of two counts of aggravated rape and the related sentences.

CONVICTIONS AND SENTENCES AFFIRMED.

[4] Based on our review of the record, the evidence (consisting of pornographic images) ultimately admitted during the trial was extracted from the HP Pavilion laptop computer that was seized from the defendant at the time of his arrest. The computer had three user account names: Dallas, Dave, and Sherry Trahan. The images were found under the password protected Dallas account recycle bin and temporary internet files.