

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 KA 0858

STATE OF LOUISIANA

VERSUS

MICHAEL ANTHONY WRIGHT

Judgment Rendered: DEC 22 2010

* * * * *

On Appeal from the Twenty-Second Judicial District Court
In and for the Parish of St. Tammany
State of Louisiana
Docket No. 440135

Honorable William J. Crain, Judge Presiding

* * * * *

Walter P. Reed
District Attorney
Covington, Louisiana

Plaintiff/Appellee
State of Louisiana

Kathryn W. Landry
Assistant District Attorney
Baton Rouge, Louisiana

Frank Sloan
Mandeville, Louisiana

Counsel for Defendant/Appellant
Michael Anthony Wright

* * * * *

BEFORE: WHIPPLE, McDONALD, AND McCLENDON, JJ.

Whipple, J. concurs.

JMC
ABW concurs
JMM

McCLENDON, J.

Defendant, Michael Anthony Wright, was charged by bill of information with aggravated incest, a violation of LSA-R.S. 14:78.1. Defendant entered a plea of not guilty. After a trial by jury, defendant was found guilty as charged. He was sentenced to eighteen years imprisonment at hard labor. Defendant now appeals, assigning as error the admission of other crimes evidence and the trial court's denial of his motions for mistrial. For the following reasons, we reverse the conviction, vacate the sentence, and remand for a new trial.

STATEMENT OF FACTS

While the specific dates are uncertain, the instant offense was alleged to have occurred between February 15, 2007 and February 21, 2007, during Mardi Gras festivities when defendant and the victim stayed at the La Quinta Inn in Slidell, Louisiana. Defendant is the father of the seventeen-year-old victim in this case, B.K., who was born as a result of defendant's sporadic relationship with the victim's mother.¹ According to the victim's mother, during B.K.'s early teenage years, he began to get into trouble at school and home. She contacted defendant, and B.K. began living with defendant when he was thirteen years old on a discontinuous basis.

According to B.K., he and defendant smoked crack cocaine, marijuana, took pain pills, and consumed alcohol during 2007 Mardi Gras festivities. The victim further indicated that he and defendant "got into a couple of fights" and stated that while they were staying at the La Quinta Inn, defendant "had me do oral sex on him." The victim further stated, "we stayed another night and we did anal sex twice." The victim confirmed that the intercourse was painful and while he ultimately asked defendant to stop, he did not fight because he was scared defendant would physically hurt or beat him. The victim had turned seventeen years old on February 10. B.K. reported the incidents to his maternal

¹ Herein, we reference the victim, whose date of birth is February 10, 1990, by initials only. See LSA-R.S. 46:1844W.

grandmother and mother before making a statement to the police on July 22, 2007, at his mother's insistence.

OTHER CRIMES EVIDENCE

In the first assignment of error, defendant contends that the trial court abdicated its authority by permitting the state to ignore the *in limine* ruling that evidence or testimony regarding the age of defendant's wife was inadmissible at trial. Defendant further argues that the prosecutor violated Rule 3.4(e) of the Louisiana Bar Association Rules of Professional Conduct in alluding to a matter of which evidence was inadmissible, that is, the age of defendant's wife, during opening arguments. Defendant contends that the trial court erred in denying the motion for mistrial in this regard. Defendant also contends that the state further elicited inadmissible testimony from the victim's mother regarding defendant's wife. Arguing that the testimony implied that there was something illegal about the sex acts between defendant and his wife, defendant contends that the trial court erred in finding the testimony admissible. Defendant also notes that the state elicited testimony from defendant regarding his wife's age during cross-examination and that the trial court repudiated its pretrial ruling by finding that testimony about defendant's sexual relationship with his wife was admissible because of credibility issues.

In the third assignment of error, defendant, in pertinent part, argues that the erroneous admission of other crimes evidence was not harmless in this case. Defendant notes that the jury was presented with a credibility choice between him and the alleged victim. He further states that his trial testimony established that he had no history of homosexual behavior. Defendant also notes that trial testimony indicated that the victim had a history of anti-social and belligerent behavior.

In this case the state filed a notice of intent to introduce evidence of other crimes by defendant, including sexual acts with a fourteen-year-old female,

herein identified as B.C.² The notice further stated that on August 5, 2005, defendant traveled to Texas to marry B.C., who was six-months pregnant and fourteen years old at the time. The state intended to introduce the evidence pursuant to LSA-C.E. art. 412.2 to show that defendant has a lustful disposition to sexually assault young children. In ruling on the admissibility of the evidence, the trial court noted that the instant case involves sexually assaultive behavior upon defendant's biological child. Comparing the acts alleged in the instant offense to the acts involving B.C., the trial court found that they were of a disparate nature and that the probative value of the other acts would be significantly outweighed by its prejudicial effect. The trial court noted that B.C. is a female who defendant married and had a child with and that the instant case involves defendant's seventeen-year-old son. Thus, the trial court disallowed "the evidence with regards to the age of the female at the time they began their sexual involvement and actually had a child together." As noted by defendant, the trial court also warned the state that the introduction of such evidence would result in a mistrial.

As further noted by defendant, during its opening remarks, the state informed the jury that while living with defendant, the victim introduced defendant to B.C. and that defendant married B.C. when she was fourteen-years old. The defense immediately moved for a mistrial. The trial court denied the motion for mistrial, noting that the prosecutor's statement did not constitute evidence of a criminal act or wrong, but warned the state to heed the pretrial ruling. During the direct examination of the victim's mother, the state inquired as to the victim's response when she instructed him to report the incident to the police and the following response was elicited, "He didn't want to call the police because he said his father gets away with everything. And he said that when he reported his father having sex with [B.C.] --." The defense again moved for a mistrial. The trial court denied the motion, finding the statement was not

² The state also gave notice of its intent to introduce evidence of defendant's acts of domestic violence against B.C., which the trial court ruled admissible.

prejudicial considering previous testimony that defendant and B.C. were married. The trial court also noted that during its opening statement, the defense raised the possibility of the victim making a false report in this case and seemingly implied that such a defense may ultimately lead to the admissibility of the other crimes evidence at issue.

Finally, during cross-examination of defendant, the state asked defendant how old B.C. was when he married her and defendant responded that B.C. was fourteen years of age. Defendant objected. The trial court noted the victim's prior testimony that he and B.C. were schoolmates and that the issue of B.C.'s age was at the forefront because the victim and defendant's credibility had been drawn as critical issues, further noting the absence of physical evidence. Considering defendant's testimony, the credibility issues in the case, and the need to "complete the picture," the trial court amended its prior ruling and found the evidence admissible. Thereafter, the state fully questioned defendant regarding the matter, including eliciting testimony as to how many months pregnant B.C. was when defendant married her, and the fact that defendant was married to another woman when he impregnated B.C.

Mistrial is a drastic remedy and warranted only when substantial prejudice will otherwise result to the accused to deprive him of a fair trial. **State v. Booker**, 02-1269, pp. 17-18 (La.App. 1 Cir. 2/14/03), 839 So.2d 455, 467, writ denied, 03-1145 (La. 10/31/03), 857 So.2d 476. A trial court's ruling denying a mistrial will not be disturbed absent an abuse of discretion. **State v. Givens**, 99-3518, p. 12 (La. 1/17/01), 776 So.2d 443, 454.

Article 401 of the Code of Evidence provides that relevant evidence is any evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Evidence of other crimes, wrongs, or acts is generally inadmissible to impeach the character of the accused. LSA-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). To avoid the unfair inference that a defendant

committed a particular crime simply because he is a person of criminal character, other crimes evidence is inadmissible unless it has an independent relevancy besides simply showing a criminal disposition. **State v. Lockett**, 99-0917, p. 3 (La.App. 1 Cir. 2/18/00), 754 So.2d 1128, 1130, writ denied, 00-1261 (La. 3/9/01), 786 So.2d 115. However, such evidence may be admissible to prove motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident. LSA-C.E. art. 404B(1). Louisiana Code of Evidence article 412.2A provides:

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.

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. In accordance with LSA-C.E. art. 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. Thus, evidence of a prior sexual offense is admissible under Article 412.2 if it is relevant and its probative value outweighs its prejudicial value.

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 LSA-C.E. art. 404. The language of Article 412.2 closely follows Federal Rule of Evidence 413. Thus, the jurisprudence interpreting the federal rule is highly instructive. See **State v. Wright**, 98-0601 (La.App. 1 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 Federal Rule of Evidence 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). Article 412.2 has been consistently applied to allow the introduction of evidence of prior uncharged misconduct in cases where a defendant has engaged in sexually inappropriate behavior with minor individuals similar to the charged misconduct. See **State v. Verret**, 06-1337 (La.App. 1 Cir. 3/23/07), 960 So.2d 208, 222, writ denied, 07-0830 (La. 11/16/07), 967 So.2d 520; **State v. Williams**, 41,731 (La.App. 2 Cir. 1/24/07), 950 So.2d 126, 131-32, writ denied, 07-0465 (La. 11/2/07), 966 So.2d 599; **State v. Mayeux**, 06-944 (La.App. 3 Cir. 1/10/07), 949 So.2d 520, 528-299. 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).

Louisiana Code of Criminal Procedure Article 770(2) provides that a mistrial shall be granted when a remark or comment is made referring to other crimes of which the evidence would have been inadmissible. Moreover, an attorney is prohibited from alluding to any matter that the attorney does not reasonably believe is relevant or that will not be supported by admissible evidence. State Bar Articles of Incorporation, Art. XVI, Rules of Professional Conduct, Rule 3.4(e). The standards in the Rules of Professional Conduct have the force and effect of substantive law. See **Succession of Cloud**, 530 So.2d 1146, 1150 (La. 1988).

In this case, we agree with the trial court's initial finding and ruling that the evidence of the defendant's sexually assaultive behavior with a female child whom he ultimately married and bore a child with is not similar to the charged misconduct in this case, homosexual, incestuous sexual intercourse with his seventeen-year-old biological son or admissible under Article 412.2. We find further that the other crimes evidence had no independent relevancy besides simply showing a criminal disposition. See **State v. Lafleur**, 398 So.2d 1074, 1080 (La. 1981). The evidence was impermissibly introduced to attack the

character of the accused. Any probative value this evidence may have is far outweighed by the danger this evidence would unfairly prejudice defendant in the eyes of the jury, leading it to render a guilty verdict because of the prior acts rather than on the strength of the evidence of the offense for which he was charged. Thus, the evidence is barred by the balancing test of Article 403.

The erroneous admission of other crimes' evidence is a trial error subject to a harmless error analysis. **State v. Johnson**, 94-1379 (La. 11/27/95), 664 So.2d 94, 101. The test for determining harmless error is whether the verdict actually rendered in the case was surely unattributable to the error. **Sullivan v. Louisiana**, 508 U.S. 275, 279, 113 S.Ct. 2078, 2081, 124 L.Ed.2d 182 (1993). Herein, the verdict was based solely on a credibility determination. Considering there was no physical evidence in this case and the evidence against defendant consisted solely of the victim's testimony, we cannot conclude that the guilty verdict actually rendered in this trial was surely unattributable to the erroneously introduced evidence. Based on the foregoing assessment, the remarks and other crimes evidence presented by the prosecution were inadmissible and prejudicial. The trial court erred in admitting the evidence in question and abused its discretion in denying the motions for mistrial in this regard. The conviction must be reversed and the case remanded to the trial court for a new trial. Finding merit in this assignment of error, we pretermitt discussion of assignment of error number two. We further pretermitt discussion of assignment of error number three to the extent that it has not been addressed above.

CONVICTION REVERSED, SENTENCE VACATED, AND REMANDED FOR A NEW TRIAL.