STATE O LOUISIANA	*	NO. 2014-KA-0599
VERSUS	*	COURT OF APPEAL
TOMMY L. SCOTT	*	FOURTH CIRCUIT
	*	STATE OF LOUISIANA
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BONIN, J., CONCURS WITH REASONS.

I concur in the affirmation of Mr. Scott's conviction but write separately because I disagree with the majority's treatment of his second assignment of error. Mr. Scott assigns as error that the trial judge did not conduct what he characterizes a "true" *Prieur* hearing, and the majority agrees. I find that the trial judge did conduct a *Prieur* hearing appropriate to the facts and issues in this case and did not abuse her discretion in ruling that the other-crime in 1992[1] was admissible under La. C.E. art. 404 B(1).

The thrust of Mr. Scott's complaint and of the majority's opinion is that a "true" *Prieur* hearing requires the introduction of "evidence." But a *Prieur* hearing, correctly understood, is simply a species of the contradictory pretrial inquiry in which preliminary questions concerning "the admissibility of evidence shall be determined by the court". La. C.E. art. 104 A. Importantly, "[i]n making its determination it is not bound by the rules of evidence except those with respect

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[1] At the *Prieur* hearing, the prosecution sought the introduction of evidence of two other-crimes in addition to the other-crime in 1992. One of the additional other-crimes occurred in 1985, and the prosecution at trial did not seek to introduce evidence of that other-crime. Mr. Scott explicitly did not object to the introduction of the 2003 other-crime as his conviction there, as expressed by him during the *Prieur* hearing, coincided with his defense that he might be a burglar but he was no rapist. He further explained at the hearing "And I would like to go back to the 2003 consensual sex case, Your Honor. Now, that case is a part of my defense" in order to show the planting of DNA evidence in the case with which he was to stand trial.

to privileges." *Id.* *See also State v. Garcia,* 09-1578, pp. 18-23 (La. 11/16/12), 108 So. 3d 1, 15-18 (hearing is not a "trial" of the offenses).

With respect to the pretrial hearing, *Prieur* held that "[p]rerequisite to the admissibility of the evidence is *a showing by the State* that the evidence of other crimes is not merely repetitive and cumulative, is not a subterfuge for depicting the defendant's bad character or his propensity for bad behavior, and that it serves the actual purpose for which it is offered." *State v. Prieur,* 277 So. 2d 126, 130 (La. 1973) (emphasis added). Notably, the Supreme Court later expressly held that "*Prieur* does not, as the defendant contends, require a pre-trial evidentiary hearing as to whether extraneous other-crime evidence may be admitted." *State v. Lukefahr,* 363 So. 2d 661, 665 (La. 1978). *Prieur,* the Supreme Court clarified, "only requires that, before such evidence is introduced, the trial court must determine, on the basis of the showing requisite for it to do so at a hearing outside the presence of the jury, that the extraneous acts are probative of a real issue and that their probative value exceeds their prejudicial effect." *Id.* *See also State v. Hatcher,* 372 So. 2d 1024, 1027 (La. 1979) ("a pretrial evidentiary hearing as to whether extraneous other-crime evidence may be admissible is not required").

Thus, at the *Prieur* hearing held in this matter on June 10, 2013, it was not necessary for the prosecution to introduce evidence of the other-crime evidence of which the defense had already been furnished the details in the amended notice which preceded our ruling and the trial court's hearing. At that hearing the prosecutor summarized each of the three other-crimes about which it intended to introduce evidence under Article 404 B(1) at the trial. The admissibility of such evidence is, of course, conditioned upon the trial judge finding that the fact-finder at trial could find by a preponderance of the evidence that the defendant committed the other-crime act. *See* La. C.E. art. 1104; *Huddleston v. United States,* 485 U.S. 681, 690 (1988); *see also* La. C.E. art. 104. Here, such a determination was not

difficult because for the other-crime in 1992 (aggravated burglary) introduced at trial Mr. Scott had already been convicted.

At the hearing, Mr. Scott articulated very well his contentions that the use of the 1992 other-crime in which the victim shot Mr. Scott's finger off were remote and that he had already taken responsibility for that offense. He reasonably argued that admitting such evidence "might make it seem like well the crime that I am charged with now that I am actually guilty because of something I did in the past." Thus, he properly and cogently raised before the trial judge the issue of whether the introduction of that evidence was really "a subterfuge for depicting [his] defendant's bad character or his propensity for bad behavior". *Prieur,* 277 So. 2d at 130. Noting, however, that even Mr. Scott concedes that the *identity* of the perpetrator of the aggravated rape and the aggravated burglary was to be the central issue because neither the victim nor her teen-aged son could identify the perpetrator, the prosecution showed that the other-crime evidence "serves the actual purpose for which it is offered." *Id.* Thus, the trial judge surely had sufficient information from the hearing to decide whether the other-crime evidence was allowable under Article 404 B(1).

Consequently, in my view, the trial judge conducted a proper *Prieur* hearing even though no evidence was introduced at the hearing, and she did not abuse her discretion in admitting the challenged evidence of another crime committed in 1992, and we need not conduct a "harmless error" review.