NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA	*	**NO. 2014-KA-0599**
VERSUS	*	
		COURT OF APPEAL
TOMMY L. SCOTT	*	
		FOURTH CIRCUIT
	*	
		STATE OF LOUISIANA

* * * * * * *

APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 468-669, SECTION "F"
Honorable Robin D. Pittman, Judge
* * * * * *
Judge Dennis R. Bagneris, Sr.
* * * * * *

(Court composed of Judge Dennis R. Bagneris, Sr., Judge Paul A. Bonin, Judge Joy Cossich Lobrano)
BONIN, J., CONCURS WITH REASONS
LOBRANO, J., CONCURS FOR THE REASONS ASSIGNED BY J. BONIN

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CONVICTIONS AFFIRMED;
SENTENCES AFFIRMED IN PART;
VACATED IN PART; AND
REMANDED

APRIL 22, 2015

The defendant, Tommy L. Scott, appeals his conviction on aggravated rape and aggravated battery charges and his multiple offender adjudication. For the reasons that follow, we affirm the defendant's convictions and his sentence for aggravated rape. However, we vacate the defendant's multiple offender adjudication and sentence, and remand the matter for resentencing on the aggravated burglary conviction.

STATEMENT OF CASE

On February 15, 2007, the State indicted the defendant with one count of aggravated rape and one count of aggravated burglary, violations of La. R.S. 14:42 and La. R.S. 14:60, respectively. These offenses allegedly happened on June 11, 1992. The defendant entered a guilty plea through his counsel, Sandra Borne, on March 1, 2007. The trial court denied defendant's motion to suppress the evidence on July 10, 2007.

Defense counsel Borne filed a motion to withdraw which was granted by the trial court on January 31, 2008. Thereafter, on February 8, 2008, the defendant appeared with Stephen Singer as his counsel.

On April 25, 2008, the trial court denied the State's Motion to Introduce Evidence of Prior Crimes.

Following a competency hearing on July 10, 2008, the trial court found the defendant competent to proceed.

On August 18, 2008, the trial court denied the defendant's motion to remove Singer as counsel. However, on November 12, 2008, it granted Singer's motion to withdraw as defense counsel. Other attorneys who represented the defendant after Singer's withdrawal included Patrick McGinity and Rick Tessier. However, McGinity withdrew as counsel on December 2, 2008 and Rick Tessier withdrew his representation on May 12, 2009.

The defendant was found not competent to proceed with trial following competency hearings conducted on September 17, 2009 and February 24, 2011. However, he was deemed competent to proceed on August 11, 2011.

On May 30, 2012, the defendant filed a motion to represent himself at trial. Later, on July 17, 2012, the trial court found the defendant competent to proceed to trial *pro se* upon considering testimony from forensic psychology experts. Notwithstanding, on the same day, the defendant withdrew his motion to represent himself *pro se.*

Another competency hearing was held on December 13, 2012. The trial court again found the defendant competent to proceed. It also ruled that the defendant could represent himself at trial. The trial court appointed Eddie Rantz as stand-by counsel in order to advise defendant of courtroom procedure.

On February 5, 2013, the State noticed its intent to introduce other crimes evidence. The trial court ruled the evidence inadmissible. The State sought supervisory review before this Court. This Court reversed the lower court's ruling

and remanded for a hearing on the State's motion.[1] After a *Prieur* hearing, the trial court ruled that the other crimes evidence was admissible.

Trial commenced on October 21, 2013, and concluded on October 23, 2013. Rantz assisted the defendant. The jury found the defendant guilty as charged on both counts.

On December 6, 2013, the defendant was sentenced on the aggravated rape conviction to life imprisonment without benefit of parole, probation or suspension of sentence, with credit for time served, and a $276.50 fine. On the aggravated burglary conviction, the trial court imposed a concurrent sentence of twenty years.

On the same day, the State filed a multiple bill relative to the aggravated burglary conviction. The defendant pled guilty to the multiple bill. The trial court then vacated its original sentence on the aggravated burglary conviction. It re-sentenced the defendant pursuant to La. R.S. 15:529.1 to thirty years at hard labor without benefit of probation or suspension of sentence with credit for time served.

On February 4, 2014, the defendant filed a *pro se* motion for new trial which was denied by the trial court. This appeal followed.

STATEMENT OF FACT

Testimony at trial considered facts and evidence from the present offense that happened on June 11, 1992, as well as "other crimes" evidence deemed admissible. We shall first review the testimony relative to the "other crimes" evidence.

Other Crimes

The State called Jim Ford to testify about an October 10, 1992 burglary. Mr. Ford stated that he and his girlfriend were asleep when the defendant entered his

[1] *State v. Tommy Scott*, unpub., 2013-0416 (La. App. 4 Cir. 5/30/13).

residence. Mr. Ford advised he was able to retrieve his handgun. He said the defendant entered the bedroom and told Ford: "Do not move or I'll kill you." The defendant switched on the bedroom light, and Ford saw that he was armed with a knife and clothed in a large coat with a nylon stocking over his head. Ford fired his gun, shooting off defendant's finger. The NOPD arrived within minutes of the shooting and collected the severed finger.

On his cross-examination of Ford, the defendant stated: "I happen to be that person that broke in your house. I didn't have on no nylon stocking or no trench coat." The defendant continued: "I'm not denying that what happened, happened, I did commit that crime. I know it's been twenty years ago that it happened." The defendant then apologized to Ford.

The State's next witness was NOPD Officer Neville Payne, a thirty year veteran of the police force. The officer testified that he received a call from dispatch on October 10, 1992, regarding an individual who lost a finger due to a gunshot wound. Payne met with the defendant at Charity Hospital. The defendant told the officer that he had lost his finger in a work-related accident. However, the defendant was arrested after Payne received information that the latent finger print taken from the severed finger retrieved from the burglary scene belonged to the defendant. During cross-examination, the defendant discussed his arrest and that he was charged with simple burglary. However, he opined that the officer's testimony was not relevant to his present situation.

K. W.[2] also testified as to other crimes evidence. She testified that in October 2003, the defendant entered her residence, armed with a knife and wearing

[2] To protect the privacy of the victims and their family members, only their initials are used herein. *See* La. R.S. 46:1844(W).

a covering over his face standing in the room with her. Her face and thumb were cut in the ensuring struggle with the defendant. He threatened to kill her with a knife if she did not stop screaming and struggling with him. The defendant demanded her money. He placed a covering over her face and raped her several times at knife point. After the rapes, she said the defendant fell asleep on her bed. She removed the cover from her face and was able to get a good look at him. She then ran to a neighbor's house to call the police. When the officers arrived, they found the defendant still asleep in K.W.'s bed. K.W. identified the defendant on the scene and at trial as the man who raped her.

As part of his cross-examination of K.W., the defendant noted that he had been through two trials involving her. He also told her that her testimony was irrelevant because he was not on trial for her rape, but rather for a sexual offense which occurred in 1992. He asked her if she previously testified that she wanted to have sex with him. K.W. responded that she had no idea what he was talking about and denounced his claims.

Detective Brian Baudier was one of the officers who investigated K.W.'s assault. Det. Baudier recalled that she was an emotional wreck and described several cuts and bruises to her body and face. Det. Baudier said that he recovered a shirt on a lawn chair outside K.W.'s house. The shirt matched the pants the defendant wore. He also noted that the defendant's pants had burrs which were similar to burrs that were on high grass outside K.W.'s backdoor. Within the house, Det. Baudier found a knife in K.W.'s bed. He directed crime lab personnel to collect the bed sheets and a shirt. After that, he conducted a show-up identification procedure from which K.W. identified the defendant as the rapist.

He advised that K.W. underwent a sexual assault examination at Charity Hospital. During the course of his investigation, a buccal swab was obtained from the defendant. This generated a genetic profile. The genetic profile produced a CODIS hit for a 1992 sexual assault that had been investigated by Detective Joseph Goins.

During cross-examination of Det. Baudier, the defendant admitted to having sex with K.W., however, he claimed it was consensual. He argued that the evidence was falsified and planted by the police to frame him.

On re-direct examination, Det. Baudier added that K.W.'s bed sheets were tested for seminal fluids and that several tests were conducted on K.W. as well.

Sgt. Michael Sam testified that he also responded to the call involving K.W. He interviewed K.W. She told Sgt. Sam that her attacker was asleep in her bedroom. Sam and his partner discovered the defendant asleep in K.W.'s bed with his pants down around his ankles and holding a knife. The defendant awoke and struggled with the officers before he was subdued with pepper spray and handcuffed. Sgt. Sam identified the defendant at trial as the person he found asleep in K.W.'s bed.

June 11, 1992 Offense

Officer Andrew Roccaforte testified as to the June 11, 1992 rape investigation that is presently before this Court. Off. Roccaforte met the victim, M.H., at her residence. She reported that her telephone line was cut, and that she had been raped. The officers were unable to identify or apprehend a suspect. Once Roccaforte determined that a sex crime had been committed, he handed over the investigation to Detective Joseph Goins of the Sex Crimes Unit.

M.H., the victim of the June 11, 1992, rape testified that at the time of the rape, she lived with her fifteen year old son. In the early morning hours of June

11, 1992, she was awakened by a man smothering her with a pillow and holding a knife to her throat. In the course of her struggle with her assailant, she suffered a bone-deep laceration to her hand. Her attacker warned her that if she did not comply with his demands or looked at him, he would kill her and her son. He demanded money and took the money she had in her wallet. He mentioned that he had cut the telephone lines so that she could not call for help. Then he raped her. After the attack, he placed M.H. in a closet with a pillow case over her head. He told her not to move and threatened to kill her if she exited the closet before he left the house. When she was satisfied that her attacker was gone, she ran to her son's room and told him she had been raped. M.H.'s son set off the house alarm and called 911. When the police arrived, M.H. related the incident to the investigating officers and met with Det. Goins. After Det. Goins interviewed her, M.H. was transported to Charity Hospital for treatment and a sexual assault examination.

Years after the rape, Detective Goins notified M.H. that the police received a DNA match based upon her sexual assault examination. She denied knowing anyone named Tommy Scott. However, she said she wanted to proceed with the prosecution.

P.H., M.H.'s son, testified. He corroborated his mother's testimony from the point where she awakened him after the rape. He noticed that her hand was cut and bleeding. He called 911, went to the front of the house, and set off the alarm. The police arrived shortly afterwards.

Gina Pineda was qualified as an expert in forensic DNA testing. Ms. Pineda identified State's Exhibit 11 as the case file generated by Reliagene which documented that the male DNA recovered from K.W.'s vaginal swab originated with the defendant.

Detective Joseph Goins testified that he was the lead investigator on the June 11, 1992, aggravated rape and aggravated burglary of M.H. Det. Goins arrived on the scene within an hour of the commission of the crimes. He interviewed M.H. and learned that the attacker woke the victim, placed a pillow case over her head and demanded money. The victim advised that she did not know the suspect; however, she got a brief glimpse of him. The victim's son was asleep in his room at the time the assailant entered the house, but he did not witness the attack. Det. Goins directed the Crime Lab in processing the scene – photographs, collection of a man's shirt, and bed linens - and then transported the victim to Charity Hospital for medical treatment and a sexual assault examination. When Goins retrieved the exam kit about two days later, he logged it into Central Evidence and Property and then submitted the kit for testing. Det. Goins noted that DNA testing was not available to the Crime lab in 1992; however, the biological samples collected for the rape kit were preserved. He advised that the case went dormant until November 2006 when Det. Baudier notified him that there was a DNA match to M.H.'s case. He contacted M.H., who advised Det. Goins that she wished to proceed with prosecution of her rape case. Det. Goins obtained an arrest warrant for the defendant. On February 12, 2007, Det. Goins obtained a buccal swab from the defendant.

Patricia Daniels, a medical technologist with the Orleans Parish Coroner's Office from 1950 to 2000, was qualified as an expert in the field of medical technology. Ms. Daniels performed the testing on the rape kit in this case. She tested two internal vaginal swabs for seminal fluid, an internal vaginal smear, which was positive for spermatozoa, and saliva and blood samples from the victim.

The defendant cross-examined Ms. Daniels at length about the reliability of the test results.

Anne Montgomery was qualified as an expert in DNA testing. She explained what DNA is; the method of extraction of DNA from bodily fluids to obtain a genetic profile; DNA's part in differentiating one person to the exclusion of all others; and the safety checks employed to ensure the reliability of test results. She testified that the sexual assault examination results for K.W. in 2003 matched the test results obtained from M.H. in 1992, and that both test results matched the defendant's genetic profile.

During cross-examination, the defendant reviewed in detail Ms. Montgomery's explanation of the test results as they applied to his profile and that of M.H. Ms. Montgomery noted that the chances that the genetic profile developed from her testing belonged to someone other than the defendant were one in ten billion.

Jennifer Schroeder testified by stipulation as an expert in molecular biology and DNA analysis. After explaining the science and importance of DNA testing for identification purposes, Ms. Schroeder confirmed that the genetic profile obtained from the sperm fraction extracted from the vaginal swab taken from M.H. matched the profile generated from the vaginal swab from K.W., and that both of those profiles matched the sample from the defendant. Ms. Schroeder testified that she had no means to manipulate the CODIS system in either the M.H. or the K.W. case.

ERRORS PATENT

We find two errors in our review for errors patent. In addition to sentences of incarceration, the trial judge imposed a fine of $276.50 on the defendant.

However, the imposition of a fine is not authorized by statutes defining the offenses. *See* La. R.S 14:42; La. R.S. 14:60. Accordingly, we amend the defendant's sentence by deleting the fine. The trial court is instructed to note the amendment in its court minutes.

The second error patent pertains to the defendant's multiple offender conviction. This error is addressed hereinafter in our review of Assignment of Error Number 3.

ASSIGNMENT OF ERROR NUMBER 1

The defense contends that the defendant lacked competency to waive his right to counsel because he was mentally ill; and hence, it argues that the trial court erred in permitting the defendant to represent himself.

Under the Sixth Amendment of the U.S. Constitution, an accused in a criminal trial has the right to the assistance of counsel. This amendment has been interpreted to "impl[y] a right of self-representation." *State v. Bell,* 2009–0199, p. 13 (La.11/30/10), 53 So.3d 437, 445, citing, *Faretta v. California,* 422 U.S. 806, 822, 95 S.Ct. 2525, 2534, 45 L.Ed.2d 562 (1975). To that end, a defendant may elect to represent himself if the choice is "knowingly and intelligently made" and the assertion of the right is "clear and unequivocal." *State v. Campbell,* 2006-0286, p. 63 (La. 5/21/08), 983 So.2d 810, 851. *Campbell* also noted: "[T]he competence that is required of a defendant seeking to waive his right to counsel is the competence to waive the right, not the competence to represent himself." *Godinez v. Moran,* 509 U.S. 389, 399, 113 S.Ct. 2680, 2687, 125 L.Ed.2d 321

(1993). Therefore, "a criminal defendant's ability to represent himself has no bearing upon his competence to choose self-representation." *Id.*[3]

There is no particular formula which must be followed by the trial court in determining whether a defendant has validly waived his right to counsel. *State v. Carpenter,* 390 So.2d 1296 (La.1980). The propriety of granting a defendant the right to represent himself should not be judged by what happens in the subsequent course of the representation; it is the record made in recognizing that right that is determinative. *State v. Hodges,* 98–0513 (La. App. 4 Cir. 11/17/99), 749 So.2d 732, 736, citing, *State v. Dupre,* 500 So.2d 873 (La. App. 1 Cir.1986).

In *State v. Santos*, the Louisiana Supreme Court held that when a defendant makes an unequivocal request to represent himself, the judge need determine only whether the accused is competent to waive counsel and "voluntarily exercising his informed free will." *State v. Santos,* 99–1897, p. 3 (La. 9/15/00), 770 So.2d 319, 321 (quoting *Faretta v. California,* 422 U.S. 806, 835, 95 S.Ct. 2525, 2541, 45 L.Ed.2d 562 (1975)). What is a "knowing and voluntary waiver" was discussed by the Louisiana Supreme Court in *State v. Carter,* 2010–0614, p. 25 (La.1/24/12), 84 So.3d 499, 520:

> "[t]he determination of whether there has been an intelligent waiver of right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." *Johnson v. Zerbst,* 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938); *see also State v. Strain,* 585 So.2d 540, 542 (La.1991)(trial courts should inquire into the accused's age, education, and mental condition in deciding, on a totality of the circumstances, whether accused understands significance of waiver). Further, a defendant must be

[3] *Campell* also quoted from *Godinez*:

> A finding that a defendant is competent to stand trial, however, is not all that is necessary before he may be permitted to plead guilty or waive his right to counsel. In addition to determining that a defendant who seeks to plead guilty or waive counsel is competent, a trial court must satisfy itself that the waiver of his constitutional rights is knowing and voluntary . . . In this sense there is a 'heightened' standard for pleading guilty and for waiving the right to counsel, but it is not a heightened standard of competence. *Id.,* 509 U.S. at 399-401, 113 S.Ct. at 2687.

> made aware of the dangers and disadvantages of self-representation so that the record demonstrates that "'he knows what he is doing and his choice is made with his eyes open.' " *Faretta,* 422 U.S. at 835, 95 S.Ct. at 2541 (quoting *Adams v. United States ex rel. McCann,* 317 U.S. 269, 279, 63 S.Ct. 236, 242, 87 L.Ed. 268 (1942)). A defendant, in other words, must know the consequences of his action. *City of Monroe v. Wyrick,* 393 So.2d 1273, 1275 (La.1981). The assertion of the right must also be clear and unequivocal. *See Faretta,* 422 U.S. at 835, 95 S.Ct. at 2541; *see also State v. Hegwood,* 345 So.2d 1179, 1181–82 (La.1977).

Upon review, the record shows that the trial court in the present matter held a competency hearing on December 13, 2012. It elicited testimony from Dr. Richard Richoux, a board certified psychiatrist specializing in forensic psychiatry. Upon hearing Dr. Richoux's testimony that the defendant met the *State v. Bennett*, 345 So.2d 1129, 1138 (La.1977) criteria, the trial judge determined that the defendant was competent to proceed to trial. Immediately thereafter, the defendant informed the court that he was invoking his right to self-representation. At that time, the trial judge held a hearing to assess the defendant's literacy and understanding as to what self-representation entailed. The defendant testified that he was forty-nine years old and graduated high school in 1980. The trial judge advised the defendant that: ". . . self-representation . . . is almost always unwise and it may be detrimental too, and I am advising you against it . . .". The judge further advised the defendant that he: would receive no special treatment from the court or the prosecutor because he was not an attorney; must follow all rules of law, criminal procedure and evidence; would have no clerical or research assistance in preparing his case; would be removed from court and his right of self-representation revoked if he became disruptive; could change his mind about self-representation at any time; and would not be able to claim inadequate representation no matter the outcome of trial. The defendant responded that he understood and repeatedly said he wished to represent himself. The judge then

questioned the defendant concerning the charges against him and possible sentences upon conviction. Defendant acknowledged that he understood the charges against him, the penalty, and the fact that the State would probably multiple bill him.

The trial judge then appointed Eddie Rantz to act as "stand-by" counsel to assist the defendant during the trial for procedural purposes. *McKaskle v. Wiggins*, 465 U.S. 168, 104 S.Ct. 944, 79 L.Ed.2d 122 (1984) (the Sixth Amendment does not prohibit a court from mandating some minimal involvement by standby counsel).

The defense now represents that the district court committed reversible error in granting defendant's request to represent himself without consideration of his "mental illness." The defense maintains that the defendant's "mental illness was so apparent to others that four competency hearings were convened and five attorneys asked to withdraw from representing him." In support, the defendant cites *Indiana v. Edwards*, 554 U.S. 164, 128 S.Ct. 2379, 171 L.Ed.2d 345 (2008), a case wherein the Court concluded that the Sixth Amendment does not prohibit the states from forcing counsel on persons who, although competent to stand trial, "still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves."

However, we find this argument unpersuasive. There is no evidence in the record to suggest the defendant suffered from significant mental impairment. The record indicates that there were five competency hearings held, and the defendant was found competent to proceed at four of those hearings. Moreover, during the last competency hearing on December 13, 2012, Dr. Richoux explained:

> [The defendant] has demonstrated. . . over a long period of time some definite paranoid tendencies, but I want to be careful to say that not all individuals who show some paranoid tendencies or paranoid traits suffer from a major mental illness in the sense that we usually use that term.
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> . . . not all individuals with paranoid traits are schizophrenic or suffer from thought disorder, or any other psychotic disorder.
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> . . . although as usual I saw some indications of what I would classify as paranoid personality, I did not feel that it rose to delusional proportions . . . he was [not] out of touch with reality with regard to whatever paranoid feelings he might have . . . there is always a question of whether an individual to what extent they are going to cooperate and people can cooperate in full, they cooperate in part, they can cooperate not at all for a variety of reasons.
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> . . . if [the defendant] chooses to be not fully cooperative with his attorney at this point and time, the motivation behind that is not a psychotic motivation. It's not because he's delusional or suffering active systems of a major mental illness . . .

The trial judge then asked Dr. Richoux what would cause the defendant to refuse to cooperate with counsel. Dr. Richoux responded:

> . . . I would say the cause would be that [the defendant] displays a certain amount of distrust. I have used the word paranoia, and I could also use the word distrust as a synonym for that . . . given [the defendant's] personality structure, his natural tendency, whether he interacts with a lawyer, whether he interacts with somebody at a convenience store, or anybody who has the potential to impact his life in any way for better or for worse, is going to second guess periodically whether that individual is really giving him good advice, whether that individual is really acting in his best interest. He's just going to do that. . .
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> . . . what I am saying now is I think he's going to have distrust because I think it's built into his personality structure and that's not going to change, but I don't think he is delusional . . . So if he fails to cooperate in full with [counsel], I will take it at this point as a reflection of just personality traits and some degree of suspiciousness, distrustfulness . . .

Dr. Richoux's testimony indicates that the defendant was not mentally ill when he waived his right to counsel. Consequently, our only remaining inquiry is whether the defendant's waiver of counsel was knowingly, intelligently and unequivocally made. The colloquy between the judge and the defendant satisfies that inquiry. In particular, the trial judge explained the difficulties in self-representation and also cautioned the defendant that such a course of action was ill-

advised, and that his interests would best be served by representation from counsel. The defendant's response demonstrated an understanding of the seriousness of the charges and the sentences. He even exhibited an understanding of a multiple bill and its purpose of enhancing his sentences. He steadfastly maintained his determination to defend himself, and he was afforded assistance of stand-by counsel.

The record clearly supports the trial court's ruling that the defendant validly waived his right to counsel. Accordingly, we find no merit to this assignment of error.

ASSIGNMENT OF ERROR NUMBER 2

This error represents that the trial court erred in admitting other crimes evidence. Defendant argues that the only real issue at trial was the identity of the victim's assailant. He stresses that the facts of the instant offense and the other crimes, contrary to the State's assertion, are not so distinctively similar that they meet the necessary standard to be introduced at trial. He contends that the State's sole purpose in introducing the evidence was to depict him as a bad person.

La. C.E. art. 1104 sets forth the burden of proof for other crimes evidence:

State v. Prieur; pretrial; burden of proof

> The burden of proof in a pretrial hearing held in accordance with *State v. Prieur,* 277 So.2d 126 (La. 1973), shall be identical to the burden of proof required by Federal Rules of Evidence Article IV, Rule 404.[4]

In *State v. Garcia,* 2009-1578 (La. 11/16/12), 108 So.3d 1, the Supreme Court addressed the proper use and admissibility of other crimes evidence, explaining:

The fundamental rule in Louisiana governing the use of evidence of other crimes, wrongs, or acts is, and has been, such evidence is not admissible to prove the accused committed the charged crime because he has committed other such crimes in the past or to show the probability he committed the crime in question because he is a man of criminal character. *State v. Lee*, 05-2098, p. 44 (La.1/16/08), 976 So.2d 109, 139; *State v. Patza*, 3 La. Ann. 512 (1848).

Nevertheless, although evidence of other crimes, wrongs, or acts may not be admitted to prove the accused is a person of criminal character, evidence of other crimes has long been admissible if the state establishes an independent and relevant reason for its admission. See *State v. Anderson*, 45 La. Ann. 651, 654, 12 So. 737, 738 (1893). This very principle is embodied in our Code of Evidence at Article 404(B)(1)[5]. . .

While still prohibiting the state from introducing evidence of other crimes, wrongs, or acts to show a probability the accused committed the charged crime because he is a "bad" person, the rule articulated Article 404(B)(1) allows admission for other purposes, i.e., to show motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or when it relates to conduct that constitutes an integral part of the act or transaction that is the subject of the present proceeding. La. Code Evid. art. 404(B)(1); *Lee,* 05-2098 at p. 44, 976 So.2d at 139; *State v. Kennedy*, 2000-1554, p. 5 (La.4/3/01), 803 So.2d 916, 920.

Several other statutory and jurisprudential rules also govern the admissibility of other crimes evidence even when one or more of these permitted purposes is asserted. *State v. Miller*, 98-0301, pp. 3-4 (La.9/9/98), 718 So.2d 960, 962. Foremost, at least one of the enumerated purposes in Article 404(B)(1) must have substantial relevance independent from showing defendant's general criminal character in that it tends to prove a material fact genuinely at issue. Lee, 05-2098 at p. 44, 976 So.2d at 139; *State v. Moore,* 440 So.2d 134, 137 (La.1983).

Moreover, the probative value of the extraneous crimes evidence must outweigh its prejudicial effect. *Lee*, 2005-2098 at p. 44, 976 So.2d at 139; *State v. Hatcher*, 372 So.2d 1024, 1027 La.1979). Separate and apart from the showing of relevancy and prejudice, the state must also prove the defendant committed the other acts, *Lee*, 2005-2098 at p. 44, 976 So.2d at 139, and satisfy the requirements set forth in *Prieur,* i.e., the state must provide the defendant with notice before trial it intends to offer prior crimes evidence.

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[4] 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).

[5] La. C.E. art. 404(B)(1) provides:

> Except as provided in Article 412 [regarding a victim's past sexual behavior in sexual assault cases], evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, of the nature of any such evidence it intends to introduce at trial for such purposes, or when it relates to conduct that constitutes an integral part of the act or transaction that is the subject of the present proceeding.

> Logically, it falls to the trial court in its gatekeeping function to determine the independent relevancy of such evidence and balance its probative value against its prejudicial effect. La. Code Evid. art. 403; *Huddleston v. United States*, 485 U.S. 681, 690-91, 108 S.Ct. 1496, 1502, 99 L.Ed.2d 771 (1988). Upon finding such relevance, the court must then balance all the pertinent factors weighing in favor of and against its admissibility. See C. McCormick, Evidence § 190, 768 (6th ed.2006). In this analysis, the court seeks to answer the question: Is this evidence so related to the crime on trial or a material issue or defense therein that, if admitted, its relevancy will outweigh the prejudicial effect, which the defendant will necessarily be burdened with?
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> Recently, we once again acknowledged this Court has long sanctioned the use of other crimes evidence to show modus operandi, as it bears on the question of identity, when the prior crime is so distinctively similar to the one charged, especially in terms of time, place, and manner of commission, one may reasonably infer the same person is the perpetrator in both instances. *Lee*, 2005-2098 at pp. 44-45, 976 So.2d at 139 (allowing the admission of such evidence "particularly when the modus operandi employed by the defendant in both the charged crime and uncharged offenses is so peculiarly distinctive one must logically say they were the work of the same person"); *State v. Hills*, 99-1750, p. 6 (La.5/16/00), 761 So.2d 516, 521; see, e.g., *State v. Code,* 627 So.2d 1373, 1381 (La.1993)(other crimes evidence admissible where it showed similar distinctive handcuff ligature, overkill, predominant use of a knife, and need for domination and control of the victims to the extent of moving them from room to room),cert. denied, 511 U.S. 1100, 114 S.Ct. 1870, 128 L.Ed.2d 490 (1994). The determination of this standard is essentially a balancing process: "The greater the degree of similarity of the offenses, the more the evidence enhances the probability that the same person was the perpetrator, and hence the greater the evidence's probative value, which is to be ultimately weighed against its prejudicial effect." *Moore*, 440 So.2d at 137-38.
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> Thus, the positive identification of a defendant as the perpetrator of a distinctively similar previous crime is often permitted to enhance the otherwise uncorroborated identification of that person as the perpetrator of the charged crime. In such cases, the evidence of the uncharged crime has much higher relevance and far greater probative value than evidence which merely indicates that the defendant has a propensity to engage in all kinds of criminal activity.

Garcia, 2009-1578 at pp. 53-57, 108 So.3d at 38-40.

A trial court's ruling on the admissibility under La. C.E. art. 404(B)(1) of other crimes evidence is reviewable under an abuse of discretion standard. See *State v. Henderson,* 2012-2422, pp. 3-4 (La. 1/4/13), 107 So.3d 566, 568.

A trial court's ruling as to the relevancy of evidence will not be disturbed absent a clear abuse of discretion. *State v. Sanders,* 2012-0409, p. 14 (La. App. 4 Cir. 11/14/12), 104 So.3d 619, 630. A trial court is vested with much discretion in determining whether the probative value of relevant evidence is substantially outweighed by its prejudicial effect. *State v. Girard,* 2012-0790, p. 6 (La. App. 4 Cir. 3/6/13), 110 So.3d 687, 691, *writ den.,* 2013-0795 (La. 9/20/13), 123 So.3d 170.

In this case, the defense argues that there was no "true" *Prieur* hearing and cites in support *State v. Altenberger,* 2013-2518 (La. 4/11/14), 139 So.3d 510, for its definition of the scope of a *Prieur* hearing:

> We note the hearing need not be a 'trial' on the offenses. *See e.g.,* [*State v.*] *Garcia*, 2009-1578, pp.18-22, 108 So.3d at 15-18; *see also State v. Shirley,* 2008-2106 (La. 5/5/09), 10 So.3d 224, 228 (the rules of evidence normally applicable in criminal trials do not operate with full force at hearings before the judge to determine the admissibility of evidence) . . . the State needs merely to present its other crimes **evidence** and its purpose in seeking its admission. *See e.g., Garcia,* 2009-1578, pp. 18-22, 108 So.3d at 15-18. . . (emphasis supplied).

Id., 2013-2518, pp. 11-12, 139 So.3d at 517.

We agree with the defendant that no "true" *Prieur* hearing took place in this case. The record indicates that the State filed a notice of its intent to introduce other crimes evidence in which it identified those crimes. The State maintained that the purpose of the other crimes evidence was to show *modus operandi* as it pertained to the identification of the defendant in the rape of M.H. However, the transcript of the hearing on the June 10, 2013 *Prieur* hearing shows that the trial court made its ruling as to the admissibility of the other crimes based solely upon the argument of the State. The State's *Prieur* notice did not include any police reports or any other evidence to show that the defendant committed the other

crimes. The State failed to produce testimony or evidence that the specific crimes referenced in the State's notice of intent actually occurred.

However, notwithstanding that the other crimes evidence was erroneously admitted at trial based on a lack of an evidentiary hearing, the trial court's ruling is subject to the harmless error analysis. *State v. Hugle,* 2011-1121 (La. App. 4 Cir. 11/17/12), 104 So.3d 598, *writ den.* 2012-2721 (La. 6/14/13), 118 So.3d 1079 (citing *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). The test for determining harmless error is "whether the guilty verdict actually rendered in this trial 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).

Upon our analysis, we determine that the error was harmless given the evidence of guilt presented at trial. The victim, M.H., testified that she was raped. Her testimony was corroborated by her son. Testimony from several experts identified the defendant through his DNA as the man who raped M.H. The use of DNA evidence to establish the identity of a defendant as an offender or to eliminate a defendant as a suspect in a criminal case is well settled in Louisiana. See *State v. Quatrevingt*, 93-1644 (La. 2/28/96), 670 So.2d 197.

Based on the foregoing, we cannot say that the jury's verdicts were attributable to the introduction of the *Prieur* evidence. Therefore, this assignment of error lacks merit.

ASSIGNMENT OF ERROR NUMBER 3

In his final assignment of error, the defense argues that the multiple bill of information is defective in that the predicate offense used to convict the defendant as a second offender was committed *after* the instant offense. The State concedes this error.

The first sentence of La. R.S. 15:529.1A(1) states, "Any person who, *after* having been convicted in this state of a felony . . . , *thereafter commits any subsequent felony* within this state, upon conviction of said felony, shall be punished as follows . . . " (emphasis added). This portion of the statute, and the jurisprudence interpreting it, require that the prior conviction must precede the principal offense in order to be used as a predicate to enhance a defendant's status as a multiple offender. *State v. Shaw*, 2006-2467, p. 13 (La.11/27/07), 969 So.2d 1233, 1241.

The record indicates that the defendant committed the present underlying offense on June 11, 1992. The purported predicate offense, the unauthorized entry of an inhabited dwelling conviction, took place on June 8, 2006. Accordingly, the trial court erred in using the defendant's unauthorized entry of an inhabited dwelling conviction- which occurred after the defendant's present offense- to serve as the predicate offense for his multiple offender adjudication.

CONCLUSION

Based on the foregoing reasons, we affirm the defendant's convictions and his sentence for aggravated rape. However, we vacate the defendant's multiple offender adjudication and sentence; and remand for resentencing on the aggravated burglary conviction.

CONVICTIONS AFFIRMED; SENTENCES AFFIRMED IN PART; VACATED IN PART; AND REMANDED