

STATE OF LOUISIANA

*

NO. 2016-KA-0370

VERSUS

*

COURT OF APPEAL

MICHAEL THOMASSIE

*

FOURTH CIRCUIT

*

STATE OF LOUISIANA

* * * * *

APPEAL FROM
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 519-261, SECTION "B"

Honorable Tracey Flemings-Davillier, Judge

* * * * *

Judge Rosemary Ledet

* * * * *

(Court composed of Judge Paul A. Bonin, Judge Rosemary Ledet, Judge Sandra Cabrina Jenkins)

BONIN, J., CONCURS WITH REASONS.

Leon A. Cannizzaro, Jr.
District Attorney
Donna Andrieu
Assistant District Attorney
Kyle Daly
Assistant District Attorney
PARISH OF ORLEANS
619 South White Street
New Orleans, LA 70119

COUNSEL FOR APPELLEE/STATE OF LOUISIANA

Christopher A. Aberle
LOUISIANA APPELLATE PROJECT
P.O. Box 8583
Mandeville, LA 70470-8583

COUNSEL FOR DEFENDANT/APPELLANT

**REVERSED AND REMANDED
FOR A NEW TRIAL**

DECEMBER 21, 2016

In this criminal appeal, the defendant, Michael Thomassie, appeals his conviction and sentence for aggravated rape, a violation of La. R.S. 14:42.¹ For the reasons that follow, we reverse and remand for a new trial.²

STATEMENT OF THE CASE

On February 13, 2014, the State charged Mr. Thomassie by grand jury indictment with aggravated rape. On March 18, 2014, he was arraigned and pleaded not guilty.

On August 17, 2015, Mr. Thomassie filed a motion to continue the trial, which the district court denied.³

¹ In 2015, the legislature amended the title of La. R.S. 14:42, changing it from “aggravated rape” to “first degree rape.” See 2015 La. Acts No. 184, § 1. La. R.S. 14:42(E) provides as follows:

E. For all purposes, “aggravated rape” and “first degree rape” mean the offense defined by the provisions of this Section and any reference to the crime of aggravated rape is the same as a reference to the crime of first degree rape. Any act in violation of the provisions of this Section committed on or after August 1, 2015, shall be referred to as “first degree rape”.

² As we routinely do, we have reviewed the record on appeal for errors patent and found none.

³ Mr. Thomassie contended that a *Daubert/Foret* hearing was required to determine the admissibility of testimony by the State’s expert witness, Anne Troy, a nurse practitioner at the Audrey Hepburn CARE Center at Children’s Hospital in New Orleans. Nurse Troy’s testimony related to delayed disclosure in child abuse cases. See *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993); *State v. Foret*, 628 So.2d 1116 (La.

On the next day, jury selection began. On August 19, 2015, before trial commenced, the district court conducted a hearing regarding the admissibility of certain text messages retrieved from Mr. Thomassie's cell phone. Over defense counsel's objections, the district court ruled that the text messages exchanged on August 17, 2015 between Mr. Thomassie and C.R., Mr. Thomassie and Anna Henry, and Mr. Thomassie and Sergeant Bruce Glaudi were admissible.⁴ On August 20, 2015, trial concluded. On that same day, the jury found Mr. Thomassie guilty of aggravated rape.

On December 15, 2015, the district court denied Mr. Thomassie's motion for judgment of acquittal and new trial, and sentenced him to life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence.

STATEMENT OF FACTS

H.P., the victim, was born on June 7, 1996.⁵ After her parents, D.C. (mother) and S.P., Sr. (father) divorced, her brothers, S.P., Jr., and B.P., went to live with their father, while H.P. stayed with her mother. About two years after the divorce, D.C. began dating Mr. Thomassie, who then was a NOPD officer. D.C. and H.P.

1993). Mr. Thomassie further claimed that the State disclosed its intent to call Nurse Troy as a witness only three days before trial. He thus argued that a continuance was required to allow him adequate time to prepare to a defense against her anticipated testimony.

⁴ At trial, Detective Eddie Williams of the New Orleans Police Department ("NOPD") Digital Forensic Unit identified the texts exchanged with Ms. Henry (State Exhibit 6) and the texts exchanged with Sergeant Glaudi (State Exhibit 7) as the texts messages he extracted from Mr. Thomassie's cell phone. Copies of the text messages were published to the jury.

⁵ The initials of the victim and victim's family members will be used in this opinion in order to protect the identity of the victim. *See* La. R.S. 46:1844(W) (barring public disclosure of the names, addresses, or identities of crime victims under the age of eighteen years and of all victims of sex offenses, and authorizing use of initials or abbreviations.).

later moved in with Mr. Thomassie in New Orleans, and in December 2003, D.C. and Mr. Thomassie had a child together—G.T.

At trial, H.P. testified that on one occasion, when she was between seven and nine years old, she was sexually abused by Mr. Thomassie.⁶ H.P. testified that on the day of the incident, she came home after school, woke her sleeping mother, and asked if she could visit a friend who lived down the street. H.P. claimed that after D.C. refused to let her visit her friend, H.P. went into the living room and sat on the couch. Shortly thereafter, Mr. Thomassie approached her and asked why she was upset. H.P. explained that D.C. would not let her go to her friend's house, and Mr. Thomassie responded that he could make her feel better. H.P. testified that Mr. Thomassie then partially inserted his penis into her vagina; thereafter, he directed her to go into the dining room where he forced his penis into her mouth. H.P. stated that her mother walked into the room and witnessed Mr. Thomassie having oral sex with H.P. D.C. testified that when she entered the room, she observed Mr. Thomassie with his penis in H.P.'s mouth.

While D.C. yelled at Mr. Thomassie, H.P. went back into the living room. D.C. testified that she threatened to report Mr. Thomassie to the police, although she failed to do so.⁷ Shortly thereafter, D.C. confronted H.P. and informed her that she was not allowed to be alone with Mr. Thomassie anymore. H.P. testified that

⁶ The indictment indicates that the incident occurred between October 1, 2003 and December 31, 2005.

⁷ D.C. testified that she had a history of drug and alcohol abuse and that she knew it would be factored into whether the NOPD would believe her over Mr. Thomassie. At trial, D.C. confirmed that she was convicted in 2014 for possession of legend drugs and placed on probation for five years.

she continued to live with her mother and Mr. Thomassie for about a year after the sexual abuse.⁸ At some point between 2003 and 2005, H.P. went to live with her father.⁹

H.P. testified that she was about twelve or fourteen years old when she disclosed the abuse to V.L., her best friend at the time. At trial, V.L. testified that H.P. disclosed the incident with Mr. Thomassie, whom H.P. called her step-father and described as a “cop.” V.L. further testified that she did not report what H.P. revealed to her. Since H.P. had not reported the incident, V.L. felt that H.P. trusted her to not report it either.

H.P. testified that in 2013, when she was about seventeen years old, the sexual abuse was first reported to law enforcement. She was helping her brother paint his newly purchased house when her mother, D.C., arrived at the house crying. H.P. testified that she got into the car with her mother, and her mother explained that Mr. Thomassie had a young girl living in his house and that she was worried about the girl being sexually abused. After H.P. explained to her mother that she did not want to report the abuse, H.P.’s brother’s girlfriend, C.R., joined them in the car. After she learned of the abuse, C.R. informed H.P. that she needed to report it. C.R. then went inside, informed H.P.’s father and brother of the abuse, and the NOPD were called.

⁸ D.C. continued to live with Mr. Thomassie for about seven or eight years following the incident.

⁹ H.P. testified that she moved into to her father’s house in in 2003 or 2004, when she was in the third grade. S.P., Sr., testified that H.P. came to live with him in 2003.

NOPD Sergeant Lawrence Jones, who was assigned as lead investigator, testified that he was contacted by the Public Integrity Bureau to investigate a sexual assault involving a police officer and a nine year old girl. Sergeant Jones arrived at the scene and later obtained statements from H.P., H.P.'s family members, Mr. Thomassie, and Mr. Thomassie's mother.¹⁰ Sergeant Jones testified that the witnesses were confused as to the timeframe of the incident. Sergeant Jones stated that "some [of the witnesses] said the victim was nine. It was later learned that the victim was actually seven."

Sergeant Jones further testified that at the conclusion of his investigation he did not apply for an arrest warrant. Sergeant Jones explained his investigation as follows:

One of the things that we're required to do with a Child Abuse Investigation is to do a consultation, which we call a charge conference, with the District Attorney. In this particular investigation it was a delayed reporting. It happened a long time ago. So there was no physical evidence involved in this case. There were several inconsistencies involved in this investigation. So, I wanted to present that case to the charge conference.

Sergeant Jones testified that the District Attorney decided to bring the case before a grand jury, which subsequently returned an indictment of aggravated rape.

DISCUSSION

Assignment of Error Number Three¹¹

¹⁰ Sergeant Jones testified that there were inconsistencies in the witnesses' statements. The inconsistencies between the H.P.'s and D.C.'s statements related to the timeline, the position of H.P. when the abuse occurred, and the status of H.P.'s clothing when the abuse occurred.

¹¹ Given our finding that Mr. Thomassie is entitled to a new trial based on the erroneous admittance of certain text messages, we premit discussion of the remaining assignments of error.

In his third assignment of error, Mr. Thomassie contends that the district court erred in admitting into evidence two sets of text messages retrieved from his cell phone.¹² Mr. Thomassie first contends that the text messages were not relevant and thus not admissible. He further contends that the texts messages were highly prejudicial and that the prejudice outweighed any probative value they might have.

Admissibility of Evidence

All relevant evidence is admissible, and evidence that is not relevant is not admissible. La. C.E. art. 402. Relevant evidence is defined as “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.” La. C.E. art. 401. Evidence, although relevant, “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.” La. C.E. art. 403.

Addressing the admissibility of evidence, this court noted in *State v. Dove*, 15-0783, pp. 29-30 (La. App. 4 Cir. 5/4/16), 194 So.3d 92, 112, the following:

“Unfair prejudice,” as used in La. C.E. art. 403, means that “the offered evidence has ‘an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.’” Author's Note (3), La. C.E. art. 403, *Handbook on Louisiana Evidence Law*, Pugh, Force, Rault & Triche, p. 380 (2011). A trial court is vested with much discretion in determining whether the probative value of relevant evidence is substantially outweighed by its

¹² Although three sets of text messages were admitted, Mr. Thomassie only appeals the admittance of two of them—the text messages to and from Ms. Henry; and those between him and Sergeant Glaudi. Because we find the admission of the text messages between Mr. Thomassie and Ms. Henry constitute reversible error, we pretermit addressing the text messages exchanged with Sergeant Glaudi.

prejudicial effect. *State v. Henry*, 11-1137, p. 9 (La. App. 4 Cir. 10/24/12), 102 So.3d 1016, 1022.

A trial court's ruling on the admissibility under La. C.E. art. 404 B(1) is reviewable under an abuse of discretion standard. *See State v. Henderson*, 12-2422, pp. 3-4 (La. 1/4/13), 107 So.3d 566, 568; *State v. Barnes*, 11-1421, p. 15 (La. App. 4 Cir. 9/19/12), 100 So.3d 926, 936. A trial court's ruling as to the relevancy of evidence will not be disturbed absent a clear abuse of discretion. *State v. Sanders*, 12-0409, 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." *Girard*, 12-0790, p. 6 [(La. App. 4 Cir. 3/6/13), 110 So.3d [687,] 691.

Id. (footnote omitted). *See also State v. Ross*, 15-1031, p. 17 (La. App. 4 Cir. 6/15/16), 195 So.3d 1210, 1221.

When determining the independent relevancy of evidence and balancing its probative value against its prejudicial effect, "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?" *State v. Altenberger*, 13-2518, p. 8 (La. 4/11/14), 139 So.3d 510, 515 (quoting *State v. Garcia*, 09-1578, p. 55 (La. 11/16/12), 108 So.3d 1, 39).

The August 17, 2015 text messages between Mr. Thomassie and Ms. Henry read as follows:

MS. HENRY: Got a question when you get up my love

MR. THOMASSIE: Ask now. I'm still up

MS. HENRY: It's a blushing question lol

MS. HENRY: Soooooo if I take a picture ... U got your stuff all shaved off ... Is that your preference on females too ? Lol

MR. THOMASSIE: I'm not completely shaved. Trimmed and shaved, lol. Yes. No hair is best but as long as you're clean, I'm good.

MS. HENRY: Yeah your [sic] trimmed I know

MR. THOMASSIE: [Red-cheeked, smiling emoji]

MS. HENRY: Ok, just that's a pain ... Itches geeeezzz you would be difficult

MS. HENRY: Ok I'll take care of you my baby.. Just feel not really a porn star ya know ;)

MS. HENRY: No pimp suit right ;)

MR. THOMASSIE: All shaved too [head-shot photo of Mr. Thomassie]

MS. HENRY: Oh well dang You look good either way, but I think I prefer the bad boy goatee lol . But I know not for court ;)

MR. THOMASSIE: It grows back quick

During the pretrial hearing, the State contended that the text messages were relevant. The State argued the following:

THE PROSECUTOR: It is very relevant, the fact that he's going to be texting selfies while picking a Jury on an aggravated rape, showing his hairless face to the woman he says I prefer—or no hair is best. How could that not be relevant when you're talking about the rape of a seven year old girl, that that's what he's going to text within twenty-four hours of picking a jury on an aggravated rape, facing a life sentence?

* * *

That to us goes directly to what we are going to say is getting into his head a little bit, and we're talking about a man who is inclined to rape a child. That to us becomes extremely important when he's talking about wanting a female to be completely without hair down there.

THE COURT: So I mean. It appears to me that the State is trying to introduce this, allegedly, to show the defendant's alleged predisposition?

THE PROSECUTOR: Correct. It's guilt. ... It's essentially evidence of guilt.

Moreover, the State referred to the text messages exchanged with Ms. Henry in its rebuttal argument at the close of trial. The State argued the following:

And you cannot stand up here and reasonably say to an intelligent group of ladies and gentlemen that it has no impact on this case when he says he prefers a female to have no pubic hair at all. This isn't a narcotics case, ladies and gentlemen. In that case I'd say, [sic] it's not relevant. If this were a murder, I'd say it's not relevant, but this is a man charged with raping a prepubescent girl, a seven year old girl, and he's taking selfies, telling his girlfriend he prefers women with no pubic hair. That should be very alarming to any person sitting on this Jury. That should be one of the most important things to give you an idea of just what kind of real good guy he is. ... And I'm going to take a selfie and talk about a prepubescent – no public [sic] hair on a woman in the rape of a seven year old girl.

In its brief to this court, the State did not address the admissibility of the text messages. At oral argument before this court, the State conceded that the probative value of the text messages was low. The State also argued that the prejudicial effect was minimal and did not outweigh the probative value of the evidence. We disagree.

In seeking to admit the text messages in question, the State offered no support for its claim that the text messages were relevant. The State simply argued that an adult male's sexual attraction to adult females with all pubic hair removed necessarily means that he is also sexually attracted to prepubescent females—because they presumably have no pubic hair. The State, however, offered no expert

testimony from an expert in the field of human sexuality or some similar field of expertise to support this contention.

On appeal, counsel for Mr. Thomassie argues that men preferring women without pubic hair is not indicative of a pedophilic predisposition. Citing various scholarly and contemporary articles, Mr. Thomassie submits that adult men commonly prefer adult women without pubic hair and that many adult women also indulge in that preference. According to the State's arguments, Mr. Thomassie contends this preference would make most men and women pedophiles.

Given the lack of any supporting evidence, Mr. Thomassie's statements regarding his preference for no pubic hair on an adult female is not evidence supporting a finding of guilt of the aggravated rape of a prepubescent girl. Rather, the State's remarks constitute irrelevant, prejudicial appeals to emotion and inflammatory arguments going beyond the facts of the present case. *See State v. Miller*, 98-0301, pp. 11-12 (La. 9/9/98), 718 So.2d 960, 966 (finding that although "patently prurient and highly inappropriate," the "defendant's statement to his neighbor's child that he had seen her naked in his bedroom with her arms and legs open [was] admissible to show his intent to molest the victim of the charged offense and to show that the molestation was not an accident."). The text messages neither relate to the crime of aggravated rape of H.P. nor a material issue here. Any probative value is outweighed by the prejudicial effect of the text messages. We thus find that the district court abused its discretion in admitting the text messages between Mr. Thomassie and Ms. Henry.

Harmless Error

The erroneous admission of evidence is subject to the harmless error analysis. *State v. Campbell*, 15-0017, p. 27 (La. App. 4 Cir. 6/24/15), 171 So.3d 1176, 1192; *State v. Williams*, 12-0252, p. 23 (La. App. 4 Cir. 4/17/13), 115 So. 3d 600, 613; *State v. Hugle*, 11-1121, p. 19 (La. App. 4 Cir. 11/7/12), 104 So. 3d 598, 613. *See also* La. C.E. art. 103(A) (“Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected.”). “Harmless error analysis begins with the premise that the evidence is otherwise sufficient to sustain the conviction if viewed from the perspective of a rational fact finder and asks whether beyond a reasonable doubt the error could not have contributed to the verdict actually returned by the defendant's jury.” *Campbell*, 15-0017, p. 27, 171 So.3d at 1192 (quoting *State v. Gibbs*, 41,062, p. 8 (La. App. 2 Cir. 6/28/06), 935 So.2d 349, 354); *Dove*, 15-0783 at p. 30, 194 So.3d at 112, n. 3. *See also Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); *Sullivan v. Louisiana*, 508 U.S. 275, 113 S.Ct. 2078, 124 L.Ed.2d 182 (1993). Stated otherwise, harmless error exists when the guilty verdict actually rendered was "surely unattributable" to the error. *State v. Higginbotham*, 11-0564, p. 3 (La. 5/6/11), 60 So.3d 621, 623. “A trial error ... may ‘be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt.’” *State v. Merwin*, 15-0681, p. 18 (La. App. 4 Cir. 1/27/16), 186 So.3d 759, 769 (quoting

Arizona v. Fulminante, 499 U.S. 279, 308-09, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991)).

As noted above, the State failed to present any argument in its brief on appeal regarding the admissibility of Mr. Thomassie’s text messages. The State both introduced the text messages into evidence at trial and continued to reference the text messages in closing arguments. The State implied to the jury that Mr. Thomassie was morally reprehensible for sending such text messages given the nature of the crime he was charged with committing. Additionally, the jury verdict was not unanimous—it was a ten to two verdict.

Considering all the facts and circumstances, we find that the erroneous admission of the texts messages was not harmless. Rather, the admittance of such evidence was prejudicial and affected substantial rights of the accused and was not harmless beyond a reasonable doubt. La. C.Cr.P. art. 921.¹³ As Sergeant Jones testified, there were many inconsistencies in H.P.’s and D.C.’s statements regarding the details surrounding the commission of the crime. Furthermore, inconsistencies were also found between H.P.’s and D.C.’s trial testimony.¹⁴ This fact, coupled with the non-unanimous jury verdict, suggests that the evidence, as viewed by the jury, was not overwhelming. Accordingly, we cannot find that the

¹³ La. C.Cr.P. art. 921 provides that “[a] judgment or ruling shall not be reversed by an appellate court because of any error, defect, irregularity, or variance which does not affect substantial rights of the accused.”

¹⁴ For instance, on cross examination, H.P. admitted that in her statement to police, she said that Mr. Thomassie did not actually insert anything into her mouth. She testified, however, that he forced it into her mouth. H.P. also testified that she informed C.R. that Mr. Thomassie had his pants down around his ankles during the incident. At trial, however, D.C. testified that Mr. Thomassie’s penis was pulled out through the zipper of his pants.

guilty verdict was surely unattributable to the error in admitting the text messages. The error thus was not harmless and requires reversal of Mr. Thomassie's conviction and sentence.

DECREE

For the foregoing reasons, we reverse the defendant's conviction and sentence and remand for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.