

1/29/01

SUPREME COURT OF LOUISIANA

No. 00-KK-0850

STATE OF LOUISIANA

v.

SIDNEY COTTON

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL,
FIRST CIRCUIT, PARISH OF WASHINGTON

VICTORY, J., Dissenting.

I agree with the majority opinion on the Dowling issue, yet point out that it is unnecessary to discuss that issue due to the majority's ruling that the other crimes evidence in dispute is inadmissible for failure of proof by the state.

However, I disagree with the majority's determination that the state failed to meet the burden of proof under Prieur for the following reasons:

- (1) The state argued the similarity of the prior charged offenses to the trial judge, and the defendant never objected to their admissibility of the grounds that the prior offenses were not sufficiently similar to the current charges to justify admissibility. Defendant's objection was only that the other crimes evidence should not be allowed because defendant was acquitted. In fact, in his Memorandum of Opposition to the state's Prieur motion, *defendant* argued that it "would be highly prejudicial if the state were allowed to introduce evidence of other *similar* crimes for which he was acquitted." (Emphasis added.) The trial court noted that the other crimes evidence "may well parallel the evidence to be presented in the prosecution of the instant case," but ruled the other crimes evidence inadmissible because it was "prejudicial and inflammatory," not because it was dissimilar. Thus, the majority has determined the outcome of admissibility based on an issue never advanced by the defendant in the trial court.
- (2) Further, the prior charged offenses and the current crimes charged *are* similar. As the majority notes, defendant was charged with performing oral sex on his son and niece, both juveniles, in 1992. His current charges are molesting a juvenile and oral sexual battery on a juvenile, age seven, early in 1995.
- (3) The state's Prieur motion claims that the other crimes evidence is admissible to show

intent. One of the crimes with which defendant is currently charged is molestation of a juvenile, a specific intent crime. In State v. Miller, 98-0301 (La. 9/9/98), 718 So. 2d 960, this court ruled that other crimes evidence is admissible in a case such as this to show lustful disposition toward minors in specific intent crimes.

I would reverse the ruling of the trial court and rule, as does the majority, that the other crimes evidence is not inadmissible merely because the defendant was acquitted. However, unlike the majority, I would allow the state to present the evidence at trial.

Accordingly, I respectfully dissent.