4/3/01

**SUPREME COURT OF LOUISIANA**

**00-KK-1554**

**STATE OF LOUISIANA**

**V.**

**PATRICK KENNEDY**

**ON WRIT OF CERTIORARI TO THE COURT OF APPEAL, FIFTH CIRCUIT,
PARISH OF JEFFERSON**

**TRAYLOR, J., dissenting**

The admission of previous sexual assaults against a different child victim to show "lustful disposition" is a valid exception to the general rule barring introduction of other crimes evidence at trial. This Court has approved the broader interpretation of the "lustful disposition" exception with respect to sexual offenses, including aggravated rape, that are committed against child victims. Additionally, the similarities between the prior offenses and the instant offense warrant the admissibility of other crimes evidence to prove plan, design or system under La. Code Evid. 404(B) and the probative value of the prior acts outweighs their prejudicial effect. For these reasons, I dissent.

*The "Lustful Disposition" Exception*

As the majority correctly notes, in cases involving adult victims, other crimes evidence has been inadmissible in Louisiana to prove intent or negate accident in cases of aggravated rape. *Moore*, 278 So.2d at 781; *McArthur*, 719 So. 2d at 1039-40. In holding the evidence inadmissible, we distinguished *Miller* by noting that the lustful disposition exception "can only be applied in certain cases involving sex crimes against children." *McArthur,* 719 So. 2d at 1040.

In child sexual abuse cases, the courts of appeal have applied the lustful

disposition exception for both general and specific intent crimes, including aggravated rape of children, although the specific enumerated factor of La. Code Evid. 404(B), such as motive, intent, plan, or system, has varied in classification.[1] As we recognized in *Miller*, "Louisiana has followed the national trend towards broader admissibility of other crimes evidence in cases involving alleged sexual abuse of minor children." 718 So.2d at 962; see PUGH ET AL, HANDBOOK ON LOUISIANA EVIDENCE LAW 328 (2000). We discussed the special issues raised by child victims of sex crimes:

> Child sexual abuse cases raise special concerns for the judicial system not present in other criminal cases. Frequently, in cases involving the sexual abuse of children, the offense takes place in secret, the victim is young, vulnerable, and reluctant to testify, and there is often no physical or other evidence the abuse took place. As a result, special laws and rules have been passed to address the unique concerns presented in these types of cases.

*Miller*, 718 So. 2d at 962.

In this case, the majority agreed with the Fifth Circuit's attempt to distinguish this Court's decision in *Miller* on the basis that an essential element of the crime, namely specific intent, was not at issue in this case. I disagree with the categorical distinction on the basis of specific versus general intent crimes for the purpose of applying the "lustful disposition" exception.

The majority explains that we must await the legislature's explicit amendment of La. Code Evid. 404 to allow admissibility of other crimes evidence under a lustful disposition exception. In reaching this conclusion, the majority relies on La. 15:445-

---

[1] *See State v. Tyler*, 619 So. 2d 807, 811-12 (La. App. 1 Cir. 1993), *writ denied*, 624 So. 2d 1225 (La. 1993) (allowing evidence that defendant raped his nieces in their preteen years in aggravated rape of defendant's stepdaughter for purposes of motive, plan and victim credibility); *State v. Howard*, 520 So. 2d 1150, 1154 (La. App. 3 Cir. 1987), *writ denied*, 526 So. 2d 790 (La. 1988) (allowing evidence of previous sexual assaults against a daughter at a period of time analogous to the current victim (pre-teen years) and under similar circumstances to demonstrate "motive and plan to systematically engage in nonconsensual relations with his daughters as they matured physically"); *State v. Bordeaux*, 95-153 (La. App. 5 Cir. 9/20/95), 662 So. 2d 22, *writ denied*, 96-0840 (La. 5/30/97), 694 So. 2d 233 (allowing testimony of victim's oldest sister that defendant molested her in rape charge regarding youngest daughter to show defendant's systematic plan, opportunity and motive); *see also Miller*, 718 So. 2d 960, 965 n.8 & 9 (listing court of appeal cases).

446 for the proposition that other crimes evidence is only admissible to prove intent, knowledge or system. However, under that statute, this Court has historically broadened existing statutory criteria for admitting other crimes evidence. Certain jurisprudential exceptions to the general bar against other crimes evidence evolved while interpreting articles La. R.S. 15:445-446, the predecessors to La. Code Evid. 404, on which the majority relies so heavily for its reasoning. This Court discussed these exceptions in *State v. Kahey,* 436 So. 2d 475, 487-88 (La. 1983):

> Aside from the related offenses admissible as part of the res gestae and convictions admissible for impeachment purposes, Louisiana statutes provide for only three instances where other crimes evidence is "substantially relevant" such as to qualify as an exception to the general rule of exclusion: acts relevant to show intent, knowledge, or system. La. R.S. 15:445, 446. *State v. Harris, supra*. Admission of another crime committed by the same "system" as the offense charged might also be relevant to show the identity of the defendant as the offender. *State v. Talbert,* 416 So.2d 97 (La.1982); *State v. Hatcher*, 372 So.2d 1024 (La.1979); *State v. Harris, supra*; *State v. Waddles*, 336 So.2d 810 (La.1976). Other jurisprudentially recognized exceptions include other crimes evidence introduced to show motive, *State v. Lafleur*, 398 So.2d 1074 (La.1981), *State v. Sutfield, supra*, *State v. Dowdy*, 217 La. 773, 47 So.2d 496 (1950), prior sex crimes committed against the same prosecutrix, *State v. Alciese*, 403 So.2d 665 (La.1981) and cases cited therein, and evidence of criminal acts of the accused constituting admissions by conduct intended to obstruct justice or avoid punishment for the present crime, *State v. Burnette and Granger*, 353 So.2d 989 (La.1978).

The comments to art. 404 provide:

> (k) The first sentence of Paragraph B of this Article is not intended to change the law. *See State v. Prieur*, 277 So.2d 126 (La.1973); Art. 1103, *infra*. Although the second sentence of Paragraph B contains a longer list of purposes for which evidence of other crimes is admissible than that found in former R.S. 15:445-446, it generally accords with the rules actually applied by the Louisiana courts. *State v. Kahey*, 436 So.2d 475 (La.1983).

The comments to art. 404(B) indicate an intent to apply *both the statutory and jurisprudential exceptions as created by Louisiana courts* while interpreting former articles 15:445-446.

The majority's mechanical application of La. Code Evid. 404(B) ignores the jurisprudential "lustful disposition" exception that has existed since before *Moore*. The application of a lustful disposition exception in child abuse cases has been applied as far back as 1938 in *State v. Cupit*, 179 So. 837 (La. 1938), followed in our courts of appeal, explicitly affirmed in cases involving child victims of sexual abuse by this Court in *Miller,* and acknowledged as an exception to article 404(B) itself in *McArthur*.[2] Thus, a reasonable interpretation of 404(B) and its accompanying comments suggests that the legislature intended to continue application of the jurisprudentially created lustful disposition exception under the expanded list of factors provided by the enactment of 404(B).[3]

The majority's reasoning also departs from the explicit rule at the federal level as well as several state courts considering the issue.[4] A review of other jurisdictions illustrates that the majority of states follow the "lustful disposition" exception for other crimes evidence in sexual offense cases, although the implementation of the exception varies in scope. *See* Thomas J. Reed, *Reading Gaol Revisited: Admission of Uncharged Misconduct Evidence in Sex Offender Cases,* 21 AM. J. CRIM. L. 127, 168 (1993). In cases involving sexual abuse of children, state courts construe the exception broadly, allowing the admission of prior sexual acts to show the defendant's

---

[2] In *McAthur*, we concluded that "[t]he *judicially created* 'lustful disposition' exception to Article 404 of the Louisiana Code of Evidence only applies in certain cases involving child sexual abuse." 719 So. 2d at 1043 (emphasis added).

[3] Rules of statutory interpretation, where unambiguous, require application of the law as written, regardless of legislative intent. In the realm of criminal statutory interpretation, provisions are to be given a genuine construction, according to the fair import of words. La. Rev. Stat. 14:3; *State v. Robertson*, 128 So.2d 646, 648 (1961). If the statute is clear and unambiguous, it is to be applied as written by the legislature. *State v. Barbier*, 98-2923 (La.9/8/99), 743 So.2d 1236, 1238. Accordingly, the longer list in art. 404 necessarily allows a broader range of purposes than the strict wording of former 15:445-446.

[4] Federal Rule of Evidence 404(b) contains a rule identical to La. Code Evid. art. 404(B), but the federal rule has been expressly supplanted in cases involving sex crimes against adult victims as well as children by Federal Rules of Evidence 413, 414, and 415. These three rules permit trial courts to admit other crimes evidence in sexual assault and child molestation prosecutions.

general sexual disposition.[5]

In the absence of any special statutory rules targeted for prosecution of sexual assault involving children, the general rules in La. Code Evid. art. 404(B) governing evidence of other similar crimes or acts are shaped by the particular policy concerns regarding crimes against children. Our legislature has indicated its intent to protect children in the first instance, relaxing the evidentiary rules to accommodate the particular nature of the child victim in cases of hearsay admissibility and right of confrontation issues.[6]

Consider the anamoly created in restricting application of the lustful disposition exception to specific intent crimes. With a bright line rule of specific intent as the requirement for admissibility in child sexual assault cases, other crimes evidence becomes admissible in attempted aggravated rape, or charges of molestation of a juvenile, but cannot be offered in the more grievious crime of aggravated rape of a child under 12. Thus, defendants who fail to accomplish sexual intercourse with the child are more likely to be faced with evidence of their prior sexual acts at trial; while those who succeed in achieving sexual penetration of a child face no questions of their

---

[5] *See, e.g., Ryan v. State*, 486 S.E. 2d 397, 398 (Ga. Ct. App. 1997) (holding that "in crimes involving sexual offenses, evidence of similar previous transactions is admissible to show the lustful disposition of the defendant and to corroborate the victim's testimony"); *State v. Phillips*, 845 P. 2d 1211, 1214 (Idaho 1993) (affirming "lustful disposition" exception to demonstrate a defendant's "general plan" to "exploit and sexually abuse" young women, and to corroborate the complainant's credibility, because the defendant's not guilty plea "places the credibility of the victim squarely in issue for the jury to decide"); *State v. Morey*, 722 A. 2d 1185, 1189 (R.I. 1999) (citing to "an 'almost universally recognized' exception to [Rhode Island] Rule 404(b) for the admission of evidence of uncharged sexual misconduct to show 'lustful disposition or sexual propensity'"); *State v. Tabor*, 529 N.W. 2d 915, 918 (Wis. Ct. App. 1995) (affirming that "it is the law in Wisconsin that 'a greater latitude of proof is to be allowed in the admission of other-acts evidence in sex crimes cases, particularly in those involving incest and indecent liberties with a minor child.'"); *see also Miller*, 718 So. 2d 960, 964 n.4 & 5 (listing other jurisdictions).

[6] *See, e.g.*, La. Rev. Stat. 15:440.1 (allowing videotaped statements made by a child victim of sexual abuse to be admissible in evidence); La. Rev. Stat. 15:283 (allowing a child abuse victim under the age of 14 to testify by closed circuit television outside of the courtroom so that he or she will not have to directly face the accused); La. Code Evid. art. 804(B)(5) (providing a special hearsay exception for a statement made by a person under the age of 12 years, unavailable as a witness, if the statement is one of initial or otherwise trustworthy complaint of sexually assaultive behavior).

prior sexual behavior, regardless of relevance. Surely the legislature did not intend that result when endorsing the application of statutory and jurisprudential exceptions to inadmissibility of other crimes evidence when enacting La. Code Evid. 404(B).

As this Court recognized in *McArthur*, the holding from *Miller* stands for the proposition that evidence of lustful disposition is applicable in cases involving sexual abuse of children, without the requirement that intent necessarily be at issue. Additionally, the evidence in this case fits within one of the 404(B) factors, is independently relevant, and more probative than prejudicial.

*Application of 404(b) Factors*

Aggravated rape is a general intent crime. La. Rev. Stat. 14:41; La. Rev. Stat. 14:42; *see Moore*, 278 So. 2d at 784 (interpreting former article 15:444)(on rehearing). Thus, the State must establish that the defendant voluntarily did the act to prove intent.[7] In the circumstances of this case, the defendant has not claimed accident or mistake; he has admitted his presence at the scene immediately before and after the alleged rape, but denies his participation in the crime. The defendant, in his statements to police at the scene of the crime and in subsequent statements to police during their investigation, has maintained that a neighbor on a bike committed the aggravated rape of the victim.[8] The victim corroborated the defendant's statements in the initial police investigation. Thus, unlike the facts in *Ledet* and *Moore*, the State has not relied on a mere guilty plea and "credit[ed] the accused with a fancy defense in order to rebut them at the outset. . ." 345 So. 2d at 478.

---

[7] The State must establish that, in the ordinary course of human experience, the defendant must have adverted to the prescribed criminal consequences as reasonably certain to result from his actions. *See* La. Rev. Stat. 14:10(2).

[8] According to the police records and defendant's statements, which were ruled admissible by the trial court in a Motion to Suppress Hearing, the defendant called 911 to report that his stepdaughter had been raped and gave a description of the perpetrator after the police arrived.

In adult cases involving aggravated rape, the issue generally revolves around consent, and thus, no one disputes that sexual intercourse, however slight, was perpetrated by the defendant. Because the act is established by both parties admitting that it occurred, intent is generally not at issue. *See* 2 Wigmore on Evidence, § 357, at 334 (Chadbourn rev. 1979). The victim's testimony, standing alone, can prove that the act occurred, and thus, no further evidence of intent is necessary. *See Ledet,* 345 So. 2d at 478*; Acliese*, 403 So. 2d at 670 (Dixon, J., dissenting)(discussing *Moore*).[9]

On the other hand, in cases involving aggravated rape of children, consent is moot. Rather, in the typical scenario, the defendant denies any act of intercourse occurred at all. In contrast, in this case, both the defendant and the child victim agree that a rape occurred, however, the parties dispute who committed the act. Unlike the adult rape cases discussed in *Moore* and *Ledet*, the participation of the defendant in this crime is at issue.[10]

In *State v. Hatcher*, this Court discussed the unusual circumstances, such as those presented in this case, in which the issue of whether the defendant committed a crime justifies the admissibility of the other crimes evidence:

> It may be argued that proof of a design, plan, system or scheme is completely foreclosed except where continuity of the offense, knowledge or intent is a material issue in the case. La.R.S. 15:446 provides that "where the offense is one of a system, evidence is admissible to prove the continuity of the offense, and the commission of similar offenses for the purpose of showing guilty knowledge and intent, but not to prove the offense charged." However, it appears more likely that the legislature intended to prohibit the introduction of evidence of a design or scheme in cases in which the evidence has no substantial relevance other than to demonstrate criminal propensity. Since the Occurrence of a crime is not

---

[9] However, we have also ruled post-trial that impeached testimony of a witness, standing alone, cannot prove the offense. Thus, the State is faced with a Catch-22: proof of defendant's intent cannot be offered to establish that the act occurred, yet the State potentially cannot rely on the impeachable testimony of the child victim as the sole proof that the act occurred.

[10] In *Ledet*, this Court concluded that "when there is no contest at all over the participation of the accused in the alleged incident, but the only question is whether any crime at all took place, evidence of extraneous offenses. . . is inadmissible." 345 So. 2d at 479.

> genuinely at issue in most prosecutions, evidence of design, plan, system or scheme usually will be inadmissible except to show knowledge and intent. But in the few cases in which the actual occurrence of crime is genuinely at issue, the design evidence has relevance independent of the defendant's propensity and should be admitted if it meets all of the other tests. In accord with general authority, Louisiana courts have admitted other crimes evidence for purposes other than those listed in the statutes. *See State v. Sutfield,* 354 So.2d 1334 (La.1978).
>
> For many of the same reasons that the evidence meets the first four tests, the trial judge was not clearly erroneous in his determination that the probative value of the other crimes evidence outweighed its prejudicial effect. It was not manifestly wrong to conclude that the likelihood that the jury would consider the evidence as tending to prove the very doing of the sexual act in question by virtue of inference from the existence of a general design or scheme manifested by peculiarly distinctive modus operandi was greater than the risk that the jury would short circuit the process and convict the defendant because of bad character or propensity toward crimes against nature.
>
> Our opinion today is in some respects inconsistent with the language, but not the holdings, of *State v. Frentz,* 354 So.2d 1007 (La.1978); *State v. Jackson,* 352 So.2d 195 (La.1977); and *State v. Ledet,* 345 So.2d 474 (La.1977). *Some of the statements in those opinions suggest that a defendant's design, scheme, plan or system may be relevant to prove identity or intent, when either is an issue in the case, but that it is never relevant to prove the very doing of the act charged. These statements were too broad in light of the well established principles set forth above. In an unusual case, such as the present one, in which the defendant causes the very doing of the act to become a genuine issue, his design, scheme, etc., may be relevant to that issue.* Nevertheless, *Frentz, Jackson,* and *Ledet* were each decided correctly and remain solid precedent for the application of the basic principles undergirding the decisions.

372 So. 2d at 1035 (emphasis added).

While acknowledging the varying degrees of similarity necessary to prove intent, identity, or occurrence of a crime, the similarities between the charged offense and prior offenses in this case warrants the admissibility of other crimes evidence to show system, design, and plan. As this Court has previously stated, "the jurisprudence of our state and of the majority of other jurisdictions appears to define crimes of a 'system' as those acts and offenses which are of a like nature and exhibit like methods or plans of operation." *State v. Spencer,* 243 So. 2d 793 (La. 1971), *overruled on*

*other grounds*, 347 So. 2d 221 (La. 1971). In a rape case, the other crimes evidence "should indicate, by common features, a plan or design which tends to show that it is carried out by doing the very act charged. . . a single, previous act, even upon another woman, may, with other circumstances, give strong indication of a design (not a disposition ) to rape. . . ." Wigmore, § 357, at 335.

Ms. Logan, the defendant's godchild, testified that the defendant raped her on three occasions when she was in the defendant's temporary custody during the summer of 1984. According to Ms. Logan, she was eight or nine years old at the time of the rapes which occurred while she and the defendant were alone in his house or while other people in the house were asleep.

The State then called the victim of the charged crime who testified that before the offense at issue, the defendant, her stepfather, had raped her in the bathroom of their house while her younger brother was asleep. She also indicated that the defendant had raped her in her bedroom and in her mother's bedroom when they were alone in the house.

Accordingly, the instant offense and the prior offenses both occurred in the defendant's home while the young victims were in the defendant's custody and while other family members were absent or sleeping. Although these similarities appear to be common characteristics of most sex offenses given that cases involving the sexual abuse of children frequently occur in secret, the commonality does not destroy their relevance when the crux of the case depends on the credibility of a child. *See Miller*, 718 So. 2d at 962.

In addition, we note the particularities put forth in this case. Both children were directed to bathe after an alleged rape that caused bleeding in the genital area. Both children were raped with the same clothing configuration; shirt on, shorts off. Both

children were withdrawn or kept out of school to accomplish one of the rapes and directed to lie to cover up the alleged incident. These similarities show a plan or system that the defendant developed to systematically engage in nonconsensual relations with prepubescent young girls in his custody or control. *See Jackson*, 625 So. 2d at 150.

*Probative Value Versus Prejudicial Effect*

Where the defendant categorically denies that the act occurred, evidence that the defendant committed similar offenses under similar circumstances is highly relevant and probative in a case which principally rests on the testimony of a now ten-year-old victim. In fact, the rationale for relaxing the general strictures against other crimes evidence in cases of sex crimes against children is that the evidence will overcome a jury's natural reluctance to believe that such abhorrent acts may occur and to satisfy any reservations jurors may have about the capacity of the child victim to perceive and relate accurately events of such a traumatic nature. *See, e.g.*, Christie I. Floyd, *Admissibility of Prior Acts Evidence in Sexual Assault and Child Molestation Cases in Kentucky: A Proposed Solution that Recognizes Cultural Context*, 38 BRANDEIS L.J. 133, 151 (1999-2000) (discussing cultural pattern of recognition and disbelief regarding sexual violation of women and children); Leslie Feiner, *Criminal Law: The Whole Truth: Restoring Reality to Children's Narrative in Long-term Incest Cases*, 87 J. CRIM. L. & CRIMINOLOGY 1385, 1387 (1997)(noting that "despite an increased recognition that child molestation is a pervasive problem in society, there is also a clear message that the main, and often only witness to this kind of crime, may not be credible.").

The credibility of the victim will undoubtably be the main issue at trial. During the *Prieur* hearing, defendant proffered several statement transcripts in which the

victim initially denied that her stepfather committed the charged crime. The defense also proffered the results of a psychological examination after the crime to that concluded the victim lacked credibility as a witness.

The fact that the other acts or crimes happened sixteen years before the charged offense is not sufficient, in and of itself, to require the exclusion of the evidence. Remoteness in time, in most cases, is only one factor to be considered when determining whether the probative value of the evidence outweighs its prejudicial effect. A lapse in time goes to the weight of the evidence, rather than to its admissibility. *See Jackson*, 625 So. 2d at 149; *State v. Cupit*, 179 So. 837 (La. 1938).

Further, although the defendant is not directly related to the victim, the defendant is quite familiar with the individuals involved to investigate any credibility issues. Ms. Logan was the daughter of his ex-wife's cousin, and in fact, lived with the defendant for a period of time. *See Miller*, 718 So. 2d at 967 (holding that prejudice was lessened because the victim, while not a relative, was also not a stranger, as the daughter of defendant's neighbor).

For the above reasons, I respectfully dissent.