

SUPREME COURT OF LOUISIANA

No. 2000-K-1158

STATE OF LOUISIANA

VERSUS

ALLEN MAISE

CALOGERO, Chief Justice, dissents and assigns reasons.

The majority has it right when it finds that the evidence of the unrelated prior sexual offense was erroneously admitted in evidence at the defendant’s trial. However, where the majority goes wrong is in concluding that the error was harmless beyond a reasonable doubt, essentially reasoning that the state’s evidence was otherwise sufficient to support the jury’s verdict of guilty of aggravated rape.

Harmless error review “looks to the basis on which ‘the jury *actually rested* its verdict.’” Sullivan v. Louisiana, 508 U.S. 275, 279, 113 S.Ct. 2078, 2081 (1993)(emphasis in original), quoting Yates v. Evatt, 500 U.S. 391, 404, 111 S. Ct. 1884 (1991). Therefore, contrary to the majority’s reasoning, “[t]he inquiry . . . is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error.” Sullivan, 508 U.S. at 279, 113 S.Ct. at 2081 (emphasis in original). As Justice Scalia explained in Sullivan, “That must be so, because to hypothesize a guilty verdict that was never in fact rendered -- no matter how inescapable the findings to support that verdict might be -- would violate the jury-trial guarantee.” 508 U.S. at 279, 113 S.Ct. at 2081-82.

When reviewed with the proper focus, the erroneous introduction of the other crimes evidence in this case, particularly the non-cumulative hearsay evidence of the

prior sexual penetration of another child, was not harmless error. The erroneously admitted evidence of a prior sexual battery involving a different minor on an earlier occasion was certainly damaging to the defendant's case. The prejudice mounted when the trial court allowed, over a continuing defense objection, at least three of the state's witnesses to discuss details of the defendant's prior juvenile adjudication for the sexual battery with varying degrees of specificity. When the trial court overruled repeated defense objections and permitted a police officer witness to relate rank hearsay testimony that the prior sexual battery actually involved penetration by the defendant, there arose a reasonable possibility that the inadmissible evidence might have contributed to the verdict.

As the majority acknowledges, the sole issue at the present trial for aggravated rape was whether penetration occurred. Ante, p. 13. Consequently, evidence that the defendant had sexually penetrated a different child was “but another way of demonstrating that he has the propensity to commit such crimes and that the act charged against him probably occurred just as the present victim claims.” State v. Kennedy, 00-1554, p. 14 (La. 4/3/01), ___ So. 2d ___, ___. It is unreasonable to expect jurors not to be affected by such evidence, Kennedy, 00-1554 at 5, ___ So. 2d at ___, particularly since the trial court here rebuffed the defendant's timely request for a limiting instruction and the trial court's failure to give such an instruction was not subsequently cured by the imprecise directions contained in the general jury charge.¹

Under the circumstances of this case, the majority cannot fairly conclude

¹ Notably, the state, as the majority finds, failed to establish a legitimate purpose for introducing the other crimes evidence under La. Code Evid. art. 404(B). In addition, the trial court's general instructions, in scatter-shot fashion, merely enumerated for the jury all of the grounds for which other crimes evidence *may* be admitted, thereby inviting the jurors to pick and choose, rather than specify the particular grounds, knowledge and intent, for which the evidence was ostensibly introduced and, thus, actually “limit” the jury's consideration of the other crimes evidence. In effect then, the jury was allowed free rein to consider the improperly admitted other crimes evidence in any fashion it deemed appropriate.

beyond a reasonable doubt that the improperly admitted evidence did not contribute to the jury's verdict of guilty of aggravated rape of a child. Given that the defendant denied having anally penetrated the present victim, the non-cumulative hearsay evidence regarding the prior sexual penetration of another child was clearly important to the state in proving that the defendant had in fact sexually penetrated the present victim: The evidence was obviously introduced for the truth of the matter asserted therein, in the state's case-in-chief, via the testimony of an otherwise credible law enforcement officer, and without opportunity for cross-examination of the victim or out-of-court declarant. This testimony effectively placed the defendant on trial again for the prior offense, now up-graded from sexual battery to aggravated rape, and may have encouraged the jury to convict the defendant of the present charge of aggravated rape for his commission of the prior sexual penetration. Finally, considering also the lengthy jury deliberation and the ten-to-two vote to convict, it cannot be fairly said that the jury's verdict was surely unattributable to the errors.

In my view, there can be no confidence in the outcome of this trial. The defendant merits a new trial. Accordingly, I respectfully dissent from the majority's decision.