

01/10/03 “See News Release 001 for any concurrences and/or dissents.”

SUPREME COURT OF LOUISIANA

No. 02-KK-2849

STATE OF LOUISIANA

VERSUS

JOE GALLIANO

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

PER CURIAM

The defendant is charged with second degree cruelty to a juvenile, a violation of LSA-R.S. 14:93.2.3. The charge arises out of an incident in which the two-year-old victim, while in defendant’s care, sustained serious brain injury consistent with shaken baby syndrome. The State filed a “Notice of Intent to Use Evidence of Other Crimes, Wrongs, or Acts” seeking to introduce evidence that, approximately four months prior to the head injury, the victim sustained a broken leg when defendant applied excessive force to extricate him from a car seat.

The district court conducted a hearing consistent with **State v. Prieur**, 277 So.2d 126 (La. 1973). The State introduced a copy of a “Care Center Forensic Report” prepared by Dr. Scott A. Benton in connection with the leg injury and the transcript of the testimony at a hearing conducted in juvenile court. At the juvenile court hearing, defendant acknowledged that the victim suffered a broken leg when he attempted to extricate the victim from his car seat. In district court the State argued that the evidence of the prior leg fracture is admissible at defendant’s trial arising out of the head injury to prove knowledge, identity and absence of mistake or accident. The district court agreed, ruling that evidence of the prior incident which resulted in a spiral fracture to the victim’s femur is admissible at defendant’s trial because it has

independent relevance to the issues of intent, system and absence of mistake or accident.

The defendant applied to the Court of Appeal, Fifth Circuit, for writs. On October 25, 2002, the court of appeal granted defendant's writ application and reversed the ruling of the district court. The court of appeal ruled that the evidence of defendant's prior bad act is inadmissible because the prior act is not similar to the current charge, does not prove a material fact at issue, has no independent relevance other than showing that the defendant is of bad character, and lacks probative value that outweighs its prejudicial effect.

Because defendant's trial was scheduled to begin on December 2, 2002, the State applied to this court for writs of certiorari from the judgment of the court of appeal and a stay of further proceedings. We granted the State's application for a stay, and now, for the reasons expressed below, we reverse the decision of the court of appeal and reinstate the district court's ruling finding the other acts evidence admissible.

As a general rule, courts may not admit evidence of other crimes, wrongs or acts of the defendant in order to show that he or she is a person of bad character who has acted in conformity therewith. LSA-C.E. art. 404 (B)(1). However, the State may introduce evidence of other crimes, wrongs or acts if it establishes an independent and relevant reason for its admissibility, such as to show motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. LSA-C.E. art. 404 (B)(1). The State must provide the defendant with notice and a hearing before trial if it intends to offer such evidence. **State v. Prieur**, 277 So.2d at 130. Additionally, the State must prove that the defendant committed the other acts.¹ *Id.*

¹ As to the requisite burden of proof, we noted in **State v. Kennedy**, 2000-1554 (La. 4/3/01), 803 So.2d 916, 920 n.5 that Article 1104 of the Louisiana Code of Evidence was added in 1994 to provide that "the burden of proof in a pretrial hearing held in accordance with *State v. Prieur*, 277

Finally, the probative value of the other crimes, wrongs or acts evidence must outweigh its prejudicial effect. LSA-C.E. art. 403; **State v. Hatcher**, 372 So.2d 1024, 1033 (La. 1979).

In the instant case, the district court conducted the requisite **Prieur** hearing at which the State introduced evidence that the defendant committed the prior act sought to be introduced into evidence. In the transcript of defendant's testimony at the juvenile court hearing conducted in connection with the prior incident, the defendant acknowledged that the victim suffered a fracture of his femur when defendant attempted to pull him out of his car seat, but defendant claimed that the incident was an accident. The State argued that the evidence of this prior incident has independent relevance to establish knowledge, identity, and absence of mistake or accident in connection with the current incident. According to the State, the evidence is admissible to negate defendant's contention that while he did shake the victim, he did not intend, nor did he shake the victim hard enough, to cause the severe head injury the victim sustained. The defendant argued that the evidence of the prior incident is not admissible because it is not similar to the incident for which defendant is being tried, has no probative value, and is designed solely to inflame the jury.

After weighing the evidence and arguments of counsel, the district court concluded that the evidence of the prior incident has independent relevance to the issues of intent, system, and absence of mistake or accident and is admissible. We find no abuse of discretion in that determination. See, State v. Stepp, 28,868 (La.App. 2 Cir. 12/11/96), 686 So.2d 76, 79, writ denied, 97-0410 (La. 6/30/97), 696

So.2d 126 (La. 1973), shall be identical to the burden of proof required by Federal Rules of Evidence Article IV, Rule 404." We need not reach the issue of the applicable burden of proof in this case, because we find that the State satisfied its burden under either the clear and convincing evidence standard or the preponderance of the evidence standard.

So.2d 1006 (trial court's ruling on the admissibility of other crimes evidence will not be overturned absent an abuse of discretion).

The district court properly invoked the exception in LSA-C.E. 404 (B)(1) and allowed the introduction of the other acts evidence to negate defendant's claims of accident, mistake and lack of intent. The evidence of the prior incident in which the victim sustained a broken femur when defendant pulled him forcefully from his car seat has probative value to show the improbability that the defendant acted without the requisite intent, or accidentally, when he, according to his own admission, shook the victim in the instant situation "to get his attention." See, State v. Monroe, 364 So.2d 570 (La. 1980) (under doctrine of chances, likelihood that defendant was required to kill twice in self defense on successive nights at the same location was so remote that evidence of the other killing was admissible to negate self defense and lack of intent). Under the particular circumstances of this case, although evidence of the prior incident is clearly prejudicial, we cannot say that it is so inflammatory as to create an unacceptable risk of luring jurors "into declaring guilt on a ground different from proof specific to the offense charged." Old Chief v. United States, 519 U.S. 172, 180, 117 S.Ct. 644, 650, 136 L.Ed.2d 574 (1997). The court of appeal erred in holding to the contrary.

Accordingly, the writ is granted, the judgment of the court of appeal is reversed, and the judgment of the trial court finding the other crimes, wrongs or acts evidence to be admissible is reinstated. The stay order, previously issued by this court is lifted, and the case is remanded to the district court for further proceedings consistent with this opinion.