NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2007 KA 0227

STATE OF LOUISIANA

VERSUS

DONALD CHRISTOPHER BURGO

Judgment Rendered: June 8, 2007

Appealed from the
Sixteenth Judicial District Court
in and for the Parish of St. Mary, State of Louisiana
Trial Court Number 168,512

Honorable Paul J. deMahy, Judge Presiding

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BEFORE: CARTER, C. J., WHIPPLE AND McDONALD, JJ.

WHIPPLE, J.

Defendant, Donald Burgo, was charged by bill of information with two counts of cruelty to the infirmed, a violation of LSA-R.S. 14:93.3. Defendant pled not guilty and waived his right to be tried before a jury. Following defendant's bench trial, the trial court found defendant guilty as charged. Defendant was originally sentenced to three years at hard labor for each conviction, with the sentences to be served concurrently.

The State instituted habitual-offender proceedings, seeking to have defendant adjudicated a third-felony habitual offender. Following the habitual-offender hearing the trial court adjudicated defendant as a second-felony habitual offender, and ruled that the State failed to carry its burden with one of the predicate convictions. The trial court vacated the original sentences in this matter, and sentenced defendant to eight years at hard labor for each of the two convictions for cruelty to the infirmed, ordering that the sentences be served concurrently.

FACTS

On August 28, 2005, with Hurricane Katrina approaching the Louisiana coast, seventy-four year-old Lois Burgo contacted her thirty-nine year-old son, defendant, and told him that she and her husband (defendant's father, James Burgo) would pick him up at his trailer in Amelia and let him stay with them at their home in Morgan City. Because of the approaching storm, Mrs. Burgo felt that defendant would be safer with them than in his trailer in Amelia.

When Mrs. Burgo picked up defendant in Amelia, she knew right away that he was "very angry" and suspected he was under the influence of some substance. After arriving at his parents' home located at 1700 Elk Street in Morgan City, defendant exited the truck and started yelling at one

of his parents' neighbors across the street. Mrs. Burgo was finally able to coax defendant to go inside the home.

Once Mrs. Burgo and defendant got to the door of her home, defendant opened the door and said, "Ladies, first," and then proceeded to push his mother through the door while yelling obscenities at her. Defendant's father, who was eighty-two years old and recovering from recent brain surgery, told defendant to stop talking to his mother that way. Defendant told Mr. Burgo that he would talk to them any way he wanted, and then struck his father.

Defendant walked out of the house and into the backyard to check on his dog. At this time, Mrs. Burgo took her husband by his hand, assisted him into the den, and went to the phone to call for help. Defendant then returned and hit Mr. Burgo again, knocking him to the floor. Defendant pulled the phone from his mother's hand, threw it to the floor, and hit his mother in the front of her head, knocking off her glasses and cutting her nose. Mrs. Burgo fell to the couch, then the floor. Mrs. Burgo thought defendant was going to attack Mr. Burgo again, so she placed herself over her husband's body as defendant struck her on the side of her head again.

At that moment, Officer John Schaff of the Morgan City Police Department entered the home and discovered the Burgos coming toward the door as if they were being chased. Behind them came defendant, who was holding a dog leash. Defendant was arrested and taken to jail. During a pat down of defendant, Officer Schaff recovered a metal pipe from defendant's left pocket with some residue of suspected narcotics.

The Burgos declined to be taken to a hospital for medical treatment. A few days later, Mr. Burgo was taken back to a nursing home and his condition began to deteriorate, in that he was losing his ability to speak and

walk. Eventually, Mr. Burgo underwent more brain surgery for blood clots on his brain. According to Mrs. Burgo, the doctors could neither confirm nor deny that defendant's blows to his father's head caused the blood clots.

Defendant did not testify.

OTHER-CRIMES EVIDENCE

In his first assignment of error, defendant argues the trial court erred in admitting irrelevant, prejudicial evidence of prior offenses without first requiring that the State provide him with the proper notice of its intent to use "other crimes" evidence at trial and without requiring the State to demonstrate a proper basis for the admissibility of the evidence.

Defendant specifically complains of the prosecutor's questioning of Mrs. Burgo regarding a court proceeding in which defendant had been ordered to have no contact with his parents. Defense counsel objected to the "other crimes" evidence on the basis that the notice he received regarding the State's intent to utilize "other crimes" evidence was inadequate, and there was no demonstrated legitimate basis upon which to admit the evidence. The other crimes at issue were two previous batteries committed by defendant against his mother.

Louisiana Code of Evidence article 404B(1) provides, in pertinent part:

> Except as provided in Article 412 [addressing the victim's past sexual behavior in sexual assault cases], evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, of the nature of any such evidence it intends to introduce at trial for such purposes.

Generally, evidence of other crimes committed by the defendant is inadmissible due to the "substantial risk of grave prejudice to the defendant." To admit "other crimes" evidence, the State must establish that there is an independent and relevant reason for doing so, i.e., to show motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or when it relates to conduct that constitutes an integral part of the act. The Louisiana Supreme Court has also held "other crimes" evidence admissible as proof of other crimes exhibiting almost identical modus operandi or system, committed in close proximity in time and place. Evidence of other crimes, however, is not admissible simply to prove the bad character of the accused. Furthermore, the "other crimes" evidence must tend to prove a material fact genuinely at issue, and the probative value of the extraneous-crimes evidence must outweigh its prejudicial effect. State v. Millien, 2002-1006, p. 10 (La. App. 1st Cir. 2/14/03), 845 So. 2d 506, 513-514.

The procedure to be used when the State intends to offer evidence of other criminal offenses was formerly controlled by State v. Prieur, 277 So. 2d 126 (La. 1973). Prior to its repeal by 1995 La. Acts, No. 1300, § 2, LSA-C.E. art. 1103 provided that the notice requirements and clear-and-convincing-evidence standard of Prieur and its progeny were not overruled by the code of evidence. Prieur dealt with LSA-R.S. 15:445 and LSA-R.S. 15:446, now-repealed statutes, which addressed the admissibility of other-crimes evidence. Under Prieur, the State was required to give a defendant notice, both that evidence of other crimes would be offered against him, and of which exception to the general exclusionary rule the State intended to rely upon. Additionally, the State had to prove by clear and convincing evidence

that the defendant committed the other crimes. State v. Millien, 2002-1006 at p. 10, 845 So. 2d at 514.

However, 1994 La. Acts, 3d Ex. Sess., No. 51 added LSA-C.E. art. 1104 and amended LSA-C.E. art. 404B. Louisiana Code of Evidence article 1104 provides that the burden of proof in pretrial Prieur hearings, "shall be identical to the burden of proof required by Federal Rules of Evidence Article IV, Rule 404."

The amendment to LSA-C.E. art. 404B inserted the language "provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, of the nature of any such evidence it intends to introduce at trial for such purposes," into the article.

The burden of proof required by Federal Rules of Evidence Article IV, Rule 404 is satisfied upon a showing of sufficient evidence to support a finding by the jury that the defendant committed the other crime, wrong, or act. Millien, 2002-1006 at p. 11, 845 So. 2d at 514. In determining whether the Government has introduced sufficient evidence, the trial court neither weighs credibility nor makes a finding that the Government has proved the conditional fact by a preponderance of the evidence. The court simply examines all the evidence in the case and decides whether the jury could reasonably find the conditional fact by a preponderance of the evidence. See Huddleston v. U.S., 485 U.S. 681, 690, 108 S. Ct. 1496, 1501, 99 L. Ed. 2d 771 (1988). The Louisiana Supreme Court has yet to resolve the issue of the burden of proof required for the admission of "other crimes" evidence in light of the repeal of LSA-C.E. art. 1103 and the addition of LSA-C.E. art. 1104. See State v. Galliano, 2002-2849, p. 3 (La. 1/10/03), 839 So. 2d 932, 933 n.1 (per curiam). However, numerous Louisiana appellate courts,

including this Court, have held the burden of proof to now be less than "clear and convincing." State v. Millien, 2002-1006 at p. 11, 845 So. 2d at 514. A trial court's ruling on the admissibility of "other crimes" evidence will not be overturned absent an abuse of discretion. State v. Galliano, 2002-2849 at pp. 3-4, 839 So. 2d at 934.

Cruelty to the infirmed is defined in pertinent part as intentional or criminally negligent mistreatment by any person to an aged person (an individual sixty years of age or older) whereby unjustifiable pain, malnourishment, or suffering is caused to that person. See LSA-R.S. 14:93.3A & C.

Defendant argues that because he acknowledged in his opening statement that he pushed his parents down, intent was not at issue. We disagree. Despite defense counsel's admission that his client had in fact pushed his parents, Mrs. Burgo's testimony portrayed a different account of the incident as opposed to defense counsel's contention of a mere push. According to Mrs. Burgo, defendant's actions toward his parents included multiple punches, which only ceased when the police arrived.

Following defendant's objection to Mrs. Burgo's testimony about how a restraining order had been issued, the prosecutor argued that he was attempting to show a pattern of intentional mistreatment by defendant toward his parents that occurred over time. The trial court ruled that these prior incidents could be used to indicate intent. We agree. Such vastly differing accounts of what occurred at the Burgo residence clearly created an issue of whether defendant intentionally mistreated his parents. Although defense counsel may have conceded that his client pushed the Burgos, there was no admission that he was guilty under the statute; thus, defendant's intent was still an issue for the trial court. Second, we note that Mrs.

Burgo's testimony regarding the prior batteries suffered by her satisfied the State's burden of proving whether defendant committed them. Further, we find the probative value of this prior conduct clearly outweighs any unfair prejudice against defendant. This matter was not tried by a jury, and the trial court clearly demonstrated that it could keep these prior incidents separate. Moreover, the introduction of the two prior incidents of battery against Mrs. Burgo did not delay the proceeding in any manner.

The record indicates the State filed a notice on June 23, 2006, for the trial that was set on June 26, 2006, (which trial actually began on June 27, 2006) indicating the State's intent to introduce incidents occurring in either 1990 or 1991, wherein defendant committed a battery on his mother, and in either 1993 or 1994, wherein defendant committed another battery on his mother.

Before allowing the evidence of defendant's prior acts against his mother into evidence, the trial court heard arguments from the prosecutor and defense counsel. Thus, there was a prerequisite determination by the trial court that these prior acts could be used to prove intent.

We also reject defendant's argument that the introduction of this evidence was improper because the notice to defendant was inadequate or not provided at all. In doing so, we note that although defense counsel claimed to have not received the notice filed by the State, the record shows that defense counsel stated, "I am not asking for a continuance. I am not saying it's a surprise. I am very well aware of [defendant's] background." Moreover, we note that during defense counsel's cross-examination of Mrs. Burgo, she admitted that she and defense counsel had known each other since 1978-1979 because of problems with defendant.

Under these circumstances, we cannot say that defendant had inadequate notice of the State's intent to use the two previous batteries he had committed against his mother. Clearly, defendant had a history of violence against his parents, and defense counsel had personal knowledge of that history. Moreover, the fact that Mr. and Mrs. Burgo had invited defendant to their home despite the existence of a prior restraining order was used by the defense. The reason for such restraining order was clearly relevant in determining defendant's intent and the nature of his actions on the date of this incident.

This assignment of error is without merit.

HABITUAL-OFFENDER SENTENCING

In his second assignment of error, defendant argues that the trial court erred in sentencing him under the habitual-offender act. Following defendant's adjudication as a second-felony habitual offender, the trial court sentenced defendant to eight years at hard labor for each of his two convictions for cruelty to the infirmed.

The record reflects that the State filed a habitual-offender bill of information on June 30, 2006, seeking to have defendant adjudicated a third-felony offender and to enhance defendant's sentence for cruelty to the infirmed. However, the bill of information charging defendant with this crime charged that defendant committed two counts of cruelty to the infirmed, and that both offenses were committed on August 28, 2005. Defendant was convicted of both counts.

It is well established that the sentence for only one underlying conviction arising out of a multi-count bill of information can be enhanced when the convictions were entered the same day and when the offenses arise out of one criminal episode. State ex rel. Berry v. State, 96-0367 (La.

5/16/97), 693 So. 2d 787; State ex rel. Porter v. Butler, 573 So. 2d 1106, 1109 (La. 1991).

Because defendant's two convictions for cruelty to the infirmed were charged in the same bill of information, were entered on the same date, and arose from the same criminal episode, the trial court erred in enhancing the sentence for both convictions. Moreover, we note the habitual-offender bill of information only sought to enhance the sentence for one of the convictions for cruelty to the infirmed.

Accordingly, we affirm the convictions and the habitual-offender adjudication, but vacate the habitual offender sentences and remand the matter for resentencing. On remand, the trial court shall impose two sentences, but only one of these two convictions shall receive an enhanced sentence.

CONVICTIONS AFFIRMED; HABITUAL-OFFENDER ADJUDICATION AFFIRMED; HABITUAL-OFFENDER SENTENCES VACATED; REMANDED FOR RESENTENCING.