

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2008 KA 0657

STATE OF LOUISIANA

VERSUS

NELSON J. CURTIS, JR.

JP

On Appeal from the 22nd Judicial District Court
Parish of St. Tammany, Louisiana
Docket No. 427,221, Division "D"
Honorable Peter J. Garcia, Judge Presiding

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BEFORE: PARRO, McCLENDON, AND WELCH, JJ.

Judgment rendered FEB 13 2009

JEW
Welch, Jr. dissents with reasons assigned
PM McCleendon, J. Concurs and Assigns Reasons.

PARRO, J.

The defendant, Nelson J. Curtis, Jr., was charged by bill of information with indecent behavior with a juvenile, a violation of LSA-R.S. 14:81. He pled not guilty. Following a jury trial, the defendant was convicted as charged. The defendant filed motions for a new trial and for post-verdict judgment of acquittal, which the trial court denied. The defendant was sentenced to imprisonment at hard labor for seven years. The court ordered the defendant to serve six months in the parish jail and suspended the remainder of the sentence. The court placed the defendant on supervised probation for five years subject to various general and special conditions. The defendant now appeals, asserting five assignments of error as follows:

1. Whether the state proved every element of the crime of indecent behavior with a juvenile when there was no proof that "there was an age difference of greater than two (2) years between the persons," as required by statute.
2. Whether the state proved every element of the crime of indecent behavior with a juvenile when there was no evidence of "intent to arouse or gratify the sexual desires of either person," as required by statute.
3. Whether the trial court erred in allowing testimony regarding other acts of similar crimes, wrongs, or acts of the defendant during the trial of this matter.
4. Whether the trial court erred in allowing Larissa Casteel, a witness called by the state in rebuttal, to testify in violation of an agreement between counsel that she would only testify if the defense presented character evidence.
5. Whether the trial court erred in denying the defendant's motion for a new trial, which brought forth newly discovered evidence based on critical testimony from crucial witnesses and enlarged photographs that showed a state's key witness, Teresa Simcox, erred or lied regarding the incident.

Finding no merit in the assigned errors, we affirm the defendant's conviction and sentence.

FACTS

On February 10, 2007, Deputy Andre Miller of the St. Tammany Parish Sheriff's Office was dispatched to Boule Prime House Restaurant in Covington, Louisiana, to investigate a complaint. Information gathered at the scene indicated that the defendant had inappropriately groped R.F., a sixteen-year-old employee. R.F., visibly nervous and very upset, told Deputy Miller she was working in the kitchen when the defendant grabbed

her and touched her breast. The defendant, who appeared intoxicated and reeked of alcohol, was arrested and charged with indecent behavior with a juvenile.

SUFFICIENCY OF THE EVIDENCE
(ASSIGNMENTS OF ERROR NUMBERS ONE AND TWO)

In these assignments of error, the defendant argues the evidence presented by the state at the trial of this matter was insufficient to prove all of the essential elements of the offense of indecent behavior with a juvenile. First, the defendant argues that, while the state successfully proved that the victim was sixteen years and eleven months old when the incident occurred, the state failed to present any evidence of the defendant's age. The defendant asserts that since the crime of indecent behavior with a juvenile requires an age difference of greater than two years between the defendant and the victim, proof of his age was essential. Secondly, the defendant argues the state failed to produce any evidence of intent to arouse or gratify the sexual desires of either person involved, another essential element of the crime charged. Because the state failed to meet its burden of proof on these essential elements, the defendant contends his conviction for indecent behavior of a juvenile must be reversed as it is unsupported by the evidence.

The standard of review for the sufficiency of the evidence to uphold a conviction is whether, when viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could conclude the state proved the essential elements of the crime and the defendant's identity as the perpetrator of that crime beyond a reasonable doubt. **Jackson v. Virginia**, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); see **State v. Johnson**, 461 So.2d 673, 674 (La. App. 1st Cir. 1984). The **Jackson v. Virginia** standard of review incorporated in Louisiana Code of Criminal Procedure article 821 is an objective standard for testing the overall evidence, both direct and circumstantial, for reasonable doubt. When analyzing circumstantial evidence, LSA-R.S. 15:438 provides that, in order to convict, the fact finder must be satisfied the overall evidence excludes every reasonable hypothesis of innocence. **State v. Nevers**, 621 So.2d 1108, 1116 (La. App. 1st Cir.), writ denied, 617 So.2d 906 (La. 1993); **State v. McLean**, 525 So.2d 1251, 1255 (La. App. 1st Cir.), writ denied, 532 So.2d 130 (La. 1988).

As previously noted, the defendant was convicted of indecent behavior with a juvenile in violation of LSA-R.S. 14:81, which, at the time of the alleged incident, provided, in pertinent part:

A. Indecent behavior with juveniles is the commission of any of the following acts with the intention of arousing or gratifying the sexual desires of either person:

(1) Any lewd or lascivious act upon the person or in the presence of any child under the age of seventeen, where there is an age difference of greater than two years between the two persons. Lack of knowledge of the child's age shall not be a defense....

The defendant's age

In the instant case, looking at the entire record, we find the evidence is sufficient to support the conclusion that an age difference of greater than two years existed between the defendant and the victim at the time of the offense. The victim testified that she was sixteen years old on February 10, 2007, the date of the alleged incident. Regarding the defendant's age, there was certainly circumstantial evidence introduced by the state and the defense, which showed the defendant was more than two years older than the victim. For example, the victim and Teresa Simcox, another Boule Prime House Restaurant employee, testified that the defendant was their boss and he owned the business. Additional evidence of the defendant's age can also be gleaned from defense witnesses' testimony. Mark Banford, an offsite manager for Boule's Prime House Restaurant, testified that Jeff Curtis, the defendant's son, is married to Banford's sister. Jeff Curtis testified that he worked as the general manager of Boule Prime House Restaurant and he confirmed that the defendant is his father. The defendant testified at the 2007 trial that he had previously been convicted of DWI in 1982 and 1988. The defendant further testified that he retired from coaching football at Mandeville High School after thirty years.

Given the foregoing, it is clear that although the evidence presented at the trial did not specifically establish the defendant's exact age, the jury was reasonable in concluding that one who owns a well established restaurant business, who was convicted of DWI twice in the 1980's, who retired as a high school football coach after thirty years of service, and who has a married child managing the restaurant, was more than two years

older than the sixteen-year-old victim in February 2007, the date of the incident.¹ The evidence as to the requisite age difference, when viewed in a light most favorable to the state, reasonably permitted a finding that the state had proven this essential element of the offense charged. This assignment of error lacks merit.

Intent to arouse or gratify sexual desires

In support of his argument that the state failed to prove the essential element of intent to arouse or gratify sexual desires, the defendant claims the only evidence pertaining to the actual offense came from the victim and the defendant. He notes that the victim did not testify that her sexual desires were either aroused or gratified by the alleged actions of the defendant, or that the defendant intended to so arouse or gratify her sexual desires. The defendant further notes that at trial he specifically testified that he did not intend to arouse or gratify the sexual desires of either himself or the victim.

The defendant argues that the video surveillance footage introduced at the trial shows that both the victim and Simcox (who claimed she witnessed the incident) provided false testimony. Specifically, he argues that the video clearly shows that he never had both hands on the victim pulling her backward, and Simcox was not looking toward the direction where the defendant and the victim were positioned when the alleged incident occurred. Thus, the defendant asserts that, on the evidence presented, no rational trier of fact could possibly have found that a touching even occurred, much less one that could be considered lewd or lascivious and intended to arouse or gratify sexual desires as required by the statute.

At the trial, the victim testified that, on the day in question, she was working as a back server at Boule's Prime House Restaurant. She explained that, at some point during her shift, the defendant started touching her. The touching began with the defendant putting his arms around her and touching her in the lower back. He also pulled her back towards him by her arms and touched her breast. The victim explained that the defendant's touching her body made her angry and afraid. She also stated that it was not

¹ Circumstantial evidence has been held acceptable and sufficient to prove the defendant's age in other indecent behavior with a juvenile cases. *See, e.g., State v. Holmes*, 96-1281 (La. App. 4th Cir. 3/11/98), 709 So.2d 1002, *writ denied*, 98-1733 (La. 11/20/98), 729 So.2d 1; *State v. Shelton*, 545 So.2d 1285 (La. App. 2nd Cir.), *writ denied*, 552 So.2d 377 (La. 1989); *State v. Zihlavsky*, 505 So.2d 761 (La. App. 2nd Cir.), *writ denied*, 511 So.2d 1152 (La. 1987).

uncommon for the defendant to touch her. The defendant even touched her several times that same evening. The victim explained she did not report the touching initially for fear she would lose her job. The victim explained that the defendant's actions of touching her breast were not accidental. The victim further testified she told Simcox of the breast-touching incident shortly after it occurred. Simcox stayed with the victim for the rest of the evening attempting to protect her from the defendant.

Teresa Simcox testified that she was employed as a server at Boule's Prime House Restaurant on the date the incident occurred. The victim was Simcox's next-door neighbor. Simcox assisted the victim in gaining employment at the restaurant. On the day the incident took place, Simcox was also present in the restaurant. She explained that she observed the defendant grab the victim's breast as they stood near the tea machine. The victim became upset and wanted to leave. Simcox requested that the victim stay until the end of her shift. She instructed the victim to stay next to her and assured she would protect her from any further fondling by the defendant.

To rebut any claim of mistake or accident, state witness Kyle Gaylot testified that, on previous occasions he personally observed the defendant grope and fondle other female employees of the restaurant. He explained that on a prior occasion, a former employee named Elaine was hanging decorations and the defendant walked up behind her and grabbed her crotch. Gaylot also observed other incidents in which the defendant would pull a female employee's shirt and look down into it, or he would walk by and rub his hand on the female employee's back and drag it down across her buttocks. Gaylot, the general manager for the restaurant, stated he received several complaints from these female employees regarding the defendant's inappropriate behavior. Gaylot also explained an incident in which a customer complained about having observed the defendant inappropriately grab an employee.

Consistent with Gaylot's testimony, Simcox likewise testified that she personally observed the defendant inappropriately touch other female employees. She explained he once grabbed Elaine in the vaginal area as she stood at the computer inputting an order, and he grabbed another employee, Larissa (Casteel), on the buttocks. Simcox further

testified that she was also subjected to inappropriate touching by the defendant on numerous occasions.

Indecent behavior with a juvenile is a specific intent crime for which the state must prove the offender's intent to arouse or gratify his sexual desires by his actions involving a child. LSA-R.S. 14:81. Specific intent to commit indecent behavior with a juvenile need not be proven as fact, but may be inferred from the circumstances and actions of the defendant. See State v. Linson, 94-0061(La. App. 1st Cir. 4/7/95), 654 So.2d 440, 445, writ denied, 95-1120 (La. 9/22/95), 660 So.2d 470.

Contrary to the defendant's assertions, the victim's testimony indicating that it was not uncommon for the defendant to touch her body as she worked and that the defendant touched her several different times on the night in question, when coupled with Gaylot's and Simcox's testimony that they personally observed the defendant physically touch other female employees on numerous occasions, is clearly sufficient to prove his touching of the victim's breast was not inadvertent and was a lewd and lascivious act designed to arouse and/or gratify the defendant's sexual desires. Considering the foregoing, we find the state proved with sufficient evidence all of the essential elements of the crime charged, including intent to arouse or gratify sexual desires, beyond a reasonable doubt. This assignment of error lacks merit.

OTHER CRIMES EVIDENCE
(ASSIGNMENT OF ERROR NUMBER THREE)

In his third assignment of error, the defendant contends the trial court erred in allowing the state to introduce evidence of other crimes and/or bad acts at his trial. The defendant asserts that the evidence was not admissible under LSA-C.E. art. 412.2, which allows evidence of other acts of similar crimes, wrongs, or acts in sex offense cases, because it involved alleged adult victims and was in no way similar to the act charged in this case. The defendant further asserts the evidence should not have been admitted because it was highly prejudicial and its probative value was clearly outweighed by the danger of unfair prejudice under LSA-C.E. art. 403.

Generally, evidence of criminal offenses other than the offense being tried is inadmissible as substantive evidence because of the substantial risk of grave prejudice to

the defendant. **State v. Hills**, 99-1750 (La. 5/16/00), 761 So.2d 516, 520. Under LSA-C.E. art. 404(B)(1), other crimes evidence "is not admissible to prove the character of a person in order to show that he acted in conformity therewith." The evidence "may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident" At least one of the enumerated purposes in Article 404(B) must be at issue, have some independent relevance, or be an element of the crime charged in order for the evidence to be admissible under Article 404(B). **State v. Kennedy**, 00-1554 (La. 4/3/01), 803 So.2d 916, 920. The inquiry, however, does not end with the determination that the other bad acts evidence is admissible for one of the Article 404(B) purposes. For "even if independently relevant, the evidence may be excluded if its probative value is substantially outweighed by the dangers of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or waste of time." **State v. Miller**, 98-0301 (La. 9/9/98), 718 So.2d 960, 962; see LSA-C.E. art. 403. Ultimately, questions regarding the admissibility of evidence are within the discretion of the trial court and should not be disturbed absent a clear abuse of that discretion. See **State v. Mosby**, 595 So.2d 1135, 1139 (La. 1992).

Louisiana Code of Evidence article 412.2 provides, in pertinent part:

A. When an accused is charged with a crime involving sexually assaultive behavior, or with acts that constitute a sex offense involving a victim who was under the age of seventeen at the time of the offense, evidence of the accused's commission of another crime, wrong, **or act involving sexually assaultive behavior** or acts which indicate a lustful disposition toward children may be admissible and may be considered for its bearing on any matter to which it is relevant subject to the balancing test provided in Article 403. (Emphasis added).

Louisiana Code of Evidence article 403 provides:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or waste of time.

Prior to trial, the state gave the defense notice of its intent to use evidence in the instant case, pursuant to LSA-C.E. art. 412.2, of other crimes, including similar sexual offenses committed by defendant against female employees. A hearing was held on the LSA-C.E.

art. 412.2 motion. At the hearing, Kyle Gaylot and Teresa Simcox testified regarding their personal observations of the defendant inappropriately touching several other female employees. The trial court ruled that the evidence was admissible under Articles 412.2 and 403 and would be permitted at the trial. The court specifically found that the probative value of the evidence outweighed the danger of any unfair prejudice and that the admission of the evidence would not confuse the issues or mislead the jury. The defense objected to the court's ruling.

We find no error or abuse of discretion in the trial court's ruling on the other crimes evidence motion. Contrary to the defendant's claim, the incidents described at the hearing and later at the trial are similar to the instant offense. The only difference between the instant offense and the other offenses the state sought to introduce was the age of the employee/victim. The evidence showed a pattern of inappropriate behavior by the defendant towards his female employees. The fact that the other incidents did not involve children is of no moment. The evidence concerning similar "sexually assaultive behavior" by this defendant against other female employees was admissible to show absence of mistake or accident by the defendant, and the probative value of the evidence was not outweighed by the danger of unfair prejudice under LSA-C.E. art. 403.

Insofar as the defendant asserts that the testimony regarding the other incidents was hearsay because the victims of the incidents did not testify, we note that both Gaylot and Simcox testified only regarding happenings they personally observed. Testimony regarding personal observations is not hearsay. LSA-C.E. art. 801. This assignment of error lacks merit.

TESTIMONY OF REBUTTAL WITNESS
(ASSIGNMENT OF ERROR NUMBER FOUR)

In this assignment of error, the defendant argues the trial court erred in allowing Larissa Casteel to testify as a rebuttal witness at his trial. He claims allowing Casteel to testify violated an agreement between the state and the defense, indicating that Casteel would only testify if the defense introduced evidence of the defendant's character. In response, the state argues the defendant put his character at issue with his trial testimony and, accordingly, allowing Casteel to testify was proper.

The record reflects that at a pretrial hearing, the prosecutor notified the court and the defense that the state may call Larissa Casteel (another former employee that the defendant allegedly inappropriately touched) as a witness. The prosecutor claimed Casteel quit her employment after numerous episodes of groping by the defendant. The prosecutor further explained that he had just learned of the existence of Casteel and the information she provided. Noting that the state failed to include any reference to Casteel as a potential witness in the notice provided during discovery, the defense objected to her being allowed to testify at the trial. The defense requested a continuance to allow time for adequate notice of this other crimes or bad acts evidence. The defense was not prepared to defend against any testimony Casteel would provide. Following argument by counsel, the trial court noted that the matter would be continued until a later date.

Thereafter, in an off-the-record discussion, the state apparently expressed concern with delaying the trial. Back on the record, the trial court agreed to proceed with the trial if the state agreed to call only those witnesses for which it previously provided notice to the defense. The state agreed to use the victim, Simcox, and Gaylot in its case-in-chief. However, the prosecutor further noted that, at that time, the state was unaware of what the defendant's defense would be at the trial. If the defendant relied on evidence of his character as a good person, the state reserved the right to call Casteel as a rebuttal witness. Thereafter, the parties agreed to proceed to trial with the agreement that Casteel would be allowed to testify in rebuttal only if the defense put on evidence of his "good" character.

At the trial, the defendant testified on his own behalf. He denied ever inappropriately touching the victim. He explained that he may have touched her arm or shoulder to move her out of the way, but he never pulled her towards him or touched her breast. He further acknowledged that he put his arm around the victim once and told her she was doing a good job.

Regarding the other incidences of alleged inappropriate touching of employees Elaine, Jennifer, and Christine, the defendant testified that the touching was not without consent. He explained that he and these women "played around" this way. He claimed

some episodes of touching were even initiated by the women. According to the defendant, none of the women ever complained about the behavior. In fact, Christine is still employed at the restaurant.

On cross-examination, the prosecutor asked the defendant if he ever inappropriately touched Larissa (Casteel). The defendant responded negatively. The defendant further testified that while Casteel was away in a rehabilitation facility, her mother approached him at the restaurant and told him that Casteel was interested in getting her job back once she was released. According to the defendant, he agreed to rehire Casteel. The defendant testified, “[t]hen she came back to the restaurant to get her job. Does that sound like I touched her inappropriately? It sounds like people are not seeing the true story.”

Later, following the conclusion of the defense’s case, the state notified the court of its intent to call Casteel to testify. The state argued that, pursuant to the pretrial agreement, Casteel could now be called to testify because the defendant, through his own trial testimony, put his character at issue. The state further noted that the defendant specifically denied any inappropriate touching of Casteel during his testimony. Counsel for the defendant objected, arguing that no such character evidence was introduced and thus, under the pretrial agreement, Casteel could not be called to testify. Counsel further noted that the exchange regarding the defendant’s interaction with Casteel was initiated by the prosecution on cross-examination.

In overruling the defendant’s objection to Casteel being called to testify, the court noted it was not necessary to specifically characterize the defendant’s trial testimony. The court stated:

However, I am saying that the fact that that agreement existed, the fact that I put that limitation on the state does not give the defendant carte blanche to say anything that he wants to say under cross-examination – I’m sorry – under direct examination or under cross-examination for that matter, without subjecting himself to the possibility of a rebuttal witness contesting what testimony was elicited from him.

And if he wants to make a blatant denial of certain facts, I’m not going to limit the state to not bring that witness forward to contest what he said either in direct or cross-examination, and I don’t care whether it was brought up by the state in cross or whether it was brought up by the defense in direct.

I think it's appropriate for this witness to come forward and testify in rebuttal to the testimony of Mr. Curtis.

After reviewing the record in this case, we find no error in the trial court's decision to allow the state to call Casteel to testify. Despite his assertions to the contrary, we find that the defendant, through his own trial testimony, presented evidence which placed his character at issue. Specifically, the defendant's testimony regarding his employment as an athletic director/coach and his method of encouraging and/or congratulating students clearly raised the issue of his disposition when interacting with children. The defendant testified:

I grabbed her and told her to do it, showed her what I wanted done, and told her, do me a good job. I'm a teacher of 30 years, a coach, athletic director. I always always have walked up to kids that I've coached, patted them on the back, and said, hey, do a good job or congratulations or something like that. I think that's what you [see] in that picture in the video. I said, hey, do me a good job; I'll be back to check on you later, and I turned around and walked off.

With this testimony, the defendant clearly attempted to establish his character as an individual who makes physical contact with children only in appropriate manners and for appropriate reasons. Once this evidence of the defendant's "good" character was introduced, the state was at liberty to call Casteel to testify. Thus, there was no violation of the pretrial agreement between the parties.

Moreover, even if we were to find that the trial court erred in allowing Casteel to testify, this error would be considered harmless. Although the testimony provided by Casteel was clearly evidence of another crime and/or bad act by the defendant, it is well settled that the erroneous admission of other-crimes evidence is a trial court error subject to harmless-error analysis on appeal. **State v. Johnson**, 94-1379 (La. 11/27/95), 664 So.2d 94, 101. The test for determining whether an error is harmless is whether the verdict actually rendered in this case "was surely unattributable to the error." **Sullivan v. Louisiana**, 508 U.S. 275, 279, 113 S.Ct. 2078, 2081, 124 L.Ed.2d 182 (1993); **Johnson**, 664 So.2d at 100.

In this case, the jury heard the sixteen-year-old victim's unequivocal testimony describing how the defendant intentionally and repeatedly touched her in an inappropriate

manner. The victim testified that the defendant pulled her towards him and touched her breast on the day in question. Simcox and Gaylot both testified to having personally observed the defendant inappropriately touching various female employees. Simcox also testified that she personally observed the defendant grab Casteel's buttocks. Therefore, even absent Casteel's testimony, the jury would have been aware of the defendant's inappropriate behavior towards Casteel. Simcox further testified that the defendant also touched her in an inappropriate manner practically every day. Despite the defendant's claim that his touching was often consensual with the former employees, Gaylot testified that, as the general manager, he received several complaints regarding the defendant's sexually offensive behavior. Accordingly, Casteel's testimony was not necessary to enhance the sufficiency of proof of any element of the state's case concerning the defendant's inappropriate behavior with the victim. Considering the foregoing, we are convinced that the guilty verdict actually rendered in this trial was surely unattributable to the testimony in question.

This assignment of error lacks merit.

DENIAL OF MOTION FOR A NEW TRIAL
(ASSIGNMENT OF ERROR NUMBER FIVE)

By this assignment of error, the defendant contends the trial judge erred in denying his motion for a new trial despite new evidence that he claims "bears relevance to the bias, interest, and other corrupt motivation of the alleged victim." In his motion, the defendant alleged that a new trial was warranted because there were witnesses who would testify that Gaylot often drank and became intoxicated at work and that the victim made statements reflecting that she made a false claim against the defendant to avenge a personal vendetta. The defendant further argues that enlarged photographs of the incident from the footage captured on the restaurant's surveillance system clearly showed that the victim and Simcox were untruthful in their testimony regarding the incident.

The motion for new trial is based on the supposition that injustice has been done the defendant, and, unless such is shown to have been the case, the motion should be denied, no matter on what allegations it is grounded. LSA-C.Cr.P. art. 851. In order to obtain a new trial based on newly discovered evidence, the defendant has the burden of

showing (1) the new evidence was discovered after trial, (2) the failure to discover the evidence at the time of trial was not caused by lack of diligence, (3) the evidence is material to the issues at trial, and (4) the evidence is of such a nature that it probably would have produced a different verdict. **State v. Smith**, 96-0961 (La. App. 1st Cir. 6/20/97), 697 So.2d 39, 43. See also LSA-C.Cr.P. art. 851(3).

At a hearing on the motion for a new trial, Derreck Gahagan, a former employee of Boule's Prime House Restaurant, denied ever observing the defendant behave inappropriately with the victim or any other female employees at the restaurant. Gahagan further testified that, approximately one week before the alleged incident in this case, he was taking the trash out of the back door of the restaurant when he heard the defendant tell the victim, who was sitting behind the building smoking a cigarette, if she was caught smoking again she would be terminated. According to Gahagan, the victim became angry, and after the defendant went back inside, she stated she would sue the defendant if she could not smoke when she wanted to. She also commented to Gahagan that the defendant had been fired from Mandeville High School for touching someone. She stated, "they'll believe me before they believe him if I say he touched me." Gahagan claimed he dismissed the victim's statements as angry venting. When asked why he did not reveal this information after the defendant's arrest, Gahagan stated:

I thought it was B.S. charges. I figured it was going to blow over and he wasn't going to have to worry about nothing. There was no point in me going to court and missing work for no reason if it's something he didn't do. I didn't think he was going to be convicted of it, so I didn't say anything.

Gahagan claimed he told the defendant's son, Jeff Curtis, of the victim's threats after the conclusion of the defendant's trial. Gahagan also testified that the defendant occasionally consumed alcoholic beverages at work.

Brad Patterson, the current general manager at Boule's Prime House Restaurant, testified that on the night of the defendant's arrest, he arrived at the restaurant to find Gaylot too intoxicated to perform his duties. Patterson further testified that he heard rumors around the restaurant that the victim threatened to do "something" to the restaurant because she was disgruntled, and she had previously been terminated from the restaurant, rehired, and was threatened with termination again. According to Patterson,

the victim indicated she was "just kidding" when he asked her if she intended to do anything. He explained that he took the rumor lightly based upon his management experience in dealing with empty threats by disgruntled employees. Regarding his failure to come forth sooner, Patterson stated he was not aware of the actual charges against the defendant initially. Later, once he became aware of the nature of the charges, he claimed he did not think it "was going to be a serious type situation." Patterson denied ever witnessing the defendant do anything inappropriate to the victim or any other female employee.

At the conclusion of the hearing, the trial court denied the motion for a new trial, essentially finding that the evidence sought to be introduced was not new, was not credible, and would not have changed the outcome of the trial.

After a careful review of the record, we find no abuse of discretion in the trial court's denial of the defendant's motion for a new trial based upon newly discovered evidence. First, we note that the evidence alleged in the motion was not "new" evidence. The defendant has failed to show why the still photographic enlargements of shots from the video surveillance footage (that was in the possession of the defense prior to the trial) could not have been produced earlier and used at the trial. Furthermore, as the state correctly observes, the two witnesses in question were Boule Prime House Restaurant employees and were available to be interviewed prior to the trial. Thus, the defendant failed to show that, notwithstanding the exercise of reasonable diligence, the evidence was not discoverable before or during the trial. A motion for new trial is properly rejected when it is based on evidence which should have, with reasonable diligence, been discovered before or during trial. **State v. Brooks**, 01-1138 (La. App. 1st Cir. 3/28/02), 814 So.2d 72, 82, writ denied, 02-1215 (La. 11/22/02), 829 So.2d 1037. Furthermore, even if we found that the evidence was newly discovered, the defendant failed to establish that the evidence was of such a nature that it would probably have produced a different verdict at a retrial. The defendant did not sustain his burden of showing that the uncorroborated testimony of the defendant's employees, whose credibility is highly

questionable, or the enlarged photographic exhibits would have resulted in the trial judge finding the victim's account of the events to be less credible.

The trial court's decision on a motion for new trial will not be disturbed absent a clear abuse of discretion. **State v. Maize**, 94-0736 (La. App. 1st Cir. 5/5/95), 655 So.2d 500, 517, writ denied, 95-1894 (La. 12/15/95), 664 So.2d 451. Considering all of the evidence presented, and taking into consideration the trial court's specific credibility determinations, it was not shown that an injustice resulted from denial of the defendant's request for a new trial. This assignment of error also lacks merit.

For the foregoing reasons, the defendant's conviction and sentence are affirmed.

CONVICTION AND SENTENCE AFFIRMED.

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COURT OF APPEAL

STATE OF LOUISIANA

 **WELCH, J., DISSENTING.**

I respectfully dissent from that portion of the opinion finding no error in the trial court's admission of prior uncharged alleged evidence of other sex acts committed by defendant with female adults in a prosecution for indecent behavior with a juvenile. Moreover, I believe that the erroneous admission of the alleged acts of sexual misconduct is not harmless error under the circumstances of this case.

Louisiana Code of Evidence article 412.2 provides that evidence of other sex acts committed by the defendant involving assaultive behavior or which indicate a lustful disposition toward children may be admissible and may be considered for its bearing on any matter to which it is relevant subject to the balancing test provided in article 403. In this case, the trial court allowed evidence of uncharged alleged acts of sexual misconduct with adult females, identified and unidentified, to be presented to the jury in a prosecution for indecent behavior with a juvenile. I strongly disagree with the majority's position that the fact the other incidents involved adult females rather than juveniles in a prosecution for indecent behavior with a juvenile is "of no moment."

Recently, the Second Circuit Court of Appeal held that evidence of prior uncharged sexually inappropriate acts by a defendant with adult females was inadmissible under article 412.2 in a prosecution for indecent behavior with female juveniles. In **State v. Parker**, 42,311 (La. App. 2nd Cir. 8/15/07), 963 So.2d 497, writ denied, 2007-2053 (La. 3/7/08), 977 So.2d 896, the State was allowed to introduce evidence of inappropriate touching engaged in by defendant with three adult females. The State argued that the evidence of the defendant's "sexually assaultive behavior" was relevant to counter the defendant's theory of the case, to prove specific intent and the absence of mistake or accident. **State v. Parker**, 42,311 at p. 12, 963 So.2d at

506. The court disagreed, holding that because the prior alleged misconduct concerned actions of the defendant with adult females only, the evidence was inadmissible under article 412.2.¹

To convict defendant of indecent behavior with a juvenile, the State had to prove specific intent to arouse or gratify his sexual desires by his actions involving a child. La. R.S. 14:81. The defendant's prior sexual misconduct with female adults has very little, if any, relevance on the issue of whether he intended to commit a lewd and lascivious act with a juvenile. Any probative value this evidence may have is far outweighed by the danger this evidence would unfairly prejudice the defendant in the eyes of the jury, leading it to render a guilty verdict because of the prior acts rather than on the strength of the evidence on the offense for which he was charged. Therefore, I conclude that the trial court abused its discretion in allowing the prior acts of sexual misconduct with adult females to be admitted into evidence at trial.

The erroneous admission of evidence is subject to the harmless error analysis, which questions whether beyond a reasonable doubt the error could not have contributed to the guilty verdict actually returned by the jury. **State v. Haddad**, 99-1272, p. 9 (La. 2/29/00), 767 So.2d 682, 689, cert. denied sub nom. Louisiana v. Haddad, 531 U.S. 1070, 121 S.Ct. 757, 148 L.E.2d 660 (2001). If there is a reasonable probability that the evidence complained of contributed to the verdict, it cannot be concluded beyond a reasonable doubt that the error was harmless. **State v. Lee**, 524 So.2d 1176, 1191 (La. 1988) (on rehearing). The harmless error inquiry is not whether the inadmissible evidence did in fact sway the jury's guilt determination, but whether there is a reasonable possibility that the erroneously admitted evidence contributed to the guilty verdict. **State v. Lee**, 524 So.2d at 1184 and 1192.

After reviewing the record in this case, I believe there is a reasonable probability that the erroneously admitted evidence contributed to the jury's guilty verdict. The evidence of the defendant's guilt in this case, wherein the State emphasized to the jury that the charged conduct was characteristic of the defendant because he had

¹ Although the court found that the trial court abused its discretion in admitting the evidence, it concluded that the error was harmless.

committed similar acts before, is hardly overwhelming. There was conflicting evidence of whether the defendant actually touched the victim's breast. The evidence against defendant consisted primarily of the victim's testimony. Because of the conflicting nature of the evidence presented, the State's case rested largely on credibility determinations. Moreover, the trial court's error in allowing the admission of other act evidence was further compounded by the trial court's error in allowing the State to breach the pretrial agreement and call Casteel as a rebuttal witness, as her testimony went directly to the defendant's credibility. Under these circumstances, I cannot conclude that the guilty verdict was surely unattributable to the erroneously admitted evidence. Therefore, I would reverse the defendant's conviction, vacate his sentence, and remand this case to the district court for a new trial.

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2008 KA 0657

STATE OF LOUISIANA

VERSUS

NELSON J. CURTIS, JR.



McCLENDON, J., concurs, and assigns reasons.

Although the calling of the witness, Larissa Casteel, appears to have violated a reasonable interpretation of defense counsel's agreement with the state, I agree that the guilty verdict was surely unattributable to the error. Thus, I respectfully concur.