NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2007 KA 2235

STATE OF LOUISIANA

VERSUS

AUGUST VARNADO

Judgment Rendered: May 2, 2008

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Appealed from the
22nd Judicial District Court
In and for the Parish of Washington, Louisiana
Case No. 05CR393287

The Honorable Raymond S. Childress, Judge Presiding

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Walter P. Reed
District Attorney
Franklinton, Louisiana
Kathryn Landry
Special Appeals Counsel
Baton Rouge, Louisiana

Counsel for Appellee
State of Louisiana

Jerry Fontenot
Covington, Louisiana

Counsel for Defendant/Appellant
August Varnado

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BEFORE: GAIDRY, McDONALD, AND McCLENDON, JJ.

GAIDRY, J.

Defendant, August Varnado, was charged by bill of information with three counts of attempted aggravated kidnapping of a child. Defendant entered a plea of not guilty and was tried before a jury. The jury unanimously determined defendant was guilty as charged. The trial court sentenced defendant on each conviction of attempted aggravated kidnapping of a child to serve a period of ten years at hard labor with the first two years to be served without benefit of probation, parole or suspension of sentence.

The State subsequently instituted habitual offender proceedings, seeking to have defendant adjudicated a second felony habitual offender. Following a hearing, the trial court adjudicated defendant a second felony habitual offender and vacated his sentence on Count One. The trial court resentenced defendant on Count One to a term of twenty years at hard labor with the first two years to be served without the benefit of probation, parole or suspension of sentence. The trial court then ordered defendant's sentences on Counts Two and Three to be served concurrently with his sentence on Count One.

Defendant appeals, citing the following assignments of error:

1. The convictions were obtained in error since insufficient evidence was presented to convict the defendant of the crimes charged.

2. The trial court erred in allowing the State to submit into evidence and present to the jury, an extremely prejudicial videotape containing animated pornography which had no established link with the offenses charged.

3. The trial court erred by allowing the State to present to the jury, evidence of other offenses without a *Prieur* hearing having first been held.

4. The trial court erred by imposing excessive sentences upon the defendant.

FACTS

On July 6, 2005, C.M., A.D., S.D., T.G., and K.G., were walking back from a trip to a local convenience store, the Circle J in Bogalusa. As they walked toward the home of some of the children, a man, later identified as defendant, passed by in a blue, four-door vehicle. The vehicle was traveling in the opposite direction of the children, and when the vehicle passed the group, defendant waved at them.

C.M. grew frightened because she had seen defendant on a prior occasion, when he had exposed himself to her and her aunt, Shannon McKelphin, as they were walking alongside the street. Defendant eventually pled guilty to two counts of obscenity stemming from that incident.

The group of children continued walking toward home, and noticed defendant had driven around the block and was approaching them a second time. Defendant got close to them, stopped his vehicle, and rolled down the driver's side window. Defendant then told the children to come closer to his vehicle and asked if they wanted a ride. None of the children got in the car and the entire group ran to the home of Shereete Dillon, who was the mother of three of the children in the group.

According to Dillon, the children raced into her home and told her that a man asked them to get into his car. One of the children knew this man as the man a relative had gone to court over. Dillon contacted the police, who came to her residence and spoke with her and the children about the incident.

Lieutenant Charles Helton of the Bogalusa Police Department was dispatched to Dillon's residence at approximately 2:35 p.m. on July 6, 2005. When Lt. Helton arrived at Dillon's residence, he noted that the children seemed excited and scared. Lt. Helton obtained information from the

children, including a description of the vehicle involved. A license-plate number initially provided to Lt. Helton failed to be accurate.

The following day, Dillon saw the vehicle that the children had described near her residence. Dillon contacted the police again and also informed the police that one of the children had identified defendant as the driver.

Lt. Helton ran defendant's name through the NCIS computer and obtained records for defendant's vehicle that matched the general description that he had been provided by the children. Lt. Helton contacted Agent Denise Smith, who worked for the Louisiana Probation and Parole Department and assisted in supervising defendant, and requested assistance in locating defendant.

Agent Smith testified that she and four other agents proceeded to meet Lt. Helton at a church on Marshall Richardson Road in Bogalusa. Once the officials met, they developed a plan whereby Lt. Helton would return to Dillon's house to make sure the children were secure, and Agent Smith and Agent Mike Breland would proceed to defendant's residence. The two other agents were assigned to canvass the area surrounding Dillon's residence in the event they encountered defendant.

Agent Smith arrived at defendant's residence on Cora Williams Drive. At the time, Raymond Varnado, defendant's brother, was the only one home. In response to Agent Smith's questions, Raymond suggested defendant could be located at the local Wal-Mart store.

Agent Smith contacted Agent Brian Mims, who proceeded to the Wal-Mart and confirmed the presence of defendant's vehicle in the parking lot. While Agent Mims maintained surveillance on defendant's vehicle, Agent

Stewart entered the Wal-Mart and made a possible identification of defendant in the toy section.

Agent Smith arrived at the Wal-Mart and proceeded into the store to locate defendant. She encountered defendant walking out of an aisle in the toy section. After exchanging greetings, Agent Smith escorted defendant out of the store and informed him that he was wanted for questioning by the Bogalusa Police Department. Before he was placed in one of the agents' units, defendant asked twice if this was regarding the "girls on Martin Luther King Street."

After defendant was turned over to the Bogalusa Police Department, Agent Smith returned to defendant's residence to ensure there were no children in the residence and determine if defendant possessed any contraband. While at defendant's residence, Agent Smith observed and photographed a large bowl of candy set up in a decorative display. Agent Smith also seized a videotape from underneath a piece of furniture in the living room entitled, "School Girl Orgies." A portion of this videotape was played for the jury. The videotape depicted animated images of children exiting a bus and engaging in sexual acts. A large bag of candy was also seized from defendant's vehicle.

Following defendant's arrest, C.M. identified defendant from a photograph as the person in the vehicle who asked if she wanted a ride. C.M. also told Agent Smith that she had previously gone to court for a matter involving defendant because she had seen him do "bad things."

At the time of trial, C.M. was thirteen years old. During her testimony, she recalled how she and the other children were returning from the Circle J store when defendant passed them in a blue vehicle traveling in the opposite direction. According to C.M., defendant waved as he passed

the group, which scared her because she had previously been the victim of one of defendant's obscenity convictions. As the group kept walking, defendant drove around the block and again approached the group in his vehicle. The second time defendant came upon the group he stopped, rolled down his window, and asked them to "come here." According to C.M., none of the children walked near the vehicle and they began running towards her mother's home. C.M. identified defendant in court as the person driving the vehicle and asking the children to come over to his vehicle.

K.G. testified at trial. K.G. confirmed C.M.'s testimony that as the group walked home from the store, defendant passed them, drove around the block, and then drove up and asked them if they wanted a ride. According to K.G., she felt as if defendant wanted her to get into the vehicle with him. Out of fear, she ran away.

T.G., who was seventeen years old at the time of trial, also testified. T.G. testified that as the group of children was walking home from the store, defendant drove past them once, then returned a second time. Defendant then stopped, rolled down his window and asked the group, "Come here, y'all want a ride?" T.G. said she ran to Dillon's home following this incident. T.G. also identified defendant in court as the individual who asked the group if they wanted a ride.

Sharon Parrott, defendant's girlfriend, testified on his behalf. According to Parrott, on July 6, 2005, she met defendant for lunch at The Dragon Palace Restaurant around 11:50 a.m. Parrott testified that they left the restaurant around 1:30 p.m., and that defendant told her he was going home to take a bath and a nap before the evening's church services. Parrott stated that she followed defendant from the restaurant as far as Long Avenue, and that she spoke to defendant on the phone at approximately 2:30

p.m.[1] Parrott assumed that defendant was at home between the time she last saw him and when she spoke to him on the phone. Parrott also testified that defendant never told her that he was not supposed to be around children because of his probation.

Robyn Talley, another friend of defendant's, testified that she accompanied defendant and Parrott for lunch on July 6, 2005.

Raymond Varnado, defendant's brother, testified at trial. Raymond stated that he shared the house located at 1021 Cora Williams Drive in Bogalusa with defendant. Raymond recalled that on July 6, 2005, he and defendant ate breakfast at Hardee's from 9:00 to 10:00 a.m., then went to Wal-Mart, then went home. When the two men returned from Wal-Mart, defendant's girlfriend called and he left to meet her for lunch. Raymond did not accompany defendant to lunch. Raymond also denied that the videotape seized from his residence ("School Girl Orgies") belonged to him.

Defendant did not testify.

SUFFICIENCY OF THE EVIDENCE

In defendant's first assignment of error, he argues that his convictions were obtained in error since insufficient evidence was presented to convict him of the crimes charged. Specifically, defendant contends that the State failed to present any evidence that defendant made more than an initial request or inquiry to provide the children with transportation. Defendant further points to the lack of evidence indicating that he offered the children anything to accept his offer or made any threats if they declined his offer. Moreover, defendant argues that no witnesses testified that defendant showed or displayed any pornographic materials or candy to the children.

[1] The Long Avenue sighting of defendant was five blocks from where the incident occurred.

The standard of review for sufficiency of the evidence to uphold a conviction is whether, 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. In conducting this review, we also must be expressly mindful of Louisiana's circumstantial evidence test, which states in part, assuming every fact to be proved that the evidence tends to prove, in order to convict, every reasonable hypothesis of innocence is excluded. Where the key issue is the defendant's identity as the perpetrator, rather than whether or not the crime was committed, the State is required to negate any reasonable probability of misidentification. Positive identification by only one witness may be sufficient to support the defendant's conviction. *State v. Wright*, 98-0601, pp. 2-3 (La. App. 1st Cir. 2/19/99), 730 So.2d 485, 486-87, writs denied, 99-0802 (La. 10/29/99), 748 So.2d 1157, 2000-0895 (La. 11/17/00), 773 So.2d 732 (citing La. R.S. 15:438).

When a conviction is based on both direct and circumstantial evidence, the reviewing court must resolve any conflict in the direct evidence by viewing that evidence in the light most favorable to the prosecution. When the direct evidence is thus viewed, the facts established by the direct evidence and the facts reasonably inferred from the circumstantial evidence must be sufficient for a rational juror to conclude beyond a reasonable doubt that the defendant was guilty of every essential element of the crime. *State v. Wright*, 98-0601 at p. 3, 730 So.2d at 487.

Prior to its 2006 amendment, La. R.S. 14:44.2 defined aggravated kidnapping of a child as:

> A. Aggravated kidnapping of a child is the unauthorized taking, enticing, or decoying away and removing from a location for an unlawful purpose by any person other than a parent, grandparent, or legal guardian of a child under the age of twelve years with the intent to secret the child from his parent or legal guardian.

Louisiana Revised Statutes 14:27 defines attempt as:

> A. Any person who, having a specific intent to commit a crime, does or omits an act for the purpose of and tending directly toward the accomplishing of his object is guilty of an attempt to commit the offense intended; and it shall be immaterial whether, under the circumstances, he would have actually accomplished his purpose.

Specific intent is that state of mind which exists when the circumstances indicate that the offender actively desired the prescribed criminal consequences to follow his act or failure to act. La. R.S. 14:10(1). Specific intent may be proved by direct evidence, such as statements by a defendant, or by inference from circumstantial evidence, such as defendant's actions or facts depicting circumstances. *State v. Crotwell*, 2000-2551, pp. 4-5 (La. App. 1st Cir. 11/9/01), 818 So.2d 34, 38-39.

Viewing the evidence in the light most favorable to the prosecution, we find the evidence sufficiently supports defendant's convictions for attempted aggravated kidnapping of a child. The State presented evidence that defendant passed the children, then drove around the block and stopped his vehicle in their vicinity. Defendant then asked the children, who were not accompanied by any parent, grandparent or legal guardian, if they wanted a ride. The jury clearly determined this offer was an attempt to take these children away from their parents or guardians by getting them into his vehicle.

In determining whether the action of a defendant is an attempt, the totality of the facts and circumstances presented by each case must be evaluated. The overt act need not be the ultimate step toward or the last

possible act in the consummation of the crime attempted. It is the intent to commit the crime, not the possibility of success that determines whether the act or omission constitutes the crime of attempt. *State v. Smith*, 94-3116, p. 3 (La. 10/16/95), 661 So.2d 442, 444.

Second, we note that the State presented sufficient evidence for the jury to conclude that defendant intended to take the children for some unlawful purpose. Defendant previously pled guilty to obscenity charges stemming from an incident involving one of the present victims, C.M., and was on probation for the obscenity convictions when the instant offenses occurred. Defendant first drove by the group, which included C.M., then returned and invited these children into his vehicle for a ride. Defendant's residence showed signs of "grooming" in the form of an elaborate candy display.[2] Agent Mims testified that the large bag of candy recovered from defendant's vehicle was inconsistent with the amount of candy usually kept on hand by diabetics, although the defense maintained defendant was a diabetic. Further, a videotape containing animated images of children engaged in sexual acts was seized from defendant's residence. Clearly, the jury had a reasonable basis to conclude that defendant intended to take these children away from their parents or guardian for some unlawful purpose.[3] Finally, the jury obviously rejected defendant's contention that the candy in his home and vehicle was for controlling his diabetes. Thus, a rational juror

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[2] Agent Smith testified that in connection with her duties of supervising sex offenders, she is trained to identify certain things in order to prevent further offenses. As a result of the types of things she is trained to observe, Smith photographed the display of candy in defendant's residence.

[3] Moreover, we note that the State presented evidence that as a condition of defendant's probation on his prior obscenity conviction, he was ordered to stay away from children. Accordingly, the mere act of being alone with these children in his vehicle, which defendant clearly attempted to accomplish, was a violation of his probation, and arguably an unlawful purpose that would satisfy this element of the offense. See La. Code Crim. P. arts. 895-899; *State v. Davis*, 375 So.2d 69, 73-74 (La. 1979).

could have concluded that the State proved beyond a reasonable doubt that defendant's request of the children to come over to his vehicle constituted an attempt to entice these children into his car with the specific intent to commit an unlawful act. See *State v. Ordodi*, 2006-0207, p. 14 (La. 11/29/06), 946 So.2d 654, 662.

Accordingly, we find the evidence sufficiently supports defendant's convictions for attempted aggravated kidnapping of a child. This assignment of error is without merit.

ADMISSIBILITY OF VIDEOTAPE

In his second assignment of error, defendant argues the trial court erred in allowing the State to play a portion of a videotape that was unfairly prejudicial to defendant. Prior to trial, the trial court denied defendant's motion to suppress the videotape.

All relevant evidence is admissible, except as otherwise provided by law. La. Code Evid. art. 402. Louisiana Code of Evidence art. 401 provides that "relevant evidence" is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. However, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, risk of misleading the jury, or by considerations of undue delay, or waste of time. La. Code Evid. art. 403. In questions of relevancy, much discretion is vested in the trial court. Ultimately, questions of relevancy and admissibility are discretion calls for the trial court, and its determinations regarding relevancy and admissibility should not be overturned absent a clear abuse of discretion. See *State v. Duncan*, 98-1730, p. 10 (La. App. 1st Cir. 6/25/99), 738 So.2d 706, 712-13.

The videotape at issue is entitled "School Girl Orgies" and was seized from underneath a sofa in the living room of defendant's residence that he shared with his brother, Raymond. The videotape is animated and is not recorded in English. In arguing that the probative value of a portion of the videotape outweighed the dangers of unfair prejudice, the prosecutor argued that when the tape was seized, it was cued to the end of a scene, which then immediately led into a scene depicting children getting off a blue bus. The children then go into a wooded area and are depicted having sexual contact. According to the prosecutor, the circumstances of the scene indicate the female's participation is not willful.

The prosecutor further argues that this particular portion of the videotape was probative of the defendant's intent to take these children away for an unlawful purpose, because this particular animated format is the type of format that one would display to children in an effort to groom them for further sexual contact.

Defendant argues that the videotape was not located at the scene of the incident at issue, nor was there any evidence introduced to indicate that defendant intended to show the videotape to the children, or that the videotape was or could be used to entice the children into engaging in sexual activity.

In ruling a portion of the videotape was admissible, the trial court found that it was probative of defendant's intent to entice the children away for an unlawful purpose.[4] We agree.

[4] In brief, defendant quotes the trial court as stating that defendant was not being tried for possession of pornography, and that under the Article 403 balancing test, the "more that's piled on, the greater the chance of this simply being too prejudicial to the point that the jury would view this as a trial of whether or not this defendant is a sick pervert versus is he guilty of ... aggravated kidnapping of a child." We note that the trial court stated these words with respect to other pornographic materials seized from defendant's

We note that only a portion of the fifty-minute animated videotape was played for the jury. The jury was well aware that the videotape was found at defendant's residence and not in his vehicle, as well as the fact the videotape was never played for the children.

However, defendant's intent to take these children away for an unlawful purpose was a major issue in this trial. Clearly, the State attempted to show that defendant, despite having been ordered to stay away from children, had certain items in his residence that were indicative of tools used to groom children for sexual activity. The candy display was one such item. Although Agent Smith never specifically testified that the videotape was another grooming item, the videotape depicting animated sexual activity involving children is clearly probative of defendant's intent to entice these children away for an unlawful purpose. However, the defense brought out at trial that possession of such an animated videotape was not in violation of the law.

We find the trial court's admission of the portion of the videotape was not an abuse of discretion because the videotape's probative value of the defendant's intent clearly outweighed any danger of unfair prejudice, misleading of the jury, confusion of the issues, or undue delay.

This assignment of error is without merit.

EVIDENCE OF OTHER OFFENSES

In defendant's third assignment of error, he argues the trial court erred in allowing the State to present evidence of other offenses without a hearing having been first held in accordance with the requirements of *State v. Prieur*, 277 So.2d 126, 128 (La. 1973) and La. Code Evid. art. 404(B)(1).

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residence. The trial court suppressed these items and noted that adults were depicted in these materials.

Specifically, defendant argues the State described defendant as a "sex offender" in its opening statement and throughout the trial. Defendant further argues that the State alleged that one of the present victims (C.M.) was the same victim of one of defendant's prior obscenity convictions, despite there being no pretrial determination of such. Finally, defendant argues that such evidence is not admissible under La. Code Evid. art. 412.2 because defendant was not charged with a crime "involving sexually assaultive behavior."

The record indicates that in the State's response to defendant's discovery request, the State set forth that it would be introducing evidence of other crimes admissible under La. Code Evid. arts. 404 and 412.2. Defendant filed a pretrial motion for a *Prieur* hearing regarding all "404(b) evidence" the State intended to introduce at trial. The record also clearly contains a transcript of a hearing conducted by the trial court wherein defendant presented his motions to suppress a statement and identification, as well as the *Prieur* issue regarding admissibility of defendant's prior obscenity convictions. Based on the record, the trial court clearly held a *Prieur* hearing and held defendant's prior convictions were admissible. Accordingly, this assignment of error is moot.

Moreover, we note that in the opening statement, the prosecutor made several references to defendant's prior convictions for obscenity; C.M.'s involvement in the incident from which the prior convictions arose; and a reference to defendant being a "sex offender." At no time did defendant lodge an objection to these references.

Defense counsel acknowledged his client's prior obscenity convictions. Moreover, during Agent Smith's testimony wherein she used the term "sex offender" to describe grooming techniques, there was no

objection by defendant. Moreover, when Agent Smith testified about what C.M. told her regarding her prior experience with defendant, there was no objection. Nor did defense counsel object during C.M.'s or Shannon McKelphin's testimony regarding defendant's previous actions towards them resulting in his convictions for obscenity.

Because defendant failed to make any type of contemporaneous objection to the introduction of any evidence regarding his prior obscenity convictions, he is precluded from raising this argument on appeal. See La. Code Crim. P. art. 841(A), La. Code Evid. art. 103(A)(1); see also *State v. Rogers*, 98-2501, p. 5 (La. App. 1st Cir. 9/24/99), 757 So.2d 655, 659, writ denied, 99-3526 (La. 6/16/00), 764 So.2d 962.

EXCESSIVE SENTENCES

In his final assignment of error, defendant argues the trial court erred by imposing excessive sentences.

Article I, Section 20 of the Louisiana Constitution prohibits the imposition of excessive punishment. Even a sentence within statutory limits may violate a defendant's constitutional right against excessive punishment and is subject to appellate review. *State v. Sepulvado*, 367 So.2d 762, 767 (La. 1979). A sentence is constitutionally excessive if it is grossly disproportionate to the severity of the offense or is nothing more than a purposeless and needless infliction of pain and suffering. *State v. Dorthey*, 623 So.2d 1276, 1280 (La. 1993). A sentence is grossly disproportionate if, when the crime and punishment are considered in light of the harm done to society, it shocks the sense of justice. *State v. Hogan*, 480 So.2d 288, 291 (La. 1985); *State v. Lanieu*, 98-1260, p. 12 (La. App. 1st Cir. 4/1/99), 734 So.2d 89, 97, writ denied, 99-1259 (La. 10/8/99), 750 So.2d 962. A trial court is given wide discretion in the imposition of sentences within statutory

limits, and the sentence imposed by it should not be set aside as excessive in the absence of manifest abuse of discretion. *State v. Lobato*, 603 So.2d 739, 751 (La. 1992).

The Louisiana Code of Criminal Procedure sets forth items that must be considered by the trial court before imposing sentence. La. Code Crim. P. art. 894.1. The trial court need not recite the entire checklist of Article 894.1, but the record must reflect that it adequately considered the criteria. *State v. Herrin*, 562 So.2d 1, 11 (La. App. 1st Cir.), writ denied, 565 So.2d 942 (La. 1990). In light of the criteria expressed by Article 894.1, a review for individual excessiveness should consider the circumstances of the crime and the trial court's stated reasons and factual basis for its sentencing decision. *State v. Watkins*, 532 So.2d 1182, 1186 (La. App. 1st Cir. 1988). Remand for full compliance with Article 894.1 is unnecessary when a sufficient factual basis for the sentence is shown. *State v. Lanclos*, 419 So.2d 475, 478 (La. 1982).

For his convictions of attempted aggravated kidnapping of a child, defendant was eligible to receive a sentence of no more than twenty years, with at least one year of the sentence imposed to be without benefit of parole, probation, or suspension of sentence. La. R.S. 14:27(D)(3) & 44.2(B)(2) & 44.1(C).

In this case, defendant was sentenced on Counts Two and Three to ten years at hard labor with the first two years to be served without benefit of probation, parole, or suspension of sentence. These sentences represent half of the terms defendant was eligible to receive. Defendant had a previous conviction for two counts of obscenity and was on probation when he committed the instant offenses. Although defendant argues he only asked these children one time if they wanted a ride, the record indicates when

defendant first encountered the group of children, he made a deliberate effort to drive by them a second time before asking them if they wanted a ride. Once asked, the children immediately began running from defendant. Under these circumstances, we do not find these sentences to be excessive.

We note that defendant's conviction on Count One was enhanced under the Habitual Offender Law following defendant's adjudication as a second felony offender. Under this provision, defendant was eligible to receive a sentence of ten to forty years at hard labor. La. R.S. 14:27 & 44.1(C) & 44.2(B)(1) & 15:529.1(A)(1)(a). Defendant was sentenced to a medium range of twenty years on this count. Considering that this conviction involved one of the same victims as defendant's prior obscenity convictions and that defendant made a special effort to engage this particular victim (C.M.), we find the trial court did not abuse its discretion in sentencing defendant to twenty years as a second felony habitual offender for his conviction on Count One.

This assignment of error is without merit.

DECREE

For the above reasons, we affirm the defendant's convictions, habitual offender adjudication, and sentences.

CONVICTIONS, HABITUAL OFFENDER ADJUDICATION, AND SENTENCES AFFIRMED.