NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 KA 0833

STATE OF LOUISIANA

VERSUS

GUY J. BOUDREAUX, JR.

On Appeal from the 22nd Judicial District Court
Parish of St. Tammany, Louisiana
Docket No. 451,303, Division "I"
Honorable Reginald T. Badeaux, III, Judge Presiding

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Guy J. Boudreaux, Jr.

BEFORE: CARTER, C.J., PARRO, AND HIGGINBOTHAM, JJ.

Judgment rendered November 9, 2011

PARRO, J.

The defendant, Guy J. Boudreaux, Jr., was charged by bill of information with fifty-one counts (counts 1-51) of possession of pornography involving juveniles, a violation of LSA-R.S. 14:81.1, and pled not guilty on all counts. On counts 1-7, 9-11, 13-37, 39-40, and 42-51, he was found guilty as charged by unanimous verdict. On counts 8, 12, 38, and 41, he was found guilty of the responsive offense of attempted possession of pornography involving juveniles, a violation of LSA-R.S. 14:27 and LSA-R.S. 14:81.1, by unanimous verdict. On counts 1-7, 9-11, 13-37, 39-40, and 42-51, on each count, he was sentenced to ten years of imprisonment at hard labor, without benefit of probation, parole, or suspension of sentence. On counts 8, 12, 38, and 41, he was sentenced to five years of imprisonment at hard labor, without benefit of probation, parole, or suspension of sentence. The court ordered the sentences to run concurrently with each other. The defendant moved for reconsideration of sentence, but the motion was denied. He now appeals, contending: (1) the trial court abused its discretion in denying the motion to suppress other crimes evidence; (2) the trial court abused its discretion in imposing maximum sentences; and (3) the trial court abused its discretion in denying the motion to reconsider sentence. For the following reasons, we affirm the convictions and sentences on all counts.

FACTS

In April of 2006, Special Agent Calvin Williams of the United States Department of Homeland Security, Child Exploitation Unit, investigated a criminal organization that was operating child pornography websites throughout the world. The websites included "Home Collection 102," and "Hard Lovers 1012." They sold only child pornography. Several individuals, including an individual in St. Tammany Parish, were identified as having made purchases of child pornography, through a "Pay Pal" account, from the websites. PayPal transaction logs identified purchases made on October 13, 2006, October 28, 2006, and November 30, 2006, by "Guy

Boudreaux," of 14202 South Lakeshore Drive, Covington, IP address[1] "68.222.5.5," and email address "financeguy_27@hotmail.com," using a credit card ending with "6451."

On February 21, 2008, Agent Williams and other police officers went to the listed address and found the defendant at a computer in the living room. After being advised of his **Miranda**[2] rights, the defendant admitted he owned the computer and his email address was "financeguy_27@hotmail.com." He also confirmed that his credit card had been used to make the purchases at issue, but claimed he no longer had the card. The defendant claimed he remembered two of the purchases. He also indicated he owned a damaged laptop in his closet. According to Agent Williams, he asked the defendant if he had used the laptop to access child pornography, and the defendant answered affirmatively. According to Agent Williams, the defendant also admitted making the purchases reflected in the PayPal transaction logs for "teen pornography." Agent Williams indicated he told the defendant the images on the Home Collection website were of under-age "teens," and the defendant confirmed he had viewed the images. According to Agent Williams, the defendant stated he viewed the pornography at least twice a week, or once every other week. Agent Williams also stated that the defendant indicated he had used the desktop computer to make the purchases.

Approximately two hours later, Agent Williams and St. Tammany Parish Sheriff's Office Detective Rachel Smith conducted a formal recorded interview with the defendant. The defendant was again advised of his **Miranda** rights. He indicated he had lived at the address since 2004. The police advised him they were investigating purchases made using his credit card. The defendant stated he owned the computer in the living room and a damaged laptop in the bedroom. He claimed any purchases in 2006 had to have been made on the laptop because the other computer was too new. He indicated his email address was

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[1] Agent Williams indicated that an IP address is an address assigned to each computer.

[2] **Miranda v. Arizona**, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

"financeguy_27@hotmail.com." He conceded he had viewed pornography on the internet, but claimed it only involved adults and teens, which he defined as persons who were eighteen years old, nineteen years old, or in their early twenties. The defendant claimed to remember only one of the three purchases being investigated. The police advised him that Hard Lovers and Home Collection were child pornography websites and the defendant indicated he did not remember accessing them every single day, but he had viewed pornography a couple of times a week. The police asked him whether he saw child pornography on the referenced websites, and the defendant replied he saw some pictures of teens younger than he was looking for. The defendant indicated he had downloaded videos of teens "that were more developed." The police asked him what they would find on his computer in regard to child pornography, and he replied, "Nothing that I know of." A subsequent search of the defendant's computers revealed numerous items of child pornography.

OTHER CRIMES EVIDENCE

In assignment of error number 1, the defendant argues that the trial court erred in denying his motion to suppress other crimes evidence. He argues the images from his laptop did not form an integral part of the charged crimes. He also argues that the state failed to give him sufficient notice of its intent to use this evidence. Additionally, he argues that the evidence was more prejudicial than probative.

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. LSA-C.E. art. 401. All relevant evidence is admissible except as otherwise provided by positive law. Evidence which is not relevant is not admissible. LSA-C.E. art. 402. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or by considerations of undue

delay, or waste of time. LSA-C.E. art. 403.

It is well settled that courts may not admit evidence of other crimes to show the defendant as a man of bad character who has acted in conformity with his bad character. LSA-C.E. art. 404(B)(1). Evidence of other crimes, wrongs, or acts committed by the defendant is generally inadmissible because of the substantial risk of grave prejudice to the defendant. However, the state may introduce evidence of other crimes, wrongs, or acts if it establishes an independent and relevant reason, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. LSA-C.E. art. 404(B)(1). Upon request by the accused, the state must provide the defendant with notice and a hearing before trial if it intends to offer such evidence. Even when the other crimes evidence is offered for a purpose allowed under Article 404(B)(1), the evidence is not admissible unless it tends to prove a material fact at issue or to rebut a defendant's defense. The state also bears the burden of proving that the defendant committed the other crimes, wrongs, or acts. **State v. Rose**, 06-0402 (La. 2/22/07), 949 So.2d 1236, 1243.

Any inculpatory evidence is "prejudicial" to a defendant, especially when it is "probative" to a high degree. **State v. Germain**, 433 So.2d 110, 118 (La. 1983). As used in the balancing test, "prejudicial" limits the introduction of probative evidence of prior misconduct only when it is unduly and unfairly prejudicial. **Id**; see also **Old Chief v. United States**, 519 U.S. 172, 180, 117 S.Ct. 644, 650, 136 L.Ed.2d 574 (1997) ("The term 'unfair prejudice,' as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged."). See also **Rose**, 949 So.2d at 1244.

Louisiana Code of Evidence article 404(B)(1) also authorizes the admission of evidence of other crimes, wrongs, or acts when the evidence "relates to conduct that constitutes an integral part of the act or transaction that is the subject of the present

proceeding." In **State v. Brewington**, 601 So.2d 656, 657 (La. 1992) (per curiam), the Louisiana Supreme Court indicated its approval of the admission of other crimes evidence, under this portion of LSA-C.E. art. 404(B)(1), "when it is related and intertwined with the charged offense to such an extent that the state could not have accurately presented its case without reference to it."

The *res gestae* doctrine in Louisiana is broad and includes not only spontaneous utterances and declarations made before or after the commission of the crime, but also testimony of witnesses and police officers pertaining to what they heard or observed during or after the commission of the crime if a continuous chain of events is evident under the circumstances. **State v. Taylor**, 01-1638 (La. 1/14/03), 838 So.2d 729, 741, cert. denied, 540 U.S. 1103, 124 S.Ct. 1036, 157 L.Ed.2d 886 (2004). Further, the *res gestae* doctrine incorporates a rule of narrative completeness by which, "the prosecution may fairly seek to place its evidence before the jurors, as much to tell a story of guiltiness as to support an inference of guilt, to convince the jurors a guilty verdict would be morally reasonable as much as to point to the discrete elements of a defendant's legal fault." **Taylor**, 838 So.2d at 743 (quoting **Old Chief v. United States**, 519 U.S. at 188, 117 S.Ct. at 654.).

Additionally, LSA-C.E. art. 412.2 provides:

> 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.
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> B. In a case in which the state intends to offer evidence under the provisions of this Article, the prosecution shall, upon request of the accused, provide reasonable notice in advance of trial of the nature of any such evidence it intends to introduce at trial for such purposes.
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> C. This Article shall not be construed to limit the admission or consideration of evidence under any other rule.

Approximately two weeks prior to trial, the state filed a notice of intent to offer

evidence, under LSA-C.E. arts. 412.2, 801(D)(4), and 404(B), "of the handful of pornographic images that were taken off the defendant's [laptop] during a recent forensic review of the computer." The defense moved to suppress the evidence from the laptop as unrelated to the investigation of the case and as more prejudicial than probative.

At the hearing on the motion, the state argued the laptop was seized from the defendant at the same time as his other computer, and the evidence from the laptop was an integral part of the whole investigation for possession of child pornography based on purchases from a known child pornography website in 2006. The state argued "[t]he agent" had viewed everything in the collection purchased by the defendant and it was all child pornography, i.e., sexual acts involving children under seventeen. The state argued the laptop was damaged and so the child pornography was recovered from the defendant's desktop computer first but, after additional assets and time were devoted to the laptop, twenty-five photographs of known child pornography were also recovered from that computer. The state also argued that the evidence from the laptop was admissible under the "lustful disposition" language of LSA-C.E. art. 412.2. Additionally, the state argued that the evidence from the laptop was admissible under LSA-C.E. art. 404(B) to show the defendant's intent, knowledge, and absence of mistake. The state indicated it had not charged the defendant with any counts based on the evidence on the laptop and had no objection to a limiting instruction on the use of the evidence.

The defense argued that the evidence from the laptop was uncharged misconduct, of which it had only been given two weeks notice, and the relevance of the evidence was outweighed by its potential for unfair prejudice.

The state responded that the defense had always known about the information from the report of Calvin Williams, which provided detailed information about the three purchases made by the defendant from known child pornography websites, as well as the type of sexual behavior, the type of sexual acts, and the ages of the

children involved. The state argued the defendant had indicated that he purchased the laptop in 2002 and, before it stopped working in 2006, he used it to make purchases of known child pornography. The state indicated U.S. Secret Service Special Agent Shawn Connor, who had initially indicated that efforts to create a bit-for-bit image from the laptop met with negative results, would be available for questioning at trial.

The trial court denied the motion to suppress. The court found that, although the evidence at issue was prejudicial, it was also relevant and reliable. The court held the probative value of the evidence outweighed its prejudicial effect. The court indicated it would give a limiting instruction during trial, upon request of the defense, and certainly at the end of the trial. Additionally, the court found the evidence at issue proved a lustful disposition toward children under LSA-C.E. art. 412.2. The court did not specifically address the claim of insufficient notice. The ruling denying the motion to suppress, however, indicates the court did not find two weeks notice insufficient. Further, to the extent the challenged evidence was part of the *res gestae* of the offenses, no notice was required. See **State v. Millien**, 02-1006 (La. App. 1st Cir. 2/14/03), 845 So.2d 506, 514.

When a trial court denies a motion to suppress, factual and credibility determinations should not be reversed in the absence of a clear abuse of the trial court's discretion, i.e., unless such ruling is not supported by the evidence. See **State v. Green**, 94-0887 (La. 5/22/95), 655 So.2d 272, 280-81. However, a trial court's legal findings are subject to a *de novo* standard of review. See **State v. Hunt**, 09-1589 (La. 12/1/09), 25 So.3d 746, 751.

We find no error or abuse of discretion by the trial court in denying the motion to suppress. The evidence of child pornography contained on the defendant's laptop was related and intertwined with the charges of pornography involving juveniles against the defendant to such an extent that the state could not have accurately presented its case without reference to the evidence. In his taped interview, the

defendant stated the pornography purchases at issue had been made using the laptop computer. He also stated he had stored movies on the laptop. This evidence constituted an integral part of the defendant's crime and was part of the *res gestae*. Further, assuming, for sake of argument, that the balancing test of LSA-C.E. art. 403 is applicable to integral act evidence admissible under LSA-C.E. art. 404(B)(1),[3] that test was satisfied in this matter. The defendant claimed he never intended to download "child" pornography. The fact he had child pornography on more than one computer was highly probative of his intent, knowledge, and the absence of mistake or accident. The child pornography on the laptop was also indicative of the defendant's lustful disposition toward children. Accordingly, the prejudicial effect to the defendant from the challenged evidence did not rise to the level of undue or unfair prejudice when balanced against the probative value of the evidence.

This assignment of error is without merit.

EXCESSIVE SENTENCE

The defendant combines assignments of error numbers 2 and 3. He argues "the maximum sentence" was excessive because he was a first offender, with no history of prior delinquency or criminal activity, who had provided honorable service to his country as a Marine.

Article I, Section 20, of the Louisiana Constitution prohibits the imposition of excessive punishment. Although a sentence may be within statutory limits, it may violate a defendant's constitutional right against excessive punishment and is subject to appellate review. Generally, a sentence is considered excessive if it is grossly disproportionate to the severity of the crime or is nothing more than the needless imposition of pain and suffering. A sentence is considered grossly disproportionate if, when the crime and punishment are considered in light of the harm to society, it is so disproportionate as to shock one's sense of justice. A trial judge is given wide discretion in the imposition of sentences within statutory limits,

[3] The Louisiana Supreme Court has left open the question of the applicability of the Article 403 test to integral act evidence admissible under LSA-C.E. art. 404(B)(1). See **State v. Colomb**, 98-2813 (La. 10/1/99), 747 So.2d 1074, 1076 (per curiam).

and the sentence imposed should not be set aside as excessive in the absence of manifest abuse of discretion. **State v. Hurst**, 99-2868 (La. App. 1st Cir. 10/3/00), 797 So.2d 75, 83, writ denied, 00-3053 (La. 10/5/01), 798 So.2d 962. Maximum sentences may be imposed for the most serious offenses and the worst offenders, or when the offender poses an unusual risk to the public safety due to his past conduct of repeated criminality. **State v. Miller**, 96-2040 (La. App. 1st Cir. 11/7/97), 703 So.2d 698, 701, writ denied, 98-0039 (La. 5/15/98), 719 So.2d 459.

Whoever commits the crime of possession of pornography involving juveniles shall be fined not more than ten thousand dollars and shall be imprisoned at hard labor for not less than two years or more than ten years, without benefit of parole, probation, or suspension of sentence. LSA-R.S. 14:81.1(E)(1) (prior to amendment by 2010 La. Acts, No. 516, § 1). On counts 1-7, 9-11, 13-37, 39-40, and 42-51, on each count, the defendant was sentenced to ten years at hard labor, without benefit of probation, parole, or suspension of sentence. Whoever attempts to commit the crime of possession of pornography involving juveniles shall be fined or imprisoned or both, in the same manner as for the offense attempted; such fine or imprisonment shall not exceed one-half of the largest fine, or one-half of the longest term of imprisonment prescribed for the offense so attempted, or both. See LSA-R.S. 14:27(D)(3). On counts 8, 12, 38, and 41, he was sentenced to five years of imprisonment at hard labor, without benefit of probation, parole, or suspension of sentence. The court ordered the sentences to run concurrently with each other. The court indicated, because this was a first offense, it recommended the defendant for consideration under the pilot program of LSA-R.S. 15:550.

The court noted the defendant had been found guilty as charged on forty-seven counts of possession of child pornography, and found guilty of attempted possession of child pornography on four counts. The trial court referenced this court to State's Exhibit #1, a videotape of a child, aged between four and six years old, being raped by her own father. The trial court found the exhibit to be "one of

the most horrific things this jury or anybody else had to see." The court found the exhibit showed the degradation and humiliation of a helpless victim, a child. The court found the state proved that the defendant had acquired State Exhibit #1 over the computer by himself. The court noted that at least half of the jurors wanted the defendant to get ten years "on each and every count." The court stated it was considering the fact that the defendant had done a lot of good things in his life, including serving his country with tours of duty in Iraq and Afghanistan. The court stated, after considering the sentencing guidelines of LSA-C.Cr.P. art. 894.1, it found that giving the defendant anything less than ten years would deprecate the seriousness of the crime. The court stated it was not its "tradition" to give a maximum sentence to a first offender, but it felt that State Exhibit #1 justified the sentence. The court noted that although there was no evidence the defendant had touched a child, or put a child at harm, and his friends were not concerned about him being around their children, to a certain extent, the defendant and the others who had downloaded State Exhibit #1 were "damn near being principals to the crime that was effected upon this child." The court noted it could order the sentences to run consecutively, but it would be ridiculous to sentence the defendant to over three hundred years. The court stated it hoped others would take note of the harsh sentence it had imposed on the defendant.

The sentences imposed were not grossly disproportionate to the severity of the offenses and, thus, were not unconstitutionally excessive. Additionally, maximum sentences were warranted due to the "horrific" nature of the child pornography involved and the numerous counts involved.

These assignments of error are without merit.

CONVICTIONS AND SENTENCES ON ALL COUNTS AFFIRMED.