NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

JFW
RHP by KW

NUMBER 2012 KA 1616

STATE OF LOUISIANA

VERSUS

JIMMIE LEWIS

Judgment Rendered: MAY 02 2013

* * * * * * *

Appealed from the
21st Judicial District Court
In and for the Parish of Tangipahoa, Louisiana
Trial Court Number 1103048

Honorable Wayne Ray Chutz, Judge

* * * * * * *

Scott M. Perrilloux
District Attorney

Attorneys for Appellee
Plaintiff – State of Louisiana

Patricia Amos
Asst. District Attorney
Amite, LA

Mary E. Roper
Louisiana Appellate Project
Baton Rouge, LA

Attorney for Appellant
Defendant – Jimmie Lewis

* * * * * *

BEFORE: PARRO, WELCH, AND KLINE,[1] JJ.

[1] Hon. William F. Kline, Jr., retired, is serving as judge *ad hoc* by special appointment of the Louisiana Supreme Court.

WFK concurs

WELCH, J.

The defendant, Jimmie Lewis, was charged by bill of information with simple burglary, a violation of La. R.S. 14:62 (count 1), and attempted aggravated rape, a violation of La. R.S. 14:42 and 14:27 (count 2). He pled not guilty and, following a jury trial, was found guilty as charged on both counts. For the simple burglary conviction, the defendant was sentenced to twelve years imprisonment at hard labor; for the attempted aggravated rape conviction, the defendant was sentenced to fifty years imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. The sentences were ordered to run consecutively. The defendant filed a motion to reconsider sentence, which was denied. The defendant now appeals, designating three assignments of error. We affirm the convictions and sentences.[2]

FACTS

On the evening of July 31, 2011, K.B. was home alone in her trailer on Pierre Lane in Ponchatoula. At about 11:00 p.m., K.B. went to her bathroom to roll her hair. As K.B. left the bathroom several minutes later, she saw the defendant in her living room holding her purse. The defendant had climbed through the window of K.B.'s son's bedroom. K.B. did not know the defendant personally. Shocked, she ran for the front door, but the defendant stopped her. K.B. begged the defendant not to hurt her. The defendant told her to shut up or he would cut her. The defendant was holding a yellow box cutter with the blade extended. The defendant brought K.B. to her bedroom and pushed her on the bed. He climbed on top of her, holding the box cutter in his right hand near her cheek and covering her mouth with his left hand. As K.B. struggled and kept pulling the defendant's hand off of her face, the defendant repeatedly told her to shut up or he would cut her. At some point during the struggle, K.B. knocked the box cutter

[2] On March 7, 2013, this court denied the defendant's Motion to Supplement the record.

from the defendant's hand. She told the defendant to take her purse and that he could have whatever he wanted, but to just take it and leave. When she asked the defendant if he would leave, he replied, "No, I am going to f--k." In an attempt to create space between herself and the defendant, which might allow her to escape or to grab a knife she had inside a "cubby" on the nightstand, K.B. asked the defendant if she could get a condom. The defendant leaned back for a moment. K.B. pushed him off of her and ran for the front door, which was open. The defendant caught up to her and tried to pull her back into the trailer. K.B. resisted and, as they struggled, the defendant punched her in the face. She fell down and the defendant ran from her trailer.

K.B. called 911. She went to the hospital where she was treated for injuries to her face and arm. K.B. told the police she recognized the defendant from a sex offender notification card she had received in the mail. The police learned that the defendant lived a few houses away, less than one-tenth of a mile, from K.B. The defendant was brought to the police station for questioning. After initially denying any involvement, the defendant admitted entering K.B.'s trailer through a window and being approached by K.B. The defendant reported that upon seeing K.B., he left. The defendant did not admit to attacking K.B. The defendant told the police he never went into K.B.'s bedroom and held her down, and he was not armed with a box cutter. The police found a yellow box cutter at the foot of K.B.'s bed.

The defendant did not testify at trial.

ASSIGNMENTS OF ERROR NOS. 1 and 2

In these related assignments of error, the defendant argues that the trial court abused its discretion in admitting evidence of other crimes and erred in denying his motion for a new trial. Specifically, the defendant contends in brief, as he did in the motion for new trial, that the sex offender notification card, which indicated that the defendant had been convicted of forcible rape, should have been redacted

to remove any reference to other crimes evidence before being introduced into evidence.

Prior to trial, the State filed a notice of intent to use evidence of other crimes. The State sought to introduce evidence of the defendant's conviction for forcible rape approximately twenty-five years prior to the instant offense. K.B. had received a sex offender notification card in the mail identifying the defendant by name, showing his picture, and listing the crime for which he had been convicted, forcible rape. In its notice of intent, the State asserted that testimony regarding the defendant's prior conviction and/or the notification card was admissible at trial because such evidence "relates to conduct that constitutes an integral part of the act or transaction that is the subject of this prosecution." The State further asserted the evidence had independent relevance to prove identity. The State noted that the defendant had a twin brother and the evidence was needed to rebut the claim of misidentification.

At a pretrial hearing on the State's motion, the trial court ruled that evidence of the defendant's previous conviction was admissible, stating in pertinent part that the State would be allowed to "utilize evidence indicating that Mr. Lewis was previously convicted and the notice that was mailed out is the manner in which the victim was able to identify who he was." In response to this ruling, the defendant filed on the day of trial a motion in limine, seeking an order from the trial court to prohibit any mention of his forcible rape conviction, as well as an order to redact the words of forcible rape from the sex offender identification card. The defendant asserted in his motion that the trial court did not provide any explanation "as to what exactly would be admissible" in its ruling. Further, the defendant argued that his forcible rape conviction was completely irrelevant and its prejudicial impact would far outweigh its probative value. The defendant asserted that the State would be able to prove the defendant was a registered sex offender with testimony

and the notification card that was mailed out; the trial court, however, could limit the prejudicial impact with an order requiring the redaction from the card of any reference to the forcible rape conviction. The trial court ruled on the defendant's motion in limine that the probative value of the unaltered notification card clearly outweighed the prejudicial effect. The trial court further stated: "The notice is the notice. Whatever it is. And for that reason, I don't have any problem with allowing the notice, if it is offered by the State to be introduced into these proceedings."

At trial, K.B. testified that she recognized the defendant from the sex offender notification card she had received in the mail. She did not mention the forcible rape conviction. She stated only that she remembered seeing his name, face, date of birth, height and weight, and address on the card. (R. p. 190). The unaltered card, however, was introduced into evidence by the State and published to the jury.

Louisiana Code of Evidence article 404(B)(1) provides:

> Except as provided in Article 412, evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, of the nature of any such evidence it intends to introduce at trial for such purposes, or when it relates to conduct that constitutes an integral part of the act or transaction that is the subject of the present proceeding.

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. In order to avoid the unfair inference that a defendant committed a particular crime simply because he is a person of criminal character, other crimes evidence is inadmissible unless it has an independent relevancy besides simply showing a criminal disposition. **State v. Lockett**, 99-0917 (La.

App. 1st Cir. 2/18/00), 754 So.2d 1128, 1130, writ denied, 2000-1261 (La. 3/9/01), 786 So.2d 115. The trial court's ruling on the admissibility of other crimes evidence will not be overturned absent an abuse of discretion. See **State v. Galliano**, 2002-2849 (La. 1/10/03), 839 So.2d 932, 934 (*per curiam*).

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. La. Code Evid. art. 401. All relevant evidence is admissible except as otherwise provided by positive law. Evidence which is not relevant is not admissible. La. Code Evid. 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. La. Code Evid. art. 403.

We note initially that despite the State's assertion in its notice of intent, the defendant's prior conviction for forcible rape did not constitute an integral part of the defendant's actions that were the subject of the instant proceeding. Under La. Code Evid. art. 404(B)(1), evidence of other crimes, wrongs, or acts may be introduced when it relates to conduct, formerly referred to as "res gestae," that "constitutes an integral part of the act or transaction that is the subject of the present proceeding." Res gestae events constituting other crimes are deemed admissible because they are so nearly connected to the charged offense that the state could not accurately present its case without reference to them. A close proximity in time and location is required between the charged offense and the other crimes evidence to ensure that the purpose served by admission of other crimes evidence is not to depict defendant as a bad man, but rather to complete the story of the crime on trial by proving its immediate context of happenings near in time and place. **State v. Colomb**, 98-2813 (La. 10/1/99), 747 So.2d 1074, 1076

(*per curiam*). 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**, 2001-1638 (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).

The defendant's other crime of forcible rape occurred twenty-five years prior to the instant charge of attempted aggravated rape. There is no proximity in time, continuous chain of events, or immediate context of happenings near in time and place regarding the two sex offenses. Accordingly, the forcible rape does not constitute "integral part of the act" evidence.

Regarding the admissibility of the identification card, we find the trial court abused its discretion in allowing the unaltered card into evidence under La. Code Evid. art. 404(B)(1). The defendant's past and present sex offenses were twenty-five years apart. While the mere passage of time between offenses will not necessarily defeat admissibility, there must be some connexity between the crime charged and the prior crime. See **State v. Jackson**, 625 So.2d 146, 151 (La. 1993). There was no connexity established at trial (or pretrial) between the forcible rape and the charged attempted aggravated rape. There were no details provided regarding the defendant's forcible rape conviction. Thus, there were no particulars of the forcible rape conviction presented by the State to compare it to the attempted aggravated rape charge to establish motive, opportunity, intent, preparation, plan, or knowledge. See La. Code Evid. art. 404(B)(1). Cf. **Jackson**, 625 So.2d at 150-52 (where evidence of the defendant's prior offenses of fondling the breasts of his daughters fifteen to twenty-four years ago was found to be admissible other crimes evidence because the victims, who were family members of the defendant, testified

in sufficient detail and particularity as to the other crimes; however, testimony of the daughters that the defendant raped one of them and fondled their vaginas was found to be inadmissible as irrelevant and overly prejudicial because the defendant was charged only with kissing his granddaughters and fondling their breasts in the instant case). Cf. **State v. Driggers**, 554 So.2d 720 (La. App. 2d Cir. 1989) (where evidence of the defendant's several prior sexual offenses that occurred seven to twenty-six years before the instant charges of indecent behavior with a juvenile and aggravated oral sexual battery was held admissible because each of the victims testified in significant detail and clarity about the prior offenses, the past victims and the victim in the instant matter were all juveniles, all the victims were relatives and neighbors of the defendant, and the incidents were all within the same time period of the victims' lives, most being pre-pubescent).

In the instant matter, it was established that K.B. was thirty-four years old and did not know the defendant at the time of the instant offense. There was no evidence or testimony regarding the details of the forcible rape conviction, such as where and how it occurred, or if the defendant used a weapon and what kind; and no evidence or testimony of the defendant's victim, such as how old she was or if she was related to the defendant. As such, the complete lack of evidence regarding the defendant's prior conviction could not be used to show independent relevance, such as motive or intent.[3] Cf. **State v. Miller**, 98-0301 (La. 9/9/98), 718 So.2d 960.

The State's argument that it was necessary to admit into evidence the

[3] While we recognize that La. Code Evid. art. 412.2 allows for broader admissibility of other crimes evidence in sex offense cases, the State sought to admit the evidence at issue only under La. Code Evid. art. 404(B). (R. pp. 97-98). Moreover, just as with Article 404(B), Article 412.2 requires similarity between the offenses to be sufficiently probative to support the admission of evidence. See **State v. Wright**, 2011-0141 (La. 12/6/11), 79 So.3d 309, 317-18. Accordingly, as discussed herein, since there were insufficient details established of the forcible rape conviction, a definitive determination of the applicability of Article 412.2, which is subject to the balancing test of Article 403, is not possible.

unaltered notification card to prove identity is unpersuasive. Detective Bryan Mannino, with the Ponchatoula Police Department, and Detective Edwin Bergeron, with the Hammond Police Department, both testified at trial that the defendant gave a statement admitting to the burglary on the night K.B. reported she was attacked. The defendant confessed that he climbed through the window and was approached by K.B. The State possessed a copy of the defendant's video confession to the police, and the video was introduced into evidence and played for the jury. Thus, the State was aware at all times that the defendant had placed himself at the scene. The videotaped statement was not made part of the appellate record.

Accordingly, the words "Forcible Rape" on the identification card should have been redacted before being admitted into evidence and published to the jury. Without these words, the jury would still have been and, in fact, was made aware, through both testimony and its own viewing of the published card, that K.B. had received a sex offender notification card in the mail with the defendant's picture and address on it and the date he had committed a sex crime. The other crimes evidence of the defendant's forcible rape conviction was irrelevant, and even if relevant, should have been excluded because its probative value was substantially outweighed by the danger of unfair prejudice or misleading the jury, and served only to prove bad character. See La. Code Evid. arts. 402, 403, and 404(B)(1). See also **State v. Mosby**, 595 So.2d 1135 (La. 1992); **State v. Lee**, 569 So.2d 1038, 1040-43 (La. App. 3rd Cir. 1990). 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. **State v. Rose**, 2006-0402 (La. 2/22/07), 949 So.2d 1236, 1244.

Despite the trial court's improper evidentiary ruling, we find the admission

of the unaltered notification card into evidence to be harmless error. See La. Code Crim. P. art. 921. The erroneous admission of other crimes evidence is a trial error subject to harmless error analysis on appeal. **State v. Johnson**, 94-1379 (La. 11/27/95), 664 So.2d 94, 102. 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.

The evidence of the defendant's guilt was overwhelming. The defendant admitted to the police that he burglarized K.B.'s trailer. K.B. testified she confronted the defendant in her living room while he was holding her purse. She identified the defendant as the same person she had seen on a sex offender notification card recently mailed to her residence. The notification card had the defendant's picture on it. K.B. further testified that when she tried to leave her trailer, the defendant stopped her and pushed her onto her bed. As he climbed on top of K.B., the defendant held a box cutter with the blade extended in his hand, and threatened to have sex with K.B. Following a brief struggle, K.B. knocked the box cutter from the defendant's hand, broke free from him, and ran to the open front door. The defendant caught up with her and, as she fought him, the defendant punched her in the mouth, knocking her down. The defendant then fled the trailer. The police found the defendant's box cutter in K.B.'s bedroom, and K.B. identified the defendant in a photographic lineup. In her photographic lineup statement, K.B. wrote, "I recognized him as the person who was in my house on July 31, 2011 and attacked me."

The State's evidence clearly established the defendant's guilt. As such, the guilty verdict rendered was surely unattributable to any evidence of the defendant's prior conviction of forcible rape. Any error in allowing such other crimes evidence to be presented to the jury was harmless beyond a reasonable doubt. See La. Code

Crim. P. art. 921; **Sullivan,** 508 U.S. at 279, 113 S.Ct. at 2081. Accordingly, the trial court did not err in denying the motion for new trial.

ASSIGNMENT OF ERROR NO. 3

In his third assignment of error, the defendant argues that his sentences are excessive. Specifically, the defendant contends that the trial court abused its discretion in imposing maximum sentences and ordering the sentences to run consecutively.

The Eighth Amendment to the United States Constitution and Article I, § 20, of the Louisiana Constitution prohibit the imposition of excessive or cruel punishment. Although a sentence falls within statutory limits, it may be excessive. **State v. Sepulvado,** 367 So.2d 762, 767 (La. 1979). A sentence is considered constitutionally excessive if it is grossly disproportionate to the seriousness of the offense or is nothing more than a purposeless and needless infliction of pain and suffering. A sentence is considered 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. Andrews,** 94-0842 (La. App. 1st Cir. 5/5/95), 655 So.2d 448, 454. The trial court has great discretion in imposing a sentence within the statutory limits, and such a sentence will not be set aside as excessive in the absence of a manifest abuse of discretion. See **State v. Holts,** 525 So.2d 1241, 1245 (La. App. 1st Cir. 1988). Louisiana Code of Criminal Procedure article 894.1 sets forth the factors for the trial court to consider when imposing sentence. While the entire checklist of La. Code Crim. P. art. 894.1 need not be recited, the record must reflect the trial court adequately considered the criteria. **State v. Brown,** 2002-2231 (La. App. 1st Cir. 5/9/03), 849 So.2d 566, 569.

The articulation of the factual basis for a sentence is the goal of La. Code Crim. P. art. 894.1, not rigid or mechanical compliance with its provisions. Where the record clearly shows an adequate factual basis for the sentence imposed,

remand is unnecessary, even where there has not been full compliance with La. Code Crim. P. art. 894.1. **State v. Lanclos**, 419 So.2d 475, 478 (La. 1982). The trial judge should review the defendant's personal history, his prior criminal record, the seriousness of the offense, the likelihood that he will commit another crime, and his potential for rehabilitation through correctional services other than confinement. See **State v. Jones**, 398 So.2d 1049, 1051-52 (La. 1981).

The defendant complains that the trial court failed to order a presentence investigation report (PSI). The defendant contends that absent a PSI or any identifiable basis for the trial court's observations, the court lacks the appropriate criteria by which to measure whether the sentences imposed were excessive. The defendant made no assertion in his written motion to reconsider sentence regarding the trial court's decision not to order a PSI. The defendant's failure to include this specific ground in his motion to reconsider sentence precludes his urging it for the first time on appeal. See La. Code Crim. P. art. 881.1(E). The ordering of a PSI lies within the discretion of the trial court. See La. Code Crim. P. art. 875(A)(1); **State v. Johnson**, 604 So.2d 685, 698 (La. App. 1st Cir. 1992), writ denied, 610 So.2d 795 (La. 1993). Moreover, it is clear in its reasons for the sentence that the trial court considered La. Code Crim. P. art. 894.1 in arriving at appropriate sentences:

> After having considered the sentencing guidelines, Code of Criminal Procedure Article 894.1, based on the evidence heard during the trial and the fact that you are a prior convicted felon, I find that there is an undue risk, that if I gave you a suspended sentence or probation that there's a very good chance that you would commit another crime.
>
> I further find that you are in need of correctional treatment or a custodial environment that can be provided most effectively by you being committed to an institution. Furthermore, any sentence less than the maximum sentence under 14:62, which is 12 years at hard labor -- any lesser would deprecate the seriousness of this offense.
>
> * * * *
>
> Again, the Court has considered the sentencing guidelines

pursuant to Code of Criminal Procedure Article 894.1 and feels that any lesser sentence would deprecate the seriousness of his crime.

Following sentencing, a revocation hearing was held. The probation officer testified that the basis of the revocation was the instant convictions of the defendant. The original sentence imposed for an unspecified crime was five years, with all suspended but one year. The trial court revoked the defendant's probation and made any unserved portion of the sentence executory.

The defendant suggests that his two sentences should have run concurrently since the statutory presumption for sentencing a person for acts constituting parts of a common scheme or plan is to have the sentences run concurrently. Concurrent rather than consecutive sentences are the general rule for multiple convictions arising out of a single course of criminal conduct, at least for a defendant without a prior criminal record. See La. Code Crim. P. art. 883. However, even if convictions arise out of a single course of conduct, consecutive sentences are not necessarily excessive; other factors must be taken into consideration in making this determination. For instance, consecutive sentences are justified where an offender poses an unusual risk to public safety. **State v. Breland**, 97-2880 (La. App. 1st Cir. 11/6/98), 722 So.2d 51, 53.

In the instant matter, the defendant's criminal conduct of illegally entering a woman's home and attempting to rape her makes him a clear threat to the safety of the community. Under these circumstances, the imposition of consecutive sentences did not render these sentences excessive. See **State v. Crocker**, 551 So.2d 707, 715 (La. App. 1st Cir. 1989). The sentences imposed for these offenses were within the statutory limits and did not constitute an abuse of discretion by the trial court. See **State v. Palmer**, 97-0174 (La. App. 1st Cir. 12/29/97), 706 So.2d 156, 160.

Regarding the imposition of maximum sentences for each conviction, this

court has stated that maximum sentences permitted under statute may be imposed only 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. Hilton**, 99-1239 (La. App. 1st Cir. 3/31/00), 764 So.2d 1027, 1037, writ denied, 2000-0958 (La. 3/9/01), 786 So.2d 113. The defendant has a prior conviction for forcible rape and the instant conviction for attempted aggravated rape. The defendant had also recently committed an unspecified crime for which he received a five-year sentence. As noted, he poses an unusual risk to the public safety.

The trial court adequately considered the factors set forth in Article 894.1. Considering the trial court's careful review of the circumstances and the nature of the crimes, we find no abuse of discretion by the trial court. The trial court provided sufficient justification for imposing the maximum sentences. See **State v. Mickey**, 604 So.2d 675, 679 (La. App. 1st Cir. 1992), writ denied, 610 So.2d 795 (La. 1993). Accordingly, the sentences imposed are not grossly disproportionate to the severity of the offenses and, therefore, are not unconstitutionally excessive.

For the foregoing reasons, the defendant's convictions and sentences are affirmed.

CONVICTIONS AND SENTENCES AFFIRMED.