NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2006 KA 1206

STATE OF LOUISIANA

VERSUS

DEAN JILES

Judgment Rendered: FEB 14 2007

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On appeal from the
Twenty-Second Judicial District Court
In and for the Parish of St. Tammany
State of Louisiana
Suit Number 387004

Honorable William J. Knight, Presiding

* * * * * *

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BEFORE: PARRO, GUIDRY, AND McCLENDON, JJ.

McClendon, J. Concurs.

GUIDRY, J.

The defendant, Dean H. Jiles, was charged by bill of information with one count of aggravated incest, a violation of La. R.S. 14:78.1, and pled not guilty. Following a jury trial, he was found guilty as charged. The defendant moved for a new trial, but the motion was denied. He was sentenced to twelve years at hard labor. He moved for reconsideration of sentence, but the motion was denied. The now appeals, designating six assignments of error. We affirm the conviction and sentence.

ASSIGNMENTS OF ERROR

1. The defendant was denied his right to due process of law guaranteed under U.S. Const. amends. V and XIV and La. Const. art. I, § 2, as there was insufficient evidence to support the guilty verdict.

2. The defendant's right to due process under U.S. Const. amends. V, VI, VIII, and XIV and La. Const. art. I, §§ 2, 13, 16, and 20 was violated when the State committed prosecutorial misconduct by prosecuting both the defendant's and the victim's case in a clear conflict of interest and did not reveal the victim's additional inducement to testify.

3. The defendant was denied his right to due process of law guaranteed under U.S. Const. amends. V and XIV and La. Const. art. I, § 17, when the trial court erred in denying his challenge for cause.

4. The defendant was denied his right to due process of law guaranteed under U.S. Const. amends. V and XIV and La. Const. art. I, § 17, when the prosecution failed to give notice of its intent to introduce evidence of highly prejudicial and speculative other crimes evidence against the defendant at trial, in violation of La. Code Evid. art. 404(B), including threats of violence, physical battery, and attempted fraud.

5. The defendant's sentence is cruel and unusual in violation of U.S. Const. amend. VIII and La. Const. art. I, § 20, when he was sentenced to twelve years at hard labor, as the sentence is excessive, arbitrary, capricious, and disproportionate based on the facts alleged and crime charged.

6. The defendant respectfully requests review of the entire record for errors patent pursuant to La. Code Crim. P. art. 920(2).

FACTS

The victim, D.P.,[1] testified at trial. Her date of birth was February 14, 1986. She had known the defendant for eleven or twelve years. He had married the victim's mother when the victim was three years old.

According to the victim, when she was three or four years old, her mother worked at night. In the middle of the night, the defendant would come into the victim's bedroom, pick her up, and sit her on the dresser. The defendant would then put his hand under the victim's shirt and touch her breasts and touch her between her legs.

When the victim was in the fifth grade, the defendant and her family moved to St. Tammany Parish. According to the victim, the defendant continued to touch her breasts and to touch her between her legs. He would also make her have oral sex with him and would have oral sex with her. The defendant would make her suck his penis and would "go down on [the victim]." The victim felt "like a whore" because the defendant would give her money when he was abusing her. The victim also testified that the defendant tried to penetrate her once, but stopped when she screamed in pain.

The victim testified she did not disclose the abuse because the defendant told her that if she said anything about the abuse, he and she would go to jail. The victim also testified she was afraid of the defendant, and he threatened to hurt the victim and her mother if she disclosed the abuse.

At some point, the victim told her mother that the defendant had been "touching" her and had tried to penetrate her. The victim's mother made the defendant leave their home. Subsequently, after the defendant spoke to the victim on the telephone, the victim convinced her mother that the defendant would not abuse the victim anymore. The victim's mother then let the defendant return to their home.

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[1] The victim is referenced herein only by her initials. See La. R.S. 46:1844(W).

However, the victim's mother then saw the defendant abusing the victim while the victim was in the kitchen trying to get a drink. The defendant had one of his hands on the victim's breast and the other one between her legs.

When the victim was fifteen years old, she met her biological father and realized the defendant was not her real father.

When she was eighteen years old, the victim reported the abuse by the defendant to the police. The victim waited until she was eighteen because at that point she knew the defendant could not hurt her "in any kind of way." She denied making up her testimony because she was angry the defendant was not her real father and further denied having been coached or told to make things up about the defendant.

The victim's mother, S.J.,[2] also testified at trial. She married the defendant in 1989, when the victim was three years old. Her childhood seemed normal.

When the victim was approximately thirteen years old, she told S.J. that the defendant had been "touching" her and had tried to "put himself inside of her[.]" S.J. was upset and angry with the defendant. The defendant tried to hit the victim for telling S.J. what had happened, but S.J. stepped between the defendant and the victim. The defendant left the home but kept calling on the telephone.

The defendant spoke to the victim on the telephone and promised he would never do anything "like that" again. The defendant then moved back in with the victim, S.J., and her son. S.J. let the defendant move back into the home because she had been married to the defendant for twelve years and he promised he would never touch the victim again. However, S.J. did not trust the defendant, and she watched and listened for what he was doing.

On one occasion, while the defendant was cooking in the kitchen, the victim went into the kitchen to get some water. S.J. was using the vacuum cleaner in

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[2] We reference the victim's mother by her initials to protect the identity of the victim. See footnote #1.

another room. S.J. heard a noise in the kitchen and went to investigate. She saw the defendant holding the victim with her back to him and not releasing her. One of the defendant's hands was on the victim's breast and the other was between her legs. When the defendant saw that S.J. was watching him, he backed away from the victim. S.J. fled with her children to her sister's house.

S.J. testified she did not report the defendant to the police because he had threatened to kill her and she was afraid of him. S.J. also testified that the defendant had punched her in the head.

S.J. testified, at one point the defendant came to her house and began beating on the door and cursing her, and she summoned the police. She told the responding police officer about the defendant's actions toward the victim. The police officer could not do anything because the victim was not living at the house at the time and she did not want to talk about the abuse.

In the summer of 2004, the defendant telephoned S.J. He wanted her to lie to some investigators in regard to a lawsuit. S.J. was angry with the defendant for getting her telephone number and for asking her to do anything for him after everything he had done. She denied telling him that she would make sure he never got any of his settlement. She also denied coaching the victim into making allegations against the defendant.

The State also introduced into evidence a July 29, 2004 recorded telephone conversation between the victim and the defendant. The victim told the defendant she had been thinking about "what happened" and asked the defendant if he was "sorry or anything." The defendant stated that if he could go back and change it, he would change everything. The defendant claimed he beat himself up "over this." He stated he had lost everything and did not even know how to tell the victim he was sorry. The victim asked the defendant, "How could you do that? Why?" The defendant replied, "I don't even know where to start." The victim asked "are you

really sorry for doing that?" The defendant replied that he was sorry for "everything that happened." The victim asked the defendant if he knew what he was doing. The defendant answered negatively. The victim asked "how could you not know what you were doing?" The defendant then refused to talk about "all this" on the telephone stating, "I don't know who is on the other end. I don't know if you are tape-recording all this. I don't know." The defendant then asked the victim to call him back in five minutes.

When the victim called the defendant back, he stated he thought it was odd that he had called S.J. a couple of days ago, and she knew he was in the middle of a settlement. The defendant stated he would not talk about his divorce and "all of that." The victim stated she did not need to know about the defendant's divorce, but needed to know "why did you do this to me?" The defendant then ended the telephone conversation.

SUFFICIENCY OF THE EVIDENCE

In assignment of error number 1, the defendant argues there was no physical evidence to support the victim's testimony against the defendant and the testimony was contradicted by testimony from other witnesses. He claims the victim and her mother gave conflicting testimony concerning the parish in which the victim first reported the alleged abuse, whether or not the victim ran away, the date the victim was examined for abuse, and whether the victim or her mother answered the questions of the examining doctor.

In reviewing claims challenging the sufficiency of the evidence, this court must consider "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979). See also La. C.Cr.P. art. 821(B); State v. Mussall, 523 So.2d 1305, 1308-09 (La. 1988).

Louisiana Revised Statutes 14:78.1, in pertinent part, provides:

> A. Aggravated incest is the engaging in any prohibited act enumerated in Subsection B with a person who is under eighteen years of age and who is known to the offender to be related to the offender as any of the following ... step, or adoptive relatives: child,...
>
> B. The following are prohibited acts under this Section:
>
> (1) Sexual intercourse, sexual battery, ... indecent behavior with juveniles, ... molestation of a juvenile, ... cruelty to juveniles, parent enticing a child into prostitution, or any other involvement of a child in sexual activity constituting a crime under the laws of this state.
>
> (2) Any lewd fondling or touching of the person of either the child or the offender, done or submitted to with the intent to arouse or to satisfy the sexual desires of either the child, the offender, or both.

After a thorough review of the record, we are convinced that viewing the evidence in the light most favorable to the State, any rational trier of fact could have found beyond a reasonable doubt that the defendant was guilty of aggravated incest. The verdict rendered against the defendant indicates the jury accepted the testimony of the State's witnesses, including the victim's account of the incident. This court will not assess the credibility of witnesses or reweigh the evidence to overturn a fact finder's determination of guilt. The testimony of the victim alone is sufficient to prove the elements of the offense. The trier of fact may accept or reject, in whole or in part, the testimony of any witness. Moreover, when there is conflicting testimony about factual matters, the resolution of which depends upon a determination of the credibility of the witnesses, the matter is one of the weight of the evidence, not its sufficiency. State v. Lofton, 96-1429, p. 5 (La. App. 1st Cir. 3/27/97), 691 So.2d 1365, 1368, writ denied, 97-1124 (La. 10/17/97), 701 So.2d 1331.

This assignment of error is without merit.

PROSECUTORIAL MISCONDUCT

In assignment of error number 2, the defendant argues that "[u]nbeknownst to either the court or defense counsel, [D.P.], also had a case that was ongoing at

the very same time before Judge Knight in Division 'J', charging [D.P.] with theft over $500, in violation of La. R.S. 14:67." The defendant argues Leigh Anne Wall prosecuted both D.P. and him and, while assuring defense counsel she would not be involved in D.P.'s case, Wall remained the prosecutor assigned to the case. The defendant also claims the State bolstered its weak case against him by holding the theft charge over the head of D.P. until the case against the defendant was concluded. The defendant also complains Wall filed a motion in limine to prevent any questioning concerning the "charges" pending against [D.P.].

Louisiana Code of Criminal Procedure article 851, in pertinent part, provides:

> The motion for a 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 shall be denied, no matter upon what allegations it is grounded.
>
> The court, on motion of the defendant, shall grant a new trial whenever:
>
> . . .
>
> (3) New and material evidence that, notwithstanding the exercise of reasonable diligence by the defendant, was not discovered before or during the trial, is available, and if the evidence had been introduced at the trial it would probably have changed the verdict or judgment of guilty[.]

Prior to trial, the State filed a motion in limine "to prohibit defense counsel, defendant, and any witnesses from referring to the victim's arrest record." The motion was heard prior to voir dire. The State argued under La. C.E. art. 609.1, cross-examination on arrests was prohibited and, while the victim had been arrested, the charges were pending. The State additionally indicated:

> Certainly, if [defense counsel] wants to question her as to whether anyone's offered her anything in exchange for her testimony, I would have no objection to that being done out of the presence of the jury. I just don't think that it's relevant evidence for the jury.

The following exchange then occurred:

> [Defense]: And, again, Your Honor, I understand the rules of evidence. One thing that I should bring to the attention of the [c]ourt,

and I don't know if you are aware of this or not, is that that case is pending in this division.

[Court]: Frankly, I was not aware of it.

[State]: I was aware of that, Judge. And someone else from – and I'm not sure who they're going to appoint, but someone else from our office is going to be handling that case, not me.
[Court]: The Court will grant the motion in limine insofar as it relates to any arrests, because of course that's prohibited under the code.

Following the conviction of the defendant, the defense moved for a new trial under La. C.Cr.P. art. 851(3). The motion set forth that the defense had advised the court that D.P. was the victim in the case against the defendant, but was a defendant on a charge of theft over $500, and there existed a potential conflict of interest as the same assistant district attorney was handling both cases. In the motion for new trial the defense alleged:

> Undersigned counsel has learned that [D.P.] was told by the District [A]ttorney, through her counsel of record, John Thomas, that the charges would be dropped once she had testified in the instant trial. Mr. Thomas will also testify that Mr. Bartholomew has never discussed the case with him and that all discussions concerning [D.P.'s] case were with Leigh Ann Wall.

Following a lengthy hearing, the trial court denied the motion for new trial. Attorney John Lindner testified at the hearing. He represented the defendant from the beginning of the case and through the trial. He moved for a bill of particulars, specifically requesting:

> 50. Please provide any and all records, reports, or "rap sheets" which reflect the arrest and conviction records of the State's witnesses for use at trial to either impeach said witnesses or to establish the witnesses' bias or interest herein.
>
> . . .
>
> 52. Describe in detail any and all evidence or information that the State has, either in its possession of [sic] which it has knowledge of, that would arguably tend to exculpate or help defendant in the preparation of his defense or to impeach any witness the State intends to use in this prosecution.

The State responded to the motion by providing open file discovery.

Lindner testified he learned that D.P. was a defendant in another case at a pretrial hearing in the case against the defendant. Lindner informed Judge Knight that Wall was prosecuting both the defendant and the victim and that fact suggested a conflict. Lindner indicated Wall stated that it was her intention to reassign the case against D.P. to another assistant district attorney in her office, and Wall would have nothing to do with the case. A month after the defendant's conviction, however, Wall was still appearing on the court minutes in the case against D.P.

Lindner testified that, following the trial against the defendant, he learned that there had been discussions between Wall and the attorney representing D.P., John Hall Thomas, whereby Thomas was told there were no real plans to go forward with the felony theft charge against D.P., but she was a witness in the case against the defendant, and the State wanted to make sure she testified.

Lindner also testified, at the defendant's trial, he never asked D.P. if she had been offered anything, promised anything, guaranteed anything, or if there was any "understanding or arrangement" because he was naïve and trusted the district attorney's office. Lindner conceded neither Thomas nor anyone else had told him that an actual deal was made for D.P. to testify against the defendant in exchange for dismissal of the case against her.

Thomas also testified at the hearing. He had been counsel for D.P. in the case against her since the prosecution was instituted in approximately December of 2004. As of the date of the hearing, February 15, 2006, D.P. was still being prosecuted. Prior to the defendant's trial, Thomas had always dealt with Wall in connection with the case against D.P. Thomas indicated that the case against D.P. had been continued for a year for two reasons. First, Wall had told the judge that she could not handle the case because D.P. was her witness in the case against the defendant. Second, after Thomas mentioned to the judge that D.P. was "very

pregnant," the judge asked Wall if the case should be continued until "after all of that?" Wall had agreed to continue the case.

In response to questioning by the defense, Thomas stated:

> Q. Mr. Thomas, did you have a discussion with Mr. Lindner regarding what your understanding was of what the district attorney's office was going to do with the charges against your client?
>
> A. There was no tit-for-tat explicit agreement. I came away from the meeting feeling like my client would get favorable treatment.
>
> Q. As a result of what?
>
> A. As a result of her being a witness for the State. I find it very unusual that [the] State was even prosecuting my client at all. And I remember Leigh Anne Wall making a comment, I'm going to have to talk to someone about the case. I can't believe we are prosecuting this case. It was such a weak case. I can't imagine how it ever got through screening.

In response to questioning by the State, Thomas stated:

> Q. Did Ms. Wall ever tell you at any time she changed her mind; she was going to handle this case?
>
> A. No. There was [a] long gap. Nothing happened at all for about six months, after that pretrial that I mentioned. And when it came back up again, I think it was reassigned at that point, to a new judge and new prosecutor.
>
> Q. Did she ever offer you anything in exchange for your client's testimony?
>
> A. No. There was never any kind of explicit offer.
>
> Q. Did she ever tell you anything regarding your client versus her testifying as a victim? Ever had that discussion with her?
>
> A. I had very little knowledge of the Jiles case at all. So no.
>
> Q. So if I ask you what deal was made between you and Ms. Wall to get your client to testify about this sexual abuse, how would you answer it?
>
> A. There was no explicit deal. I got the impression that she was favorably disposed to my client and liked her. She said [sic] made a comment that she is a sweet girl, something like that, at the pretrial conference.
>
> Q. She made no deal?

A. No.

Wall also testified at the hearing. She testified she was the prosecutor against the defendant and had been the prosecutor against D.P. Wall testified around April 19 or April 20, 2005, she recognized the conflict and notified the chief of trials that there was a conflict and she could not handle D.P.'s case. Wall testified although her name was on the record after that date, the case was repeatedly continued pending someone from her office being named to prosecute the case.

In response to questioning from the defense, Wall stated:

Q. Did you ever have discussions with [D.P.] about her theft case?

A. The first time I met with her, when she came in, the first thing I told her was that I was aware that she had a theft charge pending in Division J[,] [a]nd that I had notified my supervisor that there was a conflict. And someone else was going to be appointed to, or assigned that case to prosecute. And I asked her if she had any problem with me continuing on prosecuting the aggravated incest.

Q. And what did she tell you?

A. She said she had no problem.

Q. And did you ever discuss with her if good things happen to Dean Jiles case, maybe this case would go away?

A. No.

In response to questioning from the State, Wall stated:

Q. Did you make any deals with [D.P.'s] attorney, Mr. Thomas?

A. Never.

Q. Ever lead him to believe he had a deal?

A. Never. Based on this, the charges are still pending. And they haven't been modified.

Q. You indicated you had other cases when it happened. Were the other case[s] handled the same way? You go to [sic] supervisor and tell him you have a conflict?

A. Yes. In one of the cases, it was an aggravated rape case in Franklinton. And a witness had a pending drug charge in Division J.

> And I followed Judge Knight. So it was also in my division in Franklinton. And Scott Gardner was appointed to handle the prosecution of that witness. And then, just recently, I became aware of another conflict. And I believe that Julie Knight is, if she hadn't been already, she is going to be assigned the prosecution of the case.
>
> . . .
>
> Q. At any time, did you continue the case for the mere purpose of keeping it alive as a tool to motivate [D.P.] to testify?
>
> A. No. It was not my impression that [D.P.] needed any threats or motivation. She came forward to tell the truth about what happened to her because she was ready to move on with her life[,] and felt that she needed to come forward and tell the truth about what happened to her.

Based on the above evidence, we are unable to find that there was an abuse of discretion in the trial court's denial of the motion for new trial. The defense failed to show that prosecutorial misconduct had caused the defendant injustice.

Further, the motion in limine did not prevent questioning of the victim concerning any improper reason for her testimony. The defense did not, however, question the victim, either at trial or at the hearing on the motion for new trial, concerning whether or not she was testifying or had testified against the defendant in exchange for favorable treatment in connection with the charges pending against her.

This assignment of error is without merit.

CHALLENGE FOR CAUSE

In assignment of error number 3, the defendant argues the trial court erred in denying the defense challenge for cause against prospective juror Linda Demoruelle because she had attended a sex-crime trial prosecuted by the same prosecutor involved in the instant case and where Demoruelle's sister's child was the victim. The defendant also argues that an irregularity occurred when prospective juror Mark Marullo was peremptorily challenged by defense counsel, but still allowed to serve as the alternate juror.

Louisiana Code of Criminal Procedure article 797, in pertinent part, provides:

> The state or the defendant may challenge a juror for cause on the ground that:
>
> . . .
>
> (2) The juror is not impartial, whatever the cause of his partiality. An opinion or impression as to the guilt or innocence of the defendant shall not of itself be sufficient ground of challenge to a juror, if he declares, and the court is satisfied, that he can render an impartial verdict according to the law and the evidence;

In order for a defendant to prove reversible error warranting reversal of both his conviction and sentence, he need only show the following: (1) erroneous denial of a challenge for cause; and (2) use of all his peremptory challenges. Prejudice is presumed when a defendant's challenge for cause is erroneously denied and the defendant exhausts all his peremptory challenges.[3] An erroneous ruling depriving an accused of a peremptory challenge violates his substantial rights and constitutes reversible error. State v. Taylor, 2003-1834, pp. 5-6 (La. 5/25/04), 875 So.2d 58, 62.

A trial court is vested with broad discretion in ruling on challenges for cause and these rulings will be reversed only when a review of the voir dire record as a whole reveals an abuse of discretion. A trial judge's refusal to excuse a prospective juror for cause is not an abuse of his discretion, notwithstanding that the juror has voiced an opinion seemingly prejudicial to the defense, when subsequently, on further inquiry or instruction, he has demonstrated a willingness and ability to decide the case impartially according to the law and the evidence. Taylor, 2003-1834 at p. 6, 875 So.2d at 62-63.

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[3] The rule is now different at the federal level. See United States v. Martinez-Salazar, 528 U.S. 304, 120 S.Ct. 774, 145 L.Ed.2d 792 (2000) (exhaustion of peremptory challenges does not trigger automatic presumption of prejudice arising from trial court's erroneous denial of a cause challenge).

Linda Demoruelle was on the first and only panel of prospective jurors. In response to questioning, she indicated she had attended a trial where Wall was the attorney. The following exchange occurred between the court and Demoruelle:

> [Court]: All right. Would you be able to put that out of your mind in weighing the evidence of this case, regardless of whether the evidence was presented by the State or by the defense, and be fair and impartial to both sides?
>
> [Demoruelle]: Yes, I would.

Thereafter, when asked if she or any of her close friends or family had been victims of a crime, Demoruelle indicated her sister's child had been molested and her parents' car had been stolen twice. In response to questioning by the court, Demoruelle indicated she would be able to put the fact that members of her family had been victims of crime out of her mind and be fair and impartial to both sides.

Subsequently, in response to questioning, Demoruelle indicated her sister's adopted child had been raped by his biological parent, but Demoruelle did not think that her sister's child's case would influence her in the instant case because "[t]he case is individual." The following colloquy then occurred between the defense and Demoruelle:

> [Defense]: The sister's adopted son that you were just speaking about, was it his biological parents who were on trial that you observed Ms. Wall?
>
> [Demoruelle]: Right.
>
> [Defense]: Okay. And you sat through that trial?
>
> [Demoruelle]: Yes, I did.
>
> [Defense]: Let me ask you this, Ms. Demoruelle. If at the end of this trial you go back in deliberations, and you do not feel that the State has met their burden to return a guilty verdict, do you feel that you would have to go back to your sister and explain your actions?
>
> [Demoruelle]: No. I don't think she'd have any, you know, say-so at all about it. I mean, this is an individual, completely separate case.

[Defense]: And again, I'm not trying to pick on you, but obviously if you sat through that trial with your sister, then you're close to your sister. You did support her and her son. And obviously that was traumatic. And I want to make sure that that's not going to –

[Demoruelle]: No.

[Defense]: - influence you against my client.

[Demoruelle]: No. Don't know anything about the case. Everybody's an individual until proven guilty.

The defense challenged Demoruelle for cause, arguing she had been involved in a case that Wall tried, involving the aggravated rape of Demoruelle's sister's son, and under the circumstances "there's just too much going on. The trial court denied the defense challenge, and the defense objected to the court's ruling. Thereafter, the defense used a peremptory challenge to strike Demoruelle.

Initially, we note that the defendant exhausted his peremptory challenges in this matter. Thus, if he establishes an erroneous denial of a defense challenge for cause, prejudice is presumed, and there is reversible trial court error.

Considering Demoruelle's responses to the voir dire examination as a whole, there was no abuse of the great discretion of the trial court in regard to the ruling on the defendant's challenge for cause against Demoruelle.

The defense failed to preserve the issue of the error, if any, in the selection of Marullo as the alternate juror. An irregularity or error cannot be availed of after verdict unless, at the time the ruling or order of the court was made or sought, the party made known to the court the action which he desired the court to take, or of his objections to the action of the court, and the grounds therefor. La. C.Cr.P. art. 841.

Moreover, the defense specifically agreed to the selection of Marullo as the alternate juror. Following the selection of six jurors, the trial court and the State suggested that the alternate juror could be selected by going back through the panel of prospective jurors. The court also offered to seat a new panel from which to

select the alternate juror. The defense stated that it wanted "to start from the beginning." When the court read Marullo's name, the defense stated, "I have no problem with him."

This assignment of error is without merit.

OTHER CRIMES EVIDENCE

In assignment of error number 4, the defendant argues the State elicited testimony at trial that he was a violent and scary person, yelling often; that he struck S.J. on several occasions and threatened her life; and that he asked S.J. to lie to investigators pertaining to a civil lawsuit. He further argues the State was improperly permitted to elicit testimony from D.P. concerning sexual acts that allegedly took place beginning when she was three years old and which were not charged in the bill of information. Additionally, he argues the State failed to give notice of the bad acts under La. C.E. art. 404(B).

Louisiana Code of Evidence article 404, in pertinent part, provides:

> **B. Other crimes, wrongs, or acts.** (1) 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 other crimes committed by the defendant is inadmissible due to the "substantial risk of grave prejudice to the defendant." To admit "other crimes" evidence, the State must establish that there is an independent and relevant reason for doing so, i.e., to show motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or when it relates to conduct that constitutes an integral part of the act. The Louisiana Supreme Court has also held other crimes evidence admissible as proof of other crimes

exhibiting almost identical modus operandi or system, committed in close proximity in time and place. Evidence of other crimes, however, is not admissible simply to prove the bad character of the accused. Furthermore, the other crimes evidence must tend to prove a material fact genuinely at issue and the probative value of the extraneous crimes evidence must outweigh its prejudicial effect. State v. Tilley, 99-0569, p. 18 (La. 7/6/00), 767 So.2d 6, 22, cert. denied, 532 U.S. 959, 121 S.Ct. 1488, 149 L.Ed.2d 375 (2001).

Louisiana Code of Evidence article 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.
>
> 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.
>
> C. This Article shall not be construed to limit the admission or consideration of evidence under any other rule.

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.

The State filed two pre-trial notices of intent to introduce evidence of other crimes in this matter. The first notice set forth inpart:

> The State gives written notice of its intent to introduce evidence of other offenses admissible under [La. Code Evid. art 404] as described in the attached discovery. Such evidence is admissible as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or is an integral part of the act or transaction that is the subject of the current proceeding.

The second notice set forth:

> NOW INTO COURT, through undersigned assistant district attorney, comes the State of Louisiana, who respectfully provides this supplemental notice of intent to introduce evidence of other crimes under the provisions of Louisiana Code of Evidence 412.2. The crime alleged to have been committed by defendant in this case was a continuing and ongoing offense, as reflected in the reports that have been turned over to defense counsel in discovery. The crime began when the defendant and the victim were living in another parish. A full explanation of the crime charged is not possible without reference to the acts that occurred in other parishes. This testimony by the victim is admissible under [La. Code Evid. art. 412], and also under art. 404(B) as res gestae.

In regard to the testimony of S.J., the defendant complains of: S.J.'s testimony that she did not immediately report D.P.'s allegations of sexual abuse by the defendant because S.J. was afraid of the defendant and he was "always threatening to kill [S.J.];" S.J.'s testimony that the defendant telephoned her in the summer of 2004 and wanted her "to lie to some investigators[;]" S.J.'s testimony that the defendant tried to hit D.P. after she reported the abuse to S.J.; S.J.'s testimony that the defendant had hit her twice[;] and S.J.'s call to the police after the defendant was beating on her door and cursing at her.

In regard to the testimony of D.P., the defendant complains of her testimony concerning the defendant abusing her when she was three or four years old.

The instant assignment of error was not preserved for review. The defendant failed to contemporaneously object to the referenced testimony of S.J. or D.P. An irregularity or error cannot be availed of after verdict unless, at the time the ruling or order of the court was made or sought, the party made known to the court the action which he desired the court to take, or of his objections to the action of the court, and the grounds therefor. La. C.Cr.P. art. 841; La. C.E. art. 103(A)(1). Further, the testimony of S.J. concerning the defendant hitting her, and the defendant beating on her door and cursing her was elicited by the defense, rather

than the State. Additionally, in regard to the testimony of D.P., at the hearing on the other crimes notice, the defense stated:

> As long as we're talking about the alleged victim in this case and what happened to her from this man, I can't really object to that, Your Honor.

This assignment of error is without merit.

EXCESSIVE SENTENCE

In assignment of error number 5, the defendant argues the sentence imposed upon him was unconstitutionally excessive.

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, and the sentence imposed should not be set aside as excessive in the absence of manifest abuse of discretion. State v. Hurst, 99-2868, pp. 10-11 (La. App. 1st Cir. 10/3/00), 797 So.2d 75, 83, writ denied, 2000-3053 (La. 10/5/01), 798 So.2d 962.

A person convicted of aggravated incest shall be fined an amount not to exceed fifty thousand dollars, or imprisoned, with or without hard labor, for a term not less than five years nor more than twenty years, or both. La. R.S. 14:78.1(D) (prior to amendment by 2006 La. Acts, No. 325, § 2). The defendant was sentenced to twelve years at hard labor.

At the sentencing hearing, the court indicated it had reviewed the pre-sentence investigation report and the letters from D.P and S.J. attached to the report, as well as the letters submitted on behalf of the defendant. The court also listened to testimony from Jeanne Jiles, the present wife of the defendant. Thereafter, the court indicated it had no question that the crime, in many respects, had wreaked havoc in D.P.'s life.

In imposing sentence, the court noted: the defendant had been arrested a number of times, but had no prior convictions; he was in need of correctional treatment or a custodial environment that could most effectively be provided through an institution; because the crime was perpetrated on a young victim, and because there was a degree of empowerment in the perpetrator, any lesser sentence than the sentence to be imposed would deprecate the seriousness of the crime; because of both the emotional dependence, the financial dependence, and the marriage of the defendant to the victim's mother, the defendant certainly should have known the victim was particularly vulnerable or incapable of resistance; the defendant certainly used his position as a stepfather to facilitate the commission of the offense, and his manipulation of the victim was reprehensible; the defendant used threats of violence, not actual violence, in the commission of the crime, and certainly indicated to the victim that if she were to ever reveal the abuse, he would certainly treat her physically poorly and perhaps she would even be in trouble, which was unfortunately a very common ploy in cases of this nature; and the case was neither the most serious nor was it the most innocuous aggravated incest.

Based on our review, we conclude that the sentence imposed was not grossly disproportionate to the severity of the offense, and thus, was not unconstitutionally excessive.

This assignment of error is without merit.

PATENT ERROR

In assignment of error number 6, the defendant requests review of the record for errors patent.

Under the authority of La. C.Cr.P. art. 920(2), this court routinely examines the record for errors patent, whether or not such a request is made by the defendant. We are limited in our patent error review to errors discoverable by a mere inspection of the pleadings and proceedings and without inspection of the evidence. A review of the instant record reveals no reversible patent errors.

CONVICTION AND SENTENCE AFFIRMED.