Judgment rendered June 26, 2019.
Application for rehearing may be filed
within the delay allowed by Art. 992,
La. C. Cr. P.

No. 52,708-KA
No. 52,709-KA
No. 52,710-KA
(Consolidated cases)

COURT OF APPEAL
SECOND CIRCUIT
STATE OF LOUISIANA

* * * * *

STATE OF LOUISIANA Appellee

versus

WILLIAM TIMOTHY ALLEN, IV Appellant

* * * * *

Appealed from the
Twenty-Sixth Judicial District Court for the
Parish of Bossier, Louisiana
Trial Court Nos. 194,015, 194,015A & 194,015B

Honorable A. Parker Self, Jr., Judge

* * * * *

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* * * * *

Before PITMAN, STEPHENS, and McCALLUM, JJ.

PITMAN, J.

The trial court convicted Defendant William Timothy Allen, IV, of two counts of computer-aided solicitation of a minor and one count of indecent behavior with a juvenile. As to the convictions of computer-aided solicitation of a minor, the trial court sentenced Defendant to five years imprisonment at hard labor, all but two years suspended, to be served without the benefit of parole, probation or suspension of sentence. As to the conviction of indecent behavior with a juvenile, the trial court sentenced Defendant to two years' imprisonment at hard labor. The trial court ordered that the three sentences be served concurrently. For the following reasons, we affirm Defendant's convictions. We affirm his sentence for the conviction of indecent behavior with a juvenile, we vacate his sentences for the convictions of computer-aided solicitation of a minor and we remand the matter to the trial court for resentencing.

FACTS

The state filed three bills of information, charging Defendant with multiple crimes. These bills of information were consolidated for trial. A bench trial commenced on March 6, 2018, on the charges of computer-aided solicitation of a minor, in Docket No. 194,015; indecent behavior with a juvenile, in Docket No. 194,015A;[1] and computer-aided solicitation of a minor, in Docket No. 194,015B. The state *nolle prossed* all other charges.

[1] The bill of information originally charged Defendant with indecent behavior with a juvenile under 13. The state and Defendant filed a joint motion to amend the bill of information, and the trial court granted this motion.

Brian Montgomery testified that in 2011 and 2012 he was a sergeant with the Springhill Police Department (the "SPD") and a member of the Northwest Louisiana Internet Crimes Against Children Task Force. He stated that on October 18, 2011, he conducted a search on Craigslist using the keyword "any age." He located an advertisement for "a subject wanting to use the restroom in somebody's mouth." He responded to the advertisement by email and identified himself as a 14-year-old from Springhill, Louisiana, named Kendra Thompson ("Kendra"). He received an email response from Rick Richards, using the email address rick.p.richards@gmail.com, which said "14? I think I'll have to pass." He testified that although Richards first stated that Kendra was too young, the two continued communicating on that date. Richards told Kendra, "If you hadn't said you were 14 I'd be in my car right now on the way." When Kendra suggested that she send Richards a photograph, he responded, "Honestly, I wouldn't have a problem with a 14YO. I don't however, like the idea of going to jail." Their conversation became sexual in nature, and they discussed having oral sex and Kendra urinating and defecating on Richards. They then made plans to meet the next day after Kendra finished with school. Later that evening, Richards cancelled their meeting and stated that "meeting someone that claims to be a 14 year old on the internet probably isn't a really smart thing to do… Unless you can convince me otherwise."

Sgt. Montgomery further testified that he, as Kendra, had sporadic conversations with Richards between October 18, 2011, and March 12, 2012. On October 23, 2011, Richards initiated a sexual conversation with Kendra and sent her a link to a photograph gallery. Sgt. Montgomery

clicked on the link, but did not receive any photographs from it. They also discussed meeting in person. They continued exchanging emails over the next several days and exchanged phone numbers to communicate by text message.

Sgt. Montgomery also testified that on January 15, 2012, he, as Kendra, asked Richards if he had anyone respond to his Craigslist advertisement, and Richards responded, "Yes, but nobody your age or attractiveness. Both just peed on me." Richards then asked Kendra if she would be in the Bossier City area soon, stating that he would "like to see that you are who I think you are. That opens up the possibility of other things happening." Richards continued to ask Kendra to describe what she would like to happen between them sexually. On January 23, 2012, Kendra told Richards that she was in Bossier City, and Richards replied that he would like to see her in person so that he could see "who/what I think you are. That would make it possible to see you in the future for other, more fun, things." Kendra responded that she did not like the idea of him knowing who she was but her not knowing who he was. Richards responded that he agreed it was unfair but the "consequences I face for being wrong are really, really high."

Sgt. Montgomery further testified that on January 24, 2012, he created two corrupted photograph files and sent them to Richards so that he would believe that Kendra had attempted to send him photographs of her breasts and of herself in underwear. On February 10, 2012, he, as Kendra, answered a second Craigslist advertisement from Richards. Richards again indicated that he would like to meet Kendra. On February 25, 2012, Richards conducted a sexually explicit conversation with Kendra via Google Chat

during which they discussed anal sex, oral sex and Kendra urinating and defecating in Richards's mouth. Richards also sent Kendra a photograph of his penis, a photograph of a cup that allegedly contained his semen and urine and a photograph of his lips to a straw in that cup. They again discussed plans to meet in person.

Sgt. Montgomery also testified that in late February 2012, he communicated with Detective Shannon Mack of the Bossier Parish Sheriff's Office, who was also a member of the Northwest Louisiana Internet Crimes Against Children Task Force. He informed her that Richards had expressed an interest in a juvenile and that the conversation had turned sexual in nature, but that Richards would not come to Springhill for a meeting. He hoped that because Det. Mack was located in Bossier City, she would be able to arrange a meeting with Richards. Det. Mack created an internet persona named Brittani Storm ("Brittani"). Sgt. Montgomery testified that Kendra claimed to know Brittani through home school programs. On the evening of March 11, 2012, Kendra and Richards discussed that Brittani asked to be Richards's friend on Facebook. Richards mentioned possibly meeting both Kendra and Brittani.

Sgt. Montgomery further testified that on March 11, 2012, he, as Kendra, and Richards planned a meeting at 2:00 a.m. in Springhill so that they could engage in the previously discussed sexual activity. He provided Richards with an address for Kendra's house on 12th Street NW, Springhill, Louisiana. Richards instructed Kendra to drink diet soda to make her urine taste better, but not to hold her urine for him. Sgt. Montgomery then contacted members of the Webster Parish Sheriff's Office and the Cullen Police Department to assist in staking out the area around 12th Street NW.

At 1:23 a.m. on March 12, 2012, Richards sent a Facebook message to Kendra that he was changing clothes and getting in his vehicle. At 1:35 a.m., Richards reported that he was "on the road. And driving fast." He stated that he was not nervous, but "eager." At approximately 1:45 a.m., Richards informed Kendra that he was in Springhill and asked her to turn on a light at the house. Richards had previously described himself as a white male, approximately 5'11", 210 pounds, with brown hair, and stated that he would be driving a Honda.

Sgt. Montgomery further testified that he observed a Honda sedan on Highway 157, near its intersection with 12th Street NW, that traveled south on 12th Street NW, turned around and proceeded the other way down 12th Street NW and then repeated this route. He left his observation point and conducted a traffic stop of the vehicle. Responding law enforcement officers secured the driver of the vehicle and advised him of his *Miranda* rights. Sgt. Montgomery identified the driver as Defendant and noted that Defendant's appearance matched the description Richards gave of himself. Law enforcement officers searched Defendant's vehicle and photographed its contents. A backpack, a pistol, a lock pick tool, an iPhone, a SIM card, a digital camera, multiple digital media storage devices, two Leatherman tools, a GoPro camera, a video camera, a tri-pod, a GPS tracker, a laptop computer and a wedding ring were located in Defendant's vehicle.

On cross-examination, Sgt. Montgomery testified that he was aware that on October 9, 2012, the defense issued a subpoena for the SPD router that had been in use on October 18, 2011. He stated that when he received the subpoena, he "looked at a router," but he could not confirm that it was the same router in use on October 18, 2011. He acknowledged a letter

written in response to the subpoena, dated December 21, 2012, which reported that the SPD no longer had the router in question. He explained that when the City of Springhill changed internet providers, the router was returned to the previous company. He testified that although he was the person in the SPD in charge of the equipment, he did not know how the SPD's router was configured or what its capabilities were. He stated that a router is a device that brings internet into a home or business and that the SPD's router would store a list of websites, email addresses and IP addresses to which the SPD connected. When asked if it would store a list of places trying to connect to the SPD, he replied, "I guess it should." He testified that he had been trained in how to preserve electronic evidence, "to an extent," but acknowledged that he took no steps to preserve the router or the information contained thereon in this case. He conceded that the information on the SPD's router could have been useful to either the prosecution or the defense.

Over the state's objection, Sgt. Montgomery testified that he was a witness in a federal case where a mistrial was declared, and he explained, "I stated under oath that I had emails with that same name and I was able to produce them that showed that they did not belong to that name." He also testified that he inadvertently allowed a video to be recorded over in another investigation.

Det. Mack testified that her internet persona, 14-year-old Brittani, was friends on Facebook with Sgt. Montgomery's persona, Kendra. On or about March 6, 2012, Det. Mack, as Brittani, sent a friend request on Facebook to Richards, and Richards accepted. Brittani and Richards communicated on March 11, 2012, through Facebook and Yahoo Messenger, with Richards

using the email address rickrichards71101@yahoo.com. She testified that even after Brittani informed Richards that she was 14 years old, he engaged her in a conversation of a sexual nature and discussed the possibility of meeting in person. Richards told Brittani that he liked to "eat pussy," "eat ass," "drink pee" and "be toilet paper or a toilet." He sent Brittani the same photograph of his penis that he sent to Kendra.

Det. Mack also testified that she obtained a subpoena for the account information and the physical location of the IP address associated with the Rick Richards Facebook account and the "rickrichards71101@yahoo.com" email account. Comcast identified the internet subscriber as William Allen and the physical address as a residence in Shreveport, Louisiana, that matched Defendant's home address. Based on that information, she obtained an arrest warrant for Defendant in Bossier Parish.

Maggie Walker testified that in 2012 she worked as the Assistant City Clerk and was responsible for the City of Springhill's utility bills. She stated that the City of Springhill received free internet service from CMA Communications ("CMA") until it began charging for service sometime in the summer of 2012. She identified a computer log that showed that the City of Springhill made payments to CMA in July 2012, when CMA began charging. It also showed an invoice on November 20, 2012, and a payment made on December 4, 2012. Ms. Walker stated that she believed the invoice and payment were to terminate the CMA contract and finish any billing with the company. She identified a bill from CenturyLink for internet service for the City of Springhill, dated September 13, 2012, for prorated internet service from August 22, 2012, to September 12, 2012.

On cross-examination, Ms. Walker testified that the City of Springhill began using CenturyLink's internet service as soon as it was installed in mid-August 2012, but she could not recall the exact date when CMA's service was disconnected. She confirmed that records from CMA showed a disconnect date of November 16, 2012. She noted that when the City of Springhill changed internet providers, this included the SPD changing providers, but she did not know when CMA removed its equipment from the SPD. She testified that she was never contacted by Sgt. Montgomery regarding the internet equipment or service used by the SPD.

Randall Thomas of the Bossier City Marshall's Office was accepted as an expert in smart phone data extraction and testified that he ran multiple programs to extract data from Defendant's iPhone. He testified that 14 email accounts had been accessed by Defendant's iPhone, including the "rick.p.richards@gmail.com" email account. The iPhone also contained a contact stored as "Rick Richards," with a telephone number that matched the phone number that Richards provided to Kendra. He noted that in 2012, cell phones did not have the storage capacity to store email messages, so none were extracted from the iPhone. He extracted 16,890 text messages from the iPhone. On April 9, 2011, Defendant sent a text message to a contact saved as his wife, indicating that he intended to "make a Facebook posting for people to poop on me." Dep. Thomas testified that he did not find any text messages to Kendra or Brittani, or any conversation discussing sexual acts with minors, but he noted that there are multiples ways to send a text message, including with a laptop computer.

Following the close of the state's case in chief, the defense moved for a judgment of acquittal, arguing that the state presented insufficient evidence

to prove that Defendant had a reasonable belief that he was communicating with an individual under the age of 17. The state asserted that Defendant's conversations with Kendra over the course of several months regarding her age, her mother, her inability to drive and her school were sufficient for a reasonable finder of fact to hold that Defendant had a reasonable belief that she was under the age of 17. The trial court denied Defendant's motion.

Following the testimony of three witnesses speaking of Defendant's character, the defense re-called Sgt. Montgomery as a witness. Sgt. Montgomery identified a May 14, 2014 letter from the defense requesting information on the internet service and computer networking equipment used by the SPD between October 18, 2011, and December 21, 2012. In response to that request, Sgt. Montgomery reported that the SPD had used a router of "unknown make and model" provided by CMA; that the SPD had no records regarding hardware that had been "procured, replaced, abandoned, destroyed or otherwise brought into or removed from the possession of control" of it; that the SPD did not maintain records of IP addresses assigned to or used by it; and that the SPD had no written policies or procedures for the preservation of evidence contained on equipment that was to be "replaced, abandoned, destroyed, or otherwise removed from" its control. He testified that nothing related to the computer equipment used in connection with this investigation was saved. He conceded that, in the search of Defendant's devices, law enforcement did not discover any evidence of child pornography, other conversations with minors or any evidence that Defendant had solicited sexual acts from minors.

Defendant testified that prior to March 2012, it was very common for him to have conversations of a sexual nature with anonymous persons

online. He stated that he never used his real name and that there was no expectation of honesty in the conversations. He claimed that he never received sexual gratification from those conversations, but that he was only interested in the way the other person talked about things. He denied ever meeting someone for sex as a result of an online conversation. He noted that the text message he sent to his then-wife about creating "a Facebook posting for people to poop on me" was a joke and that he often made similar "extreme" and "bizarre" jokes online and in person.

Defendant further testified that he used the Rick Richards persona online and created a Craigslist advertisement looking for a female of any age, race or size who would be interested in urination or defecation. He stated that at the time, people accessing the personals area on the Craigslist website had to confirm that they were over the age of 18. He denied that he ever intended to have a conversation, meeting or sexual interaction with a minor.

Defendant also testified that his conversations with Kendra and Brittani were intentionally outrageous in order to eliminate people who were solely looking to meet for sex. He alleged that Kendra was the only person he communicated with who claimed to be a minor. He stated that when Kendra responded to his advertisement, he found it unbelievable that a 14-year-old would show an interest in the type of activity he described in the advertisement. He testified that he believed that he was speaking with a law enforcement officer and not a 14-year-old girl.

Defendant, who has worked in the fields of computer science and information technology, further testified that it took several actions to confirm his belief that Kendra was not a minor. After Kendra sent him an

email, he was able to learn her IP address and then trace her physical location to CMA in north Webster Parish. He then determined that on the local network near the same address, was equipment that appeared to be both professional and residential and that the router in use was a business-focused Cisco ASA router. He unsuccessfully attempted to login to the network using the default credentials, but did not attempt to break in beyond that. He stated that had the SPD's router been available for discovery, it would have shown that he attempted to start an administrative session, but was unsuccessful. He also stated that the fact that the router being used by Kendra was a Cisco ASA router indicated to him that the router was not being used at a residence, especially that of a single mother who works at Walmart, because that particular router was much more expensive and advanced than a residential router. He noted that he emailed Kendra's IP address to himself as a reminder that there was something interesting about that address. He accessed the SPD's router again on October 5, 2012, in order to verify that the subpoena requested the correct equipment. He stated that on that date, i.e., the day before the subpoena was issued, the Cisco ASA router was still in use.

Defendant admitted that he agreed to meet with Kendra at a Pizza Hut in Springhill on October 18, 2011, but stated that he had no intention of actually going there. The next day, he made the following post on an online message board:

> Speaking of 14 year olds, my continued harassment of craigslist personal ad posters now involves someone that claims to be a 14 year old girl in a neighboring town. The other possibility is it's a cop pretending to a 14 year old girl. This can't possibly backfire, can it?

He also posted that he was set to meet the girl at Pizza Hut, but that he called it off so as not to tie up law enforcement for several hours waiting for him to arrive. He testified that he continued to engage in the conversations with Kendra because he found it "fascinating to watch unfold." He conceded that he was usually the one to initiate sexual conversations with Kendra.

Defendant further testified that after a month or two of conversations with Kendra, he began to believe that he was communicating with an adult civilian, rather than law enforcement. He stated that he could not find the photograph Kendra sent him of herself anywhere else on the internet, that she routinely communicated with him during school hours and that she was using equipment that was inconsistent with whom she purported to be. He noted that Kendra used more than one computer on her network and that each computer had a different professional operating system. He stated that he assumed Brittani was another persona maintained by the person pretending to be Kendra. He stated that he never believed Kendra and Brittani to be 14-year-old girls or real people.

Defendant also testified that after Kendra told him her address on March 11, 2012, he was not able to locate any publicly available ownership information for the property. He discovered that from May 2005 to May 2007, Arkansas issued a workman's compensation exemption for a man named David Tyson, who had operated a business at the address. He learned that Tyson was a 38-year-old male, who had been self-employed for approximately six years, which would be consistent with an information technology professional using the equipment that Defendant had determined was being used by Kendra. He testified that he went to the residence on the night of March 11, 2012, to see if he could obtain any additional information

about the person with whom he was communicating, but noted that he had no intention of confronting Tyson. He brought a Nikon D5100 camera and a Nikkor 18-200 VR lens, which would be appropriate for taking pictures from a distance in the dark. He stated that he brought a gun because he was driving to an unfamiliar location, in the middle of the night, to possibly meet a man who was pretending to be a 14-year-old girl.

Defendant further testified that he has been diagnosed with attention deficit disorder and obsessive compulsive disorder. He stated that a diagnosis of obsessive compulsive disorder means that he has unwanted and intrusive thoughts daily; and, as a result, he has learned to ignore things that should be upsetting or frightening. He testified that he had been under the treatment of Dr. Patrick Sewell, a psychologist, since 2012.

Dr. Sewell, admitted as an expert in the field of psychiatry, testified that Defendant had been diagnosed with attention deficit disorder and obsessive compulsive disorder, but was "very intellectually gifted." He explained that persons with attention deficit disorder have difficulty maintaining attention and are easily distracted. He testified that Defendant's obsessive compulsive disorder is characterized by intrusive and horrific thinking, such as thoughts of self-harm or harming others. He reported that Defendant's online behavior would be consistent with his diagnoses. Specifically, Dr. Sewell testified that Defendant's curiosity, desire for contact with people, desire to know and pursuit of games and competition would contribute to his behavior. He opined that Defendant does not have a predisposition to be a sexual predator or to solicit sex from a minor.

On March 12, 2018, the trial court found Defendant guilty as charged of computer-aided solicitation of a minor, in Docket No. 194,015; indecent

behavior with a juvenile, in Docket No. 194,015A; and computer-aided solicitation of a minor, in Docket No. 194,015B.

A sentencing hearing was held on June 10, 2018. For the convictions of computer-aided solicitation of a minor, the trial court sentenced Defendant to five years' imprisonment at hard labor, all but two years suspended, to be served without the benefit of probation, parole or suspension of sentence. It placed him on three years' active, supervised probation; imposed a $1,500 fine; and prohibited him from using a computer, except as it relates to his livelihood. For the conviction of indecent behavior with a juvenile, the trial court sentenced Defendant to two years' imprisonment at hard labor. The trial court ordered that the sentences be served concurrently.[2]

Defendant appeals.

DISCUSSION

Exculpatory Evidence

In his first assignment of error, Defendant argues that the trial court erred in allowing the trial to proceed when potentially exculpatory evidence, i.e., the SPD's Cisco ASA router, was missing. He contends that the router contained exculpatory evidence that he was aware that he was contacting law enforcement rather than a teenage girl. He contends that by not being allowed to have the router analyzed by an expert, his right to present a defense was prejudiced. He argues that the error of allowing his trial to go

[2] On August 3, 2018, Defendant filed a motion to reconsider sentence to correct and/or clarify the minutes of sentencing pursuant to La. C. Cr. P. art. 881.1. On August 7, 2018, the trial court filed an order amending the minutes.

forward substantially affected the fairness of the proceeding and the reliability of the fact-finding process.

The state argues that because the defense did not make a contemporaneous objection to the trial proceeding while alleged exculpatory evidence was missing, this claim should not be reviewed on appeal. It contends that although jurisprudence recognizes circumstances where review may be granted in the absence of a contemporaneous objection in situations where the error substantially affected the fairness of the proceeding and the reliability of the fact-finding process, no such exception exists in this case.

Generally, error cannot be availed of after verdict unless it was objected to at the time of occurrence. La. C. Cr. P. art. 841. The jurisprudence has carved out an exception where such alleged trial errors raise overriding due process considerations. *State v. Garner*, 39,731 (La. App. 2 Cir. 9/8/05), 913 So. 2d 874, *on reh'g* (Nov. 17, 2005), *writ denied*, 05-2567 (La. 5/26/06), 930 So. 2d 19. Errors that affect substantial rights of the accused are reviewable by the appellate court, even absent contemporaneous objection, to preserve the fundamental requirements of due process. *State v. Matthews*, 50,838 (La. App. 2 Cir. 8/10/16), 200 So. 3d 895, *writ denied*, 16-1678 (La. 6/5/17), 220 So. 3d 752, *citing State v. Green*, 493 So. 2d 588 (La. 1986), *and State v. Williamson*, 389 So. 2d 1328 (La. 1980). The exception to the contemporaneous objection rule is not a plain error rule of general application. *State v. Matthews*, *supra*, *citing State v. Arvie*, 505 So. 2d 44 (La. 1987). To fall under the exception, the error must cast substantial doubt on the reliability of the fact-finding process. *State v. Matthews*, *supra*, *citing State v. Arvie*, *supra*.

In *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." It has found that evidence is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985). Further, "[a] 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *Id*. In *Kyles v. Whitley*, 514 U.S. 419, 115 S. Ct. 1555, 131 L. Ed. 2d 490 (1995), the United States Supreme Court added that "[t]he question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence."

Where a defendant claims that his due process rights have been violated due to the state's failure to preserve potentially useful evidence, the defendant has the burden of showing that the state acted in bad faith. *State v. Shoupe*, 46,395 (La. App. 2 Cir. 6/22/11), 71 So. 3d 508, *writ denied*, 11-1634 (La. 1/13/12), 77 So. 3d 950, *citing Arizona v. Youngblood*, 488 U.S. 51, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988). In *California v. Trombetta*, 467 U.S. 479, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984), the United States Supreme Court explained:

> Whatever duty the Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense. To meet this standard of constitutional materiality, . . . evidence must both possess an exculpatory value that was

> apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.

Spoliation of the evidence, i.e., an intentional destruction of evidence for the purpose of depriving the opposing parties of its use, creates a presumption that the evidence was destroyed because it would have been detrimental to one's case. *State v. Bobo*, 46,225 (La. App. 2 Cir. 6/8/11), 77 So. 3d 1, *writ denied*, 11-1524 (La. 12/16/11), 76 So. 3d 1202, *citing Lewis v. Albertson's Inc.*, 41,234 (La. App. 2 Cir. 6/28/06), 935 So. 2d 771, *writ denied*, 06-1943 (La. 11/9/06), 941 So. 2d 42. However, the presumption of spoliation is not applicable when failure to produce the evidence is adequately explained. *State v. Bobo*, *supra*, *citing Lewis v. Albertson's Inc.*, *supra*. A defendant is not deprived of his due process rights based on the state's failure to preserve potentially exculpatory evidentiary material unless bad faith is demonstrated. *State v. Goosby*, 47,772 (La. App. 2 Cir. 3/6/13), 111 So. 3d 494, *writ denied*, 13-0760 (La. 11/1/13), 125 So. 3d 418, *citing State v. Harris*, 01-2730 (La. 1/19/05), 892 So. 2d 1238, *cert. denied*, 546 U.S. 848, 126 S. Ct. 102, 163 L. Ed. 2d 116 (2005). To receive the adverse inference, two conditions are required—destruction of evidence and bad faith. *State v. Goosby*, *supra*, *citing United States v. Wise*, 221 F.3d 140 (5th Cir. 2000).

Because Defendant alleges a *Brady* violation, which is a violation of his due process rights, he was not required to make a contemporaneous objection to preserve the right to review this error on appeal. The evidence presented at trial showed that the SPD used a router provided by CMA between October 2011 and March 2012, while Defendant was communicating with Sgt. Montgomery, as Kendra. On October 9, 2012, the

SPD received a defense subpoena for information stored on the router and for the router to be examined by an expert. In 2012, the City of Springhill changed internet service providers and returned the CMA router to the company. The SPD did not preserve any information contained on the router prior to its return. Although there is a dispute as to when the SPD returned the router to CMA, Defendant presented no evidence at trial that the SPD should have known of the router's potential evidentiary value prior to the issuance of the subpoena or that the state's failure to preserve the router was done in bad faith.

Furthermore, Defendant failed to show that the router was in fact exculpatory evidence. Evidence is exculpatory only when it is material to the defendant's guilt, meaning that there is a reasonable probability that the evidence would have affected the outcome of the proceeding. As discussed below, the state provided sufficient evidence to prove Defendant's guilt beyond a reasonable doubt. Also, Defendant presented little evidence to show the potentially exculpatory value of the evidence contained on the router. Sgt. Montgomery conceded that the information on the router could have been useful to either the defense or the prosecution. The defense presented no expert testimony regarding what information would have been stored on the router. With an employment history in computer science and information technology, Defendant asserted that the SPD's router would have shown his attempts to log into the system from his computer. He contended that this evidence would support his argument that he knew he was communicating with a law enforcement officer or an adult civilian rather than a 14-year-old girl. In its oral reasons for its verdict, the trial

court noted that Defendant's testimony regarding what may have been contained on the router was "self-serving."

On appeal, Defendant has failed to show that his due process rights were violated or that he was denied a fair trial when his trial proceeded without the Cisco ASA router. He did not meet his burden of proving that the router contained exculpatory evidence or that the state acted in bad faith in failing to preserve this evidence.

Accordingly, this assignment of error lacks merit.

Sufficiency of the Evidence

In his second assignment of error, Defendant argues that the state presented insufficient evidence to convict him of the offenses of computer-aided solicitation of a minor and indecent behavior with a juvenile. He asserts that, had the missing and exculpatory evidence of the router been available, the defense would have been able to show reasonable doubt, i.e., that he believed that he was communicating with law enforcement or an adult civilian, rather than a 14-year-old girl.

The state argues that viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of computer-aided solicitation of a minor and indecent behavior with a juvenile beyond a reasonable doubt.

The standard of review for a sufficiency of the evidence claim is 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, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *State v. Hearold*, 603 So. 2d 731 (La. 1992); *State v. Smith*, 47,983 (La. App. 2d Cir. 5/15/13), 116 So. 3d

884. *See also* La. C. Cr. P. art. 821. This standard does not provide an appellate court with a vehicle for substituting its appreciation of the evidence for that of the fact finder. *State v. Pigford*, 05-0477 (La. 2/22/06), 922 So. 2d 517. The trier of fact makes credibility determinations and may accept or reject the testimony of any witness. *State v. Casey*, 99-0023 (La. 1/26/00), 775 So. 2d 1022, *cert. denied*, 531 U.S. 840, 121 S. Ct. 104, 148 L. Ed. 2d 62 (2000). The appellate court does not assess credibility or reweigh the evidence. *State v. Smith*, 94-3116 (La. 10/16/95), 661 So. 2d 442.

La. R.S. 14:81.3(A)(1) defines computer-aided solicitation of a minor and states:

> Computer-aided solicitation of a minor is committed when a person seventeen years of age or older knowingly contacts or communicates, through the use of electronic textual communication, with a person who has not yet attained the age of seventeen where there is an age difference of greater than two years, or a person reasonably believed to have not yet attained the age of seventeen and reasonably believed to be at least two years younger, for the purpose of or with the intent to persuade, induce, entice, or coerce the person to engage or participate in sexual conduct or a crime of violence as defined in R.S. 14:2(B), or with the intent to engage or participate in sexual conduct in the presence of the person who has not yet attained the age of seventeen, or person reasonably believed to have not yet attained the age of seventeen.

The legislature defines the term "sexual conduct" to include actual or simulated sexual intercourse, masturbation, lewd exhibition of the genitals or any lewd or lascivious act. La. R.S. 14:81.3(D). The legislature defines "electronic textual communication" as a textual communication made through the use of a computer on-line service, internet service or any other means of electronic communication. La. R.S. 14:81.3(D). La. R.S. 14:81.3 addresses the communication and intent, not the end-resulting contact. *State v. Whitmore*, 46,120 (La. App. 2 Cir. 3/2/11), 58 So. 3d 583, *writ*

denied, 11-0614 (La. 11/14/11), 75 So. 3d 937, *citing State v. Suire*, 09-150 (La. App. 3 Cir. 10/7/09), 19 So. 3d 640.

La. R.S. 14:81(A)(2) defines indecent behavior with a juvenile and states:

> Indecent behavior with juveniles is the commission of any of the following acts with the intention of arousing or gratifying the sexual desires of either person:
>
> ***
>
> (2) The transmission, delivery or utterance of any textual, visual, written, or oral communication depicting lewd or lascivious conduct, text, words, or images to any person reasonably believed to be under the age of seventeen and reasonably believed to be at least two years younger than the offender. It shall not be a defense that the person who actually receives the transmission is not under the age of seventeen.

Indecent behavior with a juvenile is a specific intent crime for which the state must prove the offender's intent to arouse or gratify his sexual desires by his actions involving a child. *State v. Holman*, 46,528 (La. App. 2 Cir. 9/21/11), 73 So. 3d 444, *citing State v. Caston*, 43,565 (La. App. 2 Cir. 9/24/08), 996 So. 2d 480. Specific intent may be inferred from the circumstances surrounding the offense and the conduct of the defendant. *State v. Holman*, *supra*, *citing* La. R.S. 14:10(1), *and State v. Draughn*, 05-1825 (La. 1/17/07), 950 So. 2d 583, *cert. denied*, 552 U.S. 1012, 128 S. Ct. 537, 169 L. Ed. 2d 377 (2007). The determination of whether the requisite intent is present in a criminal case is for the trier of fact. *State v. Holman*, *supra*, *citing State v. Huizar*, 414 So. 2d 741 (La. 1982).

Finding that an act is lewd or lascivious depends upon the time, the place and all of the circumstances surrounding its commission, including the actual or implied intention of the actor. *State v. Dorsey*, 41,418 (La. App. 2 Cir. 9/20/06), 939 So. 2d 608, *writ denied*, 06-2686 (La. 6/1/07), 957 So. 2d 174. The word "lewd" means lustful, indecent or lascivious and

signifies that form of immorality which relates to sexual impurity carried on in a wanton manner. *State v. Caston*, *supra*. Further, the word "lewd" is identified with obscenity and community norms for morality. *State v. Dorsey*, *supra*. The word "lascivious" means tending to excite lust, lewd, indecent, obscene, relating to sexual impurity and tending to deprave the morals in respect to sexual relations. *State v. Caston*, *supra*.

At trial, the state established that Defendant, using the persona Rick Richards, placed an advertisement on Craigslist in which he sought a woman of any age, race or size to urinate or defecate on him. Sgt. Montgomery, using the persona of 14-year-old Kendra, replied to this advertisement, and Defendant and Kendra communicated by email, Facebook messenger, Google messenger, Yahoo messenger and text message for a six-month period. After acknowledging Kendra's age, Defendant initiated conversations of a sexual nature in which they discussed oral and anal sex. They also discussed Kendra urinating and defecating in Defendant's mouth and what she could eat and drink to make her urine and feces taste better. He described his sexual experiences with other women. He sent Kendra a photograph of his penis and photographs of him allegedly drinking semen and urine. He also suggested to Kendra that they meet in person; and, on the early morning of March 12, 2012, he drove to the street where Kendra told him that she lived.

Det. Mack, using the persona of 14-year-old Brittani, added Defendant as a friend on Facebook, and on March 11, 2012, they had a conversation through Facebook and Yahoo Messenger. After Brittani informed him of her age, he initiated a conversation of a sexual nature during which he told her that he liked to "eat pussy," "eat ass," "drink pee"

and “be toilet paper or a toilet.” They also discussed the possibility of meeting in person. Defendant sent Brittani the same photograph of his penis that he sent to Kendra.

Defendant argues that, had the SPD’s router been available for examination by an expert, he would have been able to prove his claim that he never believed that he was communicating with a 14-year-old girl, which is a required element of both computer-aided solicitation of a minor and indecent behavior with a juvenile. As discussed above, the only evidence the defense offered as to what information may have been found on the router was Defendant’s “self-serving” testimony. The evidence offered by the state included copies of the electronic textual communication between Defendant and Kendra and between Defendant and Brittani. Both Kendra and Brittani told Defendant that she was 14 years old. In his first conversation with Kendra, Defendant stated, “If you hadn’t said you were 14 I’d be in my car now on the way” and “Honestly, I wouldn’t have a problem with a 14YO.” Prior to stating its verdict, the trial court noted that it considered the evidence regarding the router and Defendant’s testimony, though it “discount[ed] [his testimony] some as it is perhaps self-serving in a way.” The trial court found, beyond a reasonable doubt, that Defendant believed that he was communicating with an underage individual. The trier of fact, in this case the trial court, makes credibility determinations and may accept or reject the testimony of any witness. The trial court chose to reject the “self-serving” testimony of Defendant and discount his explanation that he was playing a “game” with law enforcement or an adult civilian. This court does not assess credibility or reweigh the evidence.

Regarding the convictions of computer-aided solicitation of a minor, the state proved that Defendant is older than age 17; that he used electronic communication to contact and communicate with Kendra and Brittani; that he reasonably believed Kendra and Brittani had not yet attained the age of 17; and that his purpose or intent was to persuade, induce, entice or coerce Kendra and Brittani to engage or participate in sexual conduct.

Regarding the conviction of indecent behavior with a juvenile, the state proved that Defendant transmitted, delivered and uttered textual and visual communications to Kendra; that these communications depicted lewd and lascivious conduct, text, words and images; that he reasonably believed Kendra to be under the age of 17; and that his intent was to arouse or gratify his own sexual desires or those of Kendra. Defendant's statements regarding sexual acts and the photographs he sent were clearly lewd and lascivious.

After viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found that the state proved the essential elements of the crimes of computer-aided solicitation of a minor and indecent behavior with a juvenile beyond a reasonable doubt.

Accordingly, this assignment of error is without merit.

ERRORS PATENT

Illegally Lenient Sentence

Defendant's sentences for computer-aided solicitation of a minor are illegally lenient. As to each count of computer-aided solicitation of a minor, the trial court sentenced Defendant to five years' imprisonment at hard labor, with all but two years suspended, to be served without the benefit of parole, probation or suspension of sentence. La. R.S. 14:81.3(B)(1)(c) does

not permit the trial court to impose a suspended sentence for computer-aided solicitation of a minor; it requires that the entirety of the sentence imposed be served without benefit of parole, probation or suspension of sentence.

The trial court erred in imposing a portion of Defendant's sentence as a suspended sentence. Because correcting Defendant's sentences will require sentencing discretion, it may not be corrected by this court on appeal. *See State v. Haynes*, 04-1893 (La. 12/10/04), 889 So. 2d 224; *State v. Rathore*, 52,386 (La. App. 2 Cir. 1/16/19), 262 So. 3d 1099, *writ denied*, 19-0350 (La. 5/20/19).

Accordingly, we vacate Defendant's sentences for the two convictions of computer-aided solicitation of a minor and remand the matter to the trial court for resentencing.

Sex Offender Registration and Notification

The trial court failed to properly inform Defendant of the sex offender registration and notification requirements as required by La. R.S. 15:543.

Computer-aided solicitation of a minor is defined as a sexual offense against a victim who is a minor under La. R.S. 15:541(25)(f). Indecent behavior with a juvenile is defined as a sex offense under La. R.S. 15:541(24)(a). La. R.S. 15:543 requires that the trial court provide written notification to a defendant convicted of a sex offense of the registration and notification requirements and that an entry be made in the court minutes stating that the written notification was provided to the defendant.

A review of the sentencing transcript and the Notification to Sex Offender form signed by Defendant reflects that he was provided notification of the requirement to register only as to one conviction of

computer-aided solicitation of a minor. There is no indication in the record as to whether Defendant is aware of the sex offender registration requirements for his second conviction of computer-aided solicitation of a minor or his conviction of indecent behavior with a juvenile.

Accordingly, we remand this matter to the trial court for the purpose of providing the appropriate written notice to Defendant of the sex offender registration requirements on all three convictions and for the filing of written proof of such notice in the record of the proceedings. *See State v. Wilson*, 50,418 (La. App. 2 Cir. 4/6/16), 189 So. 3d 513, *writ denied*, 16-0793 (La. 4/13/17), 218 So. 3d 629.

Right to Appeal and Time Limitations for Post-Conviction

The trial court failed to advise Defendant of his right to appeal or of the time limitations for post-conviction relief. La. C. Cr. P. art. 930.8(C) provides that at the time of sentencing, the trial court shall inform the defendant of the prescriptive period for post-conviction relief either verbally or in writing. Although the minutes state that Defendant was "advised of post-conviction rights and 30 days to appeal," a review of the sentencing transcript does not reflect that the trial court advised him of these rights.

Accordingly, we advise Defendant that no application for post-conviction relief shall be considered if it is filed more than two years after the judgment of conviction and sentence has become final under the provisions of La. C. Cr. P. arts. 914 or 922.

CONCLUSION

For the aforementioned reasons, we affirm the convictions of Defendant William Timothy Allen, IV. We affirm his sentence for the conviction of indecent behavior with a juvenile, we vacate his sentences for

the convictions of computer-aided solicitation of a minor and we remand the matter to the trial court for resentencing.

CONVICTIONS AFFIRMED. SENTENCE FOR INDECENT BEHAVIOR WITH A JUVENILE AFFIRMED. SENTENCES FOR COMPUTER-AIDED SOLICITATION OF A MINOR VACATED. REMANDED FOR RESENTENCING.