NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2006 KA 0397

STATE OF LOUISIANA

VERSUS

MICHAEL J. SVEHLA

DATE OF JUDGMENT: December 28, 2006

ON APPEAL FROM THE TWENTY-SECOND JUDICIAL DISTRICT COURT
(NUMBER 386466 DIV. "J"), PARISH OF ST. TAMMANY
STATE OF LOUISIANA

HONORABLE WILLIAM J. KNIGHT, JUDGE

* * * * * *

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* * * * * *

BEFORE: KUHN, GAIDRY, AND WELCH, JJ.

Disposition: CONVICTIONS, HABITUAL OFFENDER ADJUDICATION, AND SENTENCES AFFIRMED.

Welch J. concurs with result

KUHN, J.

Defendant, Michael J. Svehla, was charged by bill of information with twelve counts of pornography involving juveniles in violation of La. R.S. 14:81.1. He pled not guilty to all charges. Defendant filed motions to suppress the evidence and his statement to the police. The trial court denied the motions. Following a jury trial, defendant was convicted as charged on counts 1-7. He was convicted of attempted pornography involving juveniles on counts 8-12, in violation of La. R.S. 14:81.1 and 14:27. Defendant filed motions for a new trial and post-verdict judgment of acquittal. The trial court denied the motions. The state filed a multiple offender bill of information seeking to have defendant sentenced as a habitual felony offender under La. R.S. 15:529.1. Following a hearing, the trial court adjudicated defendant a third felony habitual offender and sentenced him to life imprisonment at hard labor, without benefit of probation, parole, or suspension of sentence on count 1. On counts 2-7, the court sentenced defendant to imprisonment at hard labor for ten years, without benefit of probation, parole, or suspension of sentence. Defendant was sentenced to imprisonment at hard labor, without benefit of probation, parole, or suspension of sentence, for five years on counts 8-12. The court ordered that each of the sentences run consecutively to the others. Defendant moved for reconsideration of the sentences. The trial court denied the motion. Defendant now appeals, urging the following assignments of error:

1. The trial court erred in denying the suppression motions filed by the accused as a result of the unconstitutional search, seizure and interrogation he was subjected to.

2. The trial court erred in denying the defendant's motion for a mistrial after the state amended the bill of information in the

middle of trial and where improper comments were made by a state's witness outside of court within the hearing of the jury.

3. The trial court erred in denying the defendant's motion for acquittal/directed verdict made at the conclusion of the state's evidence, and motion for posttrial judgment of acquittal because the state did not bear its burden of proof and the verdict was not supported by substantial evidence, and was contrary to the law and the weight of the evidence.

4. The maximum consecutive sentences imposed by the trial court in this case were unconstitutionally excessive.

5. The trial court erred in finding that the defendant was a third felony offender and sentencing him as a habitual offender to life imprisonment without benefit of probation, parole, or suspension of sentence.

Finding no merit in the assigned errors, we affirm defendant's convictions, habitual offender adjudication, and sentences.

FACTS

On or about July 12, 2004, Probation and Parole Officer, Robert Indest, received a telephone call from defendant's mother indicating that defendant had been using illegal drugs and his behavior was causing his family fear. At that time, defendant was on probation and Indest was his probation officer. In response to the tip, Indest, with the assistance of Probation Officer Mike Phelps, performed a residence check of defendant's home for possible probation violations. Indest searched defendant's residence and found numerous digital video discs and compact discs (collectively referred to as "discs") inside a room defendant identified as his bedroom. As a special condition of his probation, defendant was not allowed to use a computer or the Internet for personal purposes. Indest observed that some of the discs were labeled "porn" or "porn miscellaneous." Phelps picked up one of the discs and attempted to play it on the

PlayStation video game system that was connected to a nearby television. An image appeared on the television screen. After viewing the image for a few seconds (before the PlayStation system stopped playing) and observing what he believed to be a child engaged in sexual activity with an adult, Indest seized approximately 90 discs. When Indest was later able to view the discs, he observed numerous images of children, ranging from a four-year-old to teens, in sexual situations. Indest turned the discs over to the St. Tammany Parish Sheriff's Office Crime Laboratory. Further review of the discs revealed approximately twelve files containing various children engaged in sexual activity with adults. Indest returned to defendant's residence and arrested him for violating his probation. Upon his arrest, the defendant told Indest that he would have gotten rid of the discs if he knew they were illegal.

DENIAL OF MOTION TO SUPPRESS

In this assignment of error, defendant claims the evidence seized as a result of the search of his residence should have been suppressed. He argues that his residence was searched without a warrant and although the discs were in plain view, it was not immediately apparent that the items were contraband. He further argues the statement he made upon arrest should be suppressed because he was never advised of his ***Miranda*** rights.

We previously reviewed the trial court's denial of defendant's motion to suppress under our supervisory jurisdiction in ***State v. Svehla***, 2005 KW 1972 (La. App. 1st Cir. 11/10/05) (unpublished), and found the ruling to be correct. Although a pretrial determination of the admissibility of evidence does not absolutely preclude a different decision on appeal, judicial efficiency demands that

this court accord great deference to its pretrial decisions unless it is apparent, in light of a subsequent trial record, that the determination was patently erroneous and produced an unjust result. ***See State v. Johnson***, 438 So.2d 1091, 1105 (La. 1983). ***See also State v. Humphrey***, 412 So.2d 507, 523 (La. 1982) (on rehearing).

By this assignment of error, defendant again seeks review of the trial court's ruling denying his motion to suppress the discs seized from his residence and the statement made upon his arrest. The assignment of error presents no new argument. Upon review, we find that the record in this case fully supports this court's previous decision on the issue presented in the writ application and is devoid of any additional evidence that would lead us to change the conclusion we reached therein.

As a general constitutional rule, warrantless searches are per se unreasonable under the Fourth Amendment to the United States Constitution. While a warrantless search is generally unreasonable, a person on parole or probation has a reduced expectation of privacy under the Fourth Amendment of the U.S. Constitution and under Article I, § 5 of the Louisiana Constitution. An individual on probation or parole does not have the same freedom from governmental intrusion into his affairs as does the ordinary citizen. ***State v. Perry***, 39,644, p. 6 (La. App. 2d Cir. 4/13/05), 900 So.2d 313, 318.

A reasonable suspicion that criminal activity is occurring is necessary for a probation officer to conduct a warrantless search. In addition, even though warrantless searches by a probation or parole officer are allowed, courts are in

agreement that the searches must not be a subterfuge for criminal investigation. To determine whether a warrantless search by a probation or parole officer was reasonable, the Louisiana Supreme Court has adopted a four-part test, which is set forth in ***State v. Malone***, 403 So.2d 1234, 1239 (La. 1981). In order to ascertain whether a warrantless search is reasonable, a court must consider: (1) the scope of the particular intrusion; (2) the manner in which it was conducted; (3) the justification for initiating the search; and (4) the place in which it was conducted. ***See Perry***, 39,644 at p. 7, 900 So.2d at 319; ***see also*** **State v. Hamilton**, 2002-1344, p. 4 (La. App. 1st Cir. 2/14/03), 845 So.2d 383, 387 ***writ denied***, 2003-1095 (La. 4/30/04), 872 So.2d 480.

Applying the ***Malone*** factors to the instant case, we find that the scope of the search conducted at defendant's residence was not unreasonable under the circumstances. The residence search was done by defendant's probation officer in his official capacity of investigating possible criminal activity by defendant after receiving information from defendant's mother. The discs, some clearly labeled "porn," were found in plain view inside defendant's home. The momentary glimpse of the image displayed on the television when considered alone may not have been sufficient to form probable cause to arrest defendant, a convicted sex offender. However, as the trial court correctly noted, this fact certainly aroused a reasonable suspicion that child pornography existed on that particular disc and very likely on others which were similarly labeled. Thus, Indest was justified in seizing the discs for further examination.

Regarding the statement, Indest testified when he returned to the residence to arrest defendant, he informed defendant that he was being arrested for a

probation violation. He further explained to defendant that he would be detained and would not be able to bond out of jail; that he would have a probation revocation hearing where the court would determine if there was child pornography or any technical probation violations. Indest also told defendant that if he did possess child pornography, then he could be charged with that crime. At that point, defendant told Indest that if he had known the pornographic material in question was illegal, he would have gotten rid of the discs. Indest testified that he was not interrogating defendant, but instead he was "just giving him a step-by-step of what was going to happen because when you lock them up they have no idea what is going on." Indest indicated that defendant's statement was not made in response to a specific question by him. Indest stated that he had not advised defendant of his ***Miranda*** rights as he was arresting him for a probation violation and not for possession of child pornography or any such crime. He did not remember defendant saying anything else to him. Indest testified that defendant's statement was spontaneous.

In denying the motion, the trial court stated there was not an interrogation taking place and there was no need to advise defendant of his rights at that time. The trial court stated that had there been an interrogation, the advising of rights would have been necessary. It specifically found that defendant's statement was spontaneously made without any prompting from Indest.

At a hearing on a motion to suppress a confession, the state bears the burden of proving beyond a reasonable doubt the free and voluntary nature of the confession. Before what purports to be a confession can be introduced into evidence, the state must affirmatively prove that it was free and voluntary and not

made under the influence of fear, duress, intimidation, menaces, threats, inducements or promises. La. R.S. 15:451; La. C.Cr.P. art. 703(D). The state must also establish that an accused who makes a statement during custodial interrogation was first advised of his ***Miranda*** rights. Spontaneous and voluntary statements made while a defendant is in custody and not given as a result of police interrogation or compelling influence are admissible as evidence even when made without the ***Miranda*** warning. ***See State v. Tilley***, 99-0569, pp. 2-3 (La. 7/6/00), 767 So.2d 6, 11, ***cert. denied***, 532 U.S. 959, 121 S.Ct. 1488, 149 L.Ed.2d 375 (2001).

Interrogation is "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." ***Miranda v. Arizona***, 384 U.S. 436, 444, 86 S.Ct. 1602, 1612, 16 L.Ed.2d 694 (1966). ***Miranda*** warnings are applicable only when it is established that the defendant has been subject to a "custodial interrogation." ***Miranda***, 384 U.S. at 444, 86 S.Ct. at 1612. ***See State v. Maise***, 2000-1158, p. 10 (La. 1/15/02), 805 So.2d 1141, 1148-49.

In the instant case, defendant was being taken into custody, but was not being interrogated. Instead, Indest was explaining to defendant what was going to happen to him as a result of his arrest on the probation violation. Defendant then spontaneously made the statement at issue.

Considering the above, the trial court did not abuse its discretion in denying the motion to suppress the statement or the discs.

DENIAL OF MOTIONS FOR A MISTRIAL

In his second assignment of error, defendant contends the trial court erred in failing to grant his motions for a mistrial. Defendant notes that he moved for a mistrial on two separate occasions during the trial. The trial court denied both motions. Defendant challenges each of these rulings.

Amendment of the bill of information

The first motion for a mistrial was made when the trial court allowed an amendment to the bill of information after the jury had already been selected and sworn. The defendant argues that the amendment was not merely a miscitation or clerical error as it completely changed the substance of the offenses charged.

The original bill of information, filed September 14, 2004, charged defendant with twelve counts of pornography involving juveniles "by photographing, videotaping, filming or otherwise reproducing visually sexual performances involving a child under the age of seventeen (17)," a violation of La. R.S. 14:81.1(A)(1). On November 15, 2005, after the jury was selected but prior to opening statements, the state moved to amend the bill of information to delete "surplus language." The state noted that the evidence reflected that "defendant is guilty of possession of these images, by not photographing, filming, or videotaping, certainly arguably reproducing." The state argued that the bill of information should be amended to conform to the evidence. Counsel for defendant initially indicated he had no objections to the amendment. The following day, however, when the state presented a copy of the amended bill of information, which charged defendant with twelve counts of pornography involving juveniles "by possessing any photographs, films, videotapes or other

visual reproductions of any sexual performances involving a child under the age of seventeen (17)," a violation of La. R.S. 14:81.1(A)(3), counsel for defendant objected to the amendment. Counsel argued that such a substantive change in the bill would constitute a defect and warranted a mistrial. In response, the state argued that defendant would suffer no prejudice from the amendment to the bill of information because the open file discovery, pretrial hearings, *voir dire* examination and other parts of the record clearly reflected that defendant was being charged with possession of the pornography involving juveniles. The trial court, after hearing the arguments of both parties, offered to allow the defense additional time in which to prepare to defend against the amended bill of information. Defense counsel declined the offer.

In overruling defendant's objection to the amendment of the bill of information, the trial court noted:

> The Court is going to allow the amendment of the bill under Article 488 of the Code of Criminal Procedure. The Court finds that under 489 that the amendment is not prejudicial. The Court will, however, in reading the bill to the jury, make the jury aware of the fact that an original bill was filed, which was thereafter amended. So as not to create any confusion or prejudice to the jury.

La. Code Crim. P. art. 487(A) provides:

> An indictment that charges an offense in accordance with the provisions of this Title shall not be invalid or insufficient because of any defect or imperfection in, or omission of, any matter of form only, or because any miswriting, misspelling, or improper English, or because of the use of any sign, symbol, figure, or abbreviation, or because any similar defect, imperfection, omission, or uncertainty exists therein. The court may at any time cause the indictment to be amended in respect to any such formal defect, imperfection, omission, or uncertainty.
>
> Before the trial begins the court may order an indictment amended with respect to a defect of substance. After the trial begins a mistrial shall be ordered on the ground of a defect of substance.

In a jury trial, trial begins when the first prospective juror is called for examination. La. C.Cr.P. art. 761. In ***State v. Johnson***, 93-0394, p. 3 (La. 6/3/94), 637 So.2d 1033, 1034-35 (per curiam), the supreme court set out the law on the amendment of a bill of information:

> La. Const. 1974, Art. I, § 13 provides that "[i]n a criminal prosecution, an accused shall be informed of the nature and cause of the accusation against him." This requirement protects the accused's right to prepare a defense and exercise fully his rights of confrontation and cross-examination. The bill of information must therefore inform the defendant of the nature and cause of the accusation against him in sufficient detail to allow him to prepare for trial, as well as to allow the court to determine the admissibility of the evidence. Accordingly, the state may not substantively amend a bill of information to charge a new offense once trial has begun. (Citations omitted.)

Our review of the record in this case reflects that the amendment to the bill of information was merely to clarify the charges. While the amendment changed the detailed description of the actions constituting the offenses, it did not charge new offenses. Furthermore, the record reflects that defendant was obviously aware that he was to be tried for possession of child pornography. For instance, an examination of the *voir dire* in this case, including the questioning of the prospective jurors by the defense counsel, clearly reveals that there was no uncertainty as to what portion of the pornography-involving-juveniles statute defendant was being charged under. The state, in its examination, repeatedly explained to the prospective jurors that defendant was being charged with possession of child pornography. Defense counsel also acknowledged that the portion of the statute to which the "district attorney referred" was the portion that describes "intentional possession, sale, distribution, or possession with intent to

sell or distribute any photograph, film, videotape, or other visually (sic) reproduction of any sexual performance involving a child under the age of 17." Thus, the amendment was clearly made to cure the miscitation of the subsection to the charges of pornography involving juveniles. Such an amendment, even if considered erroneous, was harmless.

"A 'defect of substance' as contemplated by Article 487 of the Code of Criminal Procedure is intended to mean a defect which will work to the prejudice of the party accused." ***City of Baton Rouge v. Norman***, 290 So.2d 865, 870 (La. 1974); ***see also State v. Harris***, 478 So.2d 229, 231 (La. App. 3d Cir. 1985), ***writ denied***, 481 So.2d 1331 (La. 1986). The purpose of requiring the state to file an amendment to the indictment before trial is to provide the defendant with adequate notice of the crime for which he is charged so that he can properly prepare his defense. ***See State v. Young***, 615 So.2d 948, 951 (La. App. 1st Cir.), ***writ denied***, 620 So.2d 873 (La. 1993). Thus, a defendant suffers no prejudice when the indictment against him provides sufficient notice of the crime with which he is charged. In the instant case, defendant was clearly provided sufficient notice of the charges against him for preparation for trial. At the time of the amendment, to cure any potential prejudice, the trial court even offered defendant additional time to prepare. Counsel for defendant declined the offer. Thus, defendant has failed to prove any prejudice flowing from the amendment of the bill of information. For the foregoing reasons, we find the amendment of the language providing the details of the offenses to be one of form, and the trial court committed no error in allowing the amendment after the commencement of trial.

Comment on evidence in presence of jury

Defense counsel, upon discovering that Indest made a comment on the evidence in the presence of the jury, urged a second motion for a mistrial. Because Indest spoke of matters directly associated with the trial, defendant argues that the comment was highly prejudicial and warranted a mistrial.

The record reflects that after the lunch recess on the second day of trial, defense counsel informed the court that Indest had advised him that some of the members of the jury possibly overheard a conversation he had with a member of the court staff regarding the case. Indest explained that as he was walking outside the courtroom during the recess, the court staff member asked him how the case was proceeding. Indest replied, "It's interesting to watch the jurors' expressions." Indest explained that unbeknownst to him, several members of the jury were walking behind him when he made the aforementioned comment. Although he was not absolutely certain that the jurors actually heard the comment, Indest suspected, considering the volume of his voice, it was likely that they did.

Defense counsel moved for a mistrial. The trial court denied the motion and advised that it would admonish the jury to disregard any remark heard outside the courtroom and not heard as evidence. The trial court admonished the jury as follows:

> Ladies and gentlemen, let me open in two ways. First, in the event that any of you overheard any remarks by anyone involved in this case during lunch, then you are to disregard those remarks as they are not evidence. They were not heard in the courtroom here from the witness stand. And they are to be disregarded.
>
> As you heard me say already in this case, the evidence you are to consider is what comes from the witness stand or is introduced here in the courtroom. In the event – and that is out of an abundance of

caution – that anyone overheard anything in the hallway during lunch, you are to disregard that.

Remarks by witnesses fall under the discretionary mistrial provisions of La. C.Cr.P. art. 771, which, in pertinent part, provide as follows:

> In the following cases, upon the request of the defendant or the state, the court shall promptly admonish the jury to disregard a remark or comment made during the trial, or in argument within the hearing of the jury, when the remark is irrelevant or immaterial and of such a nature that it might create prejudice against the defendant, or the state, in the mind of the jury:
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> * * *
>
> (2) When the remark or comment is made by a witness or person other than the judge, district attorney, or a court official, regardless of whether the remark or comment is within the scope of Article 770.
>
> In such cases, on motion of the defendant, the court may grant a mistrial if it is satisfied that an admonition is not sufficient to assure the defendant a new trial.

A mistrial under the provisions of article 771 is at the discretion of the trial court and should be granted only where the prejudicial remarks of the witness make it impossible for the defendant to obtain a fair trial. ***State v. Tran***, 98-2812, p. 3 (La. App. 1st Cir. 11/5/99), 743 So.2d 1275, 1280, ***writ denied***, 99-3380 (La. 5/26/00), 762 So.2d 1101. The proper remedy for inappropriate remarks by a witness is an admonishment directing the jury to disregard the remark. The trial court should order a mistrial under article 771 only if it determines that an admonition is not adequate to assure the defendant a fair trial. As previously noted, mistrial is a drastic remedy which is warranted only if substantial prejudice results that would deprive the defendant of a fair trial, and the ruling of the trial court will not be disturbed absent an abuse of discretion. ***State v. Welch***, 448

So.2d 705, 710 (La. App. 1st Cir.), ***writ denied***, 450 So.2d 952 (La. 1984); ***State v. Clay***, 441 So.2d 1227, 1231 (La. App. 1st Cir. 1983), ***writ denied***, 446 So.2d 1213 (La. 1984). The trial judge is given wide discretion to determine whether a fair trial is impossible, or if an admonition is adequate to assure a fair trial. ***State v. Belgard***, 410 So.2d 720, 724 (La. 1982).

Initially, we note the comment in question by Indest was not prejudicial on its face. Contrary to defendant's assertions, the comment indicating that Indest found it interesting to observe the jurors' reactions to the photographic evidence did not constitute a comment on the defendant's guilt. Furthermore, we find no error or abuse of discretion in the trial court's finding that an admonition, and not a mistrial, was proper in response to a comment the jurors may or may not have heard. The prompt and thorough admonition by the trial court was sufficient to cure any potential prejudice and to assure that the defendant received a fair trial. We find no error in the trial court's refusal to grant a mistrial on this ground.

This assignment of error lacks merit.

DENIAL OF MOTION FOR POST-VERDICT JUDGMENT OF ACQUITTAL

In his third assignment of error, defendant contends the trial court erred in denying his motion for post-verdict judgment of acquittal. Specifically, defendant argues the state failed to prove the requisite element of intent. Defendant asserts the evidence presented at trial was insufficient to prove that he intentionally possessed pornography that he knew involved juveniles. He argues that there was absolutely no proof that he knew the child pornography was contained on the discs

in his room. Although some of the discs were labeled "porn," defendant notes that possession of pornography involving adults is not illegal.

The standard of review for the sufficiency of the evidence to uphold a conviction is whether, when viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could conclude the state proved the essential elements of the crime and the defendant's identity as the perpetrator of that crime beyond a reasonable doubt. See La. C.Cr.P. art. 821; ***State v. Johnson***, 461 So.2d 673, 674 (La. App. 1st Cir. 1984). The ***Jackson v. Virginia***, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), standard of review incorporated in Louisiana Code of Criminal Procedure article 821 is an objective standard for testing the overall evidence, both direct and circumstantial, for reasonable doubt. When analyzing circumstantial evidence, La. R.S. 15:438 provides the fact finder must be satisfied the overall evidence excludes every reasonable hypothesis of innocence. ***State v. Nevers***, 621 So.2d 1108, 1116 (La. App. 1st Cir.), ***writ denied***, 617 So.2d 906 (La. 1993); ***State v. McLean***, 525 So.2d 1251, 1255 (La. App. 1st Cir.), ***writ denied***, 532 So.2d 130 (La. 1988). Ultimately, all evidence, both direct and circumstantial, must be sufficient under ***Jackson*** to satisfy a rational juror that the defendant is guilty beyond a reasonable doubt. ***State v. Shanks***, 97-1885, pp. 3-4 (La. App. 1st Cir. 6/29/98), 715 So.2d 157, 159.

La. R.S. 14:81.1 defines pornography involving juveniles, in pertinent part, as follows:

A. Pornography involving juveniles is any of the following:

* * *

(3) The intentional possession, sale, distribution, or possession with intent to sell or distribute of any photographs, films, videotapes,

or other visual reproductions of any sexual performance involving a child under the age of seventeen.

In the instant case, defendant does not deny that the discs seized from his residence contained pornography involving juveniles.[1] He insists, however, that he was unaware of the existence of the illegal material on the discs.

Pornography involving juveniles is a general intent crime. ***See State v. Cinel***, 94-0942, p. 9 (La. 11/30/94), 646 So.2d 309, 316, ***cert denied***, 516 U.S. 881, 116 S.Ct. 215, 133 L.Ed.2d 146 (1995). General criminal intent is present when the circumstances indicate that the offender, in the ordinary course of human experience, must have adverted to the prescribed criminal consequences as reasonably certain to result from his act or failure to act. La. R.S. 14:10(2).

Upon review of the testimonial evidence presented in this case, we find that the state sufficiently met its burden of proving the requisite element of intent. Michael Gordon, Federal Bureau of Investigations Special Agent, testified that upon reviewing the discs in question, he identified three known series of child pornography. Gordon identified the Staben, Helen and Vahl series. Gordon confirmed that photographs from each of these well-known series depicted actual children engaged in various sexual situations.

The critical evidence of defendant's intent and/or knowledge of the existence of the pornography was defendant's own statement to the police. Both Indest and Phelps testified that upon being advised that he was being charged with a probation violation for possessing illegal pornography involving juveniles,

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[1] Since defendant has only alleged the state failed to prove he was aware of the existence of the child pornography on the discs, we need not address the sufficiency of the evidence to prove that the files in question were, in fact, pornography.

defendant indicated that he was not aware that such material was illegal. He told the officers that if he had known that the material was illegal, he would have discarded it. While this statement by defendant claims lack of knowledge of the illegality of the child pornographic material, it clearly evinces defendant's knowledge that the material was in fact contained on the discs. Thus, we find the state sufficiently proved each of the essential elements of the crime of pornography involving juveniles beyond a reasonable doubt. This assignment of error lacks merit.

EXCESSIVE SENTENCES

In his fourth assignment of error, defendant contends the trial court erred in imposing excessive sentences. Specifically, he asserts the maximum, consecutive sentences for what he refers to as "simple possession" of pornography involving juveniles is unconstitutionally disproportionate to the severity of the offenses. Defendant further asserts that it is not apparent from the court's comments that it considered the sentencing guidelines and/or adequately stated the considerations taken into account when imposing the sentences. Defendant argues the trial court should have considered, in mitigation, that he was participating in a voluntary sex offender program, was contributing to society by serving as a tutor in the GED program while incarcerated, was married and had a two-week-old son for whom he was the sole support, had a consistent history of gainful employment and was an educated and productive member of society.

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. ***State v. Sepulvado***, 367 So.2d 762, 767 (La. 1979). Generally, a sentence is considered excessive if it 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. ***State v. Reed***, 409 So.2d 266, 267 (La. 1982). 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. Lanclos***, 419 So.2d 475, 478 (La. 1982).

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

The maximum sentence permitted under a statute may be imposed only in cases involving 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. ***See State v. Hilton***, 99-1239, p. 16 (La. App. 1st Cir. 3/31/00), 764 So.2d 1027, 1037, ***writ denied***, 2000-0958 (La. 3/9/01), 786 So.2d 113.

Initially we note, while he repeatedly challenges the imposition of the maximum sentence under the pornography statute, defendant does not appear to challenge the mandatory life sentence imposed under the habitual offender law. Nor does the defendant challenge the sentences imposed on the convictions of attempted pornography involving juveniles.

The offense of pornography involving juveniles is punishable by a fine of not more than ten thousand dollars and imprisonment at hard labor for not less than two years or more than ten years, without benefit of probation, parole, or suspension of sentence. La. R.S. 14:81.1(E). As correctly noted by the defendant, La. R.S. 14:81.1 proscribes various offenses relating to pornography involving juveniles. However, we note that while the defendant has chosen to refer to the offenses for which he was convicted as "simple possession" and urges that the offenses are less egregious and warrant lesser sentences than the other offenses provided in the statute, the legislature has made no such distinction.

As previously noted, defendant in this case was sentenced, on each of counts 2-7, to ten years imprisonment at hard labor, without benefit of probation, parole, or suspension of sentence and on counts 8-12, to five years at hard labor, without benefit of probation, parole, or suspension of sentence the maximum allowed by statute for the offenses of pornography involving juveniles and attempted pornography involving juveniles. See La. R.S. 14:81.1(E) and 14:27(D)(3). Defendant was also sentenced, as a third felony habitual offender, to the mandatory sentence of life imprisonment at hard labor without the benefit of probation, parole, or suspension of sentence on count one.

In imposing the sentences in this case, the trial court ruled out the possibility of lesser sentences concluding that, in light of defendant's past criminal conduct, there would be an undue risk that defendant would commit another crime. The trial court found defendant to be desperately in need of correctional treatment in a custodial environment. It noted that such confinement was also necessary for the protection of the public, particularly young women. Based on the particularly vile nature of the offenses, the trial court concluded that any lesser sentences than the maximum would deprecate the seriousness of the offenses.

Considering the reasons for sentence articulated by the trial court and the entire record before us, we do not find the sentences imposed in this case to be excessive. While we agree that the factual circumstances are not the worst found in the jurisprudence, defendant, who committed the instant offenses while on probation for another sex offense involving a juvenile, is certainly the worst type of criminal offender. Therefore, based upon the nature of the offenses and defendant's failure to respond to past rehabilitation attempts, we find no error or abuse of discretion in the trial court's imposition of maximum consecutive sentences in this case. The sentences are not shocking to the sense of justice, nor are they needless infliction of pain and suffering. This assignment of error lacks merit.

HABITUAL OFFENDER ADJUDICATION

In his final assignment of error, defendant contends the trial court erroneously adjudicated him a third felony offender. Specifically, he asserts that the evidence presented in support of the October 28, 1996 predicate conviction (predicate number two) failed to establish a knowing and voluntary waiver of his

constitutional trial rights as required by ***Boykin***. Thus, he contends the state failed to carry its burden of proving the constitutionality of the underlying guilty plea in that predicate.[2]

In ***State v. Shelton***, 621 So.2d 769 (La. 1993), the Louisiana Supreme Court revised the scheme of allocating burdens of proof in habitual offender proceedings, stating:

> If the defendant denies the allegations of the bill of information, the burden is on the State to prove the existence of the prior guilty pleas and that defendant was represented by counsel when they were taken. If the State meets this burden, the defendant has the burden to produce some affirmative evidence showing an infringement of his rights or a procedural irregularity in the taking of the plea. If the defendant is able to do this, then the burden of proving the constitutionality of the plea shifts to the State. The State will meet its burden of proof if it introduces a "perfect" transcript of the taking of the guilty plea, one which reflects a colloquy between judge and defendant wherein the defendant was informed of and specifically waived his right to trial by jury, his privilege against self incrimination, and his right to confront his accusers. If the State introduces anything less than a "perfect" transcript, for example, a guilty plea form, a minute entry, an "imperfect" transcript, or any combination thereof, the judge then must weigh the evidence submitted by the defendant and by the State to determine whether the State has met its burden of proving that defendant's prior guilty plea was informed and voluntary, and made with an articulated waiver of the three *Boykin* rights. (footnotes omitted).

Shelton, 621 So.2d at 779-80.

Applying this jurisprudential scheme, once defendant denied the allegations of the habitual offender bill of information on the alleged predicate offense, the state had the burden of proving: 1) the existence of the prior guilty plea, and 2) that defendant was represented by counsel when the predicate plea was accepted.

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[2] Defendant does not contest predicate number one, the 2004 carnal knowledge of a juvenile conviction.

Contrary to defendant's claim, the state did not initially bear the burden of proving the constitutionality of the prior guilty plea. The state only bore the burden of proving the existence of the plea.

At the habitual offender hearing in this case, the state introduced several documents in support of predicate number one. These documents included certified copies of a St. Tammany Parish bill of information charging the defendant with the felony offense of possession with intent to distribute marijuana and a minute entry for the October 28, 1996 hearing reflecting defendant's guilty plea to the aforementioned charge and also indicating that defendant was represented by counsel at the time of the plea. A copy of a minute entry for a March 18, 1997 probation revocation hearing and a transcript of an April 26, 1999 re-sentencing hearing were also included. With these documents, the state successfully carried its initial burden of proving the existence of the prior guilty plea and that defendant was represented by counsel when the plea was taken.

Once the state met this burden, defendant was required to produce some affirmative evidence of an infringement of his rights or a procedural irregularity in the taking of the predicate guilty plea. Defendant could have attempted to meet this burden by introducing the transcript, testimony regarding the taking of the plea, or any other affirmative evidence. If defendant had met this burden, the burden of proof would have shifted back to the state to prove the constitutionality of the prior guilty plea. However, the record is devoid of any attempt by the defendant to produce any such affirmative evidence. Instead, at the habitual offender hearing, counsel for the defendant only argued that the state failed to produce the transcript of the proceeding as evidence that the trial judge explained

the ***Boykin*** rights to him during the colloquy of the predicate at issue. Because the defendant failed to meet his burden, the burden of proving the constitutionality of the prior guilty plea never shifted back to the state. "It is in this situation that the presumption of regularity attaching to a final judgment of conviction is intended to operate." ***State v. Denomes***, 95-1201, p. 10 (La. App. 1st Cir. 5/10/96), 674 So.2d 465, 471, ***writ denied***, 96-1455 (La. 11/8/96), 683 So.2d 266.

Considering the foregoing, we find no error in the trial court's consideration of the October 28, 1996, guilty plea as a predicate in adjudicating the defendant a third felony offender. This assignment of error lacks merit.

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

CONVICTIONS, HABITUAL OFFENDER ADJUDICATION, AND SENTENCES AFFIRMED.