NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 KA 0443

STATE OF LOUISIANA

VERSUS

GREGORY J. REAUX

Judgment Rendered: SEP 1 4 2011

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On Appeal from the Twenty-Second Judicial District Court
In and for the Parish of St. Tammany
State of Louisiana
Docket No. 471010

Honorable August J. Hand, Judge Presiding

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In Proper Person

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BEFORE: PETTIGREW, McCLENDON, AND WELCH, JJ.

Pettigrew, J. Concurs

McCLENDON, J.

Defendant, Gregory J. Reaux, was charged by bill of information with three counts of armed robbery (counts one, two, and three) and one count of attempted armed robbery (count four), violations of LSA-R.S. 14:64 and LSA-R.S. 14:27. The trial court denied defendant's motion to suppress the confession and his motion to suppress evidence. Defendant entered a plea of not guilty and was found guilty as charged on each count after a trial by jury. The trial court denied defendant's motion for new trial and motion for post verdict judgment of acquittal and sentenced defendant to ten years imprisonment at hard labor without the benefit of parole, probation, or suspension of sentence on each count. The trial court ordered that the sentences be served consecutively. The trial court denied defendant's motion to reconsider sentence. Defendant now appeals, raising one assignment of error in his counseled brief wherein he argues that the sentencing is excessive and an abuse of the trial court's discretion. In a pro se brief, defendant raises four additional assignments of error, challenging the trial court's denial of his motions to suppress, the trial court's denial of his motion to continue, the trial court's admission of other crimes evidence, and the sufficiency of the evidence based on the claim that the record is incomplete. For the following reasons, we affirm the convictions and sentences.

STATEMENT OF FACTS

In March and April of 2009, Jefferson and St. Tammany Parish police officers were investigating a string of robberies occurring near closing time at several Game Stop video game stores located in those areas. The instant case involves charges arising from the St. Tammany Parish offenses.

Specifically, on April 17, 2009, a robbery occurred at the Game Stop store located in Slidell, Louisiana, at approximately 9:00 p.m., just minutes before the store's closing time. Store employees Adolfo Castro (the victim in count one) and Chris Jackson were present at the time of this robbery. As Castro testified during the trial, the perpetrator was armed with a blue box cutter with the blade extended and his face was covered with a "sleeve cut-out of a T-shirt." The

perpetrator, a black male about six feet and six inches tall, was wearing blue jeans, a T-shirt, and a black cap. Castro testified that he did not take the incident seriously until he saw the box cutter. He complied with the perpetrator's demand that he put the money from both cash registers, about $813.00, into the perpetrator's black mesh bag. The perpetrator also demanded that Castro check the store safe for more money, but it was empty. He then demanded that Castro put Wii Point Cards in the bag and he complied.[1] The perpetrator took the bag and exited the store.

The next day, on April 18, employees of a Game Stop store in Covington, Louisiana, were robbed. The employees, Ryan Bohn[2] and Joel Vogt (the victims in counts two and three), described the perpetrator as a six-feet, two-to-three inches tall black male wearing light gray sweatpants, a white shirt, a scarf or fabric over his face, and armed with a blue box cutter with the blade extended. Bohn observed the perpetrator as he pulled the cloth up from around his neck to cover part of his face just before he entered the store. The perpetrator had a black mesh Jansport school bag and demanded that both employees place money from the cash registers in the bag, and they complied. Two customers were present at the time and upon his entrance, the perpetrator raised the box cutter and told them to move back. One of them offered the perpetrator his wallet, but he declined. Vogt estimated that the perpetrator took a total of about $600.00.

On April 20, 2009, defendant, a former Game Stop employee, was arrested as a result of police surveillance at a Game Stop store in Mandeville, Louisiana, that had not yet been targeted during the string of robberies. After his arrest, defendant confessed to the completed robberies and stated that he

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[1] Nintendo Points Cards are generally sold in the form of codes on scratch-cards providing 1000, 2000, or 3000 Nintendo Points. Nintendo Points are used to purchase a variety of software on the Wii Shop Channel.

[2] The record is inconsistent as to the spelling of the last name of this particular victim. Specifically, the bill of information lists the victim's name as Ryan Bohne, while the spelling used herein is provided in the trial transcript.

planned to also commit robbery at the Mandeville store, but had a change of heart just before he was approached by the police.

COUNSELED ASSIGNMENT OF ERROR

In the sole counseled assignment of error, defendant contends that the trial court abused its discretion and that the sentencing in this case is excessive because the sentence on the attempted armed robbery is the same as imposed for the completed offenses, and the sentences are to be served consecutively. Defendant argues that the trial court abused its discretion by treating all of the counts like they were of equal caliber, specifically contending that the aborted robbery should have been given less punishment than the completed offenses. Defendant notes that the offenses occurred over a short period of time and argues they were all part of a common scheme or plan with the same modus operandi. Defendant further specifies that two of the offenses were committed on the same date, at the same store, and within seconds of each other. The defendant also notes that he has no prior convictions and was in pursuit of his master's degree at the time of his arrest. Defendant concludes that under the circumstances of this case, forty years imprisonment is excessive and a needless infliction of pain and suffering.

The Eighth Amendment to the United States Constitution and Article I, Section 20 of the Louisiana Constitution prohibit the imposition of excessive or cruel 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); see also **State v. Lanieu**, 98-1260 (La.App. 1 Cir. 4/1/99), 734 So.2d 89, 97, writ denied, 99-1259 (La. 10/8/99), 750 So.2d 962. A sentence is constitutionally excessive if it is grossly disproportionate to the severity of the offense or is nothing more than a purposeless and needless infliction of pain and suffering. See **State v. Dorthey**, 623 So.2d 1276, 1280 (La. 1993). A sentence is grossly disproportionate if, when the crime and punishment are considered in light of the harm done to society, it shocks the sense of justice. **State v.**

Hogan, 480 So.2d 288, 291 (La. 1985). A trial court is given wide discretion in the imposition of sentences within statutory limits, and the sentence imposed by it should not be set aside as excessive in the absence of manifest abuse of discretion. **State v. Lobato**, 603 So.2d 739, 751 (La. 1992).

Article 894.1 of the Louisiana Code of Criminal Procedure sets forth items that must be considered by the trial court before imposing sentence. The trial court need not recite the entire checklist of Article 894.1, but the record must reflect that it adequately considered the guidelines. **State v. Herrin**, 562 So.2d 1, 11 (La.App. 1 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. **State v. Watkins**, 532 So.2d 1182, 1186 (La.App. 1 Cir. 1988). Remand for full compliance with Article 894.1 is unnecessary when a sufficient factual basis for the sentence is shown. **State v. Lanclos**, 419 So.2d 475, 478 (La. 1982).

Louisiana Code of Criminal Procedure article 883 provides in pertinent part:

> If the defendant is convicted of two or more offenses based on the same act or transaction, or constituting parts of a common scheme or plan, the terms of imprisonment shall be served concurrently unless the court expressly directs that some or all be served consecutively.

The imposition of consecutive sentences requires particular justification when the crimes arise from a single course of conduct. However, even if the convictions arise out of a single course of conduct, consecutive sentences are not necessarily excessive. Other factors must be taken into consideration in making this determination. For instance, consecutive sentences are justified when the offender poses an unusual risk to the safety of the public due to his past conduct or repeated criminality. **State v. Johnson**, 99-0385 (La.App. 1 Cir. 11/5/99), 745 So.2d 217, 221, writ denied, 00-0829 (La. 11/13/00), 774 So.2d 971.

Defendant's three armed robbery offenses carried a sentence exposure of up to ninety-nine years imprisonment at hard labor without the benefit of parole,

probation, or suspension of sentence. LSA-R.S. 14:64B. The attempted offense carried a sentencing exposure of up to forty-nine and one-half years imprisonment at hard labor without the benefit of parole, probation, or suspension of sentence. LSA-R.S. 14:64B & 14:27D(3). In the present case, the trial court sentenced defendant to a term of ten years imprisonment at hard labor on each count.

In sentencing defendant, the trial court noted its consideration of the trial testimony, the sentencing guidelines, the risk to society, and the seriousness of the offenses. The trial court further noted that there was a concern that defendant was not remorseful. The trial court concluded that if not for defendant's arrest, the pattern of activity would have continued and may have continued in the future upon his release.

If the legislature saw fit to determine a range with a maximum of ninety-nine years imprisonment at hard labor for one completed armed robbery offense and a maximum of forty-nine and one-half years imprisonment at hard labor for an attempted offense, surely a total sentence of forty years imprisonment at hard labor for three completed and one attempted offense is not excessive. Considering the trial court's reasons for sentencing and the factual details of the offenses, including multiple victims among the employees and customers who were present during the offenses, the record supports a conclusion that defendant poses an unusual risk to the safety of the public. Accordingly, we cannot say the trial court's imposition of sentences of ten years at hard labor on each count to be served consecutively is excessive or an abuse of discretion. The counseled assignment of error is without merit.

PRO SE ASSIGNMENT OF ERROR NUMBER TWO

In his pro se brief, defendant begins his assignments of error at number two and therein argues that the trial court erred in denying his motions to suppress. Defendant specifically notes that he is not challenging the initial stop, but argues that his arrest was illegal for lack of probable cause. Defendant contends that the evidence seized and the statements obtained were fruits of the

illegal arrest as there were no significant intervening factors. Defendant also argues that his first statement was not voluntary as the officers made promises in order to obtain the statement, and that the **Miranda**[3] warnings given prior to his third statement were insufficient because he was not informed of his right to stop answering questions.

The Fourth Amendment to the United States Constitution and article I, § 5 of the Louisiana Constitution protect persons against unreasonable searches and seizures. A defendant adversely affected may move to suppress any evidence from use at the trial on the merits on the ground that it was unconstitutionally obtained. LSA-C.Cr.P. art. 703A. The State bears the burden of proving the admissibility of a purported confession or any evidence seized during a search without a warrant. LSA-C.Cr.P. art. 703D. The right of law enforcement officers to stop and interrogate one reasonably suspected of criminal conduct is recognized by LSA-C.Cr.P. art. 215.1, as well as by both federal and state jurisprudence. **Terry v. Ohio**, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); **State v. Belton**, 441 So.2d 1195, 1198 (La. 1983), cert. denied, 466 U.S. 953, 104 S.Ct. 2158, 80 L.Ed.2d 543 (1984). The right to make an investigatory stop and question the particular individual detained must be based on reasonable suspicion to believe that he has been, is, or is about to be engaged in criminal conduct. **State v. Thomas**, 583 So.2d 895, 898 (La.App. 1 Cir. 1991). In making a brief investigatory stop on less than probable cause to arrest, the police must have a particularized and objective basis for suspecting the person stopped of criminal activity. The police must therefore articulate something more than an inchoate and unparticularized suspicion or hunch. **State v. Huntley**, 97-0965 (La. 3/13/98), 708 So.2d 1048, 1049 (per curiam). Because the police conducting an investigatory stop may not seek to verify their suspicions by means that approach the conditions of arrest, **Florida v. Royer**, 460 U.S. 491, 499, 103 S.Ct. 1319, 1325, 75 L.Ed.2d 229 (1983), the use of handcuffs must appear objectively reasonable in light of the facts and

[3] **Miranda v. Arizona**, 384 U.S. 436, 444, 86 S.Ct. 1602, 1612, 16 L.Ed.2d 694 (1966).

circumstances confronting the police. **State v. Porche**, 06-0312 (La. 11/29/06), 943 So.2d 335, 339.

The "probable cause" or "reasonable cause" needed to make a full custodial arrest requires more than the "reasonable suspicion" needed for a brief investigatory stop. **State v. Caples**, 05-2517 (La.App. 1 Cir. 6/9/06), 938 So.2d 147, 154, writ denied, 06-2466 (La. 4/27/07), 955 So.2d 684. Probable cause exists when the facts and circumstances known to the arresting officer, and of which he has reasonable and trustworthy information, are sufficient to justify a man of ordinary caution in the belief that the accused has committed an offense. **State v. Parker**, 06-0053 (La. 6/16/06), 931 So.2d 353, 355 (per curiam); **State v. Ceaser**, 02-3021 (La. 10/21/03), 859 So.2d 639, 644. After making an arrest, an officer has the right to much more thoroughly search a defendant and his wing span, or lunge space, for weapons or evidence incident to a valid arrest. **State v. Warren**, 05-2248 (La. 2/22/07), 949 So.2d 1215, 1226. Searches incident to arrest conducted immediately before formal arrest are valid if probable cause to arrest existed prior to the search. **State v. Surtain**, 09-1835 (La. 3/16/10), 31 So.3d 1037, 1046. A trial court's ruling on a motion to suppress the evidence is entitled to great weight, because the court had the opportunity to observe the witnesses and weigh the credibility of their testimony. **State v. Jones**, 01-0908 (La.App. 1 Cir. 11/8/02), 835 So.2d 703, 706, writ denied, 02-2989 (La. 4/21/03), 841 So.2d 791. Correspondingly, when a trial court denies a motion to suppress, factual and credibility determinations should not be reversed in the absence of a clear abuse of the trial court's discretion, i.e., unless such ruling is not supported by the evidence. See **State v. Green**, 94-0887 (La. 5/22/95), 655 So.2d 272, 280-81. However, a trial court's legal findings are subject to a *de novo* standard of review. See **State v. Hunt**, 09-1589 (La. 12/1/09), 25 So.3d 746, 751. When reviewing a trial court's ruling on a motion to suppress, the entire record may be considered. **State v. Martin**, 595 So.2d 592, 596 (La. 1992).

Louisiana Revised Statute 15:451 provides that before a purported confession can be introduced in evidence, it must be affirmatively shown to be free and voluntary and not made under the influence of fear, duress, intimidation, menaces, threats, inducements, or promises. It must also be established that an accused who makes a confession during custodial interrogation was first advised of his/her **Miranda** rights. **State v. Plain**, 99-1112 (La.App. 1 Cir. 2/18/00), 752 So.2d 337, 342. The State must specifically rebut a defendant's specific allegations of police misconduct in eliciting a confession. **State v. Thomas**, 461 So.2d 1253, 1256 (La.App. 1 Cir. 1984), writ denied, 464 So.2d 1375 (La. 1985).

The admissibility of a confession is, in the first instance, a question for the trial court; its conclusions on the credibility and weight of the testimony relating to the voluntary nature of the confession are accorded great weight and will not be overturned unless they are not supported by the evidence. **State v. Sanford**, 569 So.2d 147, 150 (La.App. 1 Cir. 1990), writ denied, 623 So.2d 1299 (La. 1993). Whether a showing of voluntariness has been made is analyzed on a case-by-case basis with regard to the facts and circumstances of each case. **State v. Benoit**, 440 So.2d 129, 131 (La. 1983). The trial court must consider the totality of the circumstances in deciding whether a confession is admissible. **State v. Hernandez**, 432 So.2d 350, 352 (La.App. 1 Cir. 1983). Testimony of the interviewing police officer alone may be sufficient to prove a defendant's statements were freely and voluntarily given. **State v. Maten**, 04-1718 (La.App. 1 Cir. 3/24/05), 899 So.2d 711, 721, writ denied, 05-1570 (La. 1/27/06), 922 So.2d 544.

The following circumstances were presented at the hearing on the motions to suppress. Lieutenant Patrick McCormick of the St. Tammany Parish Sheriff's Office received information regarding a series of robberies occurring at EB Games/Game Stop video game stores in and around St. Tammany Parish within approximately thirty minutes of the stores' closing times. In each case, the robber was described as an extremely tall black male armed with a box

cutter and wearing a white T-shirt, gray sweatpants, and a dark hat. The robber used a black bag to hold the money collected during the robberies. Based on surveillance footage from the robbery that occurred at the Slidell store, it was believed that the robber drove a white or gray Monte Carlo.

In an effort to predict the robber's next target, Lieutenant McCormick decided to conduct surveillance at approximately 8:00 p.m. on April 20, 2009, at the Game Stop located at Highway 190 in Mandeville, Louisiana, since it had not yet been targeted. Lieutenant McCormick parked nearby, stood partially obscured by hedges, and used binoculars to observe the store and its parking lot. The lieutenant was dressed in uniform at the time. He observed a male subject, later identified as defendant, who fit the description of the perpetrator. Specifically, Lieutenant McCormick described defendant as extremely tall and noted that he was carrying a black backpack and was wearing a black baseball cap, a white T-shirt, and a gray piece of cloth around his neck. Defendant entered the portion of the parking lot in front of the store that was lit by a streetlight. As a female customer exited the store, defendant stepped back out of the lit area. When Lieutenant McCormick's mobile telephone rang, defendant spotted the lieutenant and leaned forward as the two observed each other. Defendant turned and briskly walked alongside Highway 190 to a building adjacent to the Game Stop video game store. Lieutenant McCormick was communicating with Deputy Noel Forrester by mobile telephone at the time and reported his observations in real time. As Lieutenant McCormick had contacted him when he started the surveillance, Deputy Forrester was already arriving at the scene. Deputy Forrester entered the parking lot of the adjacent building. Deputy Forrester observed defendant as he looked back at the deputy and walked briskly through the back of the parking lot. Deputy Forrester accelerated and drove to the back of the parking lot as defendant crossed over a ditch into the parking lot located behind the Game Stop. Deputy Forrester then exited his unit and asked defendant to come and talk to him, and defendant complied.

Deputy Forrester requested defendant's name and identification. After stating his name, defendant initially indicated that his identification and wallet were in his vehicle but, moments later, reached into his pocket and produced both. Lieutenant McCormick drove to the parking lot also and approached defendant from the rear. Deputy Forrester specifically testified that defendant was moving his feet back and forth and looking around, actions that caused the deputy to believe defendant might run from the officers. Lieutenant McCormick similarly testified that defendant was acting uncomfortable, specifically shifting his feet, jingling his keys, and shifting his hands around the front, back, and sides of his body. As Lieutenant McCormick approached defendant from behind, he handcuffed him and read him his **Miranda** rights. Lieutenant McCormick noted that he had safety concerns due to the nature of the suspected offenses, the armed robberies having been committed with a knife. According to his testimony, Lieutenant McCormick specifically informed defendant of his right to remain silent, that anything he said would be used against him in a court of law, of his right to an attorney, and of his right to decide at any time to exercise his rights and not answer any questions or make any statements. Defendant indicated that he understood his rights.

Defendant informed the officers of the whereabouts of his vehicle, which he called a "Lumina." Deputy Forrester remained with defendant while Lieutenant McCormick searched for defendant's vehicle. Deputy Forrester conducted a pat-down search for weapons and as he began patting defendant's waist area, defendant, though his arms were handcuffed behind his back, reached around to his front pocket. Deputy Forrester and defendant briefly struggled as the deputy felt an object and noted that it felt like a knife. As defendant jerked, the object, a blue-handled box cutter, fell out and hit the ground, dividing into its manufactured parts, but not breaking.

Lieutenant McCormick located the vehicle, a white Monte Carlo, in a Shell Station parking lot, approximately two hundred feet west of the Game Stop store (four parking lots away in the opposite direction from which defendant began

walking when he spotted the lieutenant). Lieutenant McCormick observed video game merchandise in plain view in the car. Defendant was the registered owner of the vehicle. When Lieutenant McCormick returned to the area where defendant was being detained, he observed the pieces of the blue box cutter on the ground in the tire track of Deputy Forrester's unit. Lieutenant McCormick placed defendant in the unit, and he was transported to the sheriff's office and again read his **Miranda** rights. Separate written advice and waiver of rights forms were executed by the Slidell Police Department and the sheriff's office. Sergeant Shawn McClain of the Slidell Police Department and Sergeant George Cox of the St. Tammany Parish Sheriff's Office testified that detectives of the Jefferson Parish Sheriff's Office arrived in the midst of their initial interview of the defendant. Sergeant McClain and Sergeant Cox stepped in and out of the room while officers of the Jefferson Parish Sheriff's Office questioned defendant. Detective Russell Varmall of the Jefferson Parish Sheriff's Office was one of the officers from that parish who questioned defendant and was present during their entire interview. He testified that defendant did not make any admissions to the Jefferson Parish Sheriff's Office detectives, and they concluded their interview of defendant. Detective Varmall further testified that there were no threats, pressure, coercion or any promises of leniency, and a possible sentence was not discussed.

The Slidell Police Department obtained search warrants for defendant's residence and vehicle. The execution of the search warrant for the residence resulted in the recovery of a portable video game console and several box cutters. Eight Nintendo Wii point cards in their original plastic container were recovered from the driver's side rear floorboard of the vehicle; three boxes of additional Nintendo Wii point cards, caps, and a video game packaged in a box addressed to the Walker Game Stop were located in the trunk.

According to Sergeant McClain and Sergeant Cox, defendant did not make any admissions during the initial interview. As the officers were walking defendant to the jail, he stopped and said he wanted to tell them everything,

and a recorded interview was conducted at 4:07 a.m., April 21. Defendant's **Miranda** rights were reviewed at the beginning of the recording wherein defendant indicated that he understood and waived those rights. Defendant admitted to committing seven robberies at Game Stop video game stores, including the instant offenses and four prior robberies at Game Stop video game stores in other parishes, and confirmed that he wore the same attire during the robberies, specifically jeans or sweatpants, a white shirt, a gray cloth to cover his face, and a black baseball cap. Defendant also admitted to having a blue box cutter, though he did not admit to brandishing it in each robbery, to using a black bag to collect the money, and to driving the same vehicle, the white Monte Carlo, to commit the offenses. As to the final offense, defendant denied seeing any police officer observing him and stated that he abandoned the attempt on his own after reflection. The officers of the Jefferson Parish Sheriff's Office, who had left, returned when contacted and were informed that defendant confessed to the offenses to the Slidell police officers. Upon their return, said officers presented a still photograph from the surveillance footage of one of the Jefferson Parish robberies to defendant, and defendant confirmed that he was depicted in the photograph and signed and dated the photograph.

That evening, when defendant was being transported from Covington to the Slidell Police Department, he indicated that he wanted to speak to Sergeant McClain. A **Miranda** advice of rights form and waiver of rights form were again executed. Defendant's **Miranda** rights were again reviewed at the beginning of the second recording wherein defendant indicated that he understood and waived those rights. During the second recorded statement, defendant contended that he was not completely truthful during the initial confession, and minimized his involvement by specifying that he was the driver while a co-perpetrator entered the store during the first three robberies and during the April 19 instant offense, wearing the same attire that defendant admitted to wearing during the initial confession. On the recording, defendant responded positively when asked to confirm that he was told before the interview that implicating

someone else would not result in lesser charges. Defendant indicated that before he spoke to Sergeant McClain regarding a second statement, other officers who he could not name misled him by indicating that he would only be sentenced to probation, restitution, and community service for the offenses. However, defendant confirmed that Sergeant McClain explained to him before the second interview that such an indication was incorrect, that he was not being promised anything in exchange for a statement, and that any sentence was possible and would probably include imprisonment.

On April 22, 2009, Sergeant McClain and Sergeant Cox listened to defendant's second recorded statement, noticed inconsistencies, and visited defendant in the Slidell facility to discuss the inconsistencies. According to the officers, defendant admitted that he changed his statement because his uncle advised him to do so. Defendant gave a third recording stating that his initial confession was completely accurate and truthful, specifically admitting that he acted alone on each offense. During the third recording, defendant stated that he decided to tell the truth when the officers pointed out inconsistencies between his two prior-recorded statements. Advice of rights and waiver of rights forms were executed again prior to the third recording. Sergeant McClain and Sergeant Cox testified that again no threats, promises, or coercion were used to induce the third statement, and during the third recording defendant confirmed there was no abuse, threats, promises, or rewards, and that he was making the statement of his own free will. Defendant's rights were reviewed at the beginning of the third recording, including his right to remain silent, that anything he said would be used against him, and his right to an attorney.

At the hearing on defendant's motion to suppress, Detective Corey Crowe of the St. Tammany Parish Major Crimes Unit testified for the defense that he was in and out of the monitoring room while defendant was being interviewed by Sergeant McClain and Sergeant Cox on the night of his arrest. Detective Crowe testified that he had no knowledge of any threats or coercion. The defense also called as a witness Sergeant Lance Vitter of the St. Tammany Parish Sheriff's

Office, who assisted in the execution of the search warrant for defendant's residence and had brief contact with defendant after his arrest. Sergeant Vitter denied ever discussing the case with defendant, and specifically denied discussing possible charges or promises of leniency with defendant.

In pertinent part, defendant testified that Sergeant McClain and Sergeant Vitter discussed possible charges with him before his confession, indicating that he would be charged with simple robbery and further stating that it would be up to his attorney and the district attorney to "work out the deal." Defendant further testified that Detective John Carroll told him that all of the offenses would be combined and "ran through St. Tammany" so defendant could "get a fine" and move on with his life. Defendant also stated that Detective Russell Varmall told him that if he cooperated he would recommend that defendant be sentenced to a two-hundred-fifty-dollar fine, community service, and restitution, with the charges being dropped to simple robbery. Defendant further testified that during the initial interview, before his recorded confession, he stood up and told Sergeant McClain that he wanted to end the interview, saying, "No, man, the conversation's over." According to defendant, Sergeant McClain responded, "Sit your ass down. This conversation is over when I say it's over." Defendant further testified that as he was being escorted to jail (just before he decided to give the recorded confession), Detective Cox said, "This is your last chance. You in St. Tammany Parish. You're a black man. I'm going to give you all white jury, they going to start you at 60 years." Defendant added that Sergeant McClain was also saying that they could help by telling the district attorney that he cooperated. Defendant further testified that he was coerced into giving the third recorded statement, specifying that Sergeant McClain and Detective Cox entered his small L-shaped cell and told him that he needed to give another statement to "fix this," indicating that he backed out of the deal when he gave the second recorded statement limiting his participation in the robberies.

During cross-examination, defendant admitted to speaking to a relative, specifically his uncle, by telephone before giving the second statement.

Defendant denied that a box cutter fell from his waistband at the time of the pat-down search. Defendant admitted having the dark bag on his person at the time of the detention and the piece of cloth around his head under his hat, initially indicating that the officer pulled it down to his neck but later stating that it fell down to his neck when he got in the backseat of the police unit. Defendant agreed that he never asked to cease the interview during any of the recordings.

During the State's rebuttal at the hearing on the motions to suppress, the State recalled Sergeant McClain and Sergeant Cox. Both sergeants testified that they never heard Sergeant Vitter tell defendant that his charges could be dropped to simple robbery or promise him probation, or anything similar to that. Further they did not recall Sergeant Vitter having any conversations with defendant. Sergeant McClain also did not hear defendant state that he wanted to cease the interview, or any negative response or reaction in that regard. Sergeant McClain and Sergeant Cox also denied that any statements were made to defendant, prior to the first recorded confession when he was being transported to jail, regarding it being his last chance or him being black with an all-white jury or an imprisonment term or anything remotely close to that claim. Sergeant Cox denied making any coercive statements to defendant regarding a need to "fix" the situation after his second recorded statement. Sergeant Cox stated that he discussed honesty with defendant, specifically telling him that if he is honest and remorseful it was a factor that would help him as he is processed through the system. Sergeant Cox did not provide any specific information as to how defendant's cooperation would help him.

John Carroll, former detective of the Jefferson Parish Sheriff's Office, accompanied Detective Russell Varmall to St. Tammany Parish to question defendant after his arrest and after his first recorded statement when they had defendant sign and date a surveillance still photograph. Carroll testified, in pertinent part, that defendant did not ask to exercise his right to remain silent or display any signs of abuse and that there were no promises, threats, coercion, or pressure used to induce cooperation. Carroll was with Detective Varmall the

entire time they were there. During the trial, Detective Varmall's testimony was consistent with Carroll's hearing testimony.

In denying the motions to suppress, the trial court found that the initial observations of defendant while he was in the Game Stop video store parking lot gave rise to reasonable suspicion to stop him and investigate. As the officers approached defendant, further observations that corroborated the known information regarding previous robberies at Game Stop video game stores around the area, including defendant's possession of the black backpack and a gray cloth, was sufficient to give the officers probable cause for defendant's arrest. Lieutenant McCormick noted that the cloth or scarf around the defendant's neck was actually the detached sleeve of a shirt, consistent with cloth that could be used to pull over his face to conceal the lower part of his face. The trial court also noted that during the recordings, defendant denied that there was any impropriety during the course of interrogation to indicate that he was forced, coerced, or intimidated. The trial court further stated that the fact that an officer might point out that he is facing a significant penalty is not an impermissible threat and found no merit in defendant's argument that promises were used to induce a confession.

At the outset, we note that pertinent trial testimony regarding the issues raised in challenging the rulings on the motions to suppress was wholly consistent with the testimony presented during the hearing on the motions. We agree with the trial court's conclusion that the officers' detention of defendant was justified by their observations. Defendant fit the description of the perpetrator of the robberies at the other Game Stop locations, was dressed in the exact attire that the perpetrator was described as wearing during all of the previous robberies, and was discovered in a Game Stop parking lot near to and observing the store, but not pursuing an immediate entry. Defendant was wearing a white shirt and although it was warm outside, according to police testimony, defendant had a piece of cloth around his neck. Defendant appeared to be "casing the joint" when he was standing by the store and stepping in and

out of the light as customers exited the store. It was apparent that defendant was attempting to evade the officers as he briskly went to the back of the parking lot. When Lieutenant McCormick approached defendant from the rear, he was fidgeting and moving in a manner that would suggest flight was imminent. Defendant's vehicle matched the description of the perpetrator's vehicle. As the detention was brief and defendant was handcuffed for the officers' safety, arguably the scope of a **Terry** stop was not exceeded and defendant was not under arrest until after the vehicle was found and the merchandise observed in plain view.[4] At any rate, if we were to consider the moment defendant was handcuffed as the moment the detention became a full blown arrest, the above noted circumstances were sufficient to establish probable cause for defendant's arrest by that point.

As to the voluntariness of defendant's confession, we note that all of the officers involved testified that there were no promises or abuse to induce defendant's cooperation. Defendant's pro se brief notes that the taped statement form executed prior to his third recorded statement does not include advice of the right to at any time exercise his rights and not answer any questions or make any statement. However, all of the rights forms used by the officers, including the taped statement forms, include defendant's **Miranda** rights specifically, his right to remain silent, that anything he says can and will be used against him in a court of law, and his right to an attorney, appointed if necessary. Also, the Statement of **Miranda** Rights Forms executed on April 20, prior to any statement, and again on April 21, additionally advised defendant of his right to exercise his rights at any time and not answer questions or make any

[4] In **Muehler v. Mena**, 544 U.S. 93, 125 S.Ct. 1465, 161 L.Ed.2d 299 (2005), the court reviewed the reasonableness of a two to three hour detention of a woman in handcuffs while police officers conducted a search at a gang house for weapons and a wanted gang member pursuant to a warrant. Based on the circumstances therein, the court concluded that the officers' use of handcuffs for the duration of the search was reasonable, "because the governmental interests outweigh[ed] the marginal intrusion." **Menna**, 544 U.S. at 99, 125 S.Ct. at 1470. Chief Justice Rehnquist explained that the length of a detention in handcuffs, even though somewhat lengthy, must be balanced against "the government's continuing safety interests." **Menna**, 544 U.S. at 100, 125 S.Ct. at 1471. Similarly, in **State v. Boudoin**, 10-2868 (La. 3/4/11), 56 So.3d 233 (per curiam), based on the circumstances therein, the court found that the officers' use of handcuffs to detain the men as they questioned them briefly did not transform the stop into a de facto arrest. **Boudoin**, 56 So.3d at 235.

statements. Thus, defendant was fully advised of his rights on several occasions and executed several waiver of rights forms. Defendant is highly educated, having a bachelor's degree and pursuing a master's degree at the time of the arrest and worked in law enforcement as a part-time deputy monitoring inmates for two months while in school. At the beginning of the first recording, defendant said there were no threats or promises and stated that he was informed of his rights and agreed to waive them. Although defendant stated during the second recording that he was misled by an officer and told that he would get probation, restitution, and community service, he did not provide the name of any such officer (unlike during the hearing wherein officers specified by defendant denied making any such promise). The recording clearly conveys Sergeant McClain's subsequent and repeated confirmation that the statement was not being made according to any promises and including defendant's verbal agreement.

Based on defendant's responses during the recorded interviews, and the fact that he was repeatedly advised of his rights, including the right to remain silent, we find that defendant's confessions were free and voluntary. Considering the above, we further find that the trial court did not err or abuse its discretion in denying the motions to suppress. This pro se assignment of error number two is without merit.

PRO SE ASSIGNMENT OF ERROR NUMBER THREE

In pro se assignment of error number three, defendant challenges the trial court's denial of his motion for continuance after defense counsel withdrew two weeks prior to the trial. Defendant concludes that had the trial court granted the motion to continue, he would have been able to prepare for trial and contact key alibi witnesses to testify at the trial. Defendant further concludes that had he been able to prepare, the testimony of alibi witnesses would have resulted in an acquittal.

A motion for continuance, if timely filed, may be granted, in the discretion of the court, in any case, if there is good ground therefor. LSA-C.Cr.P. art. 712.

A motion for continuance shall be filed at least seven days prior to the commencement of trial. LSA-C.Cr.P. art. 707. Upon written motion at any time, the trial court may grant a motion for continuance after a contradictory hearing, but only upon a showing that such motion is in the interest of justice. LSA-C.Cr.P. art. 707. The trial court's ruling on the motion to continue will not be disturbed on appeal absent a clear abuse of discretion. Whether a refusal to grant a continuance was justified depends primarily on the circumstances of the particular case. Convictions will not be reversed absent a showing of specific prejudice caused by the denial of a continuance. **State v. Sensley**, 460 So.2d 692, 698 (La.App. 1 Cir. 1984), writ denied, 464 So.2d 1374 (La. 1985).

The basis of defendant's motion to continue was to retain private counsel. In denying the motion, the trial court noted that the public defender's office had been working on the priority case for an extended period of time and concluded that defendant would not suffer any prejudice in proceeding on the set trial date. At the time he requested the continuance, defendant did not mention potential alibi witnesses or request that he be permitted to subpoena other witnesses. A new basis for the motion for continuance, urged for the first time on appeal, is contrary to LSA-C.Cr.P. art. 841 and should not be considered.

Moreover, defendant has failed to comply with LSA-C.Cr.P. art. 709. Though labeling the witnesses named in his pro se brief as alibi witnesses, defendant has failed to set forth any facts to which these absent witnesses would have been expected to testify that would show the materiality of the testimony and the necessity for the presence of these witnesses at the trial. Further, defendant said nothing of the facts and circumstances showing a probability that the witnesses would have been available at the time to which the trial could have been deferred. Defendant also has said nothing to show that he or defense counsel used due diligence in an effort to secure the attendance of any of these potential alibi witnesses. Finally, defendant has failed to show specific prejudice. As such, we find no abuse of the trial court's discretion in

denying defendant's motion to continue. This assignment of error is without merit.

PRO SE ASSIGNMENT OF ERROR NUMBER FOUR

Defendant's pro se brief additionally argues that the trial court erred in allowing the State to introduce other crimes evidence. Defendant notes that the State introduced evidence from five other robberies, further noting that one occurred one month before the other robberies, and claiming that two of them were simple robberies. Defendant notes that he was not identified as being the perpetrator of the other robberies. Defendant also contends that without giving him **Prieur**[5] notice, the State also introduced other crimes evidence during re-direct examination of State witness Joel Vogt. Defendant contends that the **Prieur** violations constitute reversible error and he should be granted a new trial.

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

> **B. Other crimes, wrongs, or acts.** (1) Except as provided in Article 412 [not pertinent hereto], 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 a 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. 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

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[5] **State v. Prieur**, 277 So.2d 126, 130 (La. 1973).

fact genuinely at issue and the probative value of the extraneous crimes evidence must outweigh its prejudicial effect. **State v. Tilley**, 99-0569 (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).

The Louisiana Supreme Court also has 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. Under LSA-C.E. art. 404B(1), evidence of other crimes, wrongs or acts may be introduced when it relates to conduct, formerly referred to as *res gestae*, that "constitutes an integral part of the act or transaction that is the subject of the present proceeding." *Res gestae* events constituting other crimes are deemed admissible because they are so nearly connected to the charged offense that the state could not accurately present its case without reference to them. A close proximity in time and location is required between the charged offense and the other crimes. **State v. Colomb**, 98-2813 (La. 10/1/99), 747 So.2d 1074, 1076 (per curiam) (quoting **State v. Haarala**, 398 So.2d 1093, 1098 (La. 1981)).

The *res gestae* doctrine in Louisiana is broad and includes not only spontaneous utterances and declarations made before or after the commission of the crime, but also testimony of witnesses and police officers pertaining to what they heard or observed during or after the commission of the crime if a continuous chain of events is evident under the circumstances. **State v. Kimble**, 407 So.2d 693, 698 (La. 1981). In addition, integral act (*res gestae*) evidence in Louisiana incorporates a rule of narrative completeness without which the State's case would lose its "narrative momentum and cohesiveness, 'with power not only to support conclusions but to sustain the willingness of jurors to draw the inferences, whatever they may be, necessary to reach an honest verdict.'" **Colomb**, 747 So.2d at 1076 (quoting **Old Chief v. United States**, 519 U.S. 172, 186, 117 S.Ct. 644, 653, 136 L.Ed.2d 574 (1997)). The Louisiana Supreme Court has held that evidence of multiple crimes committed in a single course of conduct is admissible as *res gestae* at the trial of the accused

for the commission of one or more, but not all, of the crimes committed in his course of conduct. **State v. Washington**, 407 So.2d 1138, 1145 (La. 1981); **State v. Meads**, 98-1388 (La.App. 1 Cir. 4/1/99), 734 So.2d 792, 797, writ denied, 99-1328 (La. 10/15/99), 748 So.2d 465.

The procedure to be used when the State intends to offer evidence of other criminal offenses was formerly controlled by **State v. Prieur**, 277 So.2d 126 (La. 1973). However, 1994 La. Acts, 3d Ex.Sess., No. 51 added LSA-C.E. art. 1104 and amended LSA-C.E. art. 404B. Louisiana Code of Evidence article 1104 provides that the burden of proof in pretrial **Prieur** hearings, "shall be identical to the burden of proof required by Federal Rules of Evidence Article IV, Rule 404."

The burden of proof required by Federal Rules of Evidence Article IV, Rule 404, is satisfied upon a showing of sufficient evidence to support a finding by the jury that the defendant committed the other crime, wrong, or act. See **Huddleston v. U.S.**, 485 U.S. 681, 685, 108 S.Ct. 1496, 1499, 99 L.Ed.2d 771 (1988). The Louisiana Supreme Court has yet to address the issue of the burden of proof required for the admission of other crimes evidence in light of the repeal of LSA-C.E. art. 1103 and the addition of LSA-C.E. art. 1104. However, numerous Louisiana appellate courts, including this Court, have held that burden of proof to now be less than "clear and convincing." See **State v. Williams**, 99–2576 (La.App. 1 Cir. 9/22/00), 769 So.2d 730, 734 n.4.

In the instant case, at the **Prieur** hearing, the State noted that it sought to introduce evidence of a total of five robberies at Game Stop stores outside of the jurisdiction. Based on the details of those five offenses and the details of the instant offenses, the State argued that they were signature crimes with a particular method of operation used, justifying the introduction of the other crimes. The State further argued there were multiple grounds for the admission of the evidence, including the identity issue. The defense argued identity had not been proven in the cases, with the exception of the instant attempted armed

robbery offense. The defense further argued that the probative value of the evidence was outweighed by its prejudicial impact.

The trial court found that there was sufficient proof of the acts and that they were relevant to multiple issues, including identity, and intent as to the attempted armed robbery offense. The trial court also found the probative value of the other crimes evidence outweighed its prejudicial effect.

As previously noted, defendant contends that without giving him **Prieur** notice, the State also introduced other crimes evidence during re-direct examination of State witness Joel Vogt. Particularly, the State inquired as to whether employees of Game Stop stores were provided a device to unlock the pegs where high-risk merchandise was located. The State elicited testimony to show that the keys were not allowed to be taken home and were to remain in the store. Just prior to the objection, the State changed the subject of questioning to the vehicle spotted outside the store at the time of the offense. The trial court noted the defense opened the door to this topic during cross-examination of Vogt and, more importantly, further noted that there was no questioning by the State regarding the commission of any act by defendant. We agree with the trial court's finding that the testimony objected to during the State's re-direct examination of Vogt did not constitute other crimes evidence.

As to the evidence of the other robberies, we find that the other crimes evidence was properly admitted in this case. None of the victims were able to identify the perpetrator in this case, as a cloth, the cut arm of a sleeve, was used as a partial facial covering. The modus operandi is so similar in all of the robberies that one can easily conclude the same person was the perpetrator in all instances. All the robberies occurred at Game Stop stores near closing time, when the managers were not present, and the victims were store employees only. The other offenses at issue were committed during a short time span in March and April of 2009, specifically March 23, April 12, April 13, April 14, and April 19, and, as noted, the instant offenses occurred on April 17, April 18, and April 20. There was evidence that the perpetrator either possessed or

brandished a blue box cutter during some of the other offenses and that the perpetrator wore the same attire in each of the other offenses, consisting of the attire worn during the commission of the instant offenses. Further, in each instance the perpetrator used a black mesh school bag to collect the stolen merchandise and/or money. Additionally, the evidence is relevant to prove material facts in the instant case. Specifically, it was relevant to identity, method of selection of victims, and preparation for commission of the crimes.

Further, the State sufficiently proved that defendant committed the prior acts as defendant confessed to the offenses in his first recorded statement. Defendant's confession included detailed accounts of each robbery. We note that defendant admitted to having and/or using a blue box cutter during most of the offenses. Finally, the requirements set forth in **State v. Prieur** were met. To comply with due process, the State gave pretrial notice of its intent to use evidence of other crimes. Additionally, and in compliance with **Prieur**, the jury instructions provided that the other crimes evidence was received for the limited purpose of proving an issue for which other crimes evidence may be admitted, such as intent, and that defendant cannot be convicted of any charge other than the ones named in the bill of information or one that is responsive to those charges.

In this case, the other crimes evidence is not marginally relevant but instead provides proof that the modus operandi is so similar that it is more likely than not the work of one individual. The probative value clearly outweighs the prejudicial impact. Thus, the trial court properly found this other crimes evidence admissible under LSA-C.E. art. 404B. This assignment of error is without merit.

PRO SE ASSIGNMENT OF ERROR NUMBER FIVE

In the final pro se assignment of error, defendant contends that the trial court abused its discretion by denying his motion for new trial and post verdict judgment of acquittal without a hearing because the trial transcripts are incomplete and the sufficiency of the evidence could not, therefore, be

adequately tested. Defendant contends that the trial transcripts have been altered, contending that exculpatory testimony by State witnesses David Vigo and Stephanie Ashley and defense witness Charles McElroy is not included in the transcripts. Defendant concludes that if he had the complete, accurate record, he could show that the State did not prove its case.

Louisiana Constitution article I § 19 guarantees defendants a right of appeal "based upon a complete record of all the evidence upon which the judgment is based." Material omissions from the transcript of the proceedings at trial bearing on the merits of an appeal will require reversal. **State v. Frank**, 99–0553 (La. 1/17/01), 803 So.2d 1, 19. On the other hand, inconsequential omissions or slight inaccuracies do not require reversal. **Frank**, 803 So.2d at 20. A defendant is not entitled to relief because of an incomplete record absent a showing of prejudice based on the missing portions of the transcripts. **State v. Castleberry**, 98–1388 (La. 4/13/99), 758 So.2d 749, 773, cert. denied, 528 U.S. 893, 120 S.Ct. 220, 145 L.Ed.2d 185 (1999).

Ashley was an employee at a Jefferson Parish Game Stop and was at work when the robbery took place there on April 12, 2009. David Vigo worked at several Game Stop locations in Louisiana at different time periods and was a manager at the Game Stop in Mandeville at the time of the instant offense but was not present during the robbery. Vigo knew defendant as a customer of one of the New Orleans Game Stop locations and as a former employee of the Hammond Game Stop. McElroy testified that he was at the Game Stop store located in Covington on April 18, 2009, at the time of the robberies and offered to give the perpetrator his wallet but he refused to take it. McElroy was only able to view the uncovered, upper portion of the perpetrator's face and was unable to identify him.

Our review of the testimony of the named witnesses does not reveal any apparent omissions, and the testimony flows in a continuous, normal manner. Defendant has not provided any references to the record or any description of

the testimony claimed to have been altered. Thus, we find that defendant's claims concerning deficiencies in the record lack merit.

CONVICTIONS AND SENTENCES AFFIRMED.