**NOT DESIGNATED FOR PUBLICATION**

**STATE OF LOUISIANA**

**COURT OF APPEAL**

**FIRST CIRCUIT**

**2011 KA 2083**

RHPhy Ajc

TMH

**STATE OF LOUISIANA**

**VERSUS**

**ROGER LYNN ALLEY**

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**On Appeal from the 32nd Judicial District Court**
**Parish of Terrebonne, Louisiana**
**Docket No. 505,483, Division "A"**
**Honorable George J. Larke, Jr., Judge Presiding**

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**Defendant-Appellant**
**Roger Lynn Alley**

**BEFORE: CARTER, C.J., PARRO, AND HIGGINBOTHAM, JJ.**

**Judgment rendered June 8, 2012**

JJC, CJ Concurs

**PARRO, J.**

The defendant, Roger Lynn Alley, was charged by amended bill of information with committing, from December 2007 to April 2008, one count of molestation of a juvenile when the offender has control or supervision over the juvenile (count 1), a violation of LSA-R.S. 14:81.2(A) and (C),[1] and one count of aggravated incest (count 2), a violation of LSA-R.S. 14:78.1.[2] The defendant pled not guilty on both counts. Following a jury trial, he was found guilty as charged on both counts. On each count, he was sentenced to serve fifteen years of imprisonment at hard labor. The trial court ordered that the sentences were to run concurrently with each other. The defendant now appeals, challenging the trial court's ruling on the motion to exclude other crimes evidence and alleging that he was tried by an incorrect number of jurors. For the following reasons, we affirm the convictions and sentences.

## FACTS

The victim, N.D.,[3] testified at trial. Her date of birth was April 4, 1992. The defendant was her stepfather. She testified she had left her mother's house and had moved in with her biological father for a few months because the defendant was "being inappropriate" with her. She stated that, when she was thirteen years old and in her bed with a headache, the defendant came to rub her back, but "started rubbing on top of [her] shirt and then he worked his way under [her] shirt and after a while he unhooked [her] bra. And [N.D.] kept telling him to stop but . . . he . . . kept moving his hand like by [her] boobs on the side." The victim indicated that, a few days or a week later, the defendant grabbed a piece of ice and stuck his hand in her underwear and grabbed her "crotch" while her uncle was tickling her.

The victim testified that, after she moved back in with her mother and the defendant, the defendant would grab her on "[her] boobs and [her] butt." According to

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[1] Prior to amendment by 2008 La. Acts, No. 426, § 1 and 2011 La. Acts, No. 67, § 1.

[2] The prohibited act set forth in connection with count 2 was pornography involving juveniles. See LSA-R.S. 14:78.1(B)(1) and LSA-R.S. 14:81.1.

[3] We reference this victim only by her initials. See LSA-R.S. 46:1844(W).

the victim, the defendant also showed her pictures of naked girls and women. She alleged he showed her "porn" on his computer. She also stated that the defendant wanted her to wear "lingerie type outfits," and he cut a long, black tank top just below her "boobs" and then cut a slit in the front of the shirt. Additionally, she testified that "[the defendant] kept telling me that he wanted to lay like behind me naked and telling me that he wanted to have sex with me and he wanted to eat me out and he wanted me to give him a blow job and stuff like that." She stated that, when she was fifteen, the defendant continuously asked her for naked pictures of herself, and he took some pictures of her when she was naked. She indicated the defendant put the naked pictures on his computer. She identified State Exhibit #3, which included numerous photographs of a naked or partially clothed young girl, as photographs of her. She stated she copied the photographs from an email the defendant had sent out on his computer.

S.B.[4] also testified at the trial. Her date of birth was September 10, 1975. She indicated the defendant was four years and three months older than her. She stated she had known the defendant all of her life. Her mother and the defendant's mother were best friends, and she lived in the same house with the defendant for three or four years after her mother and father divorced. She testified that, when she was eight years old, the defendant would wake her up in the middle of the night, take her into his mother's room, tell her to sit in his lap naked from the waist down, and try to "penetrate" her. She also stated the defendant would "finger" her. Additionally, she stated the defendant would take her into his bedroom and make her give him oral sex.

S.B. further testified that, when she was nine years old, the defendant took her into his mother's bedroom and penetrated her "to the fullest extent that he could" while she sat on his lap. She started bleeding after she got up, and the defendant said, "I popped your cherry." She also stated that, when she was nine years old, the defendant took her into the garage, made her undress from the waist down, and made her sit on

[4] We reference this victim only by her initials. See LSA-R.S. 46:1844(W).

the lap of one of his friends. The defendant told her to "be the good girl [the defendant] knew [S.B.] was[,]" and she had sex with his friend. S.B. testified that, on another occasion, the defendant and his friend, Scott, held her down on a bed while Scott's older brother put his penis in her mouth.

The defendant also testified at trial. He conceded he received a bad conduct discharge from the Navy for burglary. He also conceded that he had made a video of his wife having sex with him and put it on his computer. He also had nude photos of his wife on his computer. However, he denied grabbing the victim's boobs, butt, or crotch. He also denied taking nude pictures of her.

**OTHER CRIMES EVIDENCE**

In assignment of error number 1, the defendant argues the trial court erred in allowing the state to admit evidence of other wrongs or acts, under LSA-C.E. art. 412.2, concerning the alleged incidents that occurred over twenty years earlier when the defendant was a child, because the evidence unfairly prejudiced his case, denied him the presumption of innocence, and improperly supported the victim's credibility.

Relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. LSA-C.E. art. 401. All relevant evidence is admissible, except as otherwise provided by positive law. Evidence which is not relevant is not admissible. LSA-C.E. art. 402. Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or waste of time. LSA-C.E. art. 403.

It is well settled that courts may not admit evidence of other crimes to show the defendant as a man of bad character who has acted in conformity with his bad character. **State v. Rose**, 06-0402 (La. 2/22/07), 949 So.2d 1236, 1243; see LSA-C.E. art. 404(B)(1). Evidence of other crimes, wrongs, or acts committed by the defendant is generally inadmissible because of the substantial risk of grave prejudice to the

defendant. **Rose**, 949 So.2d at 1243. However, the state may introduce evidence of other crimes, wrongs, or acts if it establishes an independent and relevant reason, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or accident. **Id.** Upon request by the accused, the state must provide the defendant with notice and a hearing before trial if it intends to offer such evidence. **Id.**; see also LSA-C.E. art. 404(B). Even when the other crimes evidence is offered for a purpose allowed under Article 404(B)(1), the evidence is not admissible unless it tends to prove a material fact at issue or to rebut a defendant's defense. **Rose**, 949 So.2d at 1243. The state also bears the burden of proving that the defendant committed the other crimes, wrongs, or acts. **Id.**

Any inculpatory evidence is "prejudicial" to a defendant, especially when it is "probative" to a high degree. **State v. Germain**, 433 So.2d 110, 118 (La. 1983). As used in the balancing test, "prejudicial" limits the introduction of probative evidence of prior misconduct only when it is unduly and unfairly prejudicial. **Rose**, 949 So.2d at 1244, citing **Old Chief v. United States**, 519 U.S. 172, 180, 117 S.Ct. 644, 650, 136 L.Ed.2d 574 (1997) ("The term 'unfair prejudice,' as to a criminal defendant, speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged.").

Additionally, Louisiana Code of Evidence article 412.2 provides:

> A. When an accused is charged with a crime involving sexually assaultive behavior, or with acts that constitute a sex offense involving a victim who was under the age of seventeen at the time of the offense, evidence of the accused's commission of another crime, wrong, or act involving sexually assaultive behavior or acts which indicate a lustful disposition toward children may be admissible and may be considered for its bearing on any matter to which it is relevant subject to the balancing test provided in Article 403.
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> B. In a case in which the state intends to offer evidence under the provisions of this Article, the prosecution shall, upon request of the accused, provide reasonable notice in advance of trial of the nature of any such evidence it intends to introduce at trial for such purposes.
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> C. This Article shall not be construed to limit the admission or consideration of evidence under any other rule.

Prior to trial, the state filed a notice of intent to offer evidence of other crimes,

under LSA-C.E. arts. 412.2, including "all sexual assaults committed by the defendant against [S.B.], DOB: 9-10-75 between 1978 and 1986 in San Angelo, Texas, the County of Tom Green." The defense moved to exclude lustful disposition evidence.

At the hearing on the motion, the state presented testimony from Terrebonne Parish Children's Advocacy Center's forensic interviewer and investigator Dawn Buquet. Buquet testified that during her investigation of the case against the defendant, she had contacted S.B. Buquet stated S.B. alleged she had known the defendant for her entire life. S.B. told Buquet that when she was three to five years old, the defendant fondled her genitals. S.B. also alleged that the defendant subsequently kissed her, fondled her breasts, and digitally penetrated her vagina. According to S.B, when she was ten to eleven years old, the defendant put her on his lap and put his penis inside her vagina on more than one occasion. On the first occasion, S.B. bled and the defendant stated he had "popped her cherry"; S.B. also claimed the defendant had forced her to perform oral sex on him. Additionally, she claimed that, on one occasion, the defendant and some of his friends held her down while another of the defendant's friends, who was approximately eighteen years old, put his penis in her mouth. S.B. alleged that, after that incident, she was forced to sit on that friend's brother's lap while she was naked from the waist down and he had sex with her. Buquet stated the defendant was four years and three months older than S.B.

The defense argued the evidence concerning S.B. was more prejudicial than probative, because the alleged incidents occurred when S.B. and the defendant were children. The defense also argued that the state could not prove the alleged incidents occurred. The state responded that the defense was arguing the weight of the evidence, rather than its admissibility. The state pointed out that the defense would have the right to cross-examine S.B. The court ruled that the evidence concerning S.B. was admissible under LSA-C.E. art. 412.2. The court noted that the evidence showed the lustful disposition of the defendant and that S.B. would be subject to cross-examination on the issue of whether or not the alleged incidents actually occurred. Additionally, the court

stated it would instruct the jury that the evidence concerning S.B. was only admissible to prove the lustful disposition of the defendant, and not to prove that he committed the instant offenses.

There was no error by the trial court in regard to the evidence being admissible concerning S.B. Counts 1 and 2 charged the defendant with crimes involving sexually assaultive behavior and with acts that constituted sex offenses involving a victim who was under the age of seventeen at the time of the offenses. Furthermore, the evidence concerning S.B. was evidence of the defendant's commission of another crime, wrong, or act involving sexually assaultive behavior or acts that were indicative of a lustful disposition toward children. The prejudicial effect to the defendant from the challenged evidence did not rise to the level of undue or unfair prejudice when balanced against the probative value of the evidence. The highly probative value of S.B.'s testimony in regard to the defendant's propensity for sexual activity with adolescent females with whom he shared the same household was not outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or by considerations of undue delay, or waste of time. See **State v. Wright**, 11-0141 (La. 12/6/11), 79 So.3d 309, 317-18. Generally, a lapse in time will go to the weight of the evidence, rather than its admissibility. **State v. Scoggins**, 10-0869 (La. App. 4th Cir. 6/17/11), 70 So.3d 145, 154, writ denied, 11-1608 (La. 2/10/12), 79 So.3d 1033. It is also noteworthy that, although the defendant testified, he never denied the accuracy of S.B.'s claims.

This assignment of error is without merit.

## INCORRECT NUMBER OF JURORS

In assignment of error number 2, the defendant argues he should have been tried by a jury of twelve jurors, rather than six jurors, because the predicate offense for count 2, pornography involving juveniles, required a jury of twelve jurors.

Prior to the beginning of voir dire, the state raised the issue of the correct number of jurors to try the offenses. The state pointed out that counts 1 and 2 were punishable by sentences with or without hard labor, which would indicate that a six-

person jury was required, but noted that the predicate for count 2 would require a twelve-person jury. The court stated that the defendant was not facing conviction for the predicate, but rather for count 2, which required a six-person jury. The state agreed with the court and referenced LSA-C.Cr.P. art. 782, providing that "[c]ases in which the punishment may be confinement at hard labor shall be tried by a jury composed of six jurors, all of whom must concur to render a verdict." The state argued that, assuming the defendant was convicted, he would be punished on counts 1 and 2, and not the predicate offense, and thus, a six-person jury was required. The defense stated it had no reason to disagree with the state's position. The court found the state's position was a logical interpretation of the law and ruled the offenses would be tried before a six-person jury.

There was no error. This assignment of error is without merit.

**CONVICTIONS AND SENTENCES AFFIRMED.**