NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2011 KA 1519

STATE OF LOUISIANA

VERSUS

DERICK JACOB HEBERT

Judgment Rendered: March 23, 2012

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Appealed from the
32nd Judicial District Court
In and for the Parish of Terrebonne
State of Louisiana
Case No. 556,314

The Honorable John R. Walker, Judge Presiding

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BEFORE: GAIDRY, McDONALD, AND HUGHES, JJ.

GAIDRY, J.

The defendant, Derick Jacob Hebert, was charged by bill of information with simple rape, a violation of La. R.S. 14:43. The defendant pled not guilty and filed a motion to suppress his confession. A hearing was held on the matter, and the motion was denied. Following a jury trial, the defendant was found guilty as charged. He was sentenced to seven years imprisonment at hard labor. The defendant now appeals, designating three assignments of error. We affirm the conviction and sentence.

FACTS

On the evening of August 28, 2009, nineteen-year-old S.J.,[1] her sister, and several friends went to Last Call, a nightclub in Thibodaux. S.J. drank alcohol and became intoxicated. S.J. testified at trial that the last thing she remembered from that night was talking to Dustin Prince and the defendant near closing time, which was 2:00 a.m. S.J. knew the defendant from high school, and Dustin was her ex-boyfriend. The next morning at about 8:30 a.m., S.J. awoke in the back seat of her car, parked near Rue Des Affaires Drive. Her shorts and panties were on the back floorboard of the car. She testified that she did not remember what happened, but she knew she had been sexually violated.

Detectives with the Terrebonne Parish Sheriff's Office investigated the case and learned that the defendant was given S.J.'s car keys after the defendant assured S.J.'s sister's boyfriend that he would make sure S.J. got home. When it was learned the defendant was the last person to be seen with S.J., he was brought to the sheriff's office for questioning. Detectives Lieutenant Terry Daigre and Cher Pitre conducted two separate recorded interviews of the defendant. In the first interview, the defendant told the

[1] The identity of the victim is protected in accordance with La. R.S. 46:1844(W).

detectives that he had consensual sex with S.J. in the back seat of her car. He said S.J. was awake and coherent, and having sex was her idea. The defendant also stated that after they had sex, S.J. briefly performed oral sex on him. In the second interview, the defendant admitted that he had sex with S.J. without her consent. He said he drove her car down a dark road so he could take advantage of her sexually. He moved S.J. to the back seat of the car and took off her shorts and underwear. The defendant then pulled down his pants to his knees and engaged in vaginal sexual intercourse with S.J. while she remained unconscious.

The defendant testified at trial that he had consensual sex with S.J. He stated that his first statement to the detectives was true, and his second statement was a lie.

ASSIGNMENT OF ERROR NO. 1

In his first assignment of error, the defendant argues that the trial court erred in denying the motion to suppress his confession. Specifically, the defendant contends that he did not understand his *Miranda* rights or the consequences of waiving those rights "due to profound learning disabilities." Accordingly, his statements were not knowingly and intelligently made. Also, based on his learning disabilities, his consent to allow a DNA sample to be taken was not valid because it was not given voluntarily.

Before a confession can be introduced into evidence, it must be affirmatively shown 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; *State v. Brown*, 481 So.2d 679, 684 (La. App. 1st Cir. 1985), writ denied, 486 So.2d 747 (La. 1986). It must also be established that an accused who makes a confession during custodial interrogation was first advised of his *Miranda* rights. *Miranda v. Arizona*,

384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). The trial court must consider the totality of the circumstances in determining whether or not a confession is admissible. *State v. Hernandez*, 432 So.2d 350, 352 (La. App. 1st Cir. 1983).

Although the burden of proof is generally on the defendant to prove the grounds recited in a motion to suppress evidence, such is not the case with the motion to suppress a confession. In the latter situation, the burden of proof is with the State to prove the confession's admissibility. See La. Code Crim. P. art. 703(D). In determining whether the ruling on defendant's motion to suppress was correct, this Court is not limited to the evidence adduced at the hearing on the motion; we may consider all pertinent evidence given at the trial of the case. *State v. Chopin*, 372 So.2d 1222, 1223 n.2 (La. 1979).

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*, 2009-1589 (La. 12/1/09), 25 So.3d 746, 751.

The State may rely on the presumption of sanity provided in La. R.S. 15:432, leaving to the defendant the initial burden of proving the existence of a mental abnormality which, under the circumstances, may have destroyed the voluntary nature of his confession. *State v. Waymire*, 504 So.2d 953, 958 (La. App. 1st Cir. 1987). Because a defendant is presumed competent, he has the burden of proving a mental defect such that he was unable to understand his *Miranda* rights and, therefore, incompetent to waive them. *State v. Ondek*, 584 So.2d 282, 292–93 (La. App. 1st Cir.), writ

denied, 586 So.2d 539 (La. 1991). See *State v. Stewart*, 93-0708 (La. App. 1st Cir. 3/11/94), 633 So.2d 925, 931, writ denied, 94-0860 (La. 9/16/94), 642 So.2d 189. In the absence of such a showing the State retains the ultimate burden of proving beyond a reasonable doubt that the confession was voluntary. *Green*, 655 So.2d at 279.

The Louisiana Supreme Court has recognized that a diminished intellectual capacity does not of itself vitiate the ability to knowingly and intelligently waive constitutional rights and make a free and voluntary confession. See *State v. Tart*, 93–0772 (La. 2/9/96), 672 So.2d 116, 126, cert. denied, 519 U.S. 934, 117 S.Ct. 310, 136 L.Ed.2d 227 (1996); *State v. Benoit*, 440 So.2d 129, 131 (La. 1983). The critical factors are whether the defendant was able to understand the rights explained to him and voluntarily gave the statement. *Tart*, 672 So.2d at 126. Once the trial judge has determined that the State has met its burden of proof, his decision is entitled to great weight on review. *State v. Lefevre*, 419 So.2d 862, 865 (La. 1982). See *State v. Patterson*, 572 So.2d 1144, 1150 (La. App. 1st Cir. 1990), writ denied, 577 So.2d 11 (La. 1991).

The issue raised by the defendant in this matter concerns the ability to comprehend his *Miranda* rights before being questioned by Detective Daigre and before consenting to a buccal swab for a DNA sample. See *Green*, 655 So.2d at 279. According to the defendant, the State did not establish that he understood his *Miranda* rights because of an apparent reading disability. The defendant asserts that he completed only the seventh grade. He also notes his mother's testimony at the motion to suppress hearing wherein she stated that the defendant had been "enrolled in special education" and completed tasks in school only with the constant assistance of someone sitting next to him "reading and explaining everything as they went."

At both the trial and the hearing on the motion to suppress the defendant's statement, Detective Daigre testified that he interviewed the defendant. At the start of the first interview, the defendant indicated the last grade he completed was the seventh grade. Detective Daigre asked the defendant if he could read or write, and the defendant said that he could. The detective informed the defendant of his rights by reading directly to the defendant from a form that listed the *Miranda* rights. The defendant acknowledged that he understood his rights. Detective Daigre stated that when he was reading the rights to the defendant, the defendant appeared to understand what he was talking about. The defendant testified at the motion to suppress hearing that when he waived his rights, he did not know what rights Detective Daigre was talking about.

The State introduced the rights form into evidence at the motion to suppress hearing and at trial. The form, dated August 29, 2009, lists the *Miranda* rights, and was twice signed by the defendant. On the form, beneath the heading "**BEFORE WE ASK YOU ANY QUESTIONS YOU MUST UNDERSTAND YOUR RIGHTS**," five rights or warnings are listed. The defendant initialed each of these and signed below them. At the bottom of the form, under the heading of "Waiver of Rights," it states:

> I have read or had read to me the above statement of my rights. I understand what my rights are. I am willing to make a statement and to answer questions now without a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure or coercion has [b]een used against me.

The defendant signed below the waiver of rights. Detective Daigre signed as a witness to both of the defendant's signatures. While the defendant listed on the rights form that the last grade completed was the seventh, we note that at the motion to suppress hearing, Deborah Hebert, the

defendant's mother, testified on direct examination that the defendant took medicine for ADHD from the first or second grade through twelfth grade. She explained that in school the defendant had to have things read to him to help him comprehend. On cross-examination, when asked about the defendant's schooling, Ms. Hebert explained that after the seventh grade, the defendant was in Special Education up to the twelfth grade. However, she qualified this explanation by stating, "So you're not really in a specific grade. It goes according -- each subject is separate." Ms. Hebert testified that the defendant's last type of employment was as a plumber's helper. She was unsure of when the defendant began working, but indicated he had remained gainfully employed for a period of time. She also testified that the defendant has a driver's license and sometimes boats. Ms. Hebert explained that as long as the defendant did not have to read it, he is very smart, and can probably do more things than the average person his age because he has so much common sense. At trial, when asked what jobs the defendant had held, Ms. Hebert replied, "Derrick [sic] is a very smart man. Derrick [sic] can do plumbing work, Derrick [sic] can do car mechanics. Derrick [sic] can do electrical work."

After interviewing the defendant, Detective Daigre sought to obtain a DNA sample from the defendant. The detective explained the "Permission to Search" form to the defendant, and both of them signed the form. At the motion to suppress hearing, Detective Daigre explained that a DNA sample would be obtained orally with a cotton swab. Detective Daigre read the entire form "line for line" to the defendant. When asked by the State if there was any confusion at any point regarding the defendant's understanding of what he was being asked, Detective Daigre replied there was not.

Our own review of the record, which includes both interviews given by the defendant, provides no indication that the defendant has a learning disability to such an extent that he would not have understood his rights or the waiver thereof as they were explained to him by Detective Daigre. On the contrary, the defendant's comprehension appeared to be more than adequate. His responses to the questions asked at trial and in the interviews were lucid and relevant. In denying the motion to suppress the statements, the trial court stated that "[it] finds that given the testimony we have that the statements were freely and voluntarily given."

We see no reason to disturb the trial court's ruling. Detective Daigre made clear in his testimony that he read each of the defendant's rights to him, that the defendant appeared to understand his rights, and that the defendant stated that he understood his rights. Despite the defendant's apparent diminished intellectual capacity, the State proved his confession was knowingly and intelligently made. The decision on the validity of a waiver is ultimately for the court. There is no controlling psychiatric principle. *Ondek*, 584 So.2d at 293. See *State v. Coleman*, 395 So.2d 704, 706-09 (La. 1981) (our supreme court concluded the trial court was correct in finding the defendant knowingly waived his right against self-incrimination despite an expert on the Sanity Commission admitting that the defendant could understand the warnings, but questioned whether he could appreciate the serious consequences of waiving his rights); *Stewart*, 633 So.2d at 931-33 (this court affirmed the trial court's denial of a motion to suppress the confession of the defendant who was mildly retarded with an IQ of 63). In *State v. Holmes*, 2006-2988 (La. 12/2/08), 5 So.3d 42, 72-73, cert. denied, __ U.S. __, 130 S.Ct. 70, 175 L.Ed.2d 233 (2009), our supreme court stated:

> Furthermore, despite the defendant's appellate claim that her low intelligence rendered her [waiver] of rights and subsequent statements involuntary, well established jurisprudence from this state shows otherwise. *See e.g.*, *State v. Green*, 94–0887 (La.5/22/95), 655 So.2d 272, 278–84 (La.1995) (mildly retarded defendant's waiver of rights was knowing and intelligent, even though psychologist testified defendant was unable to comprehend his rights; psychologist also testified defendant was educable and could be made to understand rights, police officers testified defendant understood his rights in part because of his prior criminal history); *State v. Istre*, 407 So.2d 1183, 1186–87 (La.1981) (19–year–old who had IQ of 68 and who did not know his own age intelligently waived rights, which were explained in simplistic terms that he apparently understood); *see also State v. Brown*, 414 So.2d 689, 696 (La.1982) ("'[M]oderate mental retardation and low intelligence or illiteracy do not of themselves vitiate the ability to knowingly and intelligently waive constitutional rights and make a free and voluntary confession.'") (citations omitted).

We find no legal error or abuse of discretion in the trial court's denial of the motion to suppress the defendant's confession. Similarly, based on the aforementioned analysis, we find the defendant clearly understood what he was doing when he signed the permission to search form, which allowed the State to obtain a buccal swab for DNA. The defendant's consent to search was valid and, as such, we find no legal error or abuse of discretion in the trial court's denial of the motion to suppress the DNA evidence. This assignment of error is without merit.

ASSIGNMENTS OF ERROR NOS. 2 and 3

In his related second and third assignments of error, the defendant argues, respectively, that the trial court abused its discretion in refusing to allow the defense to introduce school records to verify his history of learning disabilities, particularly, his reading and comprehension deficits; and the trial court abused its discretion in denying the motion for a new trial based on the trial court's ruling on the inadmissibility of the school records.

At trial just prior to the start of his case-in-chief, defense counsel informed the trial court he sought to introduce the defendant's special

education school records through his witness, Deborah Hebert. In ruling that the school records were inadmissible the trial court stated, in pertinent part:

> The State, by law, is obligated to show that any statements that were given in this case were free and voluntary and the circumstances under which the statements were given. Now, that's the case law and that's what the -- that's what the law provides. The -- Title 15 Section 451, it must be shown that the confession was free and voluntary and not under the influence of fear, duress, intimidation, menaces, threats, inducements or promises.
>
> Now, the mental condition of the defendant is not what is at issue in this trial. This is not a case where there is a plea of not guilty and not guilty by reason of insanity. There's not a question of the competency of the defendant that's before the Court. The question is one of the voluntariness of the statements in this matter.
>
> So, first of all, the defendant's mother is certainly not going to be able to testify as to whether she thinks he understood what was said during the course of these statements at the detective bureau, or whether some kind of way he was tricked or coerced when she wasn't present to observe these particular statements.
>
> The Court will allow her to testify concerning the fact that he is in fact ADHD, that he has a seventh grade education, those particular facts, because they are within her knowledge, she can testify to. But the circumstances surrounding the giving of the statements, she wasn't present. And under Title 15, under that particular section, she is not able to give a position about whether the statements were voluntary or not. The case law is clear, individuals even though they may be Special Ed, maybe they have limited mental capability, that does not mean that they cannot give a free, voluntary and knowing statement.
>
> So for that reason, any testimony by the mother, if she testifies, will be limited to the fact that he is ADHD and has a seventh grade education.
>
> * * * *
>
> The Court is going to deny the [admissibility] of any school records. First of all, this testing took place in 2006. This crime took place in 2009. So you have a three year gap. There is no way to determine what the defendant's mental capability was at that particular time.
>
> Now, we don't have any evidence in the record that would give any indication of the defendant's inability at this particular point to understand the proceedings. Apparently he's able to drive, he's able to function, he goes out with his friends, can go in the barrooms, can drink and work and do all kind of other things. He may be limited, but I mean the case law is still the same when it comes to competency. This is not a case a question of he is incompetent, not able to proceed, he's not able

> to assist his lawyer; this is a question of whether he voluntarily gave a statement. And the jury's only determining the weight to be given to that statement. The jury is not here to determine whether he should have given that statement. The jury is here to determine do you want to give it any weight or credibility under the circumstances where it was given. Was he forced to give that statement.
>
> And given the Court's rulings, the previous reasons, the Court is going to deny the [admissibility] of the testing results from 2006, first of all, because the State hadn't had a chance to cross-examine or to have had access to these records. Second, it requires an opinion that may be outdated because of the lapse of three years since -- between the testing and the commission of the crime, much less the date of today's trial. So for those reasons and the reasons previously stated in the record, the Court is going to deny the [admissibility] of the testing records.

Defense counsel proffered the school records.

We find no abuse of discretion in the trial court's ruling that the defendant's school records were inadmissible. As noted by the trial court, the testing of the defendant was in 2006, and he committed the crime in 2009. Thus, the three-year-old test results, especially those regarding the defendant's reading comprehension, appear to be irrelevant. 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. La. Code Evid. art. 401. In questions of relevancy, much discretion is vested in the trial court. Such rulings will not be disturbed on appeal in the absence of a showing of manifest abuse of discretion. Ultimately, questions of relevancy and admissibility are discretion calls for the trial court, and its determinations regarding relevancy and admissibility should not be overturned absent a clear abuse of discretion. *State v. Duncan*, 98-1730 (La. App. 1st Cir. 6/25/99), 738 So.2d 706, 712-13.

We note as well that the prosecutor would have been unable to cross-examine the administrator of the tests taken by the defendant or a school

administrator responsible for the school records since defense counsel sought to introduce those records through the testimony of the defendant's mother. If such evidence had been introduced through Deborah Hebert, it would have constituted inadmissible hearsay. Records of a regularly conducted business, such as school records, are properly admissible through the testimony of the custodian of records or another qualified witness. See La. Code Evid. art. 803(6). Finally, as discussed fully in the first assignment of error, any ostensible learning disability was not germane to the defendant's knowing and intelligent waiver of his rights, particularly in light of Detective Daigre's reading the waiver of rights form to the defendant.

Based on the foregoing, the trial court did not abuse its discretion in denying the motion for a new trial. Accordingly, these assignments of error are without merit.

CONCLUSION

For the reasons set forth above, the defendant's conviction and sentence are affirmed.

CONVICTION AND SENTENCE AFFIRMED.