NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2011 KA 0362

STATE OF LOUISIANA

VERSUS

KADERIOUS C. LEE

Judgment Rendered: September 14, 2011.

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On Appeal from the
18th Judicial District Court,
In and for the Parish of Iberville,
State of Louisiana
Trial Court No. 1547-07

The Honorable William C. Dupont, Judge Presiding

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Frank Sloan Mandeville, LA	Attorney for Defendant/Appellant, Kaderious Lee
Kaderious C. Lee Angola, LA	Defendant/Appellant, In Proper Person
Richard J. Ward Elizabeth A. Engolio Plaquemine, LA	Attorneys for Appellee, State of Louisiana

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

CARTER, C. J.

Defendant, Kaderious[1] C. Lee, was charged by grand jury indictment with second degree murder, a violation of La. Rev. Stat. Ann. § 14:30.1. He pled not guilty, and filed a motion to suppress the videotaped confession he gave to the police, which was denied by the trial court. Following a trial by jury, defendant was convicted as charged. The trial court sentenced him to life imprisonment at hard labor, without benefit of parole, probation, or suspension of sentence. Defendant now appeals, designating two counseled and two *pro se* assignments of error. For the following reasons, we affirm defendant's conviction and sentence.

FACTS

On November 7, 2007, the lifeless body of Alexandra[2] Lewis was discovered lying on a sidewalk by a teenager on her way to school in White Castle, Louisiana. Lewis, who either was or had been involved in a relationship with defendant's girlfriend, Catlain Hall, was killed by a single gunshot wound to the heart. On the evening preceding his death, Lewis telephoned Hall, who was with defendant at the time. When Hall handed the telephone to defendant, he and Lewis exchanged heated words. Subsequently, Hall and defendant drove around White Castle looking for Lewis. They eventually found him, and defendant shot Lewis.

MOTION TO SUPPRESS CONFESSION

In his first counseled assignment of error, defendant contends that the trial court erred in denying the motion to suppress his confession because it was given as a result of police inducements while he was under custodial interrogation. Specifically, defendant argues that he was induced to confess by Detective Blair Favaron misleading him into thinking that he could help himself by submitting to

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[1] The defendant's given name is spelled "Kaderious" in the indictment and numerous pleadings in the record. However, his signature on the "Miranda Warning" form indicates the correct spelling is "Kadarious."

[2] The victim's name is apparently misspelled in the indictment as "Alexsandra."

interrogation and giving a statement. Defendant asserts that Favaron's remarks contradicted the *Miranda*[3] warning previously given, namely that anything he said could and would be used against him. Thus, defendant maintains that his confession was not freely and voluntarily made.

No evidentiary hearing was held on defendant's motion to suppress, nor does it appear that one was requested. Instead, it was agreed by the parties that the trial court would view the videotape of defendant's statement before ruling on the motion. On the first day of trial, the trial court permitted the parties to argue the motion, and then denied it.

Review of the videotaped confession reveals that defendant was advised of his *Miranda* rights prior to being interrogated. Moreover, he indicated, both by nodding his head and by initialing the appropriate box on a "Miranda Warning" form, that he understood those rights. The videotape further reveals that on at least nine occasions during defendant's interrogation, one or the other of the two detectives present made statements to him that he should or needed to try to help himself by explaining what had occurred and/or by giving his side of the story. Defendant argues that the detectives' remarks amounted to improper inducements that vitiated the voluntariness of his confession. In support of this contention, he emphasizes that he was only eighteen years old at the time of the interrogation and had only a tenth-grade education.

On the trial of a motion to suppress, the burden is on the state to prove the admissibility of a purported confession or statement by the defendant. La. Code Crim. Proc. Ann. art. 703D. Before a purported confession or inculpatory statement can be introduced into evidence, La. Rev. Stat. Ann. § 15:451 provides that it must be affirmatively shown to be free and voluntary and not made under the influence of fear, duress, intimidation, menaces, threats, inducements, or

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[3] **Miranda v. Arizona**, 384 U.S. 436 (1966).

promises. Additionally, the state must show that an accused who makes a statement or confession during custodial interrogation was first advised of his *Miranda* rights. *State v. Plain*, 99-1112 (La. App. 1 Cir. 2/18/00); 752 So. 2d 337, 342. *See also* La. Const. art. I, § 13; La. Code Crim. Proc. Ann. art. 218.1.

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.[4] *See State v. Hunt*, 09-1589 (La. 12/1/09); 25 So. 3d 746, 751. Further, the entire record, not merely the evidence adduced at the motion to suppress hearing, is reviewable by the appellate court in considering the correctness of a ruling on a pretrial motion to suppress. *Green*, 655 So. 2d at 280.

Direct or implied promises used to obtain a confession may render the confession involuntary. *See State v. Welch*, 448 So. 2d 705, 712 (La. App. 1 Cir.), *writ denied*, 450 So. 2d 952 (La. 1984). However, to determine the voluntariness of a confession, the totality of the circumstances under which the statement was given must be reviewed. Any inducements offered by the police are but one factor in this analysis. *State v. Lavalais*, 95-0320 (La. 11/25/96); 685 So. 2d 1048, 1053, *cert. denied*, 522 U.S. 825 (1997). Moreover, the voluntariness of a confession will not be negated by mild exhortations by the police to tell the truth or telling a defendant that if he cooperates the officer will do what he can to help or that

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[4] Defendant argues that a totally *de novo* standard of review should be applied by this court in reviewing the denial of his motion to suppress, because this court has the same opportunity as the trial court to view and evaluate defendant's videotaped confession. As an additional reason, defendant notes that this court can also consider evidence from the trial, which was unavailable to the trial court at the time of its ruling. However, we believe it is unnecessary for this court to consider these arguments, because there was no dispute as to the factual circumstances surrounding defendant's confession in the instant case. Therefore, the only issue before the trial court on the motion to suppress was the legal determination as to the voluntariness of defendant's confession, which is reviewable under a *de novo* standard of review.

"things will go easier" for him. *See State v. Blank*, 04-0204 (La. 4/11/07); 955 So. 2d 90, 108-09, *cert. denied*, 552 U.S. 994 (2007); *State v. Petterway*, 403 So. 2d 1157, 1159-60 (La. 1981).

In *State v. Dison*, 396 So. 2d 1254, 1258 (La. 1981), the sheriff told the defendant that "in the past, anybody that tried to help themselves, usually got help." Additionally, a deputy told defendant that if he cooperated, the deputy would do whatever he could to help. However, both officers also told the defendant that they could promise him nothing. Given these circumstances, the supreme court held that the defendant was not improperly induced into confessing.

In *Petterway*, a deputy told the defendant words to the effect that he would be better off if he cooperated with the police. The supreme court believed that these remarks were very similar to the deputy's statement in *Dison* that he would do what he could to help if the defendant cooperated. In affirming the denial of the motion to suppress, the supreme court explained that "[s]tatements of this type, rather than being promises or inducements designed to extract a confession, are more likely musings not much beyond what this defendant might well have concluded for himself." *Petterway*, 403 So. 2d at 1160.

Likewise, we believe the statements made by the detectives in the instant case are of a substantially similar nature to those made in *Dison* and *Petterway*. The videotape of defendant's confession does not support his contention that the remarks improperly induced him to confess. Defendant gave the confession after being advised of his rights and indicating that he understood them. The videotape reflects that he was advised of the reason for the interrogation, and was questioned by the police for only approximately twenty-five minutes before confessing. No promises were made to him. In fact, Detective Favaron specifically told defendant that he wanted him to understand that he had no control over what would happen.

Under these circumstances, the detectives' statements that defendant should try to help himself by telling his side of the story did not amount to prohibited promises or inducements designed to extract a confession. Such noncommittal remarks do not rise to the level of a promise that would induce a defendant to make a statement that he otherwise would not have given. *See State v. Sepulvado*, 93-2692 (La. 4/8/96); 672 So. 2d 158, 163, *cert. denied*, 519 U.S. 934 (1996) (defendant's statement was voluntary even though he was told that giving a statement might be to his or his wife's advantage). In effect, the remarks in the present case were no more than mild exhortations to tell the truth that did not destroy the voluntary nature of defendant's confession. Accordingly, defendant's motion to suppress the confession was properly denied.

This assignment of error lacks merit.

TIME DELAYS FOR POST-CONVICTION RELIEF

In his second counseled assignment of error, defendant argues that the trial court erred in failing to properly advise him of the time delays for filing an application for post-conviction relief.

Our review of the sentencing transcript confirms that the trial court failed to advise defendant of the applicable prescriptive period. However, while La. Code Crim. Proc. Ann. art. 930.8C directs the trial court to inform the defendant of the two-year prescriptive period for applying for post-conviction relief at the time of sentencing, its failure to do so has no bearing on the sentence and is not grounds to reverse the sentence or remand the case for resentencing. This provision grants no remedy to an individual defendant who is not advised of the time limitations. *State v. LeBoeuf,* 06-0153 (La. App. 1 Cir. 9/15/06); 943 So. 2d 1134, 1142-43, *writ denied*, 06-2621 (La. 8/15/07); 961 So. 2d 1158. Moreover, as defendant has expressly raised this issue herein, it is obvious that he currently has actual notice

and knowledge of the correct prescriptive period or has the benefit of an attorney to provide him with such notice.

Considering the circumstances, we decline to remand this matter for resentencing, although we have done so in the past in similar situations. Instead, out of an abundance of caution and in the interest of judicial economy, we hereby advise defendant that La. Code Crim. Proc. Ann. art. 930.8A generally provides that no application for post-conviction relief, including applications that seek an out-of-time appeal, shall be considered if it is filed more than two years after the judgment of conviction and sentence have become final under the provisions of La. Code Crim. Proc. Ann. arts. 914 or 922. *See LeBoeuf,* 943 So. 2d at 1143.

JURY CONTAMINATION

In his first *pro se* assignment of error, defendant asserts the jury was contaminated by extraneous outside influences that warranted a mistrial.

Initially, we note that the defense never moved for a mistrial on the basis that the jury was contaminated by extraneous influences. However, defense counsel did file a motion for new trial and/or for a postverdict judgment of acquittal on this basis. The trial court held a motion hearing prior to denying both motions.

The denial of a motion for a new trial is not subject to appellate or supervisory review of the supreme court, except for error of law. *See* La. Code Crim. Proc. Ann. art. 858. Generally, a motion for new trial will be denied unless the defendant establishes that he has suffered some injustice. La. Code Crim. Proc. Ann. art. 851; *State v. Burrell,* 561 So. 2d 692, 701 (La. 1990), *cert. denied*, 498 U.S. 1074 (1991). Moreover, whether to grant or deny a motion for new trial rests within the sound discretion of the trial court, and that decision will not be disturbed on appeal absent a clear abuse of discretion. *State v. Duvall*, 97-2173 (La. App. 1

Cir. 12/28/99); 747 So. 2d 793, 797, *writ denied*, 00-1362 (La. 2/16/01); 785 So. 2d 838.

It is essential that all facts considered by the jury be presented in the courtroom with the full protection of the defendant's rights to confrontation and due process. *State v. Sinegal*, 393 So. 2d 684, 686-87 (La. 1981). A juror who considers evidence not developed or admitted at trial violates his sworn duty and may be guilty of misconduct. *State v. Galliano*, 93-1101 (La. App. 1 Cir. 6/24/94); 639 So. 2d 440, 445, *writ granted in part on other grounds and remanded*, 94-2030 (La. 1/6/95); 648 So. 2d 911. Therefore, if a reasonable possibility exists that extraneous information considered by the jury affected its verdict, a new trial is mandated. *Sinegal*, 393 So. 2d at 687; *Galliano*, 639 So. 2d at 445.

The record reveals that the trial in the instant case lasted for three days, during which time the jury was not sequestered. After the jury began its deliberations, the trial court received a written note from one of the jurors, Richard Smith, stating, "I would like to be excused because some of these people have had contact with the neighbors of the victim. Can I be excused?" The court did not excuse Mr. Smith, but determined that it would question him and other jurors about the assertion made in Mr. Smith's note.

Immediately after the jury returned its guilty verdict, the trial court questioned Mr. Smith under oath regarding his note. He testified that during deliberations a female juror, identified by the court as Elaine Ramagost, stated to the other jurors that a lady she had "dropped off in the complex" had given her some information about the case. According to Mr. Smith, Ms. Ramagost said that the lady told her that a lot was being hidden from the jury, which was not being told the truth about the case. He did not specify what complex Ms. Ramagost was referring to, nor did he indicate that she conveyed to the jury any specific facts that she purportedly was told by the non-juror. Under questioning, Mr. Smith did not

repeat his claim that the person who spoke to Ms. Ramagost was a neighbor of the victim. He indicated that he knew of no other extraneous contact with any other juror.

Subsequently, a motion for post-verdict judgment of acquittal or a new trial was filed by defendant and a hearing was held. When she was questioned under oath, Ms. Ramagost indicated that, while the trial was ongoing, she was approached in a grocery store by a person who recognized her from the courtroom as a juror. Despite the fact that she told the person not to speak to her, the person made a remark that all kinds of things go on in White Castle. Ms. Ramagost covered her ears with her hands and left the store. At the motion hearing, Ms. Ramagost additionally testified that she did not know the person who approached her. She further indicated that she cut the conversation off before the person had a chance to reveal whether they had any connection to either the defendant or to the victim.

In addition to Ms. Ramagost, eight jurors testified at the motion hearing.[5] Of these jurors, five testified that they heard Ms. Ramagost state on the morning of the last day of trial that she had been approached by someone in the grocery store who attempted to discuss the case with her. The other three jurors indicated they did not hear Ms. Ramagost make the statement, but first learned of the encounter when Mr. Smith mentioned it during deliberations. Further, two of the jurors indicated that they never heard the substantive content of what Ms. Ramagost said and several others indicated it was their understanding that she merely told the person she could not discuss the case and left the store. One juror testified that Ms. Ramagost said the person told her there was more to the case. Another juror indicated that she understood the person told Ms. Ramagost something to the effect

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[5] Of the three jurors who did not testify at the hearing, one of whom was Mr. Smith, two were not served and the third received domiciliary service.

that the jury did not know the whole truth. Each of the nine jurors who appeared at the motion hearing testified unequivocally that Ms. Ramagost's statements regarding her encounter in the grocery store had no impact on their verdict.

In denying defendant's motions, the trial court gave the following reasons for judgment:

> This was an innocuous meeting of a juror at a grocery store with someone who indicated they knew she was on the jury. She did exactly what she was told to do and that is say I can't talk to you about it. There has been no indication of any facts that were, of any facts of the case that were relayed to her in any manner whatsoever, nor any indication of any facts outside that came into the jury that was [sic] delivered by her to her fellow jurors. This was just a chance meeting and she did exactly what the Court told her to do. So that being the case, the Court finds that the motion is without merit and the Court denies the Motion for [Post-verdict Judgment of] Acquittal or New Trial.

We find no legal error in the trial court's conclusion. It was not shown that any extraneous information was conveyed to the jury by Ms. Ramagost. It is true that Ms. Ramagost may have relayed to some of her fellow jurors that the person she encountered in the grocery store made a broad statement that the jury did not know the whole truth or that things were being hidden from them. Nevertheless, there was no showing that any specific facts, circumstances, or information regarding this case was either mentioned to Ms. Ramagost or conveyed by her to her fellow jurors. Moreover, each of the jurors who testified indicated that Ms. Ramagost's recitation of the encounter had no impact on their verdict. Given the circumstances, defendant has made absolutely no showing of any prejudicial jury misconduct. The trial court did not err in denying defendant's motions for post-verdict judgment of acquittal and for new trial.

This assignment of error lacks merit.

IMPROPER CLOSING ARGUMENT

In his second *pro se* assignment of error, the defendant alleges the prosecutor improperly referred in his closing argument to defendant's prior

criminal record. Specifically, he complains of the following remarks: "You heard Kadarious Lee, served time in jail for contributing to the delinquency of a juvenile, molestation or something like that of a juvenile that he said he spent time in jail for. He said that."

Under La. Code Crim. Proc. Ann. art. 774, the scope of closing arguments is limited to "evidence admitted, to the lack of evidence, to conclusions of fact that the state or defendant may draw therefrom, and to the law applicable to the case," and the state's rebuttal is confined to answering the defendant's arguments. However, prosecutors are afforded wide latitude in choosing closing argument tactics. Further, even if the prosecutor exceeds the bounds of proper argument, a reviewing court will not reverse a conviction unless "thoroughly convinced" that the argument influenced the jury and contributed to the verdict. *State v. Casey,* 99-0023 (La. 1/26/00); 775 So. 2d 1022, 1036, *cert. denied,* 531 U.S. 840 (2000).

In the instant case, the objected-to remarks by the prosecutor referring to defendant's prior criminal record were made during rebuttal in response to defense counsel's assertion during closing argument that defendant had never been in trouble before. When defense counsel moved for a mistrial, the trial court declined to grant the motion, observing that defendant had referred to his criminal record in the videotaped confession that was played for the jury. Defense counsel did not request an admonition.

Under La. Code Crim. Proc. Ann. art. 770(2), a mistrial is warranted when the prosecutor makes a remark within the hearing of the jury during argument referring to "[a]nother crime committed or alleged to have been committed by the defendant as to which evidence is not admissible[.]" Thus, by its express terms, Article 770(2) is applicable only when the other crime evidence referred to by the prosecutor is inadmissible. In this case, the fact that defendant spent time in jail in connection with a charge of carnal knowledge of a juvenile was revealed by

defendant during his videotaped statement to the police, which was properly admitted into evidence at trial.[6] In referring to this evidence during rebuttal argument, the prosecutor apparently was unable to recall that the exact charge against defendant was carnal knowledge of a juvenile and erroneously referred to the charge as "contributing to the delinquency of a juvenile, molestation or something like that of a juvenile...." While it would have been preferable for the prosecutor to have been more precise in his remarks, his misstatement of the prior charge was not prejudicial to defendant under the facts present. In particular, we note that it was clear from the remarks that the prosecutor was not making a definitive statement of what the prior charge was, but was referring the jurors to their own recollection of what they heard defendant say in his videotaped statement. *See Hines v. Louisiana*, 102 F. Supp. 2d 690, 702 (E.D. La. 2000). Accordingly, despite the misstatement, the objected-to remarks fell within the proper scope of rebuttal argument under Article 774, since it was a reference to evidence admitted at trial and was made in direct response to an argument of defense counsel.

Moreover, even if we assumed that the prosecutor's remarks were improper, defendant is still not entitled to relief, because we are not convinced that the remarks influenced the jury and contributed to the verdict. Defendant does not allege any specific prejudice resulting from the remarks. Furthermore, the reference to defendant's prior criminal record, as well as the fact that the prior charge against him was misstated, was harmless in view of the overwhelming

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[6] Louisiana Revised Statutes 15:450 provides that "[e]very confession, admission or declaration sought to be used against any one must be used in its entirety, so that the person to be affected thereby may have the benefit of any exculpation or explanation that the whole statement may afford." A defendant may waive the protective benefit of La. Rev. Stat. Ann. § 15:450, object to the other crimes evidence, and require the court to excise it before admitting the statement. *See State v. Hart*, 96-0697 (La. 3/7/97); 691 So. 2d 651, 659. However, since there is no indication defense counsel made a request to redact any portion of the videotaped statement in the instant case, the state properly introduced the statement in its entirety.

evidence of guilt presented by defendant's admission in his videotaped confession that he shot the victim. *See* La. Code Crim. Proc. Ann. art. 921. Moreover, since evidence regarding the prior charge against defendant was introduced during trial, it is difficult to see how the prosecutor's reference to it during rebuttal argument could result in prejudice. *See State v. Bouie*, 532 So. 2d 791, 795 (La. App. 4 Cir. 1988). Much credit should be accorded to the good sense and fair-mindedness of jurors who have seen the evidence. *State v. Dilosa,* 01-0024 (La. App. 1 Cir. 5/9/03); 849 So. 2d 657, 674, *writ denied,* 03-1601 (La. 12/12/03); 860 So.2d 1153.

This assignment of error lacks merit.

CONCLUSION

For the foregoing reasons, we affirm the defendant's conviction and sentence.

CONVICTION AND SENTENCE AFFIRMED.