NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2013 KA 0141

STATE OF LOUISIANA

VERSUS

JOSEPH LEMOINE

Judgment Rendered: NOV 0 1 2013

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On Appeal from the Twenty-Second Judicial District Court
In and for the Parish of Washington
State of Louisiana
No. 106083

Honorable August Hand, Judge Presiding

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BEFORE: PETTIGREW, McDONALD, AND McCLENDON, JJ.

McCLENDON, J.

Defendant, Joseph Lee Lemoine, was charged by grand jury indictment with aggravated rape, a violation of LSA-R.S. 14:42. He entered a plea of not guilty and filed a motion to suppress his confession, which the trial court denied. Following a jury trial, defendant was found guilty as charged. Defendant filed a motion for post-verdict judgment of acquittal and a motion for new trial, both of which were denied. He was sentenced to life imprisonment at hard labor without the benefit of probation, parole, or suspension of sentence. Defendant now appeals, arguing that the trial court erred in denying his motion to suppress his confession. For the following reasons, we affirm defendant's conviction and sentence.

FACTS

In February 2009, six-year-old B.Z. disclosed that her uncle, the defendant, orally raped her.[1] B.Z.'s mother reported the matter to the police. Detective Anthony Stubbs with the Washington Parish Sheriff's Office arranged for B.Z. to be interviewed by Jo Beth Rickels, a forensic interviewer at the Children's Advocacy Center. During the videotaped interview, B.Z. told Rickels that defendant "licked her vagina" and that she "had to lick his penis" while they were behind a barn at her grandmother's house, which was located in Mt. Hermon, Louisiana.

On February 12, 2009, Detective Stubbs interviewed defendant. After signing a form advising him of his rights, defendant denied the allegations and claimed that he had never been alone with B.Z. Defendant was interviewed a second time on February 24, 2009, by Detective Stubbs and Lieutenant Tom Anderson. He again signed a form indicating that he was advised of his rights. During the second interview, defendant explained that one night when his family was camping, his wife helped him into their tent because he had been drinking. B.Z. was asleep in the same tent. Defendant's wife went back out to join the other family members. At some point in the night, he rolled over to hug and kiss

[1] The minor victim herein is referenced only by her initials. See LSA-R.S. 46:1844W.

his wife. When he wrapped his arms around what he thought was his wife and opened his eyes, he realized that it was actually B.Z. According to defendant, it was possible that his hand may have touched B.Z.'s vagina, but he could not remember. He admitted that he had a drinking problem and stated that he did not tell anyone what happened that night because he was embarrassed and ashamed. After the interview, defendant was placed under arrest.

MOTION TO SUPPRESS

In his sole assignment of error, defendant contends that the trial court erred in denying the motion to suppress his confession. Specifically, he argues that the confession was not free and voluntary because he was under the influence of alcohol.

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. LSA-R.S. 15:451. It also must be established that an accused who makes a confession during custodial interrogation was first advised of his **Miranda** rights.[2] 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 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). The trial court must consider the totality of the circumstances in deciding whether a confession is admissible. Testimony of the interviewing 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. Further, 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.

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

5/22/95), 655 So.2d 272, 280-81. As a general rule, this court reviews trial court rulings under a deferential standard with regard to factual and other trial determinations, while legal findings are subject to a *de novo* standard of review. **State v. Hunt**, 09-1589 (La. 12/1/09), 25 So.3d 746, 751.

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 LSA-C.Cr.P. art. 703D. In determining whether the ruling on defendant's motion to suppress was correct, we are 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 confession is challenged on the ground that it was not freely and voluntarily given because the defendant was intoxicated at the time of the confession, the confession will be inadmissible only when the intoxication is of such a degree as to negate the defendant's comprehension and to make him unconscious of the consequences of what he is saying. Whether intoxication exists and is sufficient to vitiate the voluntariness of a confession are questions of fact, and the ruling of the trial court on this issue will not be disturbed unless unsupported by the evidence. **State v. Williams**, 602 So.2d 318, 319 (La.App. 1 Cir.), writ denied, 605 So.2d 1125 (La. 1992).

Defendant contends that he was promised that he would not go to jail if he admitted to improperly touching the victim and that he was "drunk and thought he could go home if the made the statement." Defendant testified at the hearing on the motion to suppress and at trial. According to his testimony, he got off from work at 3:30 p.m. on the day of the second interview, and he immediately began drinking from that time until his 6:00 p.m. interview. He claimed that he was nervous about the interview and taking a voice stress test, and he started drinking to calm his nerves. Although he signed the rights form before the interview began, he did not remember doing so because he had been

drinking and was not "of his right mind." However, he did remember having a conversation with Lieutenant Anderson that was not recorded before his second interview began. Defendant claims that during the unrecorded conversation, Lieutenant Anderson "told him to say certain things" and that he would not go to jail if he did so.

Testimony presented at the hearing on the motion to suppress established that defendant was alone with Lieutenant Anderson before the second interview began because he was going to take a voice stress test, and Detective Stubbs was not certified to give the test. However, defendant eventually chose not to take the test. When Detective Stubbs entered the room, defendant appeared upset, but did not show signs of intoxication, and his speech was not slurred. Detective Stubbs went over defendant's rights with him before he signed the rights form, and defendant indicated that he understood his rights. Defendant did not ask to stop the interview at any point nor did he ask for an attorney. Detective Stubbs testified that neither he nor Lieutenant Anderson forced or coerced defendant to make the confession, and they did not threaten him or promise him anything in exchange for the confession.

The trial court denied the motion to suppress, finding that defendant's statement was clearly and voluntarily made without any threats, coercion, or improper promises. The court stated that there was an insufficient basis to find the confession should be suppressed without further proof of the point of impairment.

The testimony, the recorded statements, and the waiver forms clearly establish that defendant was advised of his **Miranda** rights and that he knowingly and intelligently waived those rights. Nothing in the record before us suggests that defendant's alleged intoxicated state was of such a degree as to negate his comprehension or make him unconscious of the consequences of what he was saying to Detective Stubbs and Lieutenant Anderson. Detective Stubb's testimony at the hearing, which the trial court found credible, showed that defendant appeared to understand his rights and did not appear intoxicated.

The trial court also found credible the detective's testimony that he and Lieutenant Anderson did not coerce defendant into making the confession. We conclude, as did the trial court, that under a totality of the circumstances, defendant's confession was voluntary. Therefore, the trial court did not err or abuse its discretion in denying the motion to suppress.

This assignment of error is without merit.

REVIEW FOR ERROR

Initially, we note that our review for error is pursuant to Louisiana Code of Criminal Procedure article 920, which provides that the only matters to be considered on appeal are errors designated in the assignments of error and "error that is discoverable by a mere inspection of the pleadings and proceedings and without inspection of the evidence." LSA-C.Cr.P. art. 920(2).

The trial court did not wait twenty-four hours after denying the motion for new trial before imposing sentence. See LSA-C.Cr.P. art. 873. However, the issue was neither assigned as error, nor was the sentence challenged, and defendant does not cite any prejudice resulting from the court's failure to delay sentencing. Thus, any error which occurred is not reversible. See **State v. Augustine**, 555 So.2d 1331, 1334-35 (La. 1990).

CONVICTION AND SENTENCE AFFIRMED.