NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2012 KA 0004

STATE OF LOUISIANA

VERSUS

SKYLER A. JENKINS

Judgment rendered June 8, 2012.

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Appealed from the
22nd Judicial District Court
in and for the Parish of St. Tammany, Louisiana
Trial Court No. 481775
Honorable William J. Crain, Judge

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HON. WALTER P. REED
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DEFENDANT
SKYLER A. JENKINS

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BEFORE: PETTIGREW, McCLENDON, AND WELCH, JJ.

PETTIGREW, J.

The defendant, Skyler A. Jenkins, was charged by amended bill of information with one count of sexual battery "by committing a sexual battery upon the person of E.C., d/o/b 5/26/97," between June 1, 2009 and July 31, 2009, a violation of La. R.S. 14:43.1(C)(2). He pled not guilty and moved to suppress his confession. Following a hearing, the motion was denied. Following a jury trial, he was found "guilty of sexual battery." He timely moved for a new trial, and for a post verdict judgment of acquittal, but the trial court failed to rule on the motions. He was sentenced to ten years at hard labor without the benefit of probation, parole, or suspension of sentence. The State moved for reconsideration of sentence and for sentencing under La. R.S. 14:43.1(C)(2), but the motion was denied. The defendant appealed contending: (1) the trial court erred in denying the motion to suppress the confession; and (2) the trial court erred in sentencing him without ruling on the timely motions for a post verdict judgment of acquittal and for a new trial. The State also appealed, contending the trial court erred in denying its motion for reconsideration of sentence. This court found merit in assignment of error number two; pretermitted consideration of the remaining assignments of error; vacated the sentence; and remanded for a hearing and disposition of the outstanding motions. **State v. Jenkins**, 2011-0364 (La. App. 1 Cir. 9/14/11), 2011 WL 4452528, (unpublished).

Following remand, the trial court denied the outstanding motions and, referencing its prior reasons for sentence, sentenced the defendant to ten years at hard labor without the benefit of probation, parole, or suspension of sentence.[1] The State orally moved for reconsideration of sentence, arguing the mandatory sentencing range was twenty-five years to ninety-nine years due to the victim's age. The trial court denied the motion for reconsideration of sentence. The defendant now appeals, contending the trial court erred in denying the motion to suppress the confession. The State also appeals, contending the

[1] The defendant waived sentencing delays.

trial court erred in sentencing the defendant under La. R.S. 14:43.1(C)(1), rather than La. R.S. 14:43.1(C)(2). For the following reasons, we affirm the conviction and sentence.

FACTS

The August 25, 2009 recorded interview of the victim, E.C., [2] was played at trial. The victim was twelve years old. She often went out with "Tiffany," who was her father's girlfriend and was twenty-five years old. Tiffany met Zack Little at a bar. Little had a friend, the defendant, who was nineteen years old. Thereafter, the victim, Tiffany, Little, and the defendant went to Mandeville together to sit by the water. The victim told Little and the defendant that she was eighteen years old and that her name was Bailey. After Tiffany and Little went off together, the defendant and the victim sat together and he asked her if she "wanted to go to the truck." She went to the truck and had sex with the defendant. It was her first time, and she was "okay with it." She stated the defendant put his thing in her "coochie." She identified the penis on a sketch of a naked boy as his "thing." She identified the vagina on a sketch of a naked girl as her "coochie."

MOTION TO SUPPRESS

In assignment of error number 1, the defendant argues the trial court erred in denying the motion to suppress confession because it was unlawfully and illegally obtained and not freely and voluntarily given. He claims the interrogating officer "carefully obtained a confession from the defendant to aggravated rape without having first advised [the defendant] that he was being detained in connection with the investigation or commission of any type of offense."

It is well settled that for a confession or inculpatory statement to be admissible into evidence, the State must affirmatively show that it was freely and voluntarily given without influence of fear, duress, intimidation, menaces, threats, inducements, or promises. La. R.S. 15:451. Further, the State must show that an accused who makes a

[2] We reference the victim only by her initials. See La. R.S. 46:1844(W).

statement or confession during custodial interrogation was first advised of his **Miranda**[3] rights. **State v. Plain**, 99-1112, p. 5 (La. App. 1 Cir. 2/18/00), 752 So.2d 337, 342.

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. 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. The trial court must consider the totality of the circumstances in deciding whether a confession is admissible. **Plain**, 99-1112 at 6, 752 So.2d at 342.

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, p. 11 (La. 5/22/95), 655 So.2d 272, 280-281. However, a trial court's legal findings are subject to a *de novo* standard of review. See **State v. Hunt**, 2009-1589, p. 6 (La. 12/1/09), 25 So.3d 746, 751.

When any person has been arrested or detained in connection with the investigation or commission of any offense, he shall be advised fully of the reason for his arrest or detention, his right to remain silent, his right against self-incrimination, his right to the assistance of counsel and, if indigent, his right to court appointed counsel. In a criminal prosecution, an accused shall be informed of the nature and cause of the accusation against him. La. Const. art. I, § 13; see also La. Code Crim. P. art. 218.1. There is, however, no requirement that a defendant be read the technical definition of a crime in order to be fully advised of the reason for his arrest or detention. **State v. Jackson**, 523 So.2d 251, 258 (La. App. 2 Cir.), writ denied, 530 So.2d 565 (La. 1988).

The defendant was advised of his **Miranda** rights, and signed a waiver of those rights prior to giving his recorded statement. The advice of rights/waiver of rights form

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

did not provide any information concerning the charge being investigated. Prior to the defendant's incriminating statement, the detective questioning the defendant advised the defendant that the detective was conducting "a criminal investigation." After the defendant stated the victim told him she was eighteen and he had sex with her in his truck, he asked "what exactly happened to get me here?" The detective advised the defendant "the fact that you had sex with a little girl." The detective then told the defendant, "[n]ow I'm about to blow your socks off; she's only twelve."

There was no reversible error or abuse of discretion in the trial court's denial of the motion to suppress. As a matter of law, lack of knowledge of the victim's age is not a defense. La. R.S. 14:43.1(B). The victim testified at trial she was twelve years old, and the defendant had sex with her in his truck. Further, her August 25, 2009 recorded interview, in which she also stated she was twelve years old and the defendant had sex with her, was played at trial. Additionally, the defense never disputed that the defendant had sex with the victim or that she was only twelve years old at the time he did so; rather the defense theory was that the defendant should not be found guilty of the charged offense because, given the particular facts of the case, the mandatory punishment was too severe for his conduct.

This assignment of error is without merit.

STATE APPEAL

The State argues "[a]lthough the State did not object to the jury verdict form, it submits the conviction by the jury of sexual battery does not preclude the court from properly sentencing defendant under [La.] R.S. 14:43.1(C)(2)." The State is incorrect.

Any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt. **Apprendi v. New Jersey**, 530 U.S. 466, 476, 120 S.Ct. 2348, 2355, 147 L.Ed.2d 435 (2000); **Jones v. United States**, 526 U.S. 227, 243 n.6, 119 S.Ct. 1215, 1224 n.6, 143 L.Ed.2d 311 (1999). Elements of an offense must be charged in the indictment, submitted to a jury, and proven by the Government beyond a reasonable doubt. **Jones,** 526 U.S. at 232, 119 S.Ct. at 1219. The statutory maximum for

Apprendi purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant. **Blakely v. Washington**, 542 U.S. 296, 303, 124 S.Ct. 2531, 2537, 159 L.Ed.2d 403 (2004); **State v. Hardeman**, 2004-0760, p. 10 (La. App. 1 Cir. 2/18/05), 906 So.2d 616, 626.

Whoever commits the crime of sexual battery shall be punished by imprisonment, with or without hard labor, without the benefit of parole, probation, or suspension of sentence, for not more than ten years. La. R.S. 14:43.1(C)(1). Whoever commits the crime of sexual battery on a victim under the age of thirteen years when the offender is seventeen years of age or older shall be punished by imprisonment at hard labor for not less than twenty-five years nor more than ninety-nine years. At least twenty-five years of the sentence imposed shall be served without the benefit of parole, probation, or suspension of sentence. La. R.S. 14:43.1(C)(2).

Following the presentation of evidence, the trial court asked the State and the defense if they had been given a copy of the proposed jury charges, and they both answered affirmatively. Following a discussion off the record, the trial court asked the State if it wanted to object on the record to the definition of sexual battery. The State answered negatively.

During closing argument, the defense argued the evidence showed the defendant had relied on the victim's representations that she was eighteen years old, and was shocked to learn her real age. The defense argued the enhanced penalty for a victim under thirteen was "meant to protect our children from child predators[,]" but was too harsh under the facts of the case because "it's not meant to mercilessly punish a 19-year-old kid who was lied to." The defense further argued:

> I was mentioning that, in this case, if you convict him as charged, 25 years in the Louisiana State [P]enitentiary is the minimum sentencing in this case, without probation, parole, or suspension of sentence. That's what he's charged with, that's what will happen if you find him guilty as charged.
>
> Now you may feel that [the defendant] has done something wrong possibly, and you may feel he deserves some kind of penalty. The judge is going to tell you about lesser included offenses. ...
>
> . . . .

> In the American system, one of the great things about this country, about our legal system, is that we have juries. If the legislature passes all kinds of crazy laws, they can't punish somebody for violating those laws without the say-so of a jury, of a jury of that person's peers, which is why we're all here.
>
> You have a right to vote any way you believe you should vote. And, ladies and gentlemen, what happens to [the defendant] today is your choice, nobody else's. And when you vote, remember that young man's life is in your hands. And he's here not because he set out to do something wrong, not because he was out looking for a 12-year-old, because he really didn't do – he didn't want to do something wrong. He's here because he was deceived.

The trial court instructed the jury on the elements for all of the verdicts listed on the verdict form. Thereafter, the court asked the State and the defense if they had any objection to the jury charges as read to the jury. The State and the defense both replied, "No, Your Honor."

The verdict form gave the jury the following choices:

> GUILTY OF SEXUAL BATTERY OF A PERSON UNDER THE AGE OF THIRTEEN
>
> GUILTY OF ATTEMPTED SEXUAL BATTERY OF A PERSON UNDER THE AGE OF THIRTEEN
>
> GUILTY OF SEXUAL BATTERY
>
> GUILTY OF ATTEMPTED SEXUAL BATTERY
>
> NOT GUILTY

During deliberations, the jury sent the trial court the following note:

> Definition of Lesser Charges
>
> Guilty of Attempted Sexual Battery – and how much time
>
> Guilty of Sexual Battery and how long
>
> Guilty of Attempted Sexual Battery & how long

The trial court recharged the jury on the elements for all of the verdicts listed on the verdict form and instructed them on the penalties for the offenses listed on their note. Thereafter, the jury returned a unanimous verdict of "guilty of sexual battery."

The trial court properly sentenced the defendant under La. R.S. 14:43.1(C)(1). The court sentenced the defendant on the basis of the facts reflected in the jury verdict. The jury did not find the presence of the fact necessary for the defendant to be

sentenced under La. R.S. 14:43.1(C)(2).[4] See **State v. Gibson**, 2009-486, p. 12 (La. App. 5 Cir. 3/9/10), 38 So.3d 373, 380, writ denied, 2010-0802 (La. 11/5/10), 50 So.3d 814. ("The relevant 'statutory maximum' for a violation of La. R.S. 14:43.1 is ten years imprisonment with or without hard labor; this is the maximum sentence the trial court could have imposed *without* any additional findings. In order to sentence the defendant pursuant to the enhanced sentencing provision of La. R.S. 14:43.1 C(2), a finder of fact must determine that the defendant was seventeen years of age or older and that the victim was under the age of thirteen (emphasis in original).")

This assignment of error is without merit.

CONVICTION AND SENTENCE AFFIRMED.

[4] In **State ex rel. Elaire v. Blackburn**, 424 So.2d 246, 251 (La. 1982), cert. denied, 461 U.S. 959, 103 S.Ct. 2432, 77 L.Ed.2d 1318 (1983), the Louisiana Supreme Court recognized the legitimacy of a "compromise verdict," i.e., a legislatively approved responsive verdict that does not fit the evidence, but that (for whatever reason) the jurors deem to be fair, as long as the evidence is sufficient to sustain a conviction for the charged offense.