NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2012 KA 0762

STATE OF LOUISIANA

VERSUS

DAVID LEWELLEN

Judgment Rendered: December 21, 2012.

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On Appeal from the
17th Judicial District Court
In and for the Parish of Lafourche
State of Louisiana
Trial Court No. 490,287
The Honorable Jerome J. Barbera, III, Judge Presiding

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BEFORE: CARTER, C.J., GUIDRY AND GAIDRY, JJ.

CARTER, C.J.

The defendant, David Lewellen, was indicted for aggravated rape of a victim under the age of thirteen years, a violation of Louisiana Revised Statutes section 14:42. He pled not guilty and was tried by a Lafourche Parish jury. The jury found the defendant guilty as charged, and the trial court sentenced him to life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. The defendant now appeals, challenging the trial court's denial of his motion for change of venue. Finding no merit in the assignment of error, we affirm the conviction and sentence.

FACTS

Between 2009 and 2010, the defendant engaged in sexual acts with his six-year old daughter, N.L., at their home in Thibodaux, which is in Lafourche Parish. N.L. reported the incidents to a teacher and was subsequently interviewed at the Children's Advocacy Center (CAC) in Lafourche Parish. At the CAC interview, N.L. indicated the defendant had anal sex with her and forced her to perform oral sex on him. The defendant also performed oral sex on her. N.L. testified at trial consistent with her interview at the CAC. The defendant was interviewed by the police, and an audio statement was taken. In his statement, the defendant admitted N.L. performed oral sex on him. He denied performing oral sex on her or penetrating her in any way.

DISCUSSION

In his sole assignment of error, the defendant argues the trial court erred in denying his motion for change of venue. Specifically, the defendant contends that because of the widespread media coverage of the case he could not receive a fair trial in Lafourche Parish.

A defendant is guaranteed a fair trial and an impartial jury. La. Const. An. Art. I, § 16; *State v. Sparks*, 88-0017 (La. 5/11/11), 68 So. 3d 435, 456, cert. denied, 132 S.Ct. 1794 (2012). Thus, the law provides for a change of venue when the defendant establishes his inability to obtain an impartial jury or a fair trial. *Sparks*, 68 So. 3d at 456. Louisiana Code of Criminal Procedure article 622 provides:

> A change of venue shall be granted when the applicant proves that by reason of prejudice existing in the public mind or because of undue influence, or that for any other reason, a fair and impartial trial cannot be obtained in the parish where the prosecution is pending.
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> In deciding whether to grant a change of venue the court shall consider whether the prejudice, the influence, or the other reasons are such that they will affect the answers of jurors on the voir dire examination or the testimony of witnesses at the trial.

Only in exceptional circumstances, such as "in the presence of a trial atmosphere which is utterly corrupted by press coverage or which is entirely lacking in the solemnity and sobriety to which a defendant is entitled in a system that subscribes to any notion of fairness and rejects the verdict of a mob," will prejudice against a defendant be presumed. *State v. Magee*, 11-0574 (La. 9/28/12), ___ So. 3d ___, ___ (*quoting State v. David*, 425 So. 2d 1241, 1246 (La. 1983)). Absent such exceptional circumstances, the defendant's burden on the motion for change of venue is to demonstrate actual prejudice. *Magee*, ___ So. 3d at ___. The record in this case does not establish the presence of exceptional circumstances; thus, the defendant was required to establish actual prejudice.

Proof of mere public knowledge or familiarity with the case is insufficient to establish actual prejudice. *Sparks*, 68 So. 3d at 457. "A defendant is not entitled to a jury entirely ignorant of his case and cannot prevail on a motion for change of venue simply by showing a general level of public awareness about the crime; rather, he must show that there exists such prejudice in the collective mind of the community that a fair trial is impossible." *Magee*, ___ So. 3d at ___.

Relevant to the trial court's determination of whether a change of venue should be ordered are the factors set forth in *State v. Bell*, 315 So. 2d 307, 309 (La. 1975), which include: (1) the nature of the pretrial publicity and the particular degree to which it has circulated in the community; (2) the connection of governmental officials with the release of the publicity; (3) the length of time between the dissemination of the publicity and the trial; (4) the severity and notoriety of the offense; (5) the area from which the jury is to be drawn; (6) other events occurring in the community which either affect or reflect the attitude of the community or individual jurors toward the defendant; and (7) any factors likely to affect the candor and veracity of the prospective jurors on voir dire.

A trial court's determination of whether the defendant has met his burden of proof on the motion for change of venue will not be disturbed on appeal absent an affirmative showing of error and abuse of discretion. *Magee*, ___ So. 3d at ___. The reviewing court's primary task is to consider the nature and scope of publicity to which prospective jurors in a community have been exposed and examine the lengths to which a court must go to impanel a jury that appears to be impartial in order to ascertain whether prejudice existed in the minds of the public which prevented the defendant from receiving a fair trial. *Magee*, ___ So. 3d at ___. This inquiry into the nature and scope of publicity disseminated in the community is facilitated by the *Bell* factors. "However, courts must distinguish between mere

familiarity with the defendant or his past and an actual predisposition against him." *Sparks*, 68 So. 3d at 457. Another gauge of whether prejudice exists in the public mind is the number of jurors excused for cause for having a fixed opinion. *Magee*, ___ So. 3d at ___.

In his brief, the defendant points to several newspaper articles and some television coverage about the allegations against him. Most of the referenced newspaper articles identified the defendant, his employer (the Lafourche Parish Sheriff's Office), and the charge he faced (rape of a child). The defendant asserts there was a strong likelihood of prejudice existing in the mind of the community.

After a thorough review of the record, we conclude that the defendant has failed to show either actual or presumed prejudice against him to the degree a fair trial was impossible. *See Huls*, 676 So. 2d at 171-72. The trial court, prosecutors, and defense counsel conducted an extensive, thorough voir dire of the prospective jurors. The twelve-person jury was chosen from a pool of forty-two prospective jurors, divided into three panels of fourteen prospective jurors each.[1] The prospective jurors were asked by the trial court whether they knew, or had read, anything about the case. In the first voir dire panel, two jurors indicated they had heard about the case. One of the jurors indicated she had read about the case in the newspaper the day before and suggested that she would have difficulty setting aside what she had learned about the case, and that she had already made up her mind. The other juror stated someone had texted her the night before about the case and that she was not sure that she could be fair; she further stated she felt she would hold against the defendant his decision to not testify. Both of these jurors were struck for cause.

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[1] In the fourth panel of voir dire, ten prospective jurors were questioned to select the alternate juror. The alternate juror chosen did not serve on the final twelve-person jury and was dismissed by the trial court prior to deliberations.

In the second voir dire panel, two jurors indicated they had heard about the case. Rainie Stevens stated that she had read about the case in the newspaper a couple of days prior to her interview, and she did not think she could put aside what she read and be fair. Donna Duet also stated she had read a small article in the newspaper about the case; however, she indicated that she could put aside what she had read and be fair. Stevens was struck for cause, and Duet was peremptorily struck by defense counsel.

In the third voir dire panel, two jurors indicated they had heard about the case. Michelle Deroche indicated that while she had read about the case in the newspaper over a year before, she could be fair. Fay Becnel stated that she had read about the case in the newspaper more than one year prior to the trial, and also that she had read a newspaper article about the case the day before trial. Becnel indicated she had no preconceived notions about the case and that she could base her verdict on the evidence only. Subsequently, Deroche and Becnel were brought in chambers to elaborate on what they knew about the case. Deroche informed the trial court that the article she read in the *Daily Comet* was about a police officer being accused of a sexual crime with a child. She remembered no other specifics or details. Becnel informed the trial court that the *Daily Comet* article she had read over a year ago was about the arrest of "a sheriff, working for the sheriff's department," and she thought the victim was a stepchild under the age of four. The *Daily Comet*[2] article she had read the day before "was just about the trial coming

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[2] The November 15, 2011 *Daily Comet* article headlined "Deputy's rape trial this week" was as follows:

> A former Lafourche sheriff's deputy accused of repeatedly raping a young family member is set to stand trial this week.
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> David Lewellen, 34, was arrested in August 2010 for having a nine-month sexual relationship with the girl who was 6 years old at the time, Lafourche sheriff's deputies said.
>
> Lewellen, a Mississippi native who worked at the Sheriff's Office as a corrections officer and patrol deputy during two stints, was indicted on an aggravated rape charge in October 2010.

up." Both Deroche and Becnel indicated that what they had read in the newspaper was no different from what they had heard during voir dire. Deroche and Becnel were peremptorily struck by defense counsel.

Of the forty-two prospective jurors questioned, only six, or 14%, of them had heard something about the case prior to being questioned during voir dire. Five of those six jurors had read about the case in the newspaper. Of those five jurors, only two jurors indicated that because of what they had read, they could not be impartial. Thus, less than 5% (4.7) of the prospective jurors questioned were influenced by the media to such an extent that they could not be fair and impartial. All six jurors who had heard about the case were struck peremptorily or for cause, and the twelve people who served as jurors had not heard about the case.

After all twelve jurors were picked, defense counsel informed the trial court that he was satisfied with the composition of the jury. The trial court then denied the motion for change of venue, stating:

> In support of the motion the defendant has entered into evidence articles from the *Daily Comet*, the newspaper published in Lafourche Parish, from August 2010, with a picture of the defendant in his uniform, Lafourche Parish Sheriff's Office uniform, with a story about his arrest on the charge of aggravated rape. The story relates comments by Sheriff Craig Webre about the defendant's employment.
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> There's a story from the *WDSU* website, again, about the arrest of the defendant, basically the same article from 2010 that was in the *Comet*.
>
> Another story from August 11, 2010, referencing the investigation, some facts about the defendant's family status, another quotation by the sheriff about the defendant's employment, his job performance, and some of the details of the investigation.
>
> Other stories from *WGNO*.
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> Another story from August 14, 2011 in the *Daily Comet*, basically recounting or revisiting the stories that were run earlier. Quotations attributed to the director of the LSU School of Social Work, and the executive director of Louisiana Foundation Against

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Jury selection is set to begin Wednesday in Judge Jerome Barbera's courtroom. If convicted, Lewellen faces mandatory life in prison.

Lewellen was booked into the Lafourche jail the day he was arrested. He has been moved several times and is now being held in Concordia Parish in lieu of a $250,000 bond.

Sexual Abuse. Those comments were in relation to the publication that the defendant, himself, had been the victim of sexual abuse.

Story from June 3, 2011, in the *LaFourche Gazette*.

Story from September 30, 2010 from the *Daily Comet*. Again, this is a story about the grand jury indictment of the defendant, and a brief recitation of the allegations against him.

Another story from August 11th where there is a reference to the defendant's statement admitting to some of the facts that formed the basis of the charge against him.

Also submitted copies of the Lafourche *Daily Comet* and the *Courier* from November 15th, yesterday, with stories about the fact that the case was coming for trial.

. . . .

We have selected a jury in this case fifty-two (52) people were called to be considered, and I think it was 53. I think we lost one and then picked up one on one panel. So, I think there were 53 people that were called to be interviewed in the voir dire process, and there were relatively few, less that I believe 10 percent of that number, that actually admitted that they read a story. The court interviewed two of them in chambers. Neither of them were released by the court for cause. They were excused by peremptory challenge. But it's significant in the case and the motion that even after all of that and even after the challenges for cause that were made by the defendant that were denied, that the defendant still did not exhaust his peremptory challenges. He still had two left. And that is a significant factor, because if the court had continuously denied challenges for cause based on publicity and the defendant had exhausted all of his challenges, then he would be severely impaired in the jury selection process if he was exhausting all of his challenges on the publicity issue and didn't have any other challenges to consider for other people on the panel. So, by my count, the defendant still had two peremptory challenges left after the third panel.

The motion to change venue is denied because the defendant has not carried his burden of proof to show that there is such prejudice in the collective mind of this community that a fair trial is impossible. I think the jury selection process proves exactly the opposite, that there is no prejudice in the collective mind of this community against this defendant in this case.

After considering the record, we find no affirmative showing of error or abuse of the trial court's sound discretion. While the record reveals that some of the prospective jurors possessed general knowledge of the case, the defendant did not demonstrate the existence of actual prejudice that prevented him from receiving a fair trial. *Compare e.g. State v. Lee*, 05-2098 (La. 1/16/08), 976 So. 2d

109, 132-37, *cert. denied*, 129 S.Ct. 143 (2008); *State v. Manning*, 03-1982 (La. 10/19/04), 885 So. 2d 1044, 1065-66, *cert. denied*, 125 S.Ct. 1745 (2005); *State v. Frank*, 99-0553 (La. 1/17/01), 803 So. 2d 1; *State v. Connolly*, 96-1680 (La. 7/1/97), 700 So. 2d 810, 815. Further, we find it particularly persuasive that defense counsel indicated he was satisfied with the composition of the jury, and that he had not exhausted all of his peremptory strikes.

Finding no merit in the assignment of error raised, we affirm the defendant's conviction and sentence.

CONVICTION AND SENTENCE AFFIRMED.