NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2014 KA 0539

STATE OF LOUISIANA

VERSUS

MICHAEL AIKENS

Judgment Rendered: DEC 10 2014

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APPEALED FROM THE TWENTY-THIRD JUDICIAL DISTRICT COURT
IN AND FOR THE PARISH OF ASCENSION
STATE OF LOUISIANA
DOCKET NUMBER 29,441

HONORABLE ALVIN TURNER, JR., JUDGE

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BEFORE: PARRO, McDONALD, AND CRAIN, JJ.

McDONALD, J.

The defendant, Michael Aikens, was charged by grand jury indictment with three counts of first degree murder, violations of LSA-R.S. 14:30. The defendant initially entered a plea of not guilty on each count. Subsequently, the trial court denied the defendant's motion to suppress statements. The defendant withdrew his original pleas and pled guilty as charged on all counts pursuant to **State v. Crosby**, 338 So.2d 584 (La. 1976), reserving the right to appeal the trial court's ruling on the motion to suppress. The trial court imposed sentences of life imprisonment at hard labor, without the benefit of parole, probation, or suspension of sentence on each count, to be served consecutively. The trial court denied the defendant's motion to reconsider sentence.

The defendant now appeals, assigning error to the trial court's ruling on the motion to suppress statements and challenging the constitutionality of LSA-C.Cr.P. art. 905.5.1(C)(1). In response to the State's brief, the defendant filed a reply brief reiterating the arguments raised in his original brief, arguing that the State's brief failed to rebut those arguments, and noting that his constitutional challenge to LSA-C.Cr.P. art. 905.5.1(C)(1) was preserved for appeal since the issue was raised below in his motion to reconsider sentence. For the following reasons, we affirm the convictions and sentences.

STATEMENT OF FACTS

As indicated, the defendant pled guilty to the instant offenses, thus there was no trial to fully develop the facts. In accordance with the testimony presented at the motion to suppress hearing and the defendant's recorded confession to the police, the following occurred. On or about February 17, 2012, the defendant, Bernard James, Rolondo Stewart, Travis Moore, and Devon James travelled in Devon James' pickup truck to the residence of the victims, Robert Irwin Marchand and his wife Shirley Marchand, with plans to steal a safe from their home office. The defendant was a past employee of Mr. Marchand. While the men were at the residence, the Marchands and Douglas Dooley, the third victim who was present at the home at the time of the invasion, were murdered, and the safe was taken from the home. After the perpetrators fled from the home, they broke into the safe and divided the contents,

including thousands of dollars, among themselves. By grand jury indictment, the five men were charged with three counts of first degree murder, and the codefendants' cases were severed from that of the defendant.

ASSIGNMENT OF ERROR NUMBER ONE

In assignment of error number one, the defendant contends the trial court erred in denying his motion to suppress statements. The defendant argues the State failed to meet its burden of proving his statements were voluntarily given, untainted by fear, duress, inducements, or promises. The defendant notes that State witnesses testified that their goal was to obtain a confession from him as opposed to ascertaining the truth. The defendant further argues that the testimony of defense expert witness, Dr. Beverly Howze, raised serious doubt as to his understanding of the rights he was relinquishing and the consequences of giving a statement to the police. The defendant notes that Dr. Howze doubted his ability to comprehend all of the words on the rights form and contends the State did not present any evidence to contradict Dr. Howze's finding of suggestibility. Further noting that the State stressed his prior interactions with the criminal justice system, the defendant argues that they failed to provide any proof that he had given knowing, intelligent, and voluntary statements during those prior interactions. The defendant specifically makes note of the fact that, in one of those prior experiences where the State had indications that the defendant had been interrogated, the charge was nol-prossed. The defendant suggests that the outcome of that case, along with the detectives' assurances that a statement was in his best interest, could have given him the impression that giving a statement would result in a favorable disposition of the instant case. Noting that his IQ falls in the same range as that of defendants in many cases where statements were found to be involuntary, the defendant argues the State failed to show that his low IQ did not interfere with his comprehension of the consequences of making a statement.

Further, the defendant argues the State did not demonstrate that he was not overborne by the psychological pressure of eight hours of police interrogation to obtain a confession. The defendant notes that, while he was given several cigarette breaks over the course of the eight hours, he was not alone or free from police interaction

during those breaks, as police officers testified that they stayed with him and engaged in small talk. The defendant further notes that the only time the police were not with him was during a meeting in the interrogation room with his aunt, Towanda Aikens, who unbeknownst to him had previously spoken to a Sheriff Jeffrey Wiley of the APSO. The defendant argues that his aunt, a relative whom he trusted, was in effect a "false friend" instrumental in overcoming his will to secure an incriminating statement.

The Fourth Amendment to the United States Constitution and Article I, §5 of the Louisiana Constitution protect persons against unreasonable searches and seizures. A defendant adversely affected may move to suppress any evidence from use at the trial on the merits on the ground that it was unconstitutionally obtained. LSA-C.Cr.P. art. 703(A). The State bears the burden of proving the admissibility of a purported confession. LSA-C.Cr.P. art. 703(D). Louisiana Revised Statute 15:451 provides that, before a purported confession can be introduced in evidence, it must be affirmatively shown to be free and voluntary and not made under the influence of fear, duress, intimidation, menaces, threats, inducements, or promises. It must also be established that an accused who makes a confession during custodial interrogation was first advised of his/her **Miranda**[1] rights. **State v. Plain**, 99-1112 (La. App. 1 Cir. 2/18/00), 752 So.2d 337, 342. The State must specifically rebut a defendant's specific allegations of police misconduct in eliciting a confession. **State v. Thomas**, 461 So.2d 1253, 1256 (La. App. 1 Cir. 1984), writ denied, 464 So.2d 1375 (La. 1985).

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. **State v. Benoit**, 440 So.2d 129, 131 (La. 1983). The trial court must consider the totality of the circumstances in deciding whether a confession is admissible. **State v. Hernandez**, 432 So.2d 350, 352 (La. App. 1 Cir. 1983). Testimony of the interviewing police 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.

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

A trial court's ruling on a motion to suppress the evidence is entitled to great weight, because the court had the opportunity to observe the witnesses and weigh the credibility of their testimony. **State v. Jones**, 01-0908 (La. App. 1 Cir. 11/8/02), 835 So.2d 703, 706, writ denied, 02-2989 (La. 4/21/03), 841 So.2d 791. Correspondingly, 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**, 09-1589 (La. 12/1/09), 25 So.3d 746, 751.

The Louisiana Supreme Court has noted that diminished mental or intellectual capacity does not itself vitiate the ability to knowingly and intelligently waive constitutional rights and make a free and voluntary confession. **Benoit**, 440 So.2d at 131; see also **State v. Young**, 576 So.2d 1048, 1053 (La. App. 1 Cir.), writ denied, 584 So.2d 679 (La. 1991). The State has the burden of proving that the defendant's mental defect did not preclude him from giving a voluntary and free confession with a knowledgeable and intelligent waiver of his rights. The critical factors are whether or not the defendant was able to understand the rights explained to him and whether or not he voluntarily gave a statement. **State v. Stewart**, 93-0708 (La. App. 1 Cir. 3/11/94), 633 So.2d 925, 931-32, writ denied, 94-0860 (La. 9/16/94), 642 So.2d 189, 189-90; **Young**, 576 So.2d at 1053.

The following factual basis was presented at the hearing on the motion to suppress. Detective Sergeant David Baldwin of the Ascension Parish Sheriff's Office (APSO) took a statement from the defendant on February 28, 2012. Detective Baldwin located the defendant as a part of his efforts to interview former acquaintances and employees of Mr. Marchand who may have had knowledge of any large amounts of money that he kept at his house. The police also received a tip indicating that the defendant had commented on the robbery. According to Detective Baldwin, the police were following up on several tips regarding different individuals and, at the time, the defendant was only one of many persons of interest, as opposed to being a suspect.

The defendant was located at a relative's residence and agreed to go to the APSO for a voluntary interview regarding the homicides. Detective Baldwin testified that the defendant was not under arrest at the time and was voluntarily transported to APSO in an unmarked, civilian model vehicle since he did not have a vehicle.

Before starting the interview, Detective Baldwin read the defendant his **Miranda** rights from a waiver of rights form. At approximately 9:42 a.m., Detective Baldwin and the defendant signed the form indicating that the defendant read and understood his rights, was willing to waive them, and had not been threatened, coerced, pressured, or promised anything in exchange for answering questions regarding the homicides, and waiving his rights. Detective Baldwin testified that the defendant appeared to be aware and gave individual confirmation that he understood each of his rights. The defendant also provided his age, thirty-five years at the time, and his last educational grade of completion, which was the twelfth grade. Detective Baldwin denied that there were any threats, coercion, or promises to the defendant and noted that the defendant seemed to understand and was clear, timely, and responsive in answering questions. When questioned about the defendant's possible mental disability, Detective Baldwin noted that he had past police experiences with mentally disabled people. Specifically regarding the defendant, Detective Baldwin stated, "He seemed normal. During the course of the interview and from the time I picked him up to the time we dropped him off after the interview, I had no indication at all that he was impaired mentally in [any way]."

Detective Baldwin testified that, after he and the defendant executed the waiver of rights form, he conducted an unrecorded pre-interview of the defendant. The recorded and transcribed interview of the defendant commenced at 10:00 a.m., it lasted for only a few minutes, and Detective Baldwin then took the defendant back to his relative's residence. The defendant stated that he had previously worked for Mr. Marchand about ten to twelve years before the date of the interview and that he was paid weekly with cash. The defendant conceded he had been in Mr. Marchand's home office before but claimed he did not recall the presence of a safe or coin collection. The defendant indicated that he did not have any information regarding the case and stated

that he was at his grandmother's house when the homicides occurred. Detective Baldwin testified that, at the time of the interview, he did not doubt the veracity of the defendant's statements. Detective Baldwin also obtained a DNA sample from the defendant and had him execute a separate waiver of rights form in that regard.

On March 6, 2012, the defendant again cooperated with a police request to come to the APSO for questioning as a possible suspect. Sergeant Jeff Griffin of the APSO testified that at approximately 10:19 a.m., the police located the defendant at a trailer home along with Beverly Tab and that Ms. Tab was coincidentally being arrested for outstanding warrants. Sergeant Griffin transported the defendant in his unit since once again, the defendant did not have transportation. Based on his interactions with the defendant during the brief transport, Sergeant Griffin noted that the defendant did not seem to suffer from any mental deficiency. Sergeant Griffin admitted that he did not inform the defendant that he was a suspect in the homicides. They arrived at the APSO at approximately 10:40 a.m., and Sergeant Griffin escorted the defendant to the interview room in the detective division. Sergeant Griffin did not further assist in the investigation.

Sergeant Melvin Boudreaux had been with the APSO for over nineteen years at the time of the hearing and was one of the investigating officers working on the Marchand/Dooley homicides. Sergeant Boudreaux testified that Ms. Tab was not actually being placed under arrest on that date. He explained that her arrest was only a guise for her protection, since she had previously implicated the defendant in a police tip and feared for her safety while the defendant was present in the home.[2] Sergeant Boudreaux met the defendant in the interview room, advised the defendant of his **Miranda** rights, and informed him that he would be questioned regarding a homicide. The defendant signed the rights form at 10:46 a.m., and indicated that he read his rights, that he understood his rights, denied being threatened or promised anything, and that he would waive his rights and give a statement. According to Sergeant Boudreaux, the defendant seemed to understand his rights. Detective Taylor and

[2] Ms. Tab told the police about incriminating statements the defendant made, and she tried to get the defendant to repeat the statements while she was wearing a listening device that allowed the police to hear her communications with the defendant. The attempt was unsuccessful.

Lieutenant Chris Moody also participated in the interview of the defendant. Sergeant Boudreaux initially asked the defendant general questions about his family and work history. According to Sergeant Boudreaux, the defendant seemed to understand the questions, gave responsive answers, and stated that he did not have any disabilities. The defendant denied any involvement in the homicides and indicated that he had not seen Mr. Marchand since he last worked for him, which was approximately ten years before the interview took place. Sergeant Boudreaux noticed and questioned the defendant regarding a cut on his right little finger, and the defendant stated that he cut it when he punched a window during an unrelated altercation. According to Sergeant Boudreaux, as indicated in his handwritten notes, at 12:31 p.m., the defendant requested and received a bathroom and smoke break lasting approximately twenty-vie minutes.

The interview proceeded at approximately 12:54 p.m. and the defendant was questioned regarding his financial situation and friendships or acquaintances. Sergeant Boudreaux's notes further indicate that, at 2:22 p.m., the defendant requested and was given another break. This break lasted for approximately fifty minutes, thus the interview proceeded at 3:07 p.m. The defendant was only back in the interview room for approximately fifteen minutes before asking for another smoke break and indicating that he would tell the police what he knew after the additional break. In response, from approximately 3:25 p.m. to 3:58 p.m., the defendant was allowed to have an additional break. The defendant stalled for a few more minutes before asking for another break at approximately 4:12 p.m., again leading the police to believe that he would provide information about the case after another break. Sergeant Boudreaux left during the defendant's 4:12 p.m. break. Sergeant Boudreaux testified that he did not threaten or coerce the defendant nor make him any promises. The defendant did not make any admissions while Sergeant Boudreaux was questioning him, though the sergeant informed the defendant that he did not think he was being honest, and he believed the defendant may have had something to do with the offenses. According to Sergeant Boudreaux, the defendant did not seem distressed and did not make any requests to leave the APSO or end the interview.

Captain Mike Tony had been with the APSO for approximately twenty-five years at the time of the hearing and oversaw the instant investigation. Captain Tony began participating in the interview of the defendant about an hour before Sergeant Boudreaux left. During the break that began at 4:12 p.m., the defendant asked for food and Captain Tony purchased him a shrimp poboy. While the defendant was eating, the police learned that his aunt, Towanda Aikens, was at the APSO, informed the defendant of her presence, and when the defendant stated that he wanted to speak to her, they allowed her to spend fifteen to twenty minutes in the interview room with the defendant while he finished eating. When Ms. Aikens opened the door, she asked the police to reenter the interview room, and it appeared that she and the defendant had been crying. At that point, the defendant, his aunt, Captain Tony, and Lieutenant Moody were present in the interview room. Ms. Aikens instructed the defendant to tell the officers what he had just revealed to her and, at that point, the defendant admitted to being involved in the homicides. He provided the names of other individuals who were involved, including Bernard James, Rolondo Stewart ("Dody"), Travis Moore ("Booda"), and Devon James. After the defendant admitted being involved and named the others who were involved, his aunt left the interview room and the police continued to question the defendant regarding the specifics of his involvement.

Captain Tony's notes included the details of the defendant's admissions. The defendant stated that he was present at the Marchand residence when Doug Dooley, Irwin Marchand, and Shirley Marchand were murdered in the home office and was also present when the incident was being planned. He stated that the men rode to the residence in Devon James' blue Suburban pickup truck. After they parked the truck, Dody opened the door to the residence and struck Mr. Marchand, who was standing in the doorway at the time. As Mr. Marchand fell to the floor, the perpetrators, including the defendant, entered the residence. Dody also struck Mrs. Marchand, knocking her to the floor, and a struggle between Dody and victim Doug Dooley then ensued. Booda assisted Dody with the attack of Mr. Dooley while Bernard James located the safe within the office area. The defendant noted that the safe had rollers and stated that he helped Mr. James place the safe into the back of the truck. Approximately two to three

minutes later, Dody exited the residence, got back into the truck, and they fled from the scene. When they arrived at Devon James' residence, they used a maul to open the safe, then divided its contents, which included cash, as well as gold and silver coins.

The defendant agreed to repeat his confession in a recorded interview. The recording began at approximately 7:00 p.m., and the defendant was again advised of his rights at the beginning of the interview. He confirmed being advised of his rights earlier that afternoon and further confirmed signing the rights form and being aware of his rights. The defendant denied that he had been threatened, coerced, or promised anything in exchange for his statement. He confirmed that he was confessing of his own free will. The defendant repeated his detailed confession. The defendant denied having a knife, cutting anyone, or seeing any of the victims get stabbed. He noted that Dody was the last perpetrator in the house before they left with the safe. The defendant initially estimated that the safe contained about five thousand dollars, but when asked how much each perpetrator received once they divided the money, he then stated, "it had to be at least almost fifteen [hundred] to two thousand dollars." He responded positively when asked if it could have been up to ten thousand dollars that was divided evenly among the five perpetrators. Based on his experience, Captain Tony testified that the defendant knew what he was doing and had a sufficient level of comprehension. He noted the defendant's vocabulary was equivalent to that of an educated person.

The State also presented evidence regarding the defendant's experience in the criminal justice system whereby he was previously advised of his rights, including a 2000 guilty plea to disturbing the peace, a 1997 guilty plea to possession of cocaine with the intent to distribute, and a 1995 armed robbery investigation where the defendant was **Mirandized**, gave a statement, and the case was nol-prossed.

The defendant presented the testimony of Dr. Beverly Howze, Ph.D., who the court accepted as an expert in clinical and forensic psychology. Dr. Howze had evaluated the defendant, who was then thirty-six years old, and prepared a report dated May 19, 2013. Dr. Howze gave the defendant a standard IQ test to measure his levels of verbal comprehension, working memory, processing speed, and perceptual

reasoning. There were also subtests on arithmetic and digit span. The defendant received a full scale IQ score of 67, which falls in the 60 to 69 range that indicates "mild mental disability." Dr. Howze testified that the defendant's verbal comprehension and memory were deficient. Dr. Howze also interviewed the defendant's family members to corroborate her diagnoses. With respect to the defendant's confession, Dr. Howze noted that, to effectively communicate with the defendant, simple sentences and simple concepts would have to be used. She noted that the grouping together of questions and concepts may have been problematic. Dr. Howze further concluded that the pattern of "interrogation, break, interrogation, break, interrogation, break" may have deteriorated the defendant's capacity to tolerate the interviews. She further testified that people with limited IQs normally lack confidence and lean on other people and that suggestibility was consistent with dependence. She confirmed that the defendant had not previously been diagnosed as mentally disabled before her evaluation and noted that many kids "end up falling between the cracks going through school." She noted that, although the defendant graduated high school and received a diploma, he did so with failing grades. She agreed, however, that failing grades are not always indicative of mental disability and agreed that the defendant might have performed better in school if he had better applied himself.

In denying the defendant's motion to suppress the statement, the trial court found that the requirements of **Miranda** were triggered and satisfied. The trial court found that the defendant's mental disability did not negate his understanding of his rights and lawful waiver of those rights. As noted, the defendant was fully advised of his rights and executed more than one waiver of rights form. As to the voluntariness of the defendant's statements, we note that the police testimony indicated that there were no promises or abuse to induce the defendant's agreement to make a statement, and the defendant indicated as such on the waiver of rights forms and during his recorded confession. Statements by the police to a defendant that he would be better off if he cooperated are not promises or inducements designed to extract a confession. **State v. Lavalais**, 95-0320 (La. 11/25/96), 685 So.2d 1048, 1053, cert. denied, 522 U.S. 825, 118 S.Ct. 85, 139 L.Ed.2d 42 (1997). A confession is not rendered inadmissible by

the fact that law enforcement officers exhort or adjure a defendant to tell the truth, provided the exhortation is not accompanied by an inducement in the nature of a threat or one which implies a promise of reward. **State v. Robertson**, 97-0177 (La. 3/4/98), 712 So.2d 8, 31, cert. denied, 525 U.S. 882, 119 S.Ct. 190, 142 L.Ed.2d 155 (1998).

We note also the defendant's familiarity with the criminal justice system. An individual's prior experiences with the criminal justice system are relevant to the waiver of rights inquiry, because they may show the individual has, in the past, and, perhaps, on numerous occasions, been informed of his constitutional rights against self-incrimination both by law enforcement and judicial officers. See **Robertson**, 712 So.2d at 30; **State v. Green**, 94-0887 (La. 5/22/95), 655 So.2d 272, 284. Further, regarding any tactics used by the police during questioning, the issue is whether or not such tactics were sufficient to make an otherwise voluntary confession or statement inadmissible. See **State v. Lockhart**, 629 So.2d 1195, 1204 (La. App. 1 Cir. 1993), writ denied, 94-0050 (La. 4/7/94), 635 So.2d 1132.

In **State v. Brown**, 414 So.2d 689 (La. 1982), the defendant was seventeen years old and a tenth grade high school student in special classes for the mentally disabled when he was arrested. While attending school, the defendant had a part-time job as a bus boy in a local cafeteria. The defendant's IQ was between 65 and 75, and the testimony at the hearing and the trial established that the defendant was capable of distinguishing between right and wrong and of intelligently assisting in his defense. Two police officers testified that the defendant was repeatedly advised of his rights and that he indicated that he understood them. On appeal, after reviewing all of the evidence from the pretrial proceedings and trial, the Louisiana Supreme Court concluded that it was unable to find the trial court abused its great discretion in concluding the defendant's statement was knowingly and voluntarily made. **Brown**, 414 So.2d at 696.

In **State v. Stewart**, 633 So.2d 925, 930, writ denied, 0860 (La. 9/16/94), 642 So.2d 189, two defense experts who had examined the defendant indicated that he was classified as mildly retarded based on his IQ scores, and further, that he would have been unable to understand and intelligently waive his rights. The police officers who

took the defendant's statement testified that the defendant said he had an eleventh grade education, that the defendant signed the waiver of rights form, that he appeared to understand each of his rights, and that he never indicated he did not wish to make a statement. On rebuttal at trial, one of the detectives testified that, at the time of the defendant's statement, he had conversed with him for several hours and the defendant did not appear to have any problems comprehending anything. Additionally, there was testimony that the defendant was employed. In upholding the decision that the defendant's confession was valid, the appellate court noted these factors, as well as its review of the confession itself, which showed that the defendant "spoke in a fairly coherent manner and gave direct responses to questions asked by the police officers about waiving his **Miranda** rights and about the details of the crime." **Stewart**, 633 So.2d at 932-33.

In his appeal brief, the defendant cites **Spano v. New York**, 360 U.S. 315, 79 S.Ct. 1202, 3 L.Ed.2d 1265 (1959), in support of his arguments that he was overborne by the prolonged police interrogation, and by police use of his aunt as a "false friend." In **Spano**, the defendant, a twenty-five year old man, retained counsel after having been indicted in a New York state court on a charge of first degree murder and a bench warrant having issued for his arrest. His counsel surrendered him to authorities in the early evening hours, and the defendant was immediately subjected to a prolonged interrogation by numerous law enforcement officers, continuing through the night and without respite into the following morning. The defendant's repeated requests to see his attorney were denied; his continued refusal to answer questions of the police, as instructed by his attorney, was finally overborne by official pressure, fatigue, and sympathy falsely aroused because of the supposed trouble caused by him to his personal friend, a fledgling police officer (Gaspar Bruno), to whom he had, shortly after the homicide, confided his version of the events leading to the shooting of the victim. He finally gave replies, constituting an admission of guilt. A unanimous Supreme Court reversed the defendant's conviction on the ground that the confession obtained by the interrogation was involuntary and therefore should not have been admitted into evidence at trial. **Spano**, 360 U.S. at 322-24, 79 S.Ct. at 1206-08.

Based on the facts and circumstances, the instant case is easily distinguishable from **Spano**. We find unpersuasive the defendant's comparison of his aunt to Gaspar Bruno, the close friend of the defendant in **Spano** who gave the police information and assisted the police in obtaining a confession. Mr. Bruno was training to become a police officer and was clearly under the instruction of the police. Conversely, there is no indication that the defendant's aunt, who the defendant admittedly trusted, was used to trick him or that she was following any police instruction.

After carefully reviewing the testimony adduced at the motion to suppress hearing, and the defendant's audiotaped statements, in light of the entire record, we find that the State met its burden of proving the defendant gave a voluntary and free confession. The State proved the defendant's mental defect did not preclude him from giving a voluntary and free confession with a knowledgeable and intelligent waiver of his rights. The rights form consisted of simplistic phrasing of the rights. The rights were read to the defendant and the defendant indicated that he read them again on his own. During the audiotaped interviews, the defendant seemed calm and his confession to the offenses seemed plainly willing. He provided responsive, intelligent answers to questions and gave a comprehensible account of the facts of the offenses. While the defendant was at the APSO for several hours on the date of his confession, he was not there overnight, and we note that the interrogation was repeatedly delayed by the multiple breaks given to the defendant as he requested. There was no indication that the defendant ever asked for an attorney despite being repeatedly advised of his rights. Further, the totality of the interview clearly conveys that the statements were not being made because of any promises, coercion, or threats. We find no abuse of discretion in the trial court's denial of the motion to suppress. Assignment of error number one is without merit.

ASSIGNMENT OF ERROR NUMBER TWO

In his second assignment of error, the defendant notes that his attorney solicited an agreement to conduct a pretrial hearing on his ineligibility for execution due to mental disability based on expert diagnosis, but the State refused. The defendant notes that LSA-C.Cr.P. art. 905.5.1(C)(1) gives prosecutors veto power over the holding

of pretrial hearings on mental retardation and, in practice, compels a defendant to either prove mental retardation to the jury at the penalty phase, or to waive his constitutional rights and accept a mandatory life sentence. The defendant specifically contends there was a jurisdictional defect prior to his plea in that the above cited statutory subsection prevented him from proving in a pretrial proceeding that due to his mental disabilities he was exempted from the death penalty prosecution instituted by the State. The defendant contends that he accepted a plea bargain for life sentences solely to avoid a punishment from which he was probably exempt. The defendant further notes that he challenged the constitutionality of LSA-C.Cr.P. art. 905.5.1(C)(1) in his motion to reconsider sentence and argues the trial court erred in denying the motion on this ground. The defendant argues that this Court should declare LSA-C.Cr.P. art. 905.5.1(C)(1) unconstitutional as it is inconsistent with U.S. Supreme Court jurisprudence and the practices of the majority of states that use capital punishment.

The defendant argues that, under **Atkins v. Virginia**, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d (2002), determination of mental retardation is a threshold legal and clinical determination that should not be treated merely as a factual determination reserved for resolution at the penalty phase. The defendant notes that other states rejected the approach used by Louisiana for several reasons, including due process considerations, avoiding undue prejudice to the defendant, saving exorbitant costs incurred by capital trials, adhering to the example set by the majority of the states, analogizing the determination of mental retardation to other issues that are decided pretrial, eliminating coercive pressure upon defendants to plead guilty to avoid the threat of execution, and sparing the victims' families from the strain of needless involvement in a death penalty trial. The defendant concludes that Louisiana's approach is not only unusual, but also constitutionally infirm as it creates a serious risk of erroneous determinations of intellectual capacity and wrongful executions of persons who are protected under **Atkins** and the Eighth Amendment.

In **Atkins**, the United States Supreme Court held that executing mentally disabled offenders is excessive punishment under the Eighth Amendment. However, while extending the Eighth Amendment protection to the mentally disabled, the

Supreme Court left the imposition of the rule to the states. **Atkins**, 536 U.S. at 317, 122 S.Ct. at 2250. In the next legislative session following the rendering of **Atkins**, the Louisiana Legislature enacted LSA-C.Cr.P. art. 905.5.1. This article provides a procedure to be used when a capital defendant raises a claim of mental retardation. The jury shall try the issue of mental retardation of a capital defendant during the capital sentencing hearing unless the State and the defendant agree that the issue is to be tried by the judge. See LSA-C.Cr.P. art. 905.5.1(C)(1) (prior to amendment by 2014 La. Acts, No. 811, §31).

A statute is presumed to be valid and its constitutionality should be upheld whenever possible. **State v. Thomas**, 04-0559 (La. 1/19/05), 891 So.2d 1233, 1235. Because a statute is presumed constitutional, the party challenging the statute bears the burden of proving its unconstitutionality. **Thomas**, 891 So.2d at 1235. Attacks on the constitutionality of a statute may be made by two methods. The statute itself can be challenged, or the statute's application to a particular defendant can be the basis of the attack. **State v. Griffin**, 495 So.2d 1306, 1308 (La. 1986). Louisiana criminal statutes must be "given a genuine construction, according to the fair import of their words, taken in their usual sense, in connection with the context, and with reference to the purpose of the provision." LSA-R.S. 14:3.

In **State v. Turner**, 05-2425 (La. 7/10/06), 936 So.2d 89, cert. denied, 549 U.S. 1290, 127 S.Ct. 1841, 167 L.Ed.2d 337 (2007), the Louisiana Supreme Court upheld the constitutionality of LSA-C.Cr.P. art. 905.5.1 generally, and further upheld the statute's provision that a jury decides the question of mental retardation during a capital sentencing hearing. The statutory procedure was followed in the instant case and the defense offers no controlling or persuasive authority for revisiting **Turner**, in which the Louisiana Supreme Court found "nothing ... to support a determination that a jury is unreliable for deciding the factual issue of whether the defendant is mentally retarded." **Turner**, 936 So.2d at 98. The Court noted that, although judicial economy would be better served by the trial judge making a pretrial determination of whether the capital defendant is mentally retarded, as that procedure would be more efficient and less costly, thus saving the State the unnecessary expense of a capital trial where the

mentally retarded defendant is exempt from the death penalty, the Legislature's choice of permitting the issue to be submitted to the jury does not offend constitutional guarantees. **Turner**, 936 So.2d at 103. Based on the foregoing, we find no merit in the second assignment of error.

CONVICTIONS AND SENTENCES AFFIRMED.