STATE OF LOUISIANA	*	**NO. 2003-K-0098**
VERSUS	*	**COURT OF APPEAL**
DARRIN RAIFORD	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**
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ON APPLICATION FOR WRITS DIRECTED TO
CRIMINAL DISTRICT COURT ORLEANS PARISH
NO. 391-156, SECTION "E"
HONORABLE CALVIN JOHNSON, JUDGE
* * * * * *
JUDGE MICHAEL E. KIRBY
* * * * * *

(Court composed of Chief Judge William H. Byrnes III, Judge James F. McKay III, Judge Michael E. Kirby)

BYRNES, C.J. – DISSENTS WITH REASONS

EDDIE J. JORDAN, JR., DISTRICT ATTORNEY
PATRICIA D. PARKER, ASSISTANT DISTRICT ATTORNEY
619 S. WHITE STREET
NEW ORLEANS, LOUISIANA 70119
COUNSEL FOR RELATOR

STATEMENT OF THE CASE

Darrin Raiford and Commodore Allen were indicted on July 31, 1997 for first degree murder. It appears from the docket master that throughout 1998 discovery motions and changes of counsel delayed the proceedings. In 1999 Allen was found incompetent to proceed, apparently resulting in delays as to both defendants. On December 5, 2000, the court began to hear testimony in connection with Raiford's motion to suppress. Additional testimony was heard on February 7, 2001, and then a motion for a lunacy hearing was filed in March 2001. Testimony on the competency issue was heard on October 16, 2001, and the court found Raiford competent to proceed but left open the question of his competency to give a statement. On August 30, 2002, the court heard more testimony in connection with Raiford's motion to suppress his confession. Finally, on November 21, 2002, the court granted the motion to suppress. The State objected and gave notice of intent to seek writs.

STATEMENT OF THE FACTS

The defendant's statement, reflects that he was arrested for a carjacking which occurred on June 7, 1997 at 2:59 a.m. The narrative of the

offense given by the defendant is that he, his codefendant Commodore, and a person named Chris were walking on St. Claude and saw a person about to exit a car. Chris told the defendant and Commodore that he was going to get the car. Chris carjacked the person, picked up the defendant and Commodore, and then drove to get gas. As they were driving on St. Roch, Chris saw some people he had had prior problems with and "went to shootin'." The three then left the scene, and as they were driving near Rumors, a nightclub, Chris parked the car, saying he saw some people he wanted to rob. That group was in a McDonald's parking lot. Chris told the defendant to get the victims' money when Chris pulled his gun and told the people to get down, so the defendant did. They also stole one of those victim's cars. After this robbery, the defendant, Chris, and Commodore went back to the Desire project where Chris lived and split up the jewelry they had taken. At some point shortly thereafter, Chris wanted to go back to retrieve the vehicle he had stolen in the first carjacking. When Chris and the defendant returned to the vicinity of the McDonald's, the police saw them. Chris ran, but the defendant did not and essentially surrendered to the police.

Also in his statement, the defendant stated that both Chris and Commodore were armed and fired their weapons at the group on St. Roch. In another part of his statement, the defendant indicated that it was

Commodore, not Chris, who was driving the car at the time of the drive-by shooting; it is not clear from the statement when they changed places. The defendant denied having a gun, but admitted that he covered his face with his shirt while at the scene of the drive-by shooting. He later responded to more detailed questions about the first carjacking, stating that he and Commodore had walked off before Chris carjacked the victim, but then Chris drove around the block and picked them up.

The defendant was also questioned in some detail about his knowledge of other carjackings which may have been perpetrated by himself, Chris, or Commodore. The defendant denied participating in any others, but gave several details about carjackings perpetrated by Chris and Commodore.

Detective Michael Riley testified at the December 5, 2000 hearing relative to the eight counts of armed robbery and one count of carjacking. He responded to the call of the incident at the corner of St. Claude and Franklin Avenue, a McDonald's parking lot. As he was interviewing the eight victims, some of them suddenly pointed out to him that their vehicle, a Ford Bronco, was passing on the street. As Detective Riley prepared to pursue in his vehicle, several of the victims followed the Bronco on foot. Just as the detective was exiting the parking lot, the victims ran back, stating

that two of the perpetrators had gotten out of the Bronco and started running towards the victims, causing them to retreat. Detective Riley instructed three of the victims to get into the police cruiser and then drove around looking for the subjects. At the corner of St. Claude and St. Roch, the victims pointed out two African-American males, one of whom was the defendant Darrin Raiford. Detective Riley attempted to apprehend both subjects, but only the defendant, who made no attempt to flee, complied with detective's instructions. The second subject escaped on foot.

Detective Riley further testified that, in the defendant's pocket, he found a wristwatch which was identified by one of the victims. He also stated that he advised the defendant of "his rights as to the detainment, why he was being detained." The defendant's only statement to Detective Riley was to the effect that he understood that the detective was the police and that he did not know what was going on. At the time Detective Riley apprehended the defendant, he had no knowledge that the defendant had any connection with a shooting.

Sergeant Richard Williams testified at the December 5, 2000 hearing that he took a statement from the defendant on June 7, 1997. Also present during the taping were Detective Duane Carkum and the defendant's aunt, Shirley Raiford. Sgt. Williams testified that the defendant filled out a rights

of arrestee form prior to giving a taped statement, and that he was not forced, coerced, or threatened. He also stated that the defendant was allowed to confer with his aunt during the taping of the statement.

During cross-examination, Sgt. Williams stated that at no time prior to the statement was the defendant advised that he was being arrested for a murder; his aunt also was not informed of his fact. He also stated that the tape was never turned off and the transcript did not indicate that there were any breaks. However, the sergeant did testify that the defendant was allowed to speak to his aunt prior to the statement, but he could not recall if it was outside the presence of police officers.

Detective Duane Carkum testified at the December 5th hearing that he was present during the defendant's statement; in fact he stated that he was the primary officer conducting the statement for the homicide case. Detective Carkum paraphrased the defendant's statement regarding the murder. The defendant said he was in a stolen vehicle with two other subjects. Those subjects confronted the victim, who was with a group in the St. Roch playground, and then began shooting at the group. They then drove away. According to Detective Carkum, the defendant was not forced, threatened or coerced to give a statement and appeared to appreciate his rights. The defendant's aunt also appeared to appreciate what was

occurring, in the opinion of Detective Carkum.

The defendant's aunt, Shirley Raiford, testified when the motion hearing continued on February 7, 2001. Ms. Raiford first stated that the defendant is her sister's child, but that she had "raised him" and had him in her custody at one time. As to the incident, she testified that a uniformed officer came to the house, which was actually her father's house, seeking to speak to the defendant's grandfather because the defendant was in trouble. According to Ms. Raiford, the officer informed her and the defendant's uncle that "Darrin had told him that he was in the car with some guys that did some shooting, and some man had ID'ed him by the truck . . .". Because the defendant's grandfather was ill, and because the defendant's mother was out of town, Ms. Raiford told the police officer that she would come to the Fifth District, although she was "kind of upset and nervous".

Ms. Raiford stated that she drove herself to the district station, and when she arrived, she spoke with an officer who told her that her nephew was in a lot of trouble, specifically because he had been "with some guys in a car. They did a drive-by shooting," and that one of the victims had died. Ms. Raiford said that at that point she began crying and asked to see the defendant. When two detectives arrived, she was escorted to a room where the defendant was sitting and allowed to sit with him for a few minutes. She

stated that she tried to ask him what happened, but “was just crying” and “couldn’t hardly get nothing out” because she was so upset. One of the detectives came in and again told her that the defendant was in the car when a drive-by shooting occurred and the victim had died. The detectives then began the taped statement, giving the defendant his rights, and asking him questions. Ms. Raiford stated that the detectives were asking things very fast, including about a robbery across the river, so she asked them if there was time for them to call the defendant’s mother. Ms. Raiford explained that she was upset and wanted to call the defendant’s mother because she did not “want to do the wrong thing.” Furthermore, she did not want to make any decisions for the defendant because he was not her child; she particularly did not want to sign any papers or anything. Ms. Raiford stated that the detectives offered to call the defendant’s mother, who was in Mississippi, but were unsuccessful in reaching her.

In further testimony, Ms. Raiford stated that when she went to the police station she believed that the defendant had already made a statement. In fact, she stated that the police told her they needed adults present, but “that Darrin had already confessed, telling him that he was implicated in it.” She also testified that when she was in the room with her nephew she did not discuss or talk to him about whether he should talk to the police because she

was too upset, shaky, and crying. They never discussed any legal rights or anything; they were just crying. Ms. Raiford said that throughout the defendant's statement she just sat there crying.

On cross-examination, Ms. Raiford agreed that the police read the defendant his rights and that they did not force, threaten, or coerce him into giving a statement while she was present.

In addition to presenting the testimony of Ms. Raiford at the February 7, 2001 hearing, the defense called Dr. Fred Davis as a witness. After the court accepted him as an expert in psychology, he testified regarding his examination of the defendant with particular regard to his competency to execute a waiver of his rights. In addition to examining the defendant on September 18, 1998, July 7, 2000, and August 11, 2000, Dr. Davis reviewed the defendant's school records, listened to the tape statement, read the incident report, and reviewed the waiver of rights form. Dr. Davis administered a battery of tests, including "Trails A and B" which measure the ability to maintain set and shift set and also taps into processing speed, which the doctor explained involves the ability to develop a particular idea about how to approach something, continue to maintain that idea over a period of time, and then determine if there is a need to change that idea. He also administered a word/color naming test to measure interference control,

the Rey-Oesterith Complex Figures procedure to measure visual/spatial working memory storage and retrieval, and the Wexler Adult Intelligence Scale Form 3 and the Wexler Memory Scale Form 3, two tests used by the school system, so that he could compare results from the school records.

Dr. Davis testified that the defendant's school records indicated that he was found to be in need of special education because of a learning disability, but there was no IQ results because the test had not been administered. Specifically, the records showed that in 1992 the defendant was eleven years old and had repeated the first and third grades; he was in third grade at that time and was not passing. The records indicated that the defendant was living with his legal guardian Shirley Raiford, that he tended to forget easily what was learned, and had a very unstable relationship with his mother. The Woodcock-Johnson test reflected that at age eleven the defendant had an overall reading score at grade level 1.4, a math level of 3.4, and a writing level of 1.5. When Dr. Davis administered the same test in 1998, six years later, the defendant's performance level had risen only to 2.0 (second grade) in reading, while his math had dropped to 2.9 and his writing to 1.3. According to Dr. Davis, these results demonstrated that, despite more years in school, the defendant had not progressed. A report in the school records from June 1995 showed that the defendant had been diagnosed as

mildly to moderately academically delayed and required virtually one-on-one with a teacher before he could be expected to learn.

Dr. Davis testified regarding the Wexler Adult Intelligence Scale which he administered to the defendant to assess general intelligence; the defendant showed a verbal IQ of 59, a performance IQ of 51, and a confidence interval of about 55 to 65 at the one percent level, which under the standard classification makes the defendant "trainably mentally retarded" but not "educably mentally retarded". Additionally, the defendant was tested for malingering, and that test reflected that he was not a malinger. The doctor also gave the defendant a new test called the "Validity Indicator Profile" developed by a doctor at a VA hospital. The defendant's answers on this test, which required him to make guesses, showed a random response pattern consistent with mental retardation. The results on the Wexler Memory test were also consistent with the IQ test results showing mental retardation.

Based on the various tests, examination of the defendant, records, and the way in which the defendant's rights were presented to him, Dr. Davis opined that the defendant would not have been able to understand the rights as presented to him. Dr. Davis explained that the problem for the defendant, as well as for other retarded persons whose information processing systems

are impaired, is that he lacks the necessary working memory to absorb information and the abstract reasoning ability to think about the information he does retain.

Furthermore, Dr. Davis discussed that the defendant's confusion and lack of understanding was manifest during the taped statement when, after being read the line, "With full knowledge of my rights, I wish to waive all the privileges against self-incrimination and make a statement about my knowledge of the commission of the crime," the defendant's response was "No, sir." The officer then asked, "You don't want to give a statement?, to which the defendant responded, "What do you mean, sir?" This interchange showed the defendant's confusion as did his subsequent response to the follow-up question of whether he wished to give a statement about his participation in the crime; the defendant asked the officer, "What like, that's like saying something like, no, you didn't want to do it or something like that?" Dr. Davis testified that this summarization reflected the defendant's "primitive and rudimentary understanding of what" was being asked of him. The doctor further explained that, given the defendant's limitations, it would be necessary to break down his rights one by one with many repetitions and simplifying the language used. Dr. Davis further stated that, in his opinion, the defendant could never make an intelligent decision alone to waive his

rights given that his overall IQ is 51.

On cross-examination, Dr. Davis admitted that his report failed to note that the defendant's aunt was present during the statement and that this failure was an oversight. However, he explained that he had been asked to evaluate whether the defendant acting autonomously could make an intelligent and knowing waiver of his rights. As to the statement itself, Dr. Davis did not dispute that the police did not ask leading questions of the defendant.

The court also questioned Dr. Davis, eliciting the fact that the defendant has an IQ of 51, and that level could render the defendant incompetent to proceed. Dr. Davis further discussed the distinction between understanding rights and making the decision of whether or not they should be waived. Based on Dr. Davis's testimony that the defendant may be incompetent to proceed, the trial court on its own motion ordered the appointment of a lunacy commission to examine the defendant, including having an IQ test administered by Dr. Salcedo.

As ordered by the court, the court-appointed experts examined the defendant. These three doctors testified at the October 16, 2001 hearing. Dr. Salcedo, an expert in forensic psychology, testified that his examination and testing showed that the defendant was mentally retarded, specifically

between the upper end of the mild, mentally retarded range and the lower end of the borderline range, or somewhere between 68 and 72. In terms of the Bennett criteria for competency to proceed, the defendant was competent to proceed and assist counsel, although he demonstrated difficulty with processing information quickly enough to keep up with the pace of a trial. Dr. Salcedo indicated that through minor changes in the trial, this difficulty could be resolved. Dr. Salcedo further testified that he evaluated the defendant in terms of the ability to understand the rights given to him at the time he made his statement. The doctor stated that, in his opinion, "the unfortunate combination of Mr. Raiford's cognitive limitations, along with the style employed by the person who was reading his *Miranda* rights, made it such that . . . Mr. Raiford did not realize or did not comprehend his *Miranda* rights or the rights that were explained to him, in the manner that they were explained to him at the time." Dr. Salcedo noted that the language used to explain the rights were "a lot of legal jargon" which clearly the defendant's educational background and cognitive limitations prevented him from following. Also, "unfortunately" in the doctor's opinion, the police officer "just sort of persisted in that approach of using a very technical, legal jargonese-oriented manner of explaining things to Mr. Raiford which it's apparent, based on his responses, that he didn't understand."

During cross-examination Dr. Salcedo testified, as Dr. Davis had, that if the defendant had been given his rights in a simpler more basic fashion, rather than the way they were, then it might have been possible for him to understand them. Dr. Salcedo was also asked whether prior interaction with the police might have made it easier for the defendant to understand his rights because of the additional exposure; however, this triggered an objection by the defense counsel who indicated that the defendant's rap sheet reflected only a single juvenile arrest. After Dr. Salcedo testified, the parties stipulated that the defendant had prior arrest as a juvenile for simple battery, curfew violation, and being a runaway.

Dr. Richoux, a forensic psychiatrist, was the second court-appointed expert to testify. He stated that he participated in the examination of the defendant in March and April 2001. Dr. Richoux testified that he found the defendant to be "mentally impaired in terms of his level of intellectual functioning." Although Dr. Richoux did not personally administer any IQ tests to the defendant, on a clinical basis and after review of the defendant's records, he agreed with Dr. Salcedo that the defendant functions somewhere from the mildly mentally retarded to the lower borderline range. He further concurred with Dr. Salcedo that the defendant was competent to proceed to trial on a very basic level, although it might be necessary during trial to

provide additional time for his counsel to explain the proceedings to him. As to the ability to waive his rights at the time he gave his statement, Dr. Richoux also concurred with Dr. Salcedo "that Mr. Raiford had major deficits in his ability to comprehend what was being said to him in terms of his legal rights . . . . He was told things and asked things, according to the transcript, . . . in a form, and using verbiage which would certainly be over the head to a considerable degree of someone with Mr. Raiford's level of intellectual functioning . . . ". Dr. Richoux's opinion was based in part on the interview he conducted with the defendant. Dr. Richoux further testified during cross-examination that simply because the defendant responded that he understood his rights, it did not mean that he did. He also suggested that the defendant's attempt to ask what giving a statement meant reflected his "gross confusion".

The last court-appointed expert to testify was Dr. Sarah Deland, an expert in forensic psychiatry. Dr. Deland testified that she participated with Drs. Salcedo and Richoux in the March and April 2001 evaluations of the defendant. She separately examined the defendant again in September 2001 because, after the first two meetings, she was undecided on whether the defendant was competent to proceed under the Bennett criteria. In the last interview, the defendant appeared less anxious and showed a better

understanding of the process, clearly because someone had been working with him. Based on this, Dr. Deland concurred in the determination by the other court-appointed experts that the defendant was competent to proceed. She was also in agreement with the other physicians that, with reasonable medical certainty in her opinion, the defendant did not understand the waiver of his rights when he gave his statement. Dr. Deland further agreed with Dr. Salcedo and Dr. Richoux's assessment of the defendant's level of intellectual functioning and that he had a learning disability.

At the conclusion of Dr. Deland's testimony and the defense introduction of the various exhibits identified throughout the hearings, the court ruled that the defendant was competent to stand trial. The court took the matter under advisement for a ruling on the motion to suppress confession, requesting that the parties provide memos. However, instead of ruling, on August 30, 2002 the court heard testimony from a Dr. Rennie Culver, an expert in forensic psychiatry, who had been asked by the State to examine the defendant. Dr. Culver testified that he reviewed the defendant's taped statement, including the audio version, before interviewing him. During the interview, he took a history from the defendant and asked questions of the defendant to determine whether he understood his rights when they were read to him. Dr. Culver stated that this case was the first

time he was asked to evaluate a defendant on the ability to waive his rights; in all the other cases his evaluation pertained to competency to stand trial or sanity at the time of the offense. According to Dr. Culver, he questioned the defendant about what occurred at the time he was arrested and the defendant stated that he was "questioned following an armed robbery in which a victim had been killed." The defendant claimed that the police had never read him his rights, that there were three other persons with him but only one other was caught, that the police tried to place dogs on him, that he was drunk when he was caught, and that he was questioned alone first and then with his aunt present. Dr. Culver stated that the defendant was able to recite his rights back "flawlessly". Dr. Culver further testified that the defendant told him that he was aware of his rights when he was arrested; the defendant said that, "As long as you don't use big words, I can understand what you say." Dr. Culver concluded that the defendant was competent to stand trial, that he did not suffer from psychosis or serious mental illness, that he does have mild mental retardation, and that he understood his rights at the time he was informed of them. This last opinion was based on the defendant's ability to understand his rights at the time of the interview, five years after the defendant's arrest, and from the audiotape which gave the doctor "the strong feeling that he understood them." Furthermore, Dr. Culver had been told

that this case was not the first time the defendant had been arrested and he did not "think there was ever an issue made about his previous arrests, as to his competence to understand his rights." Dr. Culver also testified that he had reviewed the testimony of the court-appointed experts and he agreed that the defendant was competent to proceed, but disagreed with their determination on his ability to understand his rights at the time he gave a statement. Dr. Culver explained that such a disagreement "is the sort of thing that happens among experts."

On cross-examination, Dr. Culver stated that malingering was not an issue in this case. He admitted that he had not reviewed the testimony of Dr. Davis nor had the State provided him with all of the defendant's school records. He further testified that he never asked the defendant to explain to him what the various rights meant, he merely asked him to recite them. Dr. Culver stated that he did not "know how much plainer" the *Miranda* rights could be explained so he did not see the point in asking the defendant to do so. Dr. Culver was also unaware if the defendant had actually been given his rights at the time of his one other arrest, but assumed that he had been. Dr. Culver was unable to explain why he described the defendant's crime as a robbery during which the victim was shot when in fact it was an alleged drive-by shooting. Finally, Dr. Culver conceded that many times persons in

jail are actually taught their rights, either by staff, jailhouse lawyers, or their own attorneys.

At the conclusion of Dr. Culver's testimony the court again took the matter under submission. On November 21, 2002, the court granted the motion to suppress the confession, while acknowledging the difficulty in making determinations of competence in cases such as this one, especially where the experts do not agree.

DISCUSSION

The State is before this Court arguing that the trial court erred in suppressing the defendant's confession on the grounds that his mental retardation precluded him from making a knowing and voluntary waiver of his rights. The State makes an initial argument, in addition, that the procedural safeguards for the admission of a juvenile confession were met.

In State in the Interest of Dino, 359 So. 2d 586, 594 (La. 1978), the Louisiana Supreme Court held that, for the State to meet its burden of demonstrating that a waiver of Miranda rights by a juvenile was made knowingly and intelligently, it must affirmatively show that the juvenile engaged in a meaningful consultation with an attorney or an informed parent, guardian, or other adult interested in his welfare prior to waiving his

right to counsel and privilege against self-incrimination. However, in State v. Fernandez, 96-2719 (La. 4/14/98), 712 So. 2d 485, the Louisiana Supreme Court overruled Dino and reinstated the totality of the circumstances standard applicable to adults which prevailed as to juveniles prior to Dino. 96-2719 at p. 10, 712 So. 2d at 490. This standard and the analysis to be used in the review of all confessions was restated by the court in State v. Vigne, p. 6, 2001-2940 (La. 6/21/02), 820 So. 2d 533, 537:

> A trial judge's ruling on whether or not a statement is voluntary is given great weight and will not be disturbed on appeal unless clearly unsupported by the evidence. *State v. Thornton,* 351 So.2d 480, 484 (La.1977). Before a confession may be introduced into evidence, the state must establish that the accused was advised of his constitutional rights under Article 1, Section 13 of the Louisiana Constitution and the Supreme Court's decision in *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966); *State v. Simmons,* 443 So.2d 512 (La.1983). In *Miranda,* the United States Supreme Court recognized the coercive atmosphere created by police custody and established a procedural mechanism to safeguard the exercise of a defendant's Fifth Amendment rights. Before interrogating a suspect in custody, law enforcement officials must inform the suspect that he has the right to remain silent, that his statements may be used against him at trial, that he has a right to an attorney, and that if he cannot afford an attorney, one will be appointed for him.
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> Even when a defendant has not expressly invoked his rights under *Miranda*, "[t]he courts must presume that a defendant did not waive his rights." *North Carolina v. Butler*, 441 U.S. 369,

> 373, 99 S.Ct. 1755, 1757, 60 L.Ed.2d 286 (1979). A waiver is not established by showing that a defendant was given the complete *Miranda* warnings and thereafter gave an incriminating statement. 2 Wayne R. LaFave, Jerold Israel, Nancy King, Criminal Procedure, § 6.9(d). Moreover, it is well-settled that a "heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." *Tague v. Louisiana,* 444 U.S. 469, 470, 100 S.Ct. 652, 653, 62 L.Ed.2d 622 (1980).

In cases involving allegations of diminished mental capacity, a defendant has the burden of proving the existence of any mental abnormality that might render his confession *per se* involuntary. State v. Green, 94-0887 (La. 5/22/95), 655 So. 2d 272, 279. However, although the defendant bears the burden of proving the existence of any mental abnormality which might render his confession *per se* involuntary, in the absence of such a showing the State retains the ultimate burden of proving beyond a reasonable doubt that the confession was voluntary and obtained pursuant to a knowing and intelligent waiver of the defendant's constitutional rights. State v. Brooks, 92-3331, p. 12, (La. 1/17/95), 648 So. 2d 366, 373 (Brooks 2), citing State v. Glover, 343 So. 2d 118 (La. 1977) (on rehearing).

In Brooks, the defendant had been subjected to several evaluations by both the defense and the State. Three I.Q. tests administered over a five year

period showed scores of 67, 44, and 61. The State's experts, based on these scores, considered that Brooks was mildly retarded but functional. One of the State's experts also relied on the fact that Brooks had learned to drive in New Orleans and operated a forklift in conjunction with his employment for Goodwill. These accomplishments indicated a higher level of functioning than the tests scores may have. The defense experts, in contrast, believed that the defendant was moderately to severely retarded with possible brain damage. The court on review indicated that, if only the evidence to that point were considered, "there would be a real doubt concerning whether the State had sustained its burden of proof." Brooks, p. 14, 648 So. 2d at 374. The court then reviewed other evidence, including testimony at the penalty phase of the defendant's trial. There, Dr. Juarez, the psychiatrist at Orleans Parish Prison, testified he had Brooks under his direct care several times during which the doctor saw evidence of malingering. Furthermore, while incarcerated and under Dr. Juarez's supervision, Brooks had been a tier representative responsible for approximately fifteen patient-inmates. Other experts testified that the defendant was possibly malingering or was capable of manipulation, including during the course of his confession. The court also considered defendant's confession itself and the extent to which its details were corroborated by the facts brought out at trial and found that to

be "an additional factor for this Court to consider in evaluating the clarity of Brooks' mental processes at the time of his confession." Brooks, p. 15, 648 So. 2d at 374. Therefore, because the trial court's ruling denying the motion to suppress the confession was supported by evidence in the record, it was affirmed.

The circumstances in Green were similar to those in Brooks except that, on appeal to this Court, this Court reversed the trial court's denial of the motion to suppress the confession. State v. Green, 92-2700 (La. App. 4th Cir. 3/15/94), 634 So. 2d 503 (Judge Byrnes dissenting). The testimony from the defense expert in Green is remarkably similar to that found in the instant case:

> In support of his claim that he did not knowingly and intelligently waive his rights, at the motion to re-open the suppression hearing defendant presented the testimony of Dr. Mark Zimmerman, qualified as an expert in forensic psychology. He testified that he spent about nine hours testing and interviewing defendant. Dr. Zimmerman administered the following tests on defendant: 1) Benton Visual Retention Test, a test of perceptual motor abilities; 2) screening test for, and the Luria Nebraska Neuropsychological Battery, a test for brain dysfunction; 3) Weschler Adult Intelligent Scale, an intelligence test; 4) Wide Range Achievement Test, a test of academic abilities; 5) Personality Assessment Inventory, an objective personality test; 6) Minnesota Multiphasic Personality Inventory, an objective

> personality test; 7) Rorschach, a projective personality test; 8) Mouse-Tree-Person Technique, a projective personality test.
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> Dr. Zimmerman found that defendant had an I.Q. of 65, which put him in the mildly mentally retarded range, or the educable range of retardation. Defendant's mental age is approximately ten years. Although defendant completed the ninth grade and was in the tenth grade when he dropped out of school, his functioning in reading and spelling is below the third grade level and in arithmetic is at the fifth grade level. Dr. Zimmerman also found brain dysfunction considering defendant's education level, with the parts of his brain affected being those associated with academic abilities and his ability to process information -- his intellectual abilities.
>
> Dr. Zimmerman reviewed the waiver of rights form signed by defendant and went over it with defendant, and concluded that defendant found the form difficult to read and could not adequately explain many of the words on the form such as "privilege" and "waive". Reading the form to defendant at approximately the speed he heard on the taped confession, Dr. Zimmerman found that defendant could not keep up; he could not understand the form. Dr. Zimmerman stated that he thought defendant could be made to understand his Miranda rights, but it would be very difficult for him to understand using the wording on that particular waiver form.

Green, pp. 6-7, 634 So. 2d at 507. Dr. Zimmerman also testified that Green would probably portray himself as understanding things that he did not so as to appear normal.

The State presented no expert testimony in Green. The police officer who obtained his confession testified that he was satisfied that the defendant understood his rights. The officer did not personally determine if the defendant could read or write. In reversing the trial court, this Court stated:

> Given the uncontradicted testimony of Dr. Zimmerman establishing defendant's mental retardation and his brain dysfunction, we cannot find that defendant made a knowing and intelligent waiver of his constitutional rights. With Dr. Zimmerman's testimony that defendant simply did not have the intellectual capacity to understand those rights and, in fact, did not understand his rights, the trial court clearly erred in refusing to suppress defendant's confession due to his diminished mental capacity. Considering all of the evidence presented, the State failed to prove that defendant knowingly and intelligently waived his constitutional rights prior to confessing to the murder of Pamela Block.

Green, p. 8, 634 So. 2d at 508.

On review, the Supreme Court noted that the issue presented by this Court's opinion concerned the defendant's ability to comprehend the Miranda rights. In considering whether the State met its burden of proving a knowing and intelligent waiver of his rights by the defendant, the court first noted that the detectives, who were experienced, Mirandized the defendant several times and "at no time did he articulate or in any other way evidence any lack of comprehension of his rights to remain silent or to have any

attorney present." Green, p. 12, 655 So. 2d at 281. Next, the court noted that the defendant's own two tape-recorded statements constituted "testimony" to show that the officers had read his rights to him and inquired if the defendant understood them; both times the defendant had expressly waived his rights. Id. The only evidence, in the court's view, which rebutted this evidence was the testimony of the defense expert. The court concluded that the State met its burden. A factor, in the court's opinion, was that in the progression of the defendant's two statements, the first represented an attempt to exonerate himself from culpability for the murder, but, over time, the statements evolved as the defendant was presented with additional facts. The court found that this "evolution" revealed "a mental agility and adaptability which cannot be readily associated with the diminished capacity found by the court of appeal." Green, p. 15, 655 So. 2d at 282. Furthermore, as in Brooks, the court considered "the extent to which extrinsic facts, i.e. the location of the gun, the details of the crime scene, etc., corroborated Green's ultimate confession." Id., at 283. The court further explained that the accuracy of the confession was not the issue:

> However, when faced with a claim that the defendant's mental processes are so dysfunctional as to preclude a full understanding of those rights, any facts which shed light upon the functioning of that defendant's mental processes are relevant and pertinent evidence which the trial court is entitled to consider.

Green, p. 15, 655 So. 2d at 283. The court further found that the trial court was justified in relying upon the defendant's familiarity with the criminal justice system because it tended to show that the custodial interrogation was not an experience foreign to Green, and that prior Boykinizations indicated a repeated exposure to Miranda rights and were relevant.

In State v. Anderson, 379 So. 2d 735 (La. 1980), the defendant was seventeen years old when apprehended in the course of a burglary. When he arrived at the police station, he was allowed to speak with his mother, who informed the police officer that the defendant was mentally retarded. Despite knowing this, the officer read the defendant his Miranda rights. The fact that the defendant did not understand "became apparent" to the police officer. Id. at 736. Another officer then read the waiver of rights form to the defendant and "attempted to explain each sentence to him in more simple terms." Id.. The defendant gave a statement. At the subsequent motion to suppress hearing, the officer who had gone over the rights form with the defendant testified that, when he explained the rights in a simpler terms, the defendant appeared to understand. Also at the motion hearing, there was testimony showing that the defendant was unable to read, had a comprehension level equivalent to an eight-year old child, and had dropped

out of school already. Testing showed that the defendant's I.Q. was between 50 and 69. The Supreme Court reversed the trial court's denial of the motion to suppress the confession, noting that the defendant was seventeen, that there was no evidence of employment or other factors showing his ability to communicate and be responsible, that the special education expert testified that the defendant's abilities had probably regressed since he had last been tested because he was no longer in school, and, finally, "even the testimony of the police officers . . . was quite ambivalent as to whether defendant ever understood the rights which they attempted to explain to him." Anderson at 737.

In Anderson, the court distinguished an earlier case, State v. Collins, 370 So. 2d 533 (La. 1979), which involved a mildly retarded defendant with an I.Q. of 68, on the basis that there was expert testimony to show that, if the constitutional rights were explained, the defendant could understand them. Furthermore, the defendant had been able to earn a living and support a wife and children; he had also been the subject of police interrogation before. The court also noted that, during the instant investigation, his rights had been explained to him extensively several times.

In State v. Pugh, pp. 19-21, 02-171 (La. App. 5 Cir. 10/16/02), 831 So. 2d 341, 352-54, the Fifth Circuit recently was also faced with the issue

of whether a mentally retarded defendant's confession should be suppressed:

> The Louisiana Supreme Court has recognized that a diminished intellectual capacity does not, alone, vitiate the ability to knowingly and intelligently waive constitutional rights and make a free and voluntary confession. *See, State v. Tart,* 93-0772 (La.2/9/96), 672 So.2d 116, 126, *cert. denied,* 519 U.S. 934, 117 S.Ct. 310, 136 L.Ed.2d 227 (1996); *State v. Benoit,* 440 So.2d 129, 131 (La.1983). The critical factor is whether the defendant was able to understand the rights explained to him and voluntarily gave the statement. *Tart, supra; Benoit, supra.*
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> In an earlier case [than Green], *State v. Trudell,* 350 So.2d 658 (La.1977), the Louisiana Supreme Court had concluded that the state proved that an "easily led and very suggestible" mentally retarded defendant with an I.Q. of 60 voluntarily made inculpatory statements. The defendant had twice been found incompetent to stand trial before ultimately being declared competent. In reaching the conclusion that the statements were voluntary, despite the defendant's mental illness, the *Trudell* court focused on the officers' testimony, the sanity commission reports indicating that the statements did not show psychosis, and because the individual statements which were made were, as the *Trudell* court stated, "lucid." *Id.* at 663.
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> In this case, the State presented evidence that the Defendant validly waived his *Miranda* rights through Detective Sacks' testimony. At the suppression hearing, the officer testified that, prior to the first statement, he advised the Defendant of his constitutional rights and that he read the Rights of Arrestee form to the Defendant, which the Defendant signed. According to Detective Sacks,

the Defendant said that he understood these rights, wanted to waive his rights, and desired to make a statement. The Defendant told Detective Sacks that he had completed high school and could read and write. The form, which was introduced at the hearing, contains two signature lines, one indicating that the arrestee read the form, and one indicating that the arrestee understood the rights and desired to waive them. According to Detective Sacks, the Defendant placed his signature in both places. Detective Sacks testified that he had not threatened or coerced the Defendant and stated that he had made no promises to the Defendant.

Based on the foregoing, we find that the present case is similar to *State v. Brown,* 414 So.2d 689 (La.1982) and *Green.* In this case, there was no expert testimony that the Defendant was unable to understand his rights or the ramifications of waiving his rights when he made the statements. Dr. Gandle stated at trial that she was not testifying regarding Defendant's capacity on September 18, 1997, the day of the statements. Rather, the expert testimony related only to the Defendant's ability to apply his legal rights at trial. Further, the statements seemed lucid. They evidenced an understanding by the Defendant through his attempt to exculpate himself. There was no evidence of psychosis. Also, the Defendant had a familiarity with his rights from a previous court experience.

Thus, although the record supports that the Defendant had a diminished mental capacity, we do not find that the Defendant proved that this mental defect robbed him of his ability to understand his rights and the consequences of the waiver of those rights. Therefore, we find no error in the trial court denial of the Defendant's motion to suppress his statements.

In State v. Brown, 414 So. 2d 689, cited by the court in Pugh, the defendant was seventeen when he was arrested and a tenth grade high school student in special classes for the mentally retarded. While attending school, defendant had a part-time job as a bus boy in a local cafeteria. The defendant's I.Q. was between 65 and 75, and the testimony at the hearing and trial established that 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 that the trial court abused its great discretion in concluding that the defendant's statement was knowingly and voluntarily made. State v. Brown, 414 So. 2d at 696.

In State v. Istre, 407 So. 2d 1183 (La. 1981), the defendant was a borderline mentally retarded nineteen-year old accused of rape of his three-year old niece. He entered a dual plea of not guilty and not guilty by reason of insanity. The court-appointed expert testified that, due to the defendant's mental retardation, the stress of a custodial interrogation situation would enhance his inability to cope and understand the proceedings. The expert also stated that the defendant could understand technical words when time

was taken to stop and discuss the concepts fully with him. The officer who obtained the defendant's statement admitted he was aware of the defendant's mental condition and asked one of the defendant's relatives to be present at the interrogation. Two other doctors testified that the defendant was competent to stand trial and that he could understand what was on the waiver of rights form; the defendant was also capable in their opinion to marry, raise a family, and pay bills. On appeal, the court relied, in addition to the above testimony, on the facts that the defendant had completed sixth grade and worked off shore. Furthermore, the defendant had nodded affirmatively throughout the time when he was being given his rights and the officers felt that he understood them. The court found that there was evidence to support the trial court's ruling denying the motion to suppress the confession.

In State v. Stewart, 93-0708 (La. App. 1 Cir. 3/11/94), 633 So. 2d 925, a case mentioned by the trial court, two defense experts who had examined the defendant testified 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 that 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 933.

In State v. Brown, 98-2214 (La. App. 4 Cir. 12/16/98), 753 So. 2d 259, this Court in a pretrial writ decision upheld the trial court's ruling that the defendant had intelligently waived his rights. In that case, the same Dr. Davis who testified in the instant case stated that the defendant had a full-scale score of 68, a verbal I.Q. of 68, and a performance I.Q. of 70, and was reading at just under the second-grade level. Dr. Davis opined that the defendant could not understand his rights; this opinion was based in large part on the fact that the defendant showed a poor understanding of the *Miranda* rights when he read them to him from the waiver of rights form which conformed to the audiotape of defendant's confession. On review,

this Court noted that the trial court heard testimony from a police detective who stated that he gave the defendant his *Miranda* warnings on three separate occasions, and, after learning defendant was illiterate, did so very slowly and deliberately. The third waiver was the one in the audiotaped statement upon which the trial court relied in denying the motion. Nowhere in that tape did the defendant express an inability to comprehend his rights. This Court also stated that a mere inability to read did not necessarily indicate that the defendant suffered from that level of diminished capacity necessary to vitiate his consent. Additionally, the fact that the defendant had three prior arrests was noted as relevant under Green. Finally, this Court reviewed the defendant's actual confession, which demonstrated a conscious attempt to minimize his own participation and avoid inculpating his co-perpetrator who was alive and whose name was unknown to the police, while shifting blame to the co-perpetrator who was deceased. The Court conceded that a different ruling could occur after a trial where other evidence might be adduced, but on the record before it, the trial court's ruling denying the motion to suppress evidence was not clearly erroneous.

As a review of the above cases shows, mental retardation alone is clearly not sufficient to find that the defendant could not waive his rights. On the other hand, it is also clear that a trial court's ruling is entitled to

deference. The court here, relying apparently on the testimony of four of the five experts, found that the defendant was not capable of intelligently waiving his rights. Notable facts in addition to the expert testimony which would support the court's ruling were found in the statement itself; the defendant verbalized that he could not read and write very well and indicated that he did not understand what it meant to waive his right against self-incrimination. The taped statement does not indicate that the officers questioned the defendant about his education level after he said he had problems with reading and writing. The statement further showed that Shirley Raiford did not indicate she understood the rights; instead she was concerned about whether she personally had to sign something. Also, the parties stipulated that the defendant's juvenile record consisted of a single arrest for battery; the other contacts with the authorities were for a curfew violation and a runaway violation, the latter of which most probably did not warrant a detailed explanation of Miranda rights. Also, in contrast to the Green case, there was no indication here that the defendant had ever been brought before a court and pled guilty at which time both a judge and a defense attorney arguably would have educated the defendant on his rights.

This case is also distinguishable from Brooks in that all the experts, including Dr. Culver, agreed that there was no issue of the defendant being a

malingerer. Moreover, there was no testimony that the defendant was functioning in the jail environment at a level inconsistent with his school records (for example, that he had successfully obtained a G.E.D.). There was no evidence that the defendant had ever been employed.

This Court must consider the contents of the defendant's statement itself as a part of the totality of the circumstances. In that regard, because the State has not provided a police report or transcripts of general motion hearings, it is impossible to determine if the defendant's statement accurately reflects the actual crimes; it is also impossible to tell if the defendant consciously attempted to minimize his participation, a factor in some of the cases. Notably, however, the defendant had apparently not been arrested for the murder associated with the drive-by shooting at the time he gave his statement, and thus the fact that his statement reflects no direct participation in that crime cannot, on the record before this Court, be evidence of a knowing attempt to exculpate himself. However, in his statement the defendant was able to give a relatively coherent account of the robberies which occurred that night, in particular when he was asked direct simple questions.

Interestingly, though, it appears that the defendant was more than willing to respond affirmatively to questions even though he might lack any

independent knowledge of the answer. As an example, he had trouble naming the types of vehicles stolen during the robberies the night of the murder; he did not know if the first car was gray because it was painted or primed nor was he sure of the make; he also could not think of the term for the second vehicle stolen (it was a Bronco). When the officer referred to it several times as a Jeep, the defendant then used that term. Later, when he was being questioned about other vehicles stolen by Commodore and Chris, the defendant said he knew that they had taken "a [pause] with the top open;" the officer asked "A New Yorker?" and the defendant said yes. The officer then asked, "With the top open?" and the defendant said, "Yes, sir," although there is no apparent connection in description between a convertible and a New Yorker. Overall, however, the statement appears coherent.

As to the direct evidence presented by the State, Detective Riley testified that when he arrested the defendant he advised him of his rights as to the armed robbery but did not testify what those rights were nor did he testify that he attempted to ascertain whether the defendant understood them. Sergeant Williams testified that the defendant completed the waiver of rights form prior to giving a taped statement; in fact he testified that the defendant's completion of the form was reflected in the taped statement,

even though the statement shows that the defendant said he could not read or write well so the sergeant read the form to the defendant. Detective Carkum testified that he was present and participated in questioning the defendant during his statement and that he believed the defendant understood his rights. However, there was no testimony from Detective Carkum that he made any attempt to break down the defendant's rights into simpler terms after the defendant manifested an inability to read and write, in contrast to Brown. Neither of the two police officers questioning the defendant ever testified regarding his own experience in taking statements.

As the trial court recognized, this case presents a very difficult situation. The expert testimony overwhelmingly indicates that the defendant was not able to understand and intelligently waive his rights as given to him at the time he made his statement. The extrinsic evidence that would mitigate against those experts' opinions is minimal. On the record before this Court, we cannot say the trial court was manifestly erroneous.

CONCLUSION:

For the above and foregoing reasons we grant the state's writ but affirm the trial court's ruling suppressing the defendant's statement.

WRIT GRANTED; RELIEF DENIED.