NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2010 KJ 1898

STATE OF LOUISIANA

IN THE INTEREST OF

D.Y., JR.

TMH

Judgment Rendered: February 11, 2011

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On Appeal from the
20th Judicial District Court,
In and for the Parish of West Feliciana,
State of Louisiana
Trial Court No. J-1354

Honorable, William G. Carmichael, Judge Presiding

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Samuel C. D'Aquilla, D.A. St. Francisville, LA	Attorneys for Plaintiff-Appellee, State of Louisiana
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KUHN, J CONCURS & ASSIGNS REASONS

BEFORE: KUHN, PETTIGREW, AND HIGGINBOTHAM, JJ.

JJP PETTIGREW, J. CONCURS

HIGGINBOTHAM, J.

In this juvenile delinquency proceeding, D.Y.[1] was alleged to be a delinquent by a petition filed pursuant to the Children's Code and based on the alleged commission of aggravated rape, in violation of LSA-R.S. 14:42. He denied the allegation of the petition. D.Y. filed a motion to suppress his inculpatory statement. At the conclusion of a hearing, the juvenile court denied the motion. An adjudication proceeding was conducted, and D.Y. was adjudged a delinquent child for the delinquent act charged. D.Y. was committed to the Department of Public Safety and Corrections to be confined in secure placement without parole until he attains the age of twenty-one years. He now appeals, designating the following assignments of error:

> 1. The juvenile court judge erred in denying the motion to suppress the written statement that D.Y. signed acknowledging that it was his even though it was authored by the interrogating officer. The rights form and the statement, manipulated from a fourteen-year-old with learning disabilities through intimidation and deception, cannot be deemed either knowing or voluntary.
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> 2. The juvenile court judge committed "manifest error" in finding proof beyond a reasonable doubt that D.Y. committed an aggravated rape of the child-accuser and adjudicating D.Y. delinquent.
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> 3. The juvenile-life disposition without benefit of parole or modification was imposed under a mistaken impression of the applicable law, was determined without the benefit of the disposition hearing mandated by Children's Code art. 893, and is excessive under the circumstances of the case.
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> 4. D.Y received ineffective assistance of counsel when his attorney failed to object to the imposition of an immediate disposition, failed to point out to the court in a timely manner that the disposition was not a mandatory one, failed to request a full disposition report and failed to file a timely motion requesting reconsideration of the disposition

We affirm the adjudication, vacate the disposition, and remand for further proceedings.

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[1] The record reflects that the juvenile's name is D.Y., Jr. However, for purposes of this opinion, the juvenile will be referred to as D.Y.

FACTS

In August 2008, five-year-old C.W. disclosed that D.Y., his babysitter's fourteen-year-old son, anally and orally raped him. C.W.'s mother reported the matter to the police. Ontario McKneely, a criminal investigator with the West Feliciana Parish Sheriff's Office, arranged for C.W. to be interviewed by Joelle Henderson, a forensic interviewer at the Children's Advocacy Center (CAC). During the videotaped interview, C.W. told Ms. Henderson that D.Y., who C.W. knew only by the nickname "Poo," put his "weiner man" in his "butt".[2] C.W. also stated that D.Y. let him suck his "weiner man." He indicated that these incidents occurred in D.Y.'s bedroom and no one else was present.

In connection with the police investigation, D.Y.'s parents were contacted and asked to bring D.Y. in for questioning. They complied. D.Y.'s parents signed a waiver of rights form, and D.Y. was questioned by Captain Spence Dilworth, of the West Feliciana Parish Sheriff's Office. D.Y.'s parents were not in the room when D.Y. was questioned. According to Captain Dilworth, D.Y. initially denied ever sexually abusing C.W. Later, however, D.Y. admitted he orally raped C.W. and wavered on whether he actually achieved anal penetration. Sometimes D.Y. indicated he inserted his penis into C.W.'s anus, and other times he indicated he tried but was unsuccessful. D.Y. agreed to sign a written statement regarding his admission. The statement, which was drafted by Captain Dilworth, read as follows:

> I did put my penis in [C.W.'s] mouth and booty. All of this happened just once and on one day. We did this a couple of days before [C.W.'s] mom and stepdad came over and asked me if I did what [C.W.] was saying. It was during the afternoon when we were in my room. I stuck my penis in his mouth and then I took it out. Another time we were in my room and ~~I put my penis inside [C.W.'s] butt.~~ I tried to put my penis in [C.W.'s] butt but I couldn't get it in.

[2] C.W. used the term "weiner man" to describe the male penis and "butt" to describe the anus.

D.Y. signed the statement and initialed the portion that had been stricken. D.Y. was reunited with his parents and directed to tell them what he had done. D.Y. told his parents that [C.W.'s] allegations of sexual abuse were true.

C.W. testified at the adjudication hearing. He again indicated that D.Y. anally raped him. C.W.'s CAC interview was also played for the juvenile court at the adjudication proceeding.

D.Y.'s parents and his sister testified at the adjudication proceeding. Each of these witnesses denied that D.Y. was ever alone with C.W. during the time C.W. was cared for in the family home. D.Y. did not testify.

ASSIGNMENT OF ERROR # 1

By this assignment of error, D.Y. argues the written statement should have been suppressed because the circumstances surrounding the statement failed to show that he knowingly and voluntarily waived those rights when he signed the statement. He argues that both he and his parents were intimidated by the situation and were coerced into signing the rights-waiver form without ever fully understanding the rights and the consequences of waiving the rights.

Louisiana Code of Criminal Procedure article 703(D) provides that on a motion to suppress, the burden is on the defendant to prove the ground of his motion, except the state shall have the burden of proving the admissibility of a purported confession or statement by the defendant. Before a purported confession can be introduced in evidence, it must be affirmatively shown that the statement was free and voluntary, and not made under the influence of fear, duress, intimidation, menaces, threats, inducements or promises. LSA-R.S. 15:451. The confession of an accused of any age is valid only if it was given knowingly and voluntarily. **State v. Fernandez** 96-2719 (La. 4/14/98), 712 So.2d 485, 487.

In **State v. Fernandez**, the Louisiana Supreme Court overruled **State in the Interest of Dino**, 359 So.2d 586 (La.1978), cert. denied, 439 U.S. 1047, 99 S.Ct.

722, 58 L.Ed.2d 706 (1978), which previously mandated that in order to introduce a juvenile's confession, the state must affirmatively show that the juvenile engaged in a meaningful consultation with an attorney or informed parent, guardian, or other adult interested in his welfare before he waived his right to counsel and privilege against self-incrimination. The **Fernandez** court reinstated the totality of circumstances standard as the basis for determining the admissibility of juvenile confessions. Thus, all of the facts and circumstances must be reviewed to determine whether a juvenile's confession was freely given. **State v. Fernandez**, 712 So.2d at 489-490.

Among the factors to be considered in determining the admissibility of a juvenile's confession are the juvenile's youth, experience, comprehension, and the presence or absence of an interested adult. The special needs of juveniles are analogous to the special needs of individuals with mental deficiencies and are factors to be considered. The waiver of the defendant's constitutional rights in making a confession or statement does not require a higher level of mental capacity than his level of competency to enter a plea of guilty, to assist counsel at trial, to waive his right to an attorney, or to waive other constitutional rights. **State ex rel. J.M.**, 99-1271 (La. App. 4th Cir. 6/30/99), 743 So.2d 228, 229-230. The testimony of a police officer alone can be sufficient to prove that the juvenile's statements were freely and voluntarily given. **Id.**, 743 So.2d at 231.

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 reliable evidence. See **State v. Green**, 94-0887 (La. 5/22/95), 655 So.2d 272, 281. However, a trial court's legal findings are subject to a *de novo* standard of review. See **State v. Hunt**, 2009-1589 (La. 12/1/09), 25 So.3d 746, 751.

In the instant case, the record fully supports the juvenile court's denial of the motion to suppress the written statement. At the hearing on the motion to suppress, Captain Dilworth testified he met with D.Y. and his parents on August 6, 2008. Before any questioning took place, Captain Dilworth provided D.Y. and his parents a copy of a Juvenile Rights Form. Captain Dilworth read the rights contained in the form to D.Y. and his parents and then left the room to allow the group personal time to discuss the matter. According to Captain Dilworth, D.Y. and his parents appeared to understand the rights as explained and made no indication to the contrary. Captain Dilworth testified he asked D.Y.'s parents if they understood the rights, and they responded affirmatively. D.Y. and his parents signed the form acknowledging their understanding of rights.

Captain Dilworth denied using force, threats, or any other intimidation tactics while questioning D.Y. Captain Dilworth further testified that D.Y.'s parents never asked him to refrain from interrogating the juvenile or to conduct the questioning in their presence. He explained that D.Y.'s parents, who obviously did not believe that there was any validity to the allegations, willingly agreed to allow D.Y. to be questioned outside of their presence.

Once D.Y. admitted to sexually abusing C.W., Captain Dilworth, with the juvenile's permission, reduced the statement to writing. Captain Dilworth allowed D.Y. to read the statement after it was completed. D.Y. told Captain Dilworth that he did not want to include the portion of the statement indicating actual penetration. Captain Dilworth marked through that portion of the statement and added another sentence to reflect an unsuccessful attempt at penetration. D.Y. initialed the correction and signed the written statement.

D.Y.'s mother, L.Y., testified for the defense. L.Y. testified that she told Captain Dilworth that she did not want D.Y. to be subjected to police questioning. L.Y. further testified that Captain Dilworth only read the rights form in part

(skipping some of the rights contained therein). He did not explain the rights nor did he allow time for her to confer with D.Y. and/or his father regarding the rights. L.Y. admitted she signed the rights-waiver form, but indicated she did not understand the information contained in the form. She claimed she simply signed the form, without reading it, because she was nervous. L.Y. stated she did not understand the consequences of waiving the rights contained in the form.

D.Y., Sr., the juvenile's father, also testified at the hearing. Like L.Y., D.Y., Sr., admitted to signing the rights-waiver form, but claimed he did not read it. He also claimed that he did not understand the information contained in the form. He signed the form so that they "could get out of there." D.Y., Sr., also testified that his wife told the investigating detective that she did not want him to question D.Y. outside their presence, but the detective told her he was required to do so.

D.Y. testified that he never admitted to sexually abusing C.W. He claimed the content of the written statement was fabricated by Captain Dilworth. D.Y. testified he refused to provide a written statement because he knew he had not done any of the acts the victim alleged. D.Y. further testified he signed the statement drafted by Captain Dilworth because Captain Dilworth threatened to take him to "St. James" if he did not cooperate. D.Y. further testified that he did not understand the contents of the rights-waiver form. He only signed the form because Captain Dilworth forced him to do so.

On the issue of questioning outside the presence of his parents, D.Y. claimed his mother specifically advised that she did not want him to be questioned alone. Captain Dilworth ignored L.Y.'s request and told her she had to leave the room.

On rebuttal, Captain Dilworth testified that L.Y. never indicated that she was opposed to him speaking with D.Y. He explained that L.Y. did not believe the allegations, and she wanted D.Y. to be afforded the opportunity to "give his side of the story."

The admissibility of a confession is, in the first instance, a question for the trial court; its conclusions on the credibility and weight of the testimony relating to the voluntary nature of the confession are accorded great weight and will not be overturned unless they are not supported by the evidence. Whether a showing of voluntariness has been made is analyzed on a case-by-case basis with regard to the facts and circumstances of each case. The trial court must consider the totality of the circumstances in deciding whether a confession is admissible. **State v. Guidry**, 93-1091, (La. App. 1st Cir. 4/8/94), 635 So.2d 731, 733-734, writ denied, 94-0960 (La. 7/1/94), 639 So.2d 1163. Once the trial court has determined that the state has met its burden of proof with respect to voluntariness of the confession, its decision is entitled to great weight on review. **State v. Ondek**, 584 So.2d 282, 293 (La. App. 1st Cir.), writ denied, 586 So.2d 539 (La. 1991).

After careful review of the record before us, we find that under the totality of the circumstances, there was evidence showing that D.Y.'s waiver of his rights and his statement were intelligently and voluntarily made. The juvenile court obviously found Captain Dilworth to be a credible witness and accepted his testimony that D.Y. and his parents were read all of the rights on the form, they all indicated that they understood the rights, and D.Y. voluntarily, without any force or intimidation, agreed to waive his rights and make a statement. This credibility determination will not be disturbed on appeal.

D.Y.'s brief also notes that he suffers from a learning disability and is a "slow learner." We note that although L.Y. testified that D.Y. was previously diagnosed with Attention Deficit Hyperactivity Disorder (ADHD), there was no testimony that this condition made the juvenile incapable of understanding and voluntarily waiving his rights. The juvenile court did not err or abuse its discretion in denying the motion to suppress the statement.

This assignment of error lacks merit.

ASSIGNMENT OF ERROR #2

In his second assignment of error, D.Y. challenges the sufficiency of the evidence of aggravated rape. He specifically argues that the credibility choices made by the juvenile court judge in this case are manifestly erroneous and warrant reversal of the adjudication.

When the state charges a child with a delinquent act, it has the burden of proving each element of the offense beyond a reasonable doubt. LSA-Ch.C. art. 883. On appeal, the applicable standard of review is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. This standard of review applies to juvenile proceedings in which a child is adjudicated a delinquent. However, in juvenile proceedings, the scope of review of this court extends to both law and facts. LSA-Const. art. V. § 10(B); **State in the Interest of D.F.**, 2008-0182 (La. App. 1st Cir. 6/6/08), 991 So.2d 1082, 1084-1085, writ denied, 2008-1540 (La. 3/27/09), 5 So.3d 138.

The **Jackson v. Virginia**, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979), standard of review incorporated in LSA-C.Cr.P art. 821 is an objective standard for testing the overall evidence, both direct and circumstantial, for reasonable doubt. When analyzing circumstantial evidence, LSA.-R.S. 15:438 provides that, assuming every fact to be proved that the evidence tends to prove, in order to convict, it must exclude every reasonable hypothesis of innocence. **State in the Interest of D.F.**, 991 So.2d at 1085. The testimony of the victim alone is sufficient to prove the elements of the offense. **State in the Interest of D.M.**, 97-0628 (La. App. 1st Cir. 11/7/97), 704 So.2d 786, 790. Once the crime itself has been established, a confession alone may be used to identify the accused as the perpetrator. **State in the Interest of D.F.**, 991 So.2d at 1085.

The crime of aggravated rape is defined in LSA-R.S. 14:42, which provides, in part, as follows:

> A. Aggravated rape is a rape committed ... where the anal, oral, or vaginal sexual intercourse is deemed to be without lawful consent of the victim because it is committed under any one or more of the following circumstances:
>
> * * * *
>
> (4) When the victim is under the age of thirteen years. Lack of knowledge of the victim's age shall not be a defense.

"Rape is the act of anal, oral, or vaginal sexual intercourse with a male or female person committed without the person's lawful consent." LSA-R.S. 14:41(A). "Emission is not necessary, and any sexual penetration, when the rape involves vaginal or anal intercourse, however slight, is sufficient to complete the crime." LSA-R.S. 14:41(B).

After undertaking our state's constitutionally mandated review of the law and facts in a juvenile proceeding, we find no manifest error by the juvenile court in its adjudication of delinquency based on D.Y.'s commission of aggravated rape. The five-year-old victim's testimony at the adjudication hearing and his videotaped CAC interview established that D.Y. anally raped the young child. It is well settled that if found to be credible, the testimony of the victim of a sex offense alone is sufficient to establish the elements of the offense, even where the state does not introduce medical, scientific, or physical evidence to prove the commission of the offense by the defendant. See **State v. Hampton**, 97-2096 (La. App. 1st Cir. 6/29/98), 716 So.2d 417, 418-421. Therefore, the victim's testimony was sufficient to prove all of the elements of aggravated rape. Further, Captain Dilworth's testimony proved that D.Y. verbally confessed to raping the child and also signed a written statement memorializing his confession. Even in the absence of any physical findings, any rational trier of fact, viewing the evidence in this case

in the light most favorable to the state, could have found, proven beyond a reasonable doubt and to the exclusion of every reasonable hypothesis of innocence, all of the essential elements of aggravated rape.

This assignment of error lacks merit.

ASSIGNMENT OF ERROR #3

In his third assignment of error, D.Y. argues the juvenile court erred in failing to conduct a disposition hearing and in failing to recognize that the court could deviate from the mandatory minimum disposition if it deemed the disposition excessive under the facts of the case. D.Y. further argues that the "juvenile life" disposition is excessive.

In **State v. Dorthey**, 623 So.2d 1276, 1280-1281 (La. 1993), the Louisiana Supreme Court recognized that if a trial judge determines that the minimal mandated punishment makes no "measurable contribution to acceptable goals of punishment" or that the sentence amounts to nothing more than "the purposeful imposition of pain and suffering" and is "grossly out of proportion to the severity of the crime," he is duty bound to reduce the sentence to one that would not be constitutionally excessive.

Louisiana Children's Code article 897.1(A) provides:

> After adjudication of a felony-grade delinquent act based upon a violation of . . . R.S. 14:42, aggravated rape . . . the court shall commit the child who is fourteen years or older at the time of the commission of the offense to the custody of the Department of Public Safety and Corrections to be confined in secure placement until the child attains the age of twenty-one years without benefit of parole, probation, suspension of imposition or execution of sentence, or modification of sentence.

In **State v. Johnson**, 97-1906 (La. 3/4/98), 709 So.2d 672, the Louisiana Supreme Court reexamined the issue of when **Dorthey** permits a downward departure from mandatory minimum sentences. The court held that to rebut the

presumption that the mandatory minimum sentence was constitutional, the defendant had to "clearly and convincingly" show that:

> [he] is exceptional, which in this context means that because of unusual circumstances this defendant is a victim of the legislature's failure to assign sentences that are meaningfully tailored to the culpability of the offender, the gravity of the offense, and the circumstances of the case.

Johnson, 709 So.2d at 676. It is not the role of the sentencing court to question the wisdom of the legislature in setting mandatory minimum punishments for criminal offenses. Rather, "the sentencing court is only allowed to determine whether the particular defendant before it has proven that the mandatory minimum sentence is so excessive in his case that it violates our constitution." **Johnson**, 709 So.2d at 677.

In the instant case, prior to imposing the disposition, the court noted:

> Thank you. Under the provisions of Article 897.1, I have no discretion after an adjudication of a felony grade delinquent act based upon one of the things is aggravated rape. The Court shall commit the child, who is 14 years or older at the time of the commission of the offense to the custody of the Department of Public Safety and Correction to be confined in a secure placement until the child attains the age of 21 years without benefit of parole, probation, suspension of imposition or execution of sentence or modification of sentence.

Later, at a hearing on a motion for reconsideration of the disposition, counsel for D.Y. argued that he is exceptional and the circumstances of the instant offense warrant a deviation from the mandatory disposition. Counsel requested that the juvenile court reconsider the juvenile life sentence and afford D.Y. a lesser sentence. In denying the motion, the court noted again that the statute requires the juvenile life sentence:

> Thank you. The motion is denied. I base his sentence on the evidence that I heard at trial, not on anything else. And the statute requires–and by statute, that is the minimum sentence that he has received.

In **State in the Interest of A.A.S.**, 30,775 (La. App. 2d Cir. 4/8/98), 711 So.2d 319, writ granted and decision vacated, 98-1505 (La. 10/16/98), 726 So.2d

900, the juvenile was adjudicated delinquent for committing aggravated rape. The juvenile court sentenced the juvenile to a term less than the mandatory disposition of Article 897.1. On appeal, the second circuit reversed, and remanded the matter for the entry of a judgment of disposition consistent with Article 897.1. The Louisiana Supreme Court later vacated the decision of the appellate court and remanded the case to the juvenile court for reconsideration of its disposition according to the criteria set forth in **Johnson**, Supra. **State in the Interest of A.A.S.**, 98-1505 (La. 10/16/98), 726 So.2d 900.

The decision of the Louisiana Supreme Court in **A.A.S** indicates that a juvenile court judge has the authority to deviate below the mandatory minimum disposition set forth in Article 897.1(A) when a juvenile has been adjudicated delinquent of aggravated rape. See **State in the Interest of A.B.**, 2007-907 (La. App. 5th Cir. 3/25/08), 983 So.2d 934, 942.

In the instant case, the juvenile court judge erred when he stated he had no discretion in sentencing D.Y. to juvenile life, the mandatory minimum disposition set forth in Article 897.1. We therefore vacate the disposition and remand the matter to the juvenile court for reconsideration of its disposition according to the criteria set forth in **Johnson**. See **State v. Washington**, 2000-301, (La. App. 5th Cir. 9/26/00), 769 So.2d 1235, 1241-1242, writs denied, 2000-2971 (La. 9/28/01), 798 So.2d 106 and 00-3041 (La. 9/28/01), 798 So.2d 108.

The record reflects that immediately following the juvenile's adjudication as a delinquent for the offense of aggravated rape, the juvenile court proceeded with the disposition. No disposition hearing was held. There is no indication that D.Y. waived the disposition hearing. The juvenile court simply noted that there was no discretion in the disposition after an adjudication based upon aggravated rape and ordered D.Y. committed to custody until he attains the age of twenty-one.

Louisiana Children's Code article 892 provides, "[p]rior to entering a judgment of disposition, the court shall conduct a disposition hearing. The disposition hearing may be conducted immediately after the adjudication and shall be conducted within thirty days after the adjudication. Such period may be extended for good cause." A juvenile court's failure to conduct a disposition hearing has been found to be harmless error when the disposition is mandatory. See **State in the Interest of C.D.**, 95-160 (La. App. 5th Cir. 6/28/95), 658 So.2d 39, 42. However, because we are vacating the disposition and remanding the matter, we recommend that the juvenile court allow D.Y. the benefit of a disposition hearing. We also pretermit discussion of the excessive disposition argument raised in this assignment of error and the ineffective assistance of counsel claims (all relating to the disposition) raised in assignment of error number four.

This assignment of error has merit.

For the foregoing reasons, the aggravated rape adjudication is affirmed. The disposition is vacated and the matter is remanded to the juvenile court for re-imposition of disposition.

ADJUDICATION AFFIRMED; DISPOSITION VACATED, AND REMANDED FOR FURTHER PROCEEDINGS.

STATE IN THE

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KUHN, J., concurring.

I believe it is apparent that in denying the motion for reconsideration of the disposition, the juvenile court based his decision solely on the evidence it heard at trial and not on the belief that it had no discretion under La. Ch.C. art. 897.1. But I concur because any ambiguity in the juvenile court's rationale should be interpreted in favor of the juvenile and there is no harm presented by allowing the juvenile court to more fully articulate its reasoning.