NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 KA 1392

STATE OF LOUISIANA

VERSUS

KEVIN WILLIAMS

Judgment Rendered: FEB 1 1 2011

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On Appeal from the Twenty-Second Judicial District Court
In and for the Parish of St. Tammany
State of Louisiana
Docket No. 456515

Honorable William J. Crain, Judge Presiding

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BEFORE: WHIPPLE, McDONALD, AND McCLENDON, JJ.

McCLENDON, J.

The defendant, Kevin Williams, was charged by grand jury indictment with one count of second degree murder, a violation of LSA-R.S. 14:30.1, and pled not guilty. Following a jury trial, he was found guilty as charged by unanimous verdict. He was sentenced to life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence. He now appeals, contending the trial court erred in denying his motion to suppress his confession/incriminating statement and erred in allowing an enhanced version of the confession/incriminating statement to be played for the jury. For the following reasons, we affirm the conviction and sentence.

FACTS

On July 10, 2008, the body of the victim, Ileana Lyons, was found wedged between the toilet and the vanity in the bathroom of the house she rented in Covington. The body was in a state of "advanced decomposition." The cause of death was blunt force head trauma and facial bone fractures. The victim had suffered multiple fractures to her face, consistent with being beaten with a hard object such as a crowbar. She was naked from the waist down. A pair of bloodstained shorts was located near the body. All the doors were locked, but an upstairs window was open. The doors could be locked without a key when someone left. On approximately July 4, 2008, the mail delivery person had noticed a smell coming from the house and had knocked on the door to check on the victim, but no one answered.

During the summer of 2008, April Marie Nixon was involved in a sexual relationship with the defendant. During that time, the defendant told Nixon, "I did something that I have to get out of Covington, because I did something I wasn't supposed to do. And I feel like the walls is closing in on me." Subsequently, the defendant told Nixon he had killed "this lady." He also showed her a shirt with dried bloodstains, and told her he had worn the shirt when "he did what he did." He threatened Nixon that if she ever disclosed what he had told her, he would

"make sure something happened to [Nixon]." Additionally, Nixon saw the defendant driving the victim's car.

Also during the summer of 2008, Broderick Garrett worked with the defendant at a temporary labor service. On July 2, 2008, the defendant told Garrett that the defendant needed to get a check cashed, which was written out to Garrett. The defendant claimed he had the check written out to Garrett because the defendant did not have an identification or driver's license. The defendant drove Garrett to the bank in the victim's car in order to cash said check. However, the bank refused to cash the check due to insufficient funds in the account. Garrett asked the defendant what was wrong with the check, and the defendant replied nothing was wrong with it. Garrett told the defendant that if nothing was wrong with the check, he should take it back to the lady and get her to cash the check. The defendant stated, "I ain't going to worry about it." Garrett destroyed the check because his name was on the check. However, he identified State Exhibit #9, one of the victim's checks, dated June 26, 2008, and payable to the defendant in the amount of $200, as being similar to the check he had destroyed.

Charlene Dilworth Pierre knew the defendant during the summer of 2008. During the Fourth of July weekend, she saw the defendant driving the victim's car. The defendant claimed the car belonged to his girlfriend. Thereafter, on approximately July 11, 2008, when asking Pierre if she knew anyone who wanted to buy a microwave or a computer, the defendant told her "My break-in spot has been discovered."

Juanita Magee also knew the defendant during the summer of 2008. At the end of June 2008, the defendant came to her with a checkbook. He asked Magee to write her name on a piece of paper and then left the room, returning with a check made out to Magee. Magee and the defendant cashed the check at a Quick Stop. She identified State Exhibit #10, one of the victim's checks, dated June 28, 2008, and payable to "McGee" in the amount of $100, as the check she had cashed with the defendant.

During questioning, the defendant initially denied having the victim's checks. He then claimed he had purchased them "on the street." He also initially denied having the victim's car, but then conceded "he was riding around" in the car. After the defendant was left alone in the interrogation room, he stated, "Why I murder that bitch."

Hair recovered from the bloodstained shorts found near the victim's body matched the DNA profile of the defendant. Additionally, the defendant told an inmate at the St. Tammany Parish Jail that he (the defendant) had used a crowbar to kill the victim.

MOTION TO SUPPRESS

In assignment of error number 1, the defendant argues the trial court erred in denying the motion to suppress confession/inculpatory statement because his confession/incriminating statement in the interrogation room was obtained in violation of his right to privacy.

It is well settled that for a confession or inculpatory statement to be admissible into evidence, the State must affirmatively show that it was freely and voluntarily given without influence of fear, duress, intimidation, menaces, threats, inducements, or promises. LSA-R.S. 15:451. Further, the State must show that an accused who makes a statement or confession during custodial interrogation was first advised of his **Miranda**[1] rights. **State v. Plain**, 99-1112, p. 5 (La.App. 1 Cir. 2/18/00), 752 So.2d 337, 342.

The admissibility of a confession is, in the first instance, a question for the trial court; its conclusions on the credibility and weight of the testimony relating to the voluntary nature of the confession are accorded great weight and will not be overturned unless they are not supported by the evidence. Whether or not 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 or not a confession is admissible. **Plain**, 99-1112 at p. 6, 752 So.2d at 342.

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

When a trial court denies a motion to suppress, factual and credibility determinations should not be reversed unless such finding is not adequately supported by the reliable evidence. See **State v. Green**, 94-0887, p. 11 (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, p. 6 (La. 12/1/09), 25 So.3d 746, 751.

In the instant case, prior to trial, the defendant moved to suppress his confession/incriminating statement, arguing, *inter alia*, it was not given freely and voluntarily. Following a hearing, the trial court denied the motion, finding, even assuming arguendo, the defendant did not know that he was "being taped," he had no reasonable expectation of privacy while under interrogation for a murder in the interrogation room of the police department.

Covington Police Department Detective Steven Short testified at the hearing on the motion to suppress. He identified State Exhibit #1 as a copy of the advice of **Miranda** rights/waiver of rights form which the defendant signed in his presence. Detective Short indicated he made no promises to the defendant in exchange for his statement and did not intimidate, threaten, or coerce him into making a statement. He conceded he never told the defendant his statement was being recorded even when the detective was not in the room, but indicated the recorder was on the desk between the defendant and himself.

The determination of whether a person has a constitutionally protected reasonable expectation of privacy depends on whether the person invoking its protection can claim a "justifiable," a "reasonable," or a "legitimate expectation of privacy" that has been invaded by government action. **Smith v. Maryland**, 442 U.S. 735, 740, 99 S.Ct. 2577, 2580, 61 L.Ed.2d 220 (1979). The individual claiming protection must show that he exhibited a subjective expectation of privacy and that his subjective expectation of privacy is one that society is prepared to recognize as reasonable. **Id.**

In denying the motion to suppress, the trial court relied upon **State v. Hussey**, 469 So.2d 346 (La. App. 2 Cir.), writs denied, 475 So.2d 777 (La. 1985).

Hussey involved the issue of the admissibility of an inculpatory conversation in the rear seat of a State Police car, recorded by a hidden recorder. **Hussey**, 469 So.2d at 347. The court in **Hussey** held the conversation admissible, noting La. Const art. I, § 5 protects against unreasonable invasions of privacy, as does the Fourth Amendment, and that any expectation of privacy the defendants had was unreasonable and unjustifiable under federal jurisprudence. **Hussey**, 469 So.2d at 351; see **State v. Peterson**, 619 So.2d 786, 789 (La.App. 4 Cir. 1993)("Thus, if the private individuals talking among themselves in **Hussey** could not have a reasonable expectation of privacy, an arrestee speaking to police officers in a police annex building would be even less reasonable in having an expectation of privacy."); **Lanza v. State of New York**, 370 U.S. 139, 143, 82 S.Ct. 1218, 1221, 8 L.Ed.2d 384 (1962) ("[I]t is obvious that a jail shares none of the attributes of privacy of a home, an automobile, an office, or a hotel room. In prison, official surveillance has traditionally been the order of the day."); **United States v. Harrelson**, 754 F.2d 1153, 1168-71 (5th Cir.), cert. denied, 474 U.S. 908, 106 S.Ct. 277, 88 L.Ed.2d 241 and 474 U.S. 1034, 106 S.Ct 599, 88 L.Ed.2d 578 (1985) (electronically intercepted conversation between an incarcerated prisoner and his visiting wife by a hidden and disguised tape recorder was admissible because the expectation of privacy could not be found reasonable).

There was no error or abuse of discretion in the trial court's denial of the motion to suppress. The defendant attempts to distinguish **Hussey**, arguing he had not been arrested and charged with a crime when he made his incriminating statement and he was alone in a room, muttering to himself. These distinctions, however, are inconsequential. While the defendant had not been formally arrested when he made the statement at issue, he certainly knew he was suspected of a crime, and had been formally advised of, and waived his **Miranda** rights. Additionally, the room in which the defendant was alone, was the interrogation room of a police department. Further, this case does not involve a hidden recorder, but rather a recorder on a desk in front of the defendant. Any

expectation of privacy the defendant had under these circumstances was not reasonable.

This assignment of error is without merit.

ENHANCEMENT OF RECORDED CONFESSION/INCRIMINATING STATEMENT

In assignment of error number 2, the defendant argues the trial court failed in its duty under **Daubert v. Merrell Dow Pharmaceuticals, Inc.**, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), by allowing an enhanced version of the confession/incriminating statement to be played for the jury. **Daubert** recognized trial courts are obligated to act in a "'gatekeeping'" function to "'ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable.'" 509 U.S. at 589, 113 S.Ct. at 2795.[2]

During questioning, Detective Short left the defendant alone in the interrogation room, with the recorder still recording. At that time, the defendant had been advised he was being held in reference to some cashed checks. He had not been told he was suspected of murdering the victim. While the defendant was alone in the room, he stated, "Why I murder that bitch." Detective Short testified he took the recorded statement of the defendant to St. Tammany Parish Sheriff's Office Crime Lab Technician Judith Kovacevich to have it "enhanced." Both the original and the enhanced versions of the statement were played at trial.

Kovacevich testified the crime lab used software called Video Analyst to enhance video images and audio recordings. The program uses filters to enhance recordings and either slow down or speed up words to make them more understandable. Enhancement of an audio recording does not change any of the words in the original. Video Analyst has been accepted in the forensic community as properly enhancing video and audio recordings. Kovacevich indicated she had

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[2] Subsequent to **Daubert**, the United States Supreme Court has held the gatekeeping duty imposed upon trial courts in **Daubert** with regard to scientific testimony applies to all expert testimony. **Kumho Tire Co., Ltd. v. Carmichael**, 526 U.S. 137, 147, 119 S.Ct. 1167, 1174, 143 L.Ed.2d 238 (1999).

used the program to enhance video on several occasions, but the instant case was her first time she had used it to enhance audio.

On cross-examination, Kovacevich indicated she was qualified to use Video Analyst because she had attended a week-long training course provided by the creators of the program. She indicated an audio enhancement resulted in the listener hearing the words differently than they would hear them from the original, but added audio enhancement did not remove or add any words. The court asked the defense if it had any objection to the playing of the enhanced version of the recording. The defense replied, "I'll make an objection based on the fact that it may be distorted." The court overruled the objection, finding that an appropriate foundation had been made.

This issue was not preserved for appeal. It is well settled that defense counsel must state the basis for an objection when it is made, pointing out the specific error to the trial court. The grounds for objection must be sufficiently brought to the court's attention to allow it the opportunity to make the proper ruling and prevent or cure any error. See LSA-C.E. art. 103 (A)(1); LSA-C.Cr.P. art. 841. See **State v. Trahan**, 93-1116, p. 16 (La.App. 1 Cir. 5/20/94), 637 So.2d 694, 704. The defendant's objection that the recording might be "distorted" did not raise any type of **Daubert** issue below. Therefore, he cannot raise this issue for the first time on appeal.

For the foregoing reasons, we affirm the defendant's conviction and sentence.

CONVICTION AND SENTENCE AFFIRMED.