NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2006 KA 2081

STATE OF LOUISIANA

VERSUS

LYDEL JAMES SMITH

Judgment Rendered: May 4, 2007

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On Appeal from the Thirty-Second Judicial District Court
In and For the Parish of Terrebonne
State of Louisiana
Docket No. 452,849

Honorable John R. Walker, Judge Presiding

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BEFORE: PARRO, GUIDRY, AND McCLENDON, JJ.

McCLENDON, J.

Lydel James Smith, defendant, was charged by bill of information with two counts of simple burglary, violations of LSA-R.S. 14:62.[1] He pled not guilty. Defendant was tried on Count Two before a jury.[2] The jury determined defendant was guilty, and the trial court sentenced defendant to a term of eight years at hard labor.

For the reasons that follow, defendant's conviction and sentence are affirmed.

FACTS

On the morning of February 26, 2005, Yolanda Honoré, a teacher at Southdown Elementary School located at 1124 St. Charles Street in Houma, arrived for "Saturday School." Saturday School was a punishment for children who had misbehaved. At about 7:30 a.m., Honoré went to the Third Grade Building and noticed things were out of the ordinary, including some shattered glass on the floor and an ice machine in the teachers' lounge that was tilted because the bricks used to level it were gone. Honoré called the assistant principal, Myra Austin.

After Austin arrived, she could tell the school had been burglarized and called the police. Austin noticed that one computer was missing from one of the classrooms in the Third Grade Building. The missing computer was identified as a Dell CPU, with a monitor and a Hewlett Packard printer.

On March 7, 2005, Detective Travis Theriot of the Houma Police Department was investigating an unrelated incident. The following day, during the course of his investigation, defendant was brought in and questioned.

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[1] Defendant's conviction for simple escape is addressed in **State v. Smith**, 2006-2135 (La.App. 1 Cir. 5/4/07) (unpublished) released this date.

[2] The record does not indicate the disposition of Count One.

Defendant waived his **Miranda** rights and provided the Houma police with a statement indicating he had been receiving computers from two men, identified only as "Rollo" and "Slim." Defendant told the police that most of these computers had student files on them. During this statement, defendant admitted going to Southdown School with Slim.

After speaking with the Houma police officers, defendant was also interviewed by Detective Allen LeBlanc of the Terrebonne Parish Sheriff's Office. During this interview, defendant described how he accompanied someone he identified only as "Slim" to Southdown School a couple of weeks earlier and how they entered the school through a bathroom window. Once inside the school, defendant removed a brick from under the ice machine in the teachers' lounge and it was thrown through a classroom window in order to get the door of the classroom open. Defendant stated that they stole a computer and printer, which they brought to his house.

Defendant testified at trial. Defendant claimed that his fiancée, Tora Bins, had a drug problem and that, in an effort to help her, they had moved from a bad neighborhood in New Orleans and settled in Houma, where defendant was originally from. According to defendant, he realized that Bins did not want to stop using drugs. Defendant testified that it was Bins who would bring computers home for him to work on for extra money. He testified that "[o]ne thing lead to another. We ended up with a piece of surveying equipment at my apartment." Defendant testified that he called surveying companies when Bins was not home in an effort to determine whether it came from one of them, knowing it was an expensive piece of equipment. Defendant claimed he was merely trying to return the equipment.

Defendant testified that the secretary for Robert Rembert's company confirmed that the leveler belonged to them and said she would send someone over to retrieve it. Defendant left the apartment after telling Bins that someone would come and get the leveler. Instead of someone from Rembert's office, two policemen arrived.

Defendant claimed that he gave an incriminating statement to the police because he did not want Bins to go to jail. Defendant testified that Detective Kyle Faulk of the Houma Police Department had threatened that if he did not incriminate himself, his mother and Bins would be arrested and harassed by the police. At trial, defendant claimed his entire March 8, 2005 statement was false. At the time of trial, Bins had left him. Defendant admitted he had prior convictions of robbery, assault and escape while in the military and had been convicted of simple escape two days earlier.

MOTIONS TO SUPPRESS

In his first assignment of error, defendant argues the trial court erred in denying his motion to suppress his statement and all of the evidence obtained from his apartment even though the state's witnesses verified that defendant reported being threatened by the police moments before giving his incriminating statement. Defendant argues that he gave an incriminating statement under the threat that his mother and fiancée would be harassed and even arrested for a crime that neither he, his mother, nor his fiancée had committed.

The admissibility of a confession is, in the first instance, a question for the trial court. The trial court's rulings on the credibility and weight of the testimony relative 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. Corkern**, 03-1393, p. 9 (La.App. 1 Cir. 9/17/04), 897 So.2d 57, 63, writ denied, 04-2627 (La. 2/18/05), 896 So.2d 29. In reviewing the correctness of a trial court's ruling on a motion to suppress a confession, we are not limited to the evidence introduced at the hearing, but may consider all evidence adduced at trial. **State v. Corkern**, 03-1393 at p. 9, 897 So.2d at 64.

At issue is the March 8, 2005 statement defendant provided to the Houma Police Department implicating himself in the burglary of Southdown School. According to Detective Theriot, defendant was advised of his **Miranda** rights and executed a waiver of rights form. Detective Theriot denied that he threatened, coerced, or induced defendant to make a statement. Detective Theriot indicated defendant actually gave two statements. Defendant's first statement did not indicate that he went to Southdown School. Because the police did not feel defendant was being truthful, further questioning was done. As a result of this continued questioning, defendant provided a second statement indicating he had gone to Southdown School. Detective Theriot denied defendant was threatened in any manner and also denied that anyone threatened to arrest defendant's fiancée or mother or embarrass them. Detective Faulk also denied that anyone threatened defendant in order to get him to make a statement.

Detective LeBlanc arrived at the Houma Police Department after defendant had already provided his statements to the police. Detective LeBlanc testified that he advised defendant of his **Miranda** rights and defendant executed a waiver of rights form. Detective LeBlanc testified that defendant told him he had been threatened by the Houma police, but

defendant did not detail what this alleged threat was. After waiving his rights, defendant proceeded to give the same statement to Detective LeBlanc that he now claims he gave only because of threats by the Houma police. Defendant does not claim that Detective LeBlanc threatened him.

After reviewing the record, we do not find that the trial court erred in failing to suppress defendant's March 8, 2005 statement given to the Houma police. The record clearly indicates that defendant executed a waiver of rights form prior to providing a statement to the police. Despite defendant's claim that the Houma police threatened him, he provided the same statement to a representative of the Terrebonne Parish Sheriff's Office after indicating that he had been threatened.

Considering the totality of the circumstances and according great weight to the trial court's credibility determinations, we find the trial court did not err in denying defendant's motion to suppress his statement.

In his second assignment of error, defendant also challenges the introduction of the leveling machine and the computers into evidence since all of the items were confiscated as a result of an illegal search. Defendant argues the police lacked probable cause, exigent circumstances or even reasonable suspicion to believe that defendant was engaged in illegal activity.

The Fourth Amendment to the United States Constitution and Article I, § 5 of the Louisiana Constitution protect persons against unreasonable searches and seizures. Subject only to a few well-established exceptions, a search or seizure conducted without a warrant issued upon probable cause is constitutionally prohibited. Once a defendant makes an initial showing that a warrantless search or seizure occurred, the burden of proof shifts to the state to affirmatively show it was justified under one of the narrow

exceptions to the rule requiring a search warrant. LSA-C.Cr.P. art. 703(D); **State v. Young**, 06-0234, pp. 5-6 (La.App. 1 Cir. 9/15/06), 943 So.2d 1118, 1122.

A search conducted pursuant to consent is an exception to the requirements of a warrant and probable cause. Consent to search is valid when freely and voluntarily given by a person who possesses common authority or other sufficient relationship to the premises or effects sought to be inspected. **State v. Brumfield**, 05-2500, p. 5 (La.App. 1 Cir. 9/20/06), 944 So.2d 588, 593.

An exception to the search warrant requirement also exists for items in plain view. Two conditions must be satisfied to trigger the application of the doctrine: 1) prior justification for intrusion into the protected area; and 2) it must be immediately apparent without close inspection that the items are evidence or contraband. "Immediately apparent" requires no more than probable cause to associate the property with criminal activity. **State v. Young**, 06-0234 at p. 6, 943 So.2d at 1122-23. Moreover, we note a warrantless search of a home can be justified on the basis of the exigent circumstances presented by the risk of destruction of evidence. **Georgia v. Randolph**, 547 U.S.103, __n.6, 126 S.Ct. 1515, 1524 n.6, 164 L.Ed.2d 208 (2006).

In the present case, the Houma Police Department's investigation of a G-2 leveler reported stolen from Rembert Services led them to defendant's apartment. A-1 Pawn had received a call from EZ Pawn reporting that a black male had attempted to pawn the leveler there and had indicated he was headed towards A-1 Pawn. Nancy Bergeron, at A-1 Pawn, reported to the police that she had received a phone call from a man inquiring about pawning the leveler. Bergeron had previously received a flyer from

Rembert Services in reference to the leveler being stolen. Bergeron turned over the phone number of the caller who inquired about pawning the leveler, 868-9835, and the name associated with that number on the caller ID, Zachary Smith.

The police used the Internet to look up the physical address for that phone number and obtained the address of 209 Magnolia Street in Houma. The police went to the complex at that address, which housed four apartments, and made contact with Tora Bins, who confirmed that 868-9835 was her phone number.

When speaking to the police in front of her apartment, Bins informed them that her boyfriend, defendant, was attempting to sell a G-2 leveler to A-1 Pawn earlier that day. Bins told the police that she would return it and invited Detectives Theriot and Faulk inside the apartment while she retrieved the leveler.

Once the two detectives were inside the apartment, they noted that several computers were near the door and that one of the computers matched the description of the stolen computer that had just been reported to them earlier that day by St. Matthews School. Upon seeing the computers, including the one that had matched the recent report of a stolen computer from St. Matthews School (a separate offense from the instant charge), the police advised Bins of her **Miranda** rights, then questioned her about the computers. Bins reported to the police that the computers had "showed up" at her house early Sunday morning and her boyfriend, defendant, had advised her that he was doing some work on them. At that point the computers were seized.

Defendant claims that the police did not have consent to enter his apartment because he was the only one living there. According to

defendant's testimony, he and Bins were no longer living together on the date the police seized the leveler and computers. Defendant admitted that he initially told the police that they were living together at this time, but he later claimed that such statement was a lie to protect Bins.

In denying the motion to suppress the evidence, the trial court relied upon the fact that Bins allowed the police into the apartment. During the hearing on the motion to suppress, defendant testified that while he claimed to be at another apartment in the complex and observed the police enter his apartment, he never went to the police and indicated they had no permission to be in his apartment. Although defendant claimed that he and Bins were not living together on that date, the trial court made a credibility determination that such claim was not true. Bins made no similar indication and informed the police that she was present when the computers "showed up" a few days earlier.

We also note that, because the police had recently taken a description of a stolen computer with a green back from St. Matthews School and were then confronted with a computer fitting that description in the residence of someone who had earlier that day tried to pawn a stolen leveler, exigent circumstances existed justifying the seizure of the computer equipment and leveler.

Accordingly, we find that the trial court did not err in denying defendant's motion to suppress this evidence.

This assignment of error is without merit.

OTHER CRIMES EVIDENCE

In defendant's final assignment of error, he argues that the trial court erred in allowing the state to use other crimes evidence to support its prosecution against him for simple burglary. Specifically, defendant claims

that the trial court allowed the state to elicit testimony relative to the theft of a leveling machine to justify its decision to arrest, detain, and prosecute defendant.

Defendant also notes that the other crimes evidence (i.e., having possession of the leveling machine) should not have been presented to the jury because the state failed to give the proper notice of its intent to use such evidence and because the connexity in time and location had not been established by the state during its case-in-chief.

Our review of the trial transcript indicates the state **did not** present testimony regarding a leveling machine. Although the circumstances surrounding the investigation of that leveling machine and their relation to the present charges were detailed at the hearing on defendant's motions to suppress, there were no references to such made by the state's witnesses in front of the jury during the trial of this matter. Moreover, it was defendant's own testimony that provided the jury with references regarding the stolen leveling machine.

In other words, defendant's assignment of error has no merit because the state did not present any evidence regarding the stolen leveler in its case-in-chief. The state did cross-examine defendant regarding the leveler after he brought it up on direct testimony. During cross-examination by the prosecutor, defendant admitted he tried to pawn the leveler, but denied he told the police that he took the leveler from a truck parked on School Street.

In **State v. Hall**, 558 So.2d 1186, 1190-91 (La.App. 1 Cir.), writ denied, 564 So.2d 318 (La. 1990), the court was presented with evidence that defendant had illegally discharged a weapon during an incident which occurred several hours before he murdered the victim, which arguably constituted other crimes evidence. However, noting that defendant relied on

the prior illegal discharge of a weapon as an important component of his self-defense argument, we found that if error occurred in admitting this evidence of the prior illegal discharge, such error was harmless beyond a reasonable doubt.

In the present case, defendant made the issue of the stolen leveling machine part of his defense, i.e., that Bins had brought these items, along with other computers, into his apartment. Similar to the reasoning in **State v. Hall**, if any error occurred in admitting such evidence, it was harmless beyond a reasonable doubt.

This assignment of error is without merit.

CONVICTION AND SENTENCE AFFIRMED.