NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2006 KA 0822

STATE OF LOUISIANA

VERSUS

TYRONE STEVENS

Judgment Rendered: NOV - 3 2006

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On Appeal from the 20th Judicial District Court
In and For the Parish of East Feliciana, State of Louisiana
Trial Court No. 02-CR-1068, Division "A"

Honorable George H. Ware, Jr., Judge Presiding

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BEFORE: PETTIGREW, DOWNING, AND HUGHES, JJ.

HUGHES, J.

The defendant, Tyrone Stevens, was originally charged by grand jury indictment with first degree murder, a violation of LSA-R.S. 14:30. The defendant entered a plea of not guilty. The trial court denied the defendant's motion to suppress. The defendant filed an application for supervisory writs with this court. The writ was denied on May 5, 2004. **State v. Stevens**, 2004-0720 (La. App. 1 Cir. 5/5/04) (unpublished). The defendant's application for supervisory relief from the Louisiana Supreme Court was also denied. **State v. Stevens**, 2004-1391 (La. 10/8/04), 883 So.2d 1025. The State amended the charge to second degree murder, a violation of LSA-R.S. 14:30.1. The defendant again entered a plea of not guilty. Ultimately, the defendant entered a plea of *nolo contendere* to the amended charge of manslaughter (a violation of LSA-R.S. 14:31) pursuant to **North Carolina v. Alford**, 400 U.S. 25, 37-38, 91 S.Ct. 160, 167-168, 27 L.Ed.2d 162 (1970), reserving his right to appeal under **State v. Crosby**, 338 So.2d 584, 588 (La. 1976). The defendant waived sentencing delays and was sentenced to forty years imprisonment at hard labor. The defendant now appeals, assigning error as to the trial court's denial of the motion to suppress. For the following reasons, we affirm the conviction and sentence.

FACTS

As the defendant entered a guilty plea to the charge, the facts of the instant offense were not fully developed. The facts and circumstances integral to the arguments raised in the sole assignment of error, as unfolded during the presentation of evidence at the motion to suppress hearing, will be presented as the assignment of error is addressed.

ASSIGNMENT OF ERROR

In his sole assignment of error, the defendant challenges the trial court's ruling on his motion to suppress the evidence and confession. As to the evidence, the defendant specifically argues that the testimony presented at the motion to suppress hearing overwhelmingly proved that the arresting officer only stopped the defendant's vehicle because he and his passengers were African-American males who were traveling around town just after a murder had taken place a few miles away. The defendant argues that the arresting officer had a history of targeting African-Americans for traffic investigations. The defendant further argues that the evidence (three handguns and alleged blood evidence) was not in plain view. The defendant notes testimony that a white napkin was used to dab the substance, suspected to be blood, located on the backseat of his vehicle. The defendant argues that this close inspection led to the officers' conclusion that the substance was blood. The defendant argues that the arresting officer "went too far" in his investigatory procedures. The defendant concludes that because he and his passengers were targeted for the investigatory stop strictly because of their race, not the "supposed" traffic violation, the motion to suppress the evidence should have been granted.

As to the confession, the defendant avers that the motion to suppress the confession should have been granted because his statement was not voluntary. The defendant specifically avers that the statement was obtained through coercion and threats. The defendant claims that the statement was given after he was handcuffed to a bench in the police station for five hours without being allowed to call his wife, use the restroom, or to get food. The defendant further claims that he was told he would get "the big needle" and "the dumbest lawyer in town." The defendant avers that because he was a

Mississippi resident who had no criminal record and was unfamiliar with Louisiana law, he felt compelled to give the police the confession. The defendant contends that it is unclear whether he understood the substance of his statement to the police. Finally, the defendant speculates that the approximate thirty-minute interrogation that took place before his recorded statement "more than likely" concerned what he should say in order to "avoid getting the needle."

Although a pretrial determination of the propriety of a trial court's ruling does not absolutely preclude a different decision on appeal, judicial efficiency demands that this court accord great deference to pretrial decisions unless it is apparent, in light of a subsequent trial record, that the determination was patently erroneous and produced an unjust result. **State v. Humphrey**, 412 So.2d 507, 523 (La. 1981) (on rehearing 3/12/82); **State v. Booker**, 2002-1269, p. 15 (La. App. 1 Cir. 2/14/03), 839 So.2d 455, 466, writ denied, 2003-1145 (La. 10/31/03), 857 So.2d 476. This assignment of error presents the same arguments raised in the defendant's prior writ application to this court. Based on the following analysis, we find the record fully supports our previous decision on the issues presented. When the trial judge issues a ruling on a defendant's motion to suppress, the appellate court looks at the totality of the evidence presented at the hearing on the motion to suppress. The trial court's factual findings during a hearing to suppress evidence are entitled to great weight and should not be disturbed unless they are clearly erroneous. **State v. Casey**, 99-0023, p. 6 (La. 1/26/00), 775 So.2d 1022, 1029, cert denied, 531 U.S. 840, 121 S.Ct. 104, 148 L.Ed.2d 62 (2000).

The Traffic Stop

Officer Darren Kilcrease (a Caucasian) of the Clinton Police Department testified that on July 31, 2002, at approximately 11:45 p.m., he conducted a traffic stop on Louisiana Highway 67 in Clinton, Louisiana. The traffic stop was video and audio recorded as it progressed.[1] Officer Kilcrease specifically testified as follows:

> I was heading off of Liberty Road headed back south at the stop sign. I seen [sic] a late '80s model Caprice come by and had three black male subjects in it. After they passed by me, they was [sic] watching me real close. And after they passed by, I seen [sic] the car didn't have a license plate on it. I waited until the traffic had cleared, and I pulled out.

Officer Kilcrease testified that there was no visible license plate on the vehicle, specifically noting his observation of the rear exterior and back windshield of the vehicle. Officer Kilcrease began pursuing the vehicle as it headed east on St. Helena Street. Officer Kilcrease approached the vehicle just south of Jackson Street, activated his lights, and conducted the traffic stop. The driver (the defendant) parked on the north side of a Mobil gas station parking lot. Officer Kilcrease advised the defendant that he was being stopped because the vehicle did not have a license plate. Officer Kilcrease requested the defendant's driver's license, vehicle registration and title, and proof of insurance. The defendant did not have any of the requested documentation. The defendant indicated that he mistakenly left the documentation at home. The defendant further explained that the license plate must have fallen to the back floorboard of the vehicle. Officer Kilcrease allowed the defendant to retrieve the license plate.[2] Officer Kilcrease noted that the defendant and the passengers of the vehicle

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[1] An audio microphone was worn by Officer Kilcrease, but much of the dialogue is inaudible.

[2] The defendant produced a permanent Mississippi license plate. Although the defendant did not have his driver's license on his person, he did provide his driver's license number.

appeared to be very nervous. The defendant was unable to stand still and the passengers were unable to sit still. According to Officer Kilcrease, the passengers kept watching the officer and "ducking around like they was [sic] trying to hide something in the vehicle."

According to Officer Kilcrease's testimony, at this point of the stop he received a radio communication regarding a body (the victim herein) that was discovered north of Jackson, Louisiana. Officer Kilcrease called for assistance with the stop. Chief Eddie Stewart, the Chief of Police of the Clinton Police Department (an African-American), and Captain Arkell Merritt, also of the Clinton Police Department (a Caucasian), were among the officers to arrive on the scene. All three occupants were questioned separately regarding the details of their trip and their failure to have documentation/licenses. After the responses were compared, the officers realized that the occupants had conflicting accounts. Captain Merritt concluded that the vehicle license plate had recently been removed from the exterior of the vehicle since the mounting area was still dusty and not yet washed clean by rain or other weather conditions. According to the testimony presented, the vehicle inspection sticker was either expired or was not on the car. The officers decided to impound the vehicle based on the lack of vehicle documentation and the fact that none of the occupants had a driver's license or identification. The defendant was ticketed for the lack of vehicle registration, proof of insurance, a driver's license, and a visible license plate. The defendant was questioned as to whether he had any weapons. The defendant nervously began to back away. The defendant continued to take backward steps and informed the officers that a gun was in

the vehicle.[3] The officers moved in closer to surround the defendant and he was handcuffed. The officers decided to conduct an on-the-spot inventory search of the vehicle.[4] The audio/video recording reveals Chief Stewart's inquiry as to whether one of the other officers had an inventory sheet. He then asked the defendant if anything of value was in the vehicle. The defendant's response, if any, was inaudible. Chief Stewart then asked again whether Officer Kilcrease had an inventory sheet. Officer Kilcrease responded negatively and Chief Stewart stated, "I can just use my tablet and let the driver sign it."

One handgun was located under the front right seat and two more handguns were located in the back of the vehicle. As observed on the audio/video recording, one of the officers walked over to the car on the driver's back passenger side and yelled, "What the f... is this? Look at this s...!" According to Captain Merritt's testimony, he observed, in plain view, and smelled what he was "just about completely sure" was blood and flesh or possibly brain matter. The blood had a gloss; thus the officer assumed it was fresh. Officer Kilcrease blotted the suspected blood with a piece of paper. Officer Kilcrease stated that he could not tell whether it was really blood, but he thought that it could be blood. Captain Merritt testified that there was a shine or sheen and the pieces of "flesh or brain matter" were "obviously still moist by sight." He stated that he did not tell Officer Kilcrease to dab it because he would not have touched it at all. The court

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[3] While much of the recording of the stop is inaudible, the defendant can be viewed backing up after one of the officers questioned him regarding a gun. After being instructed to place his hands on the vehicle, the defendant stated, "Yeah, I got a gun in the car."

[4] At the time of the inventory search, Captain Merritt was aware of the report of a non-responsive male laying in the road near Jackson, Louisiana with blood coming from his head. While Chief Stewart and Captain Merritt referred to the search as an inventory search, Officer Kilcrease testified that Chief Stewart and Captain Merritt began to "shake the vehicle down." Officer Kilcrease suspected that the automobile was searched because the defendant did not give the officer an answer when asked about weapons, and "his nervousness and backing up and attempting to run, they took his action as there were guns in the vehicle."

asked if this blood and brain matter or flesh would be considered to be something in plain view. Captain Merritt responded positively.

Officer Kilcrease testified that on routine traffic stops, the police only give a citation and let the drivers go. However, he noted that this was a routine traffic stop until the driver became nervous and backed away from the officer when questioned about a gun. The defendant and the other subjects were placed in a police unit as the officers assessed the situation. Officer Kilcrease received an additional communication regarding the victim. Chief Stewart contacted members of the Jackson Police Department and informed them of the instant circumstances. Chief Stewart was instructed to hold the vehicle. The traffic stop transformed into a criminal investigation and the inventory search was ceased. Chief Stewart instructed a lieutenant to bring evidence tape to seal off the vehicle. The officers told the three subjects that they were not under arrest, but they were going to the jail until the officers could fully assess the situation. All three subjects were transported to the Clinton Police Department for questioning.

The defendant testified that he gave one of the officers his social security number, which is his license number. The defendant informed the officers that his wife could bring the necessary documentation within forty minutes and asked to use a telephone. The defendant was instructed to wait. The defendant testified that he did not put his license plate on the back of his vehicle because of the location of his gas tank lid. The defendant stated that when he would open the lid, it would bend the plate so he kept it in his back windshield. He further explained that the plate must have fallen before the stop. The defendant confirmed that Officer Kilcrease told him that he was being stopped for lack of a license plate.

The defendant testified that he did not remember stating that there was a gun in the vehicle. He also testified that he did not consent to the retrieval of a gun. He stated that Officer Kilcrease told him that they were going to impound the car and that the defendant could get someone to pick him up. He further stated that he did not attempt to run or back away when questioned about guns.

Lieutenant Billy DeMoss from the Clinton Police Department testified that he prepared the racial profiling policy for the Clinton Police Department in accordance with State legislation. Lieutenant DeMoss testified that Officer Kilcrease had a rather significant increase in the number of summonses issued to Caucasians, African-Americans, and Asians or others during the month of the instant stop. Lieutenant DeMoss stated, "He seemed to have been very active that month." He also testified that during this time, there was a request from Chief Stewart that if an officer was going to be working a traffic detail, they should write a ticket for every hour that they are out. He indicated that Chief Stewart instructed the officers that racial profiling would not be tolerated in their police department. Lieutenant DeMoss had no personal knowledge of complaints on racial profiling in the parish.

Kirk Evans, an investigator, testified that he went to the Clinton Town Hall and reviewed January 2001 through July 2003 arrest records. Mr. Evans examined the records of arrests made after a stop, but only the stops that were initiated following a police officer's observation of a violation. The total number of arrests was 213,[5] wherein 168 (79%) were African-American and 21% were Caucasian. Officer Kilcrease had a total of 32

[5] There were actually five additional arrests, but for those five arrests, the race of the arrestee could not be determined.

arrested during this time period, and 26 of the 32 were African-American males. Four of them were Caucasian males, and two were African-American females. Mr. Evans stated that there was no evidence that Caucasian persons were committing more offenses than African-American persons but that African-American persons were being arrested more frequently. He testified that he saw some of these arrests where it looked like they did nothing to be arrested. He saw several files that were more detailed and had exclamation marks in places that he thought were "a little inappropriate" and it concerned him. The offenses that alerted him consisted of individuals who were booked for not signing tickets or for arguing with police officers.

Chief Stewart testified that a couple of months before the hearing, a group came into the Clinton Town Hall asserting that the Clinton Police Department was writing more citations for African-Americans than they had been in the past. He stated that he "took care of that at the meeting, and also invited them to come look at the tapes which none of them did." He also stated that he requested the specific names of the complainants, via written correspondence, so that he could turn the names over to the U.S. Justice Department. According to Chief Stewart's testimony, no one accepted the registered letter that he sent and he could not get anyone who attended the meeting to come forth. He further stated that he did not find any wrongdoing on the part of his officers.

Regarding the stop, the trial court held that there was no *de facto* racial profiling as the activities of the Clinton Police Department herein were conducted in an exemplary manner and without regard to race, color, or creed. The court noted that at the time of the stop, neither the defendant nor the passengers had a driver's license or proof of insurance. Additionally, the car was parked at a gas station, a congested public location where it could

not be left. Thus, the court concluded that it was appropriate to perform an inventory search.

An officer must have a reasonable and articulable suspicion to stop an individual. In determining reasonableness, the court must consider whether the facts known to the officer at the time of the stop would warrant an officer of reasonable caution to believe that the action taken was appropriate. **Terry v. Ohio**, 392 U.S. 1, 21-22, 88 S.Ct. 1868, 1880, 20 L.Ed.2d 889 (1968). The principles set forth in **Terry** apply to stops of both pedestrians and motor vehicles. The police officer may briefly seize a person if the officer has an objectively reasonable suspicion, supported by specific and articulable facts, that the person is, or is about to be, engaged in criminal conduct or is wanted for past criminal acts. Louisiana Code of Criminal Procedure article 215.1(A) provides that an officer's reasonable suspicion of crime allows a limited investigation of a person. As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred. **Whren v. U.S.**, 517 U.S. 806, 810, 116 S.Ct. 1769, 1772, 135 L.Ed.2d 89 (1996). In **Whren**, the defense argued that a police officer will almost invariably be able to catch any given motorist in a technical violation, and that this creates the temptation to use traffic stops as a means of investigating other law violations, as to which no probable cause or even articulable suspicion exists. **Whren**, 517 U.S. at 810, 116 S.Ct. at 1773. To guard against the potential for such abuse, the United States Supreme Court has concluded that a stop is not constitutional (a violation of the Equal Protection Clause) if it is predicated on race alone. See **Whren**, 517 U.S. at 813, 116 S.Ct. at 1774.

The Equal Protection Clause prohibits race-based selective enforcement of the law only when such enforcement had a discriminatory

effect and was motivated by a discriminatory purpose. To show a violation of the Equal Protection Clause, plaintiffs must prove that the defendants' actions had a discriminatory effect and were motivated by a discriminatory purpose. **Chavez v. Illinois State Police**, 251 F.3d 612, 635-636 (7th Cir. 2001). To prove discriminatory effect, the plaintiffs are required to show that they are members of a protected class, that they are otherwise similarly situated to members of the unprotected class, and that plaintiffs were treated differently from members of the unprotected class. **Chavez**, 251 F.3d at 636. A party may show that he was similarly situated yet treated differently by identifying individuals who received disparate treatment or by using statistics to demonstrate a significant disparity. **Chavez**, 251 F.3d at 636. The Supreme Court and other federal courts across the country, have addressed the potential implications of racial profiling. See **United States v. Montero-Camargo**, 208 F.3d 1122, 1134-35 (9th Cir.) (en banc), cert. denied sub nom. **Sanchez-Guillen v. U.S.**, 531 U.S. 889, 121 S.Ct. 211, 148 L.Ed.2d 148 (2000) (discussing stops based on race or ethnic appearance); **Martinez v. Village of Mount Prospect**, 92 F.Supp.2d 780, 782 (N.D. Ill. 2000) (noting racial profiling of any kind is anathema to our criminal justice system); **United States v. Leviner**, 31 F.Supp.2d 23, 33 (D. Mass. 1998) (finding motor vehicle offenses, in particular, raise deep concerns about racial disparity). When statistics are introduced, they must address the issue of whether one class is being treated differently than others similarly situated. **Chavez**, 251 F.3d at 638. Supreme Court precedent also suggests that minority motorists alleging that a pretextual traffic stop constituted a denial of equal protection must show that similarly situated Caucasian motorists could have been stopped, but were not. **Chavez**, 251 F.3d at 637-41.

Herein, the defendant has not proven that non-minorities, similarly situated, were not prosecuted in similar factual circumstances. There was no evidence that non-minorities who were stopped for a similar traffic violation and had no license, registration, or other identification in the vehicle and advised officers that a gun was in the vehicle did not have their cars searched or sealed for impoundment. However, the defendant has presented statistics that Officer Kilcrease has stopped more African-Americans than Caucasians. An official act, however, is not unconstitutional solely because it has a racially disproportionate impact. **Castaneda v. Partida**, 430 U.S. 482, 493, 97 S.Ct. 1272, 1279, 51 L.Ed.2d 498 (1977). To prevail on an equal protection claim, the petitioner must further demonstrate that the decision-makers in his case acted with a discriminatory purpose. **McCleskey v. Kemp**, 481 U.S. 279, 292, 107 S.Ct. 1756, 1767, 95 L.Ed.2d 262 (1987). This requires evidence that the decision-maker intended to pursue a course of action at least in part because of its adverse effects on an identifiable group. **McCleskey**, 481 U.S. at 298, 107 S.Ct. at 1770. Herein, the record does not indicate that the officers in this case blatantly acted with a discriminatory purpose. The defendant's vehicle did not have a license plate displayed, a violation of LSA-R.S. 32:51. Officer Kilcrease testified that this was his basis for pulling over the defendant's vehicle. At that time Officer Kilcrease had not yet heard about the shooting victim in Jackson and was not looking for suspects; the evidence supports his testimony. Chief Stewart noted that although the defendant produced a license plate, once it was established that none of the passengers possessed driver's licenses, registration, or other identification, the car was going to be impounded. The defendant was stopped for a traffic violation, i.e., failure to display a license plate. He did not possess a driver's license, vehicle registration, proof of

insurance, or other documentation for the vehicle. When asked whether there was a gun in the car, he began backing away as if he had something to hide. We find that the defendant has failed to raise an inference of purposeful discrimination or a prima facie showing of discrimination based upon the statistics introduced.

When vehicles are impounded, local police departments generally follow a routine practice of securing and inventorying the contents of the automobiles. These procedures developed in response to three distinct needs: protection of the owner's property while it remains in police custody, protection for the police against claims or disputes over lost or stolen property, and protection of the police from potential danger. **South Dakota v. Opperman**, 428 U.S. 364, 369, 96 S.Ct. 3092, 3097, 49 L.Ed.2d 1000 (1976). The United States Supreme Court has recognized an inventory search as an exception to the warrant requirement. **South Dakota v. Opperman**, 428 U.S. at 370-376, 96 S.Ct. at 3097-3100. To fall within the inventory exception, however, the State must prove that the impoundment of the defendant's vehicle was necessary and that the inventory of the vehicle's contents was necessary and reasonable in its scope. **State v. Crosby**, 403 So.2d 1217, 1219 (La. 1981). Some of the factors that are significant in determining that a so-called inventory search was merely subterfuge are: formal impoundment procedures were not followed; the search was conducted "in the field;" a tow truck was not called before commencing the search; and the car owner was not asked for his consent to search, if his car contained valuables, if he would waive an inventory search, or if he could make other arrangements within a reasonable amount of time and with reasonable effort, to have someone pick up the vehicle. **State v. Killcrease**, 379 So.2d 737, 739 (La. 1980).

In the present case, the impoundment of the vehicle was necessary, as the defendant possessed no identifying documentation for himself or the vehicle. Chief Stewart testified that it would not be driven away from the scene. This was established before the search began. We note that while the officers herein inquired as to whether there were any valuables in the vehicle before searching it, the search of the defendant's vehicle began before a tow truck arrived, before an inventory sheet had been provided, and was made at the scene of the stop. Nonetheless, it is apparent that the search was conducted at the scene as a result of the defendant's statement that a gun was in the car. The officers arrived on the scene, noticed that although the defendant had a license plate, he did not have identification, a license, registration, proof of insurance, or any other type of information. The audio/video recording reveals that when asked whether there was a gun in the vehicle, the defendant shook his head as if implying there was no gun in the vehicle and began backing away from the officers. The defendant then indicated that there was a gun in the vehicle. Although the officers did not possess any inventory sheets at the time of the incident, it appears that Chief Stewart was adamant on having the vehicle towed because proper documentation was not produced; the inventory search was conducted at the scene for the safety of the officers. Captain Merritt's testimony highlighted his safety concerns as follows:

> Any time I do an inventory of a vehicle and I've been advised by a driver that there's a possibility of a weapon in there, the first thing I'm going to move is the weapon for my safety and anybody standing around. You reach under a seat and start grabbing stuff and you grab the trigger on a gun, you could shoot yourself or somebody. So the first thing that I was looking for was, if there was a weapon, to get it out.

As Chief Stewart located several handguns, Captain Merritt began looking for other weapons. Captain Merritt saw what appeared to be "blood

and flesh or possibly brain matter" on the back seat. Although Officer Kilcrease eventually dabbed the stain with a piece of paper, based on the noted testimony and our review of the photographical evidence presented by the State, it is evident that this blood and these particles of flesh were immediately apparent regardless of whether Officer Kilcrease dabbed it with paper or not.

In **State v. Parker**, 355 So.2d 900, 903 (La. 1978), the Louisiana Supreme Court recognized that "[p]lain view serves to provide a means of securing probable cause, and, absent the applicability of one of the true exceptions to the warrant requirement, nothing more." The prerequisites for a legitimate "plain view" seizure under the Fourth Amendment are: (1) there is a prior justification for police intrusion into a protected area, and (2) it is immediately apparent without close inspection that the items are evidence or contraband. **Horton v. California**, 496 U.S. 128, 135-136, 110 S.Ct. 2301, 2307-2308, 110 L.Ed.2d 112 (1990). "Immediately apparent" requires no more than probable cause to associate the property with criminal activity. **Texas v. Brown**, 460 U.S. 730, 741-42, 103 S.Ct. 1535, 1543, 75 L.Ed.2d 502 (1983).

We find that the impoundment of the defendant's vehicle in the instant case was necessary. We further find that the inventory of the vehicle's contents was necessary and reasonable in its scope. Considering the circumstances, including the evidence that the permanent license plate had been recently removed from the vehicle in question, the nervousness of the defendant and the passengers, the inconsistent stories provided by the defendant and the passengers, the defendant's reaction when questioned about weapons, the presence of three handguns in the vehicle, and the

officers' awareness of an injured individual in the vicinity of the stop, we find that the impoundment and inventory of the vehicle were justified.

The Confession

Joel Odom (a former detective of the East Feliciana Parish Sheriff's Office), the primary detective in the investigation of the homicide of Demarco Dunn, testified. He stated, "When [the defendant] first initially walked into the room, he started speaking, and after he stopped speaking, we advised him of his rights, and he continued [to speak]." He testified that the defendant signed the waiver of rights form. The defendant allegedly informed Detective Odom that he picked up the victim, there was an altercation, he pulled the trigger, and shot Demarco Dunn in the head. When the defendant first entered the room, he "started talking" and told Detective Odom, "I shot him in self-defense."

In the taped statement the defendant gave after waiving his **Miranda**[6] rights, he stated that there was an altercation during which the victim got belligerent and pulled defendant's hair.

Detective Odom indicated that it appeared that Dunn had been robbed because his pockets were "out turned" and looked like they had been emptied. He indicated that he did not threaten or intimidate the defendant to give the statement and that it was voluntarily given as no promises were made. Detective Odom stated that the defendant was never threatened with the "big needle" or told that he would receive the "dumbest lawyer" in town.[7]

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

[7] Detective Odom testified that he never heard Detective McKey say that the defendant was going to get the big needle. He did, however, note that "the needle" is a phrase that has been used by Detective McKey before.

The defendant testified that after arriving at the jail, he was seated on a bench and handcuffed to the bench for over five hours while the two passengers were taken aside and questioned. The defendant did not go to the restroom and made no phone calls, but asked a trustee for water and was given some. According to the defendant, Police Chief Perkins (of Amite County, Mississippi, where the defendant resided) was there for a short time. The defendant testified that Chief Perkins advised the defendant to cooperate with the officers and they would take it easy on him. The defendant recounted that he walked into the room, was offered a seat, and was questioned concerning what happened. The defendant stated that an officer told him that one of the juvenile passengers said that the defendant shot the victim in the head, threw him out of the car, and went through his pockets. The defendant also stated that Detective Don McKey "started making like a big fuss cussing [sic]." Detective McKey allegedly told the defendant that if he did not cooperate and tell them what happened, "[W]e've got a long needle we can shove up your arm and we can supply you with the dumbest lawyer we can find." The defendant indicated that they did not read his rights to him until after they questioned him. The officers allegedly stopped the tape and told the defendant to repeat his confession because the tape was not clear enough. The defendant then indicated, "I was fuzzy in the head. I couldn't remember what I had just told them because the way [Detective McKey] was arguing and yelling I didn't know what I said." The defendant asserted that when Detective McKey started the tape over and he would not say anything else, he was then read his rights and taken to lock down.

The defendant denied walking through the door and confessing right away as Detective Odom testified previously during the hearing. Defendant stated that he felt threatened when Detective McKey told him he would get

"the needle" and a "dumb lawyer" to try his case. Defendant also stated that there was an implied promise that if he cooperated, things would go easier for him. The defendant testified that his statement was not voluntary because "[w]hen you've got a person kicking the front of your chair and screaming in your face and you [sic] not really understanding what's going on and talking to you, like I say, in the state of mind I was in, I was willing to tell him whatever he wanted me to say just to back him up off of me. I was going along with everything."

During rebuttal testimony, Detective McKey, who was also present during the defendant's confession, testified that he clearly explained to the defendant his rights before he made a statement. Detective McKey testified that he did not threaten or coerce the defendant to sign the waiver of rights form. He stated that he began talking about the case and advised the defendant that he was looking at either first degree murder and the death penalty or second degree murder. The defendant asked for the difference between the two charges and Detective McKey advised him that the punishment for second degree murder was life imprisonment and the punishment for first degree murder could be the death penalty. He noted that the defendant was told this before he gave a statement. According to Detective McKey, the defendant was cooperative before and after the comment on charges. The defendant allegedly cooperated and gave his statement as to what occurred in the automobile surrounding the shooting. He testified that the defendant in no way stated that he wanted to stop or that he wanted an attorney. Detective McKey stated that the defendant was not denied food, drink or sleep for a significant time period. Detective McKey stated that he never remembered using the term "the needle" before. He indicated that he informed the defendant that he had questioned the two

passengers and they told him everything about the shooting. He informed the defendant that it was probably in his best interest to cooperate so they would know his side of the story because the two passengers put everything on the defendant. When the defendant first entered the room, they read the defendant his rights and the defendant confirmed his desire to continue.

Much of the above-described discussion took place during the thirty-minute period before the recording was started. The defendant's rights were reiterated on the tape and the defendant provided a statement that was consistent with the one provided before the recording was started. According to Detective McKey, the defendant was never told that he would get a bad lawyer and the defendant was not threatened.

Detective Joel Odom also testified on rebuttal. Detective Odom reiterated that the defendant was not threatened, and no promises, inducements, or force was used to obtain the defendant's statements. Detective Odom also indicated that the defendant requested an explanation as to the difference between first and second degree murder and was informed of the different potential punishments for the offenses. The defendant told his own version of the facts of the offense and was not informed of the details provided by the two passengers. When questioned by the court, Detective Odom confirmed that the defendant did not display any discomfort while at the police station and never complained.

The trial court ruled that the confession was admissible as the defendant understood his rights and there were no threats or violence, intimidation, no coercion, and no inducements. The judge stated he felt that there was a knowing and intelligent waiver of rights by the defendant after having been thoroughly advised of his rights. The trial judge found, "The defendant was not in a situation where he was mentally coerced into this

because of an extended period of time during which he was deprived of sleep, in which he was deprived of food, that he had to stand on his head or he had to put up with 110 degree temperatures or anything like 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. Additionally, the State must show that an accused who makes a statement or confession during custodial interrogation was first advised of his **Miranda** rights. **State v. King**, 563 So.2d 449, 453 (La. App. 1 Cir.), writ denied, 567 So.2d 610 (La. 1990). The admissibility of a confession is in the first instance a question for the trial court. Its conclusions on the credibility and weight of testimony relating to the voluntariness of the confession for the purpose of admissibility will not be overturned on appeal unless they are not supported by the evidence. **State v. Daughtery**, 563 So.2d 1171, 1177 (La. App. 1 Cir.), writ denied, 569 So.2d 980 (La. 1990). 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. **State v. Benoit**, 440 So.2d 129, 131 (La. 1983). The trial court must consider the totality of the circumstances in deciding whether a statement or confession is admissible. **State v. Hernandez**, 432 So.2d 350, 352 (La. App. 1 Cir. 1983). A mild exhortation to tell the truth, or a remark that if the defendant cooperates the officer will "do what he can" or "things will go easier," does not negate the voluntary nature of the confession. **State v. English**, 582 So.2d 1358, 1364 (La. App. 2 Cir.), writ denied, 584 So.2d 1172 (La. 1991).

We find that the evidence presented at the hearing on the motion to suppress supported the court's conclusions on the credibility and weight of

the testimony relating to the voluntary nature of the defendant's statement. Based on the foregoing conclusions, we find that there was no abuse of discretion in the trial court's denial of the defendant's motion to suppress the evidence and statement herein. The defendant's sole assignment of error lacks merit.

CONVICTION AND SENTENCE AFFIRMED.