2015 IL App (5th) 130406-U

NO. 5-13-0406

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	St. Clair County.
	)	
v.	)	No. 08-CF-241
	)	
KENNETH ZOOK,	)	Honorable
	)	John Baricevic,
Defendant-Appellee.	)	Judge, presiding.

JUSTICE STEWART delivered the judgment of the court.
Justices Welch and Schwarm concurred in the judgment.

ORDER

¶ 1 *Held*: The circuit court properly suppressed, on fourth amendment grounds, an audio-video recording of statements the defendant made during phone calls to his mother and his girlfriend while he was alone in an interrogation room at the police station where he had asked if he could have privacy to make the phone calls, a detective responded affirmatively, and the detectives left the room so that he could make the calls, closing the door behind them.

¶ 2 On March 7, 2008, the defendant, Kenneth Zook, was indicted for the offense of first degree murder, in violation of section 9-1(a)(2) of the Criminal Code of 1961 (720 ILCS 5/9-1(a)(2) (West 2006)), in that he, without lawful justification, shook five-month-old Alayna Frazier repeatedly, knowing that such actions created a strong probability of

death or great bodily harm, thereby causing the infant's death. After a hearing, the circuit court granted the defendant's motion *in limine* to exclude an audio-video recording of certain statements he made during phone calls to his mother and his girlfriend while he was alone in an interrogation room at the police station after his custodial interrogation had concluded. The legal basis for the ruling was that approximately 30 minutes before making the calls, the defendant had asked if he could have privacy to make the calls, to which a detective responded, "Yea. Just sit tight for a minute and *** [w]e'll get to that." When the defendant renewed his request to make phone calls after the interrogation had concluded, the detectives granted his request and left the room, closing the door behind them.

¶ 3 The State filed a timely notice of appeal and certificate of substantial impairment. For the reasons that follow, we affirm.

¶ 4 BACKGROUND

¶ 5 At approximately 11:47 p.m. on February 17, 2008, Belleville police responded to a 9-1-1 call concerning an unconscious infant. The infant, her mother, Kayla Frazier, and the defendant were present when police and paramedics arrived. The infant was transported to the hospital, where medical staff indicated that she had suffered from child abuse. The defendant and the infant's mother were arrested at the hospital.

¶ 6 Belleville detectives Matthew Eiskant and Karl Kraft interrogated the defendant three times over the next two days. The record on appeal contains a video recording of each interrogation.

¶ 7 The first interrogation occurred on the afternoon of February 18. The defendant

was told three times during that interrogation that the interrogation room was audio-video recorded. During that interrogation, the defendant denied any involvement in the infant's injuries. About an hour after the end of the first interrogation, the detectives learned that the infant had died, but they did not tell the defendant about her death.

¶ 8 The second interrogation occurred that same evening. During that interrogation, the defendant admitted that he had been high on heroin and claimed that he had blacked out, falling on top of the infant. During that interrogation, the defendant was not admonished about the interrogation room being audio-video recorded.

¶ 9 The third interrogation began at 3:56 p.m. the next afternoon. At the outset of that interrogation, the defendant was reminded that anytime they were in the interrogation room, it was audio-video recorded. At approximately 4:30 p.m., the defendant admitted that he had shaken the infant because he was angry and that her head had snapped back and forth. About 10 minutes after his admission, while in the interrogation room with only Detective Eiskant, the defendant asked if he could make phone calls. Detective Eiskant responded, "Absolutely, absolutely. *** Hang tight. When we get through this." Detective Eiskant then read aloud a "checklist sheet," which included, among other things, the admonition that "this room is audio-video recorded." Detective Eiskant subsequently left the room.

¶ 10 Detective Kraft reentered the room a few minutes later. The defendant asked if it was "okay if [he had] a little privacy" while he made the calls. Detective Kraft responded, "Yea. Just sit tight for a minute and *** [w]e'll get to that." Detective Kraft then left the room. The defendant remained alone in the room for most of the next 20

minutes.

¶ 11 The detectives returned at 5:10 p.m. and resumed the interrogation. They had a mannequin of a small child and asked the defendant to demonstrate how he had shaken the infant. The defendant showed the detectives how he had shaken the infant. At 5:13 p.m., Detective Eiskant advised the defendant that the interrogation was over.

¶ 12 The defendant again asked if he could call his mother and his girlfriend. Detective Eiskant responded, "Yea. Absolutely," and both detectives picked up their interrogation materials and left the room, closing the door behind them. Alone in the interrogation room, the defendant then placed several calls to his mother and his girlfriend on a phone that was present in the room. During the calls, the defendant found out, for the first time, that the infant had died. He was visibly upset that the infant had died. During the calls, he admitted that he had shaken the infant because he had been high on drugs.

¶ 13 On May 23, 2012, the defendant filed a motion *in limine* seeking to bar from trial the audio-video recording of the statements he made during the phone calls to his mother and his girlfriend. In the motion, he stated, among other things, that the "detectives left the room so that [he] could make phone calls, *** presumably giving him privacy to make the calls, and also clearly indicating that the interview had been concluded." He also alleged that because he was not told that his phone calls were being recorded, and he did not consent to the recording of the calls, the recording of the calls violated the eavesdropping statute (720 ILCS 5/14-2(a)(1) (West 2010) (later held unconstitutional in *People v. Clark*, 2014 IL 115776, ¶ 25, 6 N.E.3d 154)). Finally, he alleged that using the audio-video recording of his statements made during the calls would violate his fourth,

fifth, and sixth amendment rights under the United States Constitution and article I of the Illinois Constitution.

¶ 14 At the hearing on the motion, defense counsel argued that when the detectives concluded the interrogation and left the room so that the defendant could be alone to make phone calls to his mother and his girlfriend, the defendant had an expectation of privacy to make the calls. Counsel argued that such calls are not routinely recorded by the Belleville police department. Counsel also argued that, because the defendant did not explicitly consent to the recording of his end of the calls (the voices of those on the other end of the calls were not recorded and were not audible on the audio-video recording), the eavesdropping statute had been violated and the recording should be excluded. Counsel argued that the defendant had a reasonable expectation of privacy in the calls when the detectives left the room.

¶ 15 The prosecutor responded that the defendant had been repeatedly admonished that the room was being recorded. The prosecutor also noted that, when the defendant made the calls, he had already confessed to the detectives. The prosecutor argued that the defendant chose to make the calls out of that interrogation room, knowing that everything in there was audio-video recorded. The prosecutor also argued that there was no eavesdrop of the defendant making the calls because he knew the room was recorded.

¶ 16 Initially, the circuit court denied the motion *in limine*, finding that "[t]he defendant was informed by the detectives that all communication in the room was recorded" and that he "had no reasonable expectation of privacy with regard to the phone calls that he made in *** the room." The cause proceeded to trial from June 4 to June 9, 2012, but

ended in a mistrial after the jury was unable to reach a unanimous verdict.

¶ 17 On July 30, 2013, the defendant again filed a motion *in limine*, asking the circuit court (which was now presided over by a different judge) to reconsider its initial ruling as to the admissibility of the audio-video recording of the statements he made during his phone calls to his mother and his girlfriend. The motion noted that the first judge did not take into consideration the fact that the defendant expressly asked the detectives to leave the room so he could have privacy to make the calls. The motion argued that this request plainly indicated that the defendant was not aware that the calls were going to be recorded and that he was not aware that he had relinquished any expectation of privacy.

¶ 18 At the August 14, 2013, hearing on the motion, defense counsel argued that the defendant's specific request for, and apparent receipt of, privacy supported a ruling to bar the State from using the audio-video recording. The State argued that suppression was not warranted because the defendant was advised numerous times that the interrogation room was audio-video recorded, he knew the detectives were listening, and he merely wanted the detectives out of the room while he made the calls.

¶ 19 On August 16, 2013, the circuit court entered an order granting the defendant's motion *in limine.* The order provides, in pertinent part, as follows:

> "The defense requests a motion [*in limine*] to prohibit the use of telephone conversations made after the defendant made a statement implicating himself in the murder of a child. That request is based on the defendant asking words to the effect of 'Is it okay if I have a little privacy?' to make some phone calls. The officer responds that 'Yeah, just sit tight, we'll get to that.' The interview

continued for about thirty minutes; and when it concludes, the defendant again requests to make calls but does not raise the privacy issue again. The officers leave the room for him to make calls, giving him some privacy.

The issue as I see it is: Does this request for privacy make a constitutional claim that the defendant is no longer participating in a custodial interrogation? The State relies on the government's repeated warnings that the room he was in had ongoing recording capabilities and the repeated Miranda warnings he received. There is no question the custodial interrogation here was done in a professional manner and within the guidelines of the Constitution up to the point of contention. In fact, I commend the officers involved for pursuing their task while being respectful of the personal liberties our country affords defendants.

It is that information, in fact, that I believe induced the defendant to ask for privacy. He knew that police were listening. Why else would he ask for privacy? The only conclusion I can make from the officer's response of 'Yeah' is that he would be granted privacy. The officers supported that assumption by leaving the room. The defendant was asking for and received an expectation of privacy. I see no other interpretation of his words. The officers could have, if they wanted to listen, said so. They could have said no. They could have said nothing. But the officer said 'Yeah.' "

On August 19, 2013, the State filed a timely notice of appeal and certificate of substantial impairment.

¶ 20 ANALYSIS

¶ 21 Initially, the defendant argues that this court lacks jurisdiction to hear the State's appeal because, in the defendant's view, the circuit court's order solely impacts the manner in which the State will present its case and does not have the substantive effect of suppressing evidence. In a criminal case, the State may, under Supreme Court Rule 604(a)(1), appeal an order that has the substantive effect of suppressing evidence where the State certifies that the suppression substantially impairs its ability to prosecute the case. Ill. S. Ct. R. 604(a)(1) (eff. Feb. 6, 2013); *In re K.E.F.*, 235 Ill. 2d 530, 537, 922 N.E.2d 322, 326 (2009). In determining whether the order suppresses evidence, we do not defer to the parties or the circuit court. *In re K.E.F.*, 235 Ill. 2d at 537-38, 922 N.E.2d at 326. Instead, we make our own assessment, looking at the substantive effect of the order rather than its form. *Id.* at 538, 922 N.E.2d at 326.

¶ 22 In *People v. Drum*, 194 Ill. 2d 485, 491, 743 N.E.2d 44, 47 (2000), the State sought, unsuccessfully, to admit the prior testimony of two witnesses who indicated that they would not testify at the defendant's trial. The Illinois Supreme Court determined that the trial court's order substantively barred the use of this testimony at the defendant's trial regardless of whether the order was characterized as "excluding" the testimony or "suppressing" it. *Id.* at 491, 743 N.E.2d at 48. The court concluded that evidence is "suppressed" within the meaning of Rule 604(a)(1) when the trial court's order "prevents [the] information from being presented to the fact finder." *Id.* at 492, 743 N.E.2d at 48. The court, in *Drum*, distinguished its decision in *People v. Truitt*, 175 Ill. 2d 148, 676 N.E.2d 665 (1997), *abrogated in part in People v. Miller*, 202 Ill. 2d 328, 781 N.E.2d

300 (2002)), where the trial court's order left an avenue open for admission of the evidence in question, *i.e.*, live testimony, but the State declined to avail itself of that option. *Drum*, 194 Ill. 2d at 492, 743 N.E.2d at 48.

¶ 23 In *Truitt*, the State had sought to prove up its controlled substance case using section 115-15 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-15 (West 1994) (allowing the State, with certain procedural requisites, to establish lab results solely by means of a lab report, without live testimony from the analyst) (later held unconstitutional in *People v. McClanahan*, 191 Ill. 2d 127, 729 N.E.2d 470 (2000))). *Truitt*, 175 Ill. 2d at 149-50, 676 N.E.2d at 666. The trial court in *Truitt* rendered a seemingly prescient ruling, declaring section 115-15 unconstitutional, which meant that the State would have to present live testimony from the person who actually analyzed the substance in question and who prepared the lab report. *Id.* at 150, 676 N.E.2d at 666. The State appealed directly to the Illinois Supreme Court, ultimately resting its claim of jurisdiction on Rule 604(a)(1). *Id.* at 150-51, 676 N.E.2d at 666-67. The court concluded that it had no jurisdiction over the matter because the trial court's order did not have the effect of suppressing evidence. *Id.* at 152-53, 676 N.E.2d at 667. The court noted that the order would not prevent any facts or opinions from being presented to the jury. *Id.* at 152, 676 N.E.2d at 667. The court found that the sole impact of the order would be on the manner in which those facts and opinions were presented. *Id.* The court stated that instead of being able to rely on a piece of paper, the State would have to present testimony from an actual witness. *Id.*

¶ 24 In *In re K.E.F.*, the State sought to admit a recording of the victim's out-of-court

statement, and the trial court indicated it would admit it as long as the State questioned the live witness about the pertinent events. *In re K.E.F.*, 235 Ill. 2d at 539-40, 922 N.E.2d at 327. The State chose not to question the live witness about those events, and the trial court refused to admit the recording. *Id.* The appellate court dismissed the State's appeal for lack of jurisdiction (*id.* at 537, 922 N.E.2d at 326), and the Illinois Supreme Court affirmed (*id.* at 541, 922 N.E.2d at 328). The court held that, as in *Truitt*, "admissibility of the evidence in question was a matter entirely within the State's control." *Id.* at 540, 922 N.E.2d at 328. The court noted that "the prosecution had the option of presenting live testimony to secure admission of the information it sought to introduce, an option that it declined to pursue." *Id.* The court concluded that "the sole impact of the circuit court's order [wa]s on the *means* by which the information [wa]s to be presented" and, thus, it was "not suppression of evidence." (Emphasis in original.) *Id.*

¶ 25 Relying on *Truitt* and *In re K.E.F.*, the defendant in the present case argues that the circuit court's order really did not have the substantive effect of suppressing evidence, but rather it simply impacted the means by which the State could present his statements. He argues that instead of being able to play the recording of his phone calls for the jury, the State will have to present testimony from actual witnesses, his mother and his girlfriend. Similarly, instead of playing his post-interrogation confession during the phone calls, the State will have to play his mid-interrogation confession, which defense counsel did not move to suppress.

¶ 26 We disagree. The circuit court excluded an identifiably discrete piece of evidence. Unlike in *Truitt*, that particular piece of evidence–the audio-video recording of the

defendant's actual admissions made during the phone calls–was not admissible under any other alternative means. There is a fundamental distinction between the evidence the State sought to submit–the dramatic audio-video recorded statements capturing the defendant's exact words, demeanor, and visual manifestations of remorsefulness–and the hearsay repetition of those statements from witnesses friendly to the defendant and undoubtedly motivated to shade their testimony in such a way as to greatly minimize their impact against the defendant. Accordingly, the circuit court's order had the substantive effect of suppressing evidence. The State appealed as it was entitled to under Rule 604(a)(1), and this court has jurisdiction to consider this appeal.

¶ 27 We turn then to the merits of the appeal. The issue on appeal is whether the circuit court properly suppressed the audio-video recording of the statements the defendant made during the phone calls to his mother and his girlfriend. For the reasons that follow, we answer that question in the affirmative.

¶ 28 The fourth amendment to the United States Constitution protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const., amend. IV. This protection applies to the states through the due process clause of the fourteenth amendment. *People v. Wilson*, 228 Ill. 2d 35, 40, 885 N.E.2d 1033, 1037 (2008). Similarly, article I, section 6, of the Illinois Constitution of 1970 provides, in pertinent part, that "[t]he people shall have the right to be secure in their persons, houses, papers[,] and other possessions against unreasonable searches [and] seizures." Ill. Const. 1970, art. I, § 6. In *People v. Caballes*, 221 Ill. 2d 282, 315-16, 851 N.E.2d 26, 46 (2006), the Illinois Supreme Court upheld the limited

lockstep doctrine and construed the search and seizure clause of the Illinois Constitution in lockstep with the federal search and seizure clause.

¶ 29 The starting point for fourth amendment search and seizure analysis is *Katz v. United States*, 389 U.S. 347 (1967). In *Katz*, the United States Supreme Court established the principle that the "Fourth Amendment protects people, not places." *Id.* at 351. Therefore, "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection," "[b]ut what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Id.* Justice Harlan's concurring opinion in *Katz* established the following two-prong requirement for determining when the fourth amendment is triggered: (1) a person must "have exhibited an actual (subjective) expectation of privacy" and (2) the expectation must "be one that society is prepared to recognize as 'reasonable.' " *Katz*, 389 U.S. at 361 (Harlan, J., concurring). This test has since been adopted by the majority of the Court. *California v. Ciraolo*, 476 U.S. 207, 211 (1986).

¶ 30 "The question of whether one has a legitimate expectation of privacy such that he can claim the protection of the fourth amendment is to be answered in light of the totality of the circumstances of the particular case." *People v. Rosenberg*, 213 Ill. 2d 69, 78, 820 N.E.2d 440, 446 (2004). "It is the defendant's burden to establish that he had a legitimate expectation of privacy that was violated by the challenged search." *Id.*

¶ 31 When, as here, a circuit court grants a motion to suppress evidence based upon a violation of the fourth amendment, we review that ruling under the two-part test adopted by the United States Supreme Court in *Ornelas v. United States*, 517 U.S. 690, 699

(1996). *People v. Harris*, 228 Ill. 2d 222, 230, 886 N.E.2d 947, 953 (2008). The circuit court's factual findings are upheld unless they are against the manifest weight of the evidence. *Id.* at 230, 886 N.E.2d at 953-54. The reviewing court then assesses the established facts in relation to the issues presented and may draw its own conclusions in deciding what relief, if any, should be granted. *Id.* at 230, 886 N.E.2d at 954. Accordingly, this court reviews *de novo* the ultimate legal question of whether suppression is warranted. *Id.*

¶ 32 Applying these principles to the facts of this case, we must first determine whether the trial court's finding–that the defendant, by his conduct, demonstrated a subjective expectation of privacy or sought to preserve his phone calls as private–was against the manifest weight of the evidence. After a careful review of the record, we conclude that the trial court's finding in this regard was not against the manifest weight of the evidence. The defendant demonstrated a subjective expectation of privacy by explicitly asking for, and apparently receiving, privacy before placing his calls. The defendant's explicit request for privacy demonstrated that he sought to preserve his phone calls as private. At the end of his third interrogation over two days, he was well aware of where he was, and accordingly, what he was requesting. The detectives' admonitions that the room was audio-video recorded spurred the defendant to explicitly ask for privacy before placing his calls. Detective Kraft's affirmative grant of privacy (by answering in the affirmative when the defendant asked if he could have privacy to make his calls), combined with the fact that the detectives left the room and closed the door behind them so that he could make his calls, led the defendant to believe that his phone calls would be private.

¶ 33 We turn then to the second inquiry under *Katz*, *i.e.*, whether the defendant's expectation of privacy is reasonable. "In pursuing this inquiry, we must keep in mind that '[t]he test of legitimacy is not whether the individual chooses to conceal assertedly "private" activity,' but instead 'whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment.' " *Ciraolo*, 476 U.S. at 212 (quoting *Oliver v. United States*, 466 U.S. 170, 181-83 (1984)).

¶ 34 In *Katz*, the prosecutor was permitted, over the petitioner's objection, to introduce evidence of the petitioner's end of phone conversations overheard by FBI agents who had attached an electronic listening and recording device to the outside of the public phone booth from which he placed his calls. *Katz*, 389 U.S. at 348. The Court held that the government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the phone booth and therefore constituted a "search and seizure" within the meaning of the fourth amendment. *Id.* at 353. In his concurring opinion, Justice Harlan explained that "[t]he critical fact in [that] case [wa]s that '(o)ne who occupies it, (a telephone booth) shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume' that his conversation is not being intercepted." *Katz*, 389 U.S. at 361 (Harlan, J., concurring) (quoting *id.* at 352). Justice Harlan explained that "[t]he point is not that the booth is 'accessible to the public' at other times [citation] but that it is a temporarily private place whose momentary occupants' expectations of freedom from intrusion are recognized as reasonable." *Id.*

¶ 35 Similarly, under the facts of this case, we conclude that the interrogation room was

a temporarily private place and that the defendant's expectation of freedom from intrusion while he made his calls is one that society is prepared to recognize as reasonable. The defendant had sought to exclude the detectives' company and their uninvited ears by explicitly requesting privacy to make his calls. The detectives could have refused the defendant's request for privacy to make his calls, but they did not. Because Detective Kraft answered in the affirmative when the defendant asked if he could have privacy to make his calls and because the detectives left the defendant alone in the room to make his calls, closing the door behind them, the subsequent recording of those calls unjustifiably intruded upon the defendant's privacy and " 'infringe[d] upon *** personal and societal values protected by the Fourth Amendment.' " *Ciraolo*, 476 U.S. at 212 (quoting *Oliver*, 466 U.S. at 181-83).

¶ 36 CONCLUSION

¶ 37 For the foregoing reasons, we affirm the order of the circuit court of St. Clair County granting the defendant's motion to suppress the audio-video recording of the statements he made during the phone conversations with his mother and his girlfriend and remand the case for further proceedings consistent with this decision.

¶ 38 Affirmed and remanded.