IN THE SUPREME COURT OF THE STATE OF NEVADA

KENYON BUCHANAN,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 44801

FILED

JUN 22 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY J. Richards
CHIEF DEPUTY CLERK

ORDER AFFIRMING IN PART AND REMANDING

This is an appeal from a judgment of conviction, pursuant to a jury verdict, of one count of trafficking in a controlled substance. Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

The parties are familiar with the facts, and we do not recount them except as pertinent to our disposition.

On September 7, 2004, Appellant Kenyon Buchanan was arrested and taken into custody as a result of a 911 call relating to domestic violence. He was placed under arrest, and the responding officers found cocaine and marijuana in his pockets. The officers then asked his girlfriend, Kristal Mack, for consent to search their shared apartment, which she gave. Officers had Mack sign a consent-to-search card. Sometime after they began the search, Buchanan was present near the entry of his apartment, but did not object to the search. The search led to the discovery of measuring scales and firearms. The State ultimately charged Buchanan with: (1) trafficking in a controlled substance (cocaine), (2) unlawful possession of a firearm, and (3) altering the serial number on a firearm.

Shortly after his arraignment, Buchanan filed a proper person motion for new counsel. After holding a hearing to consider this motion, the district court denied Buchanan's request.

A two-day jury trial commenced on December 6, 2004. Mack was not called to testify even though she was available. However, the State introduced the consent-to-search card signed by Mack and elicited testimony from one of the officers indicating that Mack had orally consented to the search. The jury returned a guilty verdict as to trafficking in a controlled substance, but acquitted Buchanan of unlawful possession of a firearm and altering the serial number on a firearm.

Buchanan was sentenced to a maximum of three years in prison with the possibility of parole after one year; he received 128 days credit for time served. He was also assessed fees for an administrative assessment, drug analysis, and DNA testing.

On appeal, Buchanan contends that (1) the officers violated NRS 171.137 because they failed to investigate "mitigating circumstances" before they placed Buchanan under arrest, (2) Mack's consent to search was invalid, rendering the officers' search unlawful and warranting reversal of his conviction, (3) the district court abused its discretion when it denied his motion for new counsel, (4) the admission of the signed consent-to-search card and testimony regarding Mack's oral consent violated his right to confrontation under Crawford v. Washington,[1] (5) he was prejudiced by the State's indirect comment during closing argument that he had the ability to call Mack to the stand, (6) the district court used

[1]541 U.S. 36 (2004).

an erroneous jury instruction on the trafficking charge, (7) the district court erroneously allowed the State to introduce evidence of Buchanan's prior marijuana use, and (8) the district court failed to follow established jury selection procedures.

NRS 171.137

Buchanan claims his arrest was illegal pursuant to NRS 171.137. As a preliminary matter, we note that the record is void of a motion to suppress the poisonous fruits of Buchanan's purportedly illegal arrest. We also note that the suppression of evidence was not an issue at trial. Because a suppression motion was not filed and because the legality of Buchanan's arrest was not raised at trial, we may only review the legality of Buchanan's arrest for plain error.[2]

NRS 171.137(1) requires an officer to arrest an individual if the officer has probable cause to believe that the individual committed domestic battery in the preceding twenty-four hours, unless mitigating circumstances exist. The probable cause requirement implies that officers responding to domestic violence calls must conduct some form of preliminary investigation before placing an individual under arrest. A 911 domestic violence call, while pertinent to the investigation, is not sufficient to establish probable cause for an arrest. Officers must observe the condition of the participants and the premises, and at least conduct a brief interview of each participant if the participants are available.

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[2]Allred v. State, 120 Nev. 410, 418, 92 P.3d 1246, 1252 (2004) (holding that failure to raise an issue below normally precludes appellate review, unless there was plain error); NRS 178.602.

Further, if the officers have probable cause to believe that a mutual battery occurred, the officers must attempt to determine the identity of the primary aggressor.[3]

At trial, there was conflicting testimony as to what type of investigation had been conducted by the officers, if any, prior to Buchanan's arrest. However, the arresting officer testified that both Buchanan and Mack were briefly interviewed prior to Buchanan's arrest. Another responding officer testified that he briefly questioned Mack, that the bedroom was a "wreck," and that Mack had noticeable injuries while Buchanan appeared to be uninjured. The record reveals evidence that the officers conducted a sufficient investigation pursuant to NRS 171.137. Based on the officers' interviews and investigation of the scene, we conclude that the officers complied with NRS 171.137 and there was probable cause to believe that Buchanan committed an act of domestic violence.[4] We further conclude that it was not plain error to admit evidence stemming from Buchanan's arrest at trial.[5]

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[3]NRS 171.137(2).

[4]We are aware that there is evidence in the record indicating that Mack was the primary aggressor in this domestic dispute. However, based upon the condition of the apartment, Mack's readily apparent injuries, Buchanan's lack of injuries, and the officers' brief interviews, the officers had probable cause to believe that Buchanan was the primary, if not sole aggressor.

[5]As for the implication that NRS 171.137 unconstitutionally allows officers to enter a home without a warrant, we note that while warrantless searches and seizures are presumptively unreasonable, officers may legally enter a home without a warrant when faced with exigent circumstances. Brigham City, Utah v. Stuart, 126 S. Ct. 1943, 1947

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Validity of Mack's Consent to Search

"This court 'reviews the lawfulness of a search de novo because such a review requires consideration of both factual circumstances and legal issues.'"[6] This court has concluded that "[a] warrantless search is valid if the police acquire consent from a cohabitant who possesses common authority over the property to be searched."[7]

The officers conducted a search of Mack's and Buchanan's shared apartment after Mack gave consent. When consent was sought, Mack was inside the apartment and Buchanan was apparently outside on the front balcony near the doorway. Ostensibly, Buchanan was on the premises when the officers asked Mack for consent to search the apartment. However, the officers did not ask Buchanan for his consent, even though he was physically present. In Georgia v. Randolph,[8] the United States Supreme Court held that officers cannot search a residence in the face of an objection from a present, nonconsenting inhabitant, even

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. . . *continued*

(2006). Given the inherent dangers of domestic violence, a domestic violence call could certainly be considered an exigent circumstance which would allow the officers to enter the home without a warrant and to conduct an investigation limited to domestic violence. Id. The Legislature codified these concerns by enacting NRS 171.137.

[6]Casteel v. State, 122 Nev. 356, 360, 131 P.3d 1, 3 (2006) (quoting McMorran v. State, 118 Nev. 379, 383, 46 P.3d 81, 84 (2002)).

[7]Id.

[8]126 S. Ct. 1515 (2006).

if another inhabitant consents.[9] However, the court drew a "fine line" distinction between a present and objecting inhabitant and a present and non-objecting inhabitant.[10] The court noted that:

> [W]e have to admit that we are drawing a fine line; if a potential defendant with self-interest in objecting is in fact at the door and objects, the co-tenant's permission does not suffice for a reasonable search, whereas the potential objector, nearby but not invited to take part in the threshold colloquy, loses out.
>
> This is the line we draw, and we think the formalism is justified. So long as there is no evidence that the police have removed the potentially objecting tenant from the entrance for the sake of avoiding a possible objection, there is practical value in the simple clarity of complementary rules, one recognizing the co-tenant's permission when there is no fellow occupant on hand, the other according dispositive weight to the fellow occupant's contrary indication when he expresses it.[11]

We recently embraced this distinction in Casteel v. State, where we held that the search of the defendant's apartment and personal belongings was valid because the defendant failed to protest the search and failed to deny his co-habitant's authority to consent to the search.[12] Similar to Casteel, in this case, Buchanan was present but failed to object.

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[9]Id. at 1526.

[10]Id. at 1527.

[11]Id.

[12]122 Nev. at 361, 131 P.3d at 4.

Under Randolph, the officers had no duty to invite Buchanan "to take part in the threshold colloquy" once Mack consented. In other words, the officers had no duty to afford Buchanan an opportunity to object in the face of Mack's consent, so long as the officers did not intentionally remove Buchanan from the apartment in an attempt to avoid a possible objection. There is no evidence that the officers did so here. Thus, in the face of a co-habitant's consent to search, it is incumbent solely upon another present, nonconsenting co-habitant to object to the search.[13] Buchanan failed to object to the search in the face of Mack's consent.

Therefore, we conclude that Mack's consent to search was valid authority for a search of the premises.

Admission of testimony regarding oral consent to search and the admission of the written consent to search card

At trial, the officers testified that Mack gave them oral consent to search the apartment. Further, the district court allowed the State to admit a written consent to search card as a trial exhibit. Notably, defense counsel did not object to this evidence at trial. Failure to object to an issue at trial will generally preclude appellate review.[14] Even assuming, arguendo, that the officers' testimony regarding Mack's oral consent to search implicated the concerns of the Confrontation Clause set

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[13]See Randolph, 126 S. Ct. at 1527; Casteel, 122 Nev. at 361, 131 P.3d at 4.

[14]Allred, 120 Nev. at 418, 92 P.3d at 1252.

forth in Crawford v. Washington,[15] we conclude that Mack's oral consent to search was nontestimonial under Crawford,[16] and the officers' testimony regarding Mack's consent to search was not barred by the Confrontation Clause.

Additionally, we conclude that the written consent to search card was also nontestimonial under Crawford. Even if the consent to search card were testimonial, this court reviews certain Confrontation Clause violations for harmless error "where it is clear beyond a reasonable doubt that the guilty verdict actually rendered in the case was 'surely unattributable to the error.'"[17] Here, Buchanan was clearly in possession of a substantial amount of narcotics. It is undisputed that the officers found the narcotics on his person when he was taken into custody. Buchanan testified that the narcotics were not his because they belonged to Mack. This raised an issue of credibility, and despite Buchanan's testimony the jury determined that the narcotics belonged to him. The admission of the testimony regarding Mack's oral consent to search and

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[15]541 U.S. 36, 51-52 (2004) (out-of-court testimony is not admissible under the Confrontation Clause, unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant).

[16]Id. at 51-52 (testimonial statements include extrajudicial statements such as affidavits, depositions, prior testimony, or confessions).

[17]Flores v. State, 121 Nev. 706, 721, 120 P.3d 1170, 1180 (2005) (quoting Sullivan v. Louisiana, 508 U.S. 275, 279 (1993)). We further conclude that the consent to search evidence was not inadmissible hearsay because they were not offered to prove the truth of the matter asserted. See NRS 51.035. Harmless error analysis also applies to the erroneous admission of hearsay statements. See Franco v. State, 109 Nev. 1229, 1237, 866 P.2d 247, 252 (1993).

the consent to search card did not go to Buchanan's guilt or innocence, but was merely admitted to show that the officers had authorization to search Buchanan's home. In light of the overwhelming evidence presented at trial, we conclude that it is clear beyond a reasonable doubt that the guilty verdict was unattributable to the admission of the consent to search evidence.

Remaining issues

As to the remaining issues on appeal, we conclude that they are without merit[18] or that the errors claimed were harmless beyond a reasonable doubt.[19]

However, we remand this appeal for the limited purpose of correcting the judgment of conviction. Buchanan pleaded not guilty to all charges. He was convicted of trafficking in a controlled substance, based upon a jury verdict. The judgment of conviction erroneously states that Buchanan pleaded guilty to trafficking in a controlled substance. Accordingly, we

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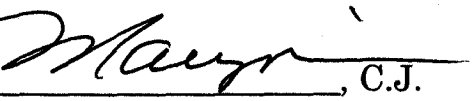
[18]In reaching our decision, we have reviewed Buchanan's supplemental authorities and supplemental appendix.

[19]See Flores, 121 Nev. at 721, 120 P.3d at 1180.

ORDER the judgment of the district court AFFIRMED IN PART AND REMAND this matter to the district court for proceedings consistent with this order.



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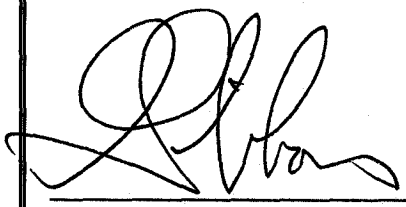

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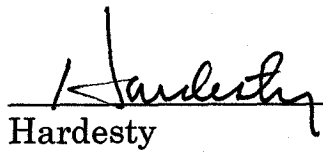

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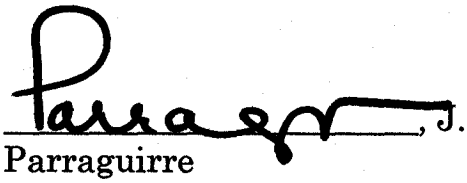

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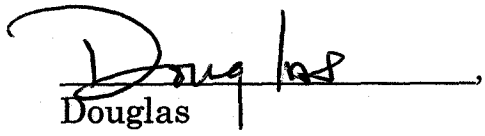

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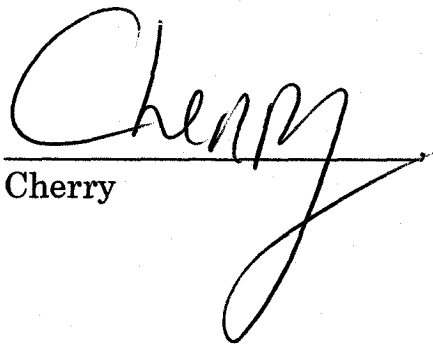

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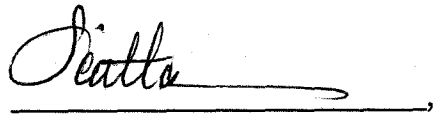

, J.
Saitta

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Eighth District Court Clerk