IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JOSEPH FLEMING-EDWARDS, A/K/A JOSEPH UYLSSES FLEMING,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 84100-COA

ORDER OF REVERSAL AND REMAND

Joseph Fleming-Edwards (Fleming) appeals from a judgment of conviction, pursuant to a jury verdict, of ownership or possession of firearm by prohibited person. Eighth Judicial District Court, Clark County; Christy L. Craig, Judge.

On December 3, 2020, at around 4:45 a.m., LVMPD Officer Quinn Lamboo noticed a white Dodge Charger approaching from the opposite direction with its high beams illuminated.[1] Officer Lamboo followed the Charger, paced it going 60 miles per hour in a 45 miles per hour zone, and initiated a traffic stop.[2] According to Officer Lamboo, the Charger took a "prolonged amount of time to stop." Once the Charger had pulled over, Officer Lamboo called for backup.

Officer Lamboo contacted the driver, identified as Fleming, and requested Fleming's license, insurance, and registration. Fleming provided the documents, which Officer Lamboo took back to his vehicle to conduct a records check.

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[1]We recount facts only as necessary for our disposition.

[2]Fleming does not dispute the validity of the initial traffic stop.

The records check disclosed arrests (but not convictions) for prior violent offenses as well as an arrest for murder of a police officer with the use of a deadly weapon. While Officer Lamboo was still in his patrol vehicle, backup Officer Jaime Gallegos arrived. Officers Lamboo and Gallegos returned to Fleming's car together and found him on the phone with his girlfriend. Officer Lamboo asked Fleming to exit the vehicle to conduct a field interview. Fleming initially declined, but after a conversation with Officer Lamboo lasting approximately one minute, he exited the vehicle when Officer Lamboo promised he could remain on the phone with his girlfriend.

Officer Lamboo escorted Fleming to his police cruiser and patted him down for weapons. No weapons were found. While Officer Lamboo was searching Fleming's person, Officer Gallegos began to search Fleming's vehicle. Officer Gallegos opened the driver's side front door of the Charger and observed an extended magazine for a handgun in the driver's door panel pocket. Officer Gallegos then signaled to Officer Lamboo to place Fleming in custody and continued to search the car.

Officer Gallegos eventually located a 1911 .45 caliber handgun tucked behind the passenger seat in the map pocket. After reading Fleming his *Miranda* rights, Officer Lamboo asked Fleming if his DNA would be on the gun, to which Fleming answered "yes." After finding the firearm, the vehicle was then frozen pending a search warrant.

The State charged Fleming with one count of ownership or possession of firearm by a prohibited person pursuant to NRS 202.360. Prior to trial, Fleming filed two motions relevant to this appeal, the first being a motion to suppress fruits of illegal search. In this motion, Fleming argued that the State unlawfully extended his traffic stop by asking him to

exit the vehicle without reasonable suspicion to justify that request. The State responded that officers were permitted to remove Fleming from the vehicle and then "frisk" the vehicle for weapons. The district court found police officers did not unlawfully remove Fleming from his vehicle or impermissibly extend the duration of the traffic stop by asking him to exit his vehicle, and that evidence of the firearm did not need to be suppressed. The court's order denying Fleming's motion contained a single sentence conclusion.[3]

Thereafter, Fleming filed a second motion, this time a motion to suppress fruits of illegal vehicle frisk. In this motion, Fleming argued the police lacked reasonable suspicion that Fleming was "engaged in any criminal conduct" or "was armed and dangerous at the time of the stop," and therefore police could not lawfully search Fleming's vehicle without a warrant. The State responded that once Fleming exited the vehicle, officers could conduct a limited protective sweep of the areas in which a weapon may be hidden for officer safety. The district court summarily denied this motion via minute order without a hearing, findings of fact, or legal conclusions.

The matter proceeded to a jury trial. At trial, Fleming proposed an instruction stating that "actual knowledge" was a material element of possession. The district court denied the requested instruction, finding that NRS 202.360 (governing firearm possession) did not contain the word "knowledge." Fleming was convicted and sentenced to 14-40 months in the

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[3]When the district court made its oral ruling (and as reflected in the minute order), the court stated that "the defense failed to raise whether the frisk of the car was lawful; therefore, it was not going to address that issue."

Nevada Department of Corrections with 248 days credit for time served. Fleming now appeals.

On appeal, Fleming argues that the district court erred in: (1) failing to address whether police impermissibly prolonged Fleming's traffic stop; (2) concluding that Officer Gallegos conducted a valid "vehicle frisk;" and (3) declining to provide Fleming's proposed jury instruction.

Although we disagree with Fleming in how the district court analyzed whether police impermissibly prolonged Fleming's traffic stop in connection with his first suppression motion, we conclude that the district court abused its discretion when it summarily denied Fleming's second suppression motion that challenged the "vehicle frisk" without holding any hearing, without stating its reasoning, and without making any findings of fact. In addition, we conclude that the district court erred by refusing Fleming's proposed jury instruction, and the error was not harmless beyond a reasonable doubt.

The district court correctly found the traffic stop was not impermissibly prolonged

Fleming argues on appeal that Officer Lamboo's request for a field interview was a separate investigation unrelated to the original mission of the traffic stop. Thus, asking Fleming to exit the vehicle for the purpose of conducting a field interview impermissibly prolonged the traffic stop. In response, the State contends that officers could lawfully ask Fleming to exit the vehicle under *Pennsylvania v. Mimms*, 434 U.S. 106 (1977), and therefore asking him to exit the vehicle did not impermissibly prolong the stop.

We agree with the State that *Mimms* allowed Officer Lamboo to request Fleming exit his vehicle. Without deciding whether any field interview would have been related to the original traffic investigation, we

conclude the traffic stop was not impermissibly extended because no field interview took place, and therefore suppression is not required on this ground.[4]

Officers are allowed to ask a driver to exit the vehicle during a traffic stop without offending the Fourth Amendment. *Mimms*, 434 U.S. at 111. However, under *Rodriguez v. United States*, "a police stop exceeding the time needed to handle the matter for which the stop was made violates the Constitution's shield against unreasonable seizures." 575 U.S. 348, 350 (2015). Such furthered detention which "detours from that mission" of the original traffic stop may become unlawful. *Id.* at 356.

In *Rodriguez*, the United States Supreme Court addressed whether police could routinely extend an otherwise-completed traffic stop, absent reasonable suspicion, to conduct a K-9 drug sniff around a suspect's vehicle. The Court held that an on-scene investigation into other crimes (*e.g.*, the drug sniff) detoured from the mission of the traffic stop and could not be justified as part of the traffic stop unless that search was independently supported by reasonable suspicion of criminal activity. *Id.* at 355.

In this case, Officer Lamboo admitted that he asked Fleming to exit the vehicle in order to conduct a "field interview." Fleming contends that because a field interview was unrelated to the initial traffic stop, Officer Lamboo's *request* that he exit the vehicle for the purpose of conducting a field interview was a "detour" that impermissibly extended the duration of the stop under *Rodriguez*.

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[4]Because a field interview never took place, we cannot determine whether the substance of the intended field interview would have been part of the mission of the original traffic stop.

Although Fleming argues the stop was impermissibly extended from the moment Fleming was asked to exit his vehicle because the *purpose* of asking him to exit was to conduct a separate field interview, as the Supreme Court explained in *Rodriguez,* "[t]he reasonableness of a seizure . . . *depends on what the police in fact do.*" 575 U.S. at 357 (emphasis added) (citing *Knowles v. Iowa,* 525 U.S. 113, 115-17 (1998)). Regardless of what Officer Lamboo intended to do, because he did not in fact conduct a field interview, there is no basis to conclude that the police impermissibly prolonged Fleming's traffic stop under *Rodriguez.* Further, Officer Lamboo's request for Fleming to exit his vehicle is specifically authorized by *Mimms.* Therefore, as a matter of law, Fleming has failed to demonstrate he is entitled to relief on this claim.

The district court erred in failing to hold an evidentiary hearing or make factual findings on Fleming's motion to suppress the fruits of the vehicle frisk

Fleming next argues the district court erred in finding that Officer Gallegos conducted a valid "vehicle frisk" because Officer Gallegos lacked the requisite reasonable suspicion to conduct a warrantless search. Fleming also contends, albeit in a footnote, that the district court failed to make adequate factual findings when it summarily denied Fleming's motion without a hearing.[5] The State responds that Officer Gallegos did have reasonable suspicion under the totality of circumstances to check for weapons, and therefore the "vehicle frisk" was valid. The State did not specifically address the district court's lack of factual findings.

We conclude that the district court improperly denied Fleming's motion to suppress without conducting an evidentiary hearing and without

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[5]We note the order at issue was signed by District Judge Michelle Leavitt.

stating its reasoning or making any findings of fact. *See Somee v. State*, 124 Nev. 434, 441-42, 187 P.3d 152, 158 (2008).

"Suppression issues present mixed questions of law and fact. This court reviews findings of fact for clear error, but the legal consequences of those facts involve questions of law that we review de novo." *State v. Beckman*, 129 Nev. 481, 485-86, 305 P.3d 912, 916 (2013) (internal citations omitted).

"The Fourth Amendment does not 'require . . . police officers [to] take unnecessary risks in the performance of their duties.'" *United States v. Robinson*, 846 F.3d 694, 696 (4th Cir. 2017) (quoting *Terry v. Ohio*, 392 U.S. 1, 23 (1968)). Therefore, as recognized in *Michigan v. Long*, during a lawful traffic stop when a driver has been ordered to exit a vehicle, law enforcement may conduct a limited protective sweep for safety purposes in "those areas in which a weapon may be placed or hidden." 463 U.S. 1032, 1049 (1983). In *Long*, the Supreme Court explained that this type of "vehicle frisk" is permissible "if the police officer possesses a reasonable belief based on 'specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant' the officers in believing that the suspect is dangerous and the suspect may gain immediate control of weapons." 463 U.S. at 1049-50 (quoting *Terry*, 392 U.S. at 21). "[T]he issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." *Id.* (quoting *Terry*, 392 U.S. at 27).

In this case, the district court denied Fleming's second suppression motion via minute order, without conducting any hearing, and without any factual or legal analysis to support its denial. Similarly, in *Somee v. State*, the district court denied a suppression motion without

conducting an evidentiary hearing and without making any findings of fact or conclusions of law. 124 Nev. at 443, 187 P.3d at 158-59. In *Somee*, the defendant's suppression motion was based solely on evidence presented to the grand jury.[6] Because "the district court failed to conduct an evidentiary hearing, make factual findings regarding the officers' search of [the defendant], or state a legal standard for making its determination," the Nevada Supreme Court concluded that the record was inadequate for it to review the district court's decision. 124 Nev. at 443, 187 P.3d at 158-59. As the court explained, "[w]ithout an adequate record, [an appellate court] cannot review a district court's decision to admit or suppress evidence." *Id.* at 441-42, 187 P.3d at 158.

Therefore, given the lack of factual findings here by the district court, we reverse the judgment of conviction and remand for the district court to hold an evidentiary hearing. Following the evidentiary hearing, the district court will need to make specific findings on whether there are "specific and articulable facts when taken together with the rational inferences from those facts" which create a reasonable belief that "the suspect is dangerous and the suspect may gain immediate control of weapons." *Long*, 463 U.S. at 1049.

The district court erred in refusing Fleming's proposed jury instruction, and the error was not harmless beyond a reasonable doubt

Finally, Fleming contends that the district court erred when it denied his proposed *Crawford*[7] jury instruction that emphasized the

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[6]Similar to *Somee*, the only evidence considered by the district court in this case pertaining to suppression was that adduced at the preliminary hearing.

[7]*Crawford v. State*, 121 Nev. 744, 753, 121 P.3d 582, 588 (2005).

element of "actual knowledge" in order to find Fleming guilty of ownership or possession of firearm by a prohibited person. Fleming's proposed jury instruction stated:

> An essential element of the crime of PROHIBITED PERSON IN POSSESSION OF A FIREARM is that the defendant had actual knowledge of the firearm's presence. If the state has not proven beyond a reasonable doubt that the defendant had actual knowledge of the firearm's presence you must find him not guilty.

The State objected, and the district court refused to give the instruction because the statute criminalizing ownership or possession of a firearm by certain prohibited persons, NRS 202.360, does not contain the words "knowingly" or "knowledge." Therefore, the district court concluded that knowledge cannot be considered an element of the crime.

Because district courts have "broad discretion" in settling jury instructions, this court reviews a district court's decision regarding jury instructions for abuse of discretion or judicial error. *Crawford*, 121 Nev. at 748, 121 P.3d at 585. "An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason." *Id.* (quoting *Jackson v. State*, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001)). However, this court reviews the accuracy of a proposed jury instruction de novo. *Nay v. State*, 123 Nev. 326, 330, 167 P.3d 430, 433 (2007). And we "evaluate[ ] appellate claims concerning jury instructions using a harmless error standard of review." *Honea v. State*, 136 Nev. 285, 289, 466 P.3d 522, 526 (2020) (quoting *Mathews v. State*, 134 Nev. 512, 517, 424 P.3d 634, 639 (2018)).

Pursuant to *Crawford*, "specific jury instructions that remind jurors that they may not convict the defendant if proof of a particular element is lacking should be given upon request." 121 Nev. at 753, 121 P.3d

at 588. A separate "positive instruction as to the elements of the crime does not justify refusing a properly worded negatively phrased 'position' or 'theory' instruction." *Id.*

NRS 202.360 provides that certain enumerated classes of persons "shall not own or have in his or her possession or under his or her custody or control any firearm." The State contends that Fleming's proposed instruction was not an accurate statement of the law because NRS 202.360 does not contain the words, "actual knowledge," "knowledge," or "knowingly," and thus "knowledge" is not a statutory element of the crime of ownership or possession of a firearm by a prohibited person.

However, the word "possession" does appear in the statute, and in *Palmer v. State*, 112 Nev. 763, 768, 920 P.2d 112, 115 (1996), the Nevada Supreme Court recognized that the legal definition of "possession" requires knowledge, regardless of whether possession is actual or constructive:

> "The law, in general, recognizes two kinds of possession: actual possession and constructive possession. A person who *knowingly* has direct physical control over a thing, at a given time, is then in actual possession of it. A person, who, although not in actual possession, *knowingly has both the power and the intention* at a given time to exercise dominion or control over a thing, either directly or through another person or persons, is then in constructive possession of it."

Id. at 768-69, 920 P.2d at 115 (emphasis added) (quoting *Black's Law Dictionary* 1163 (6th ed. 1990)).

Additionally, in *Shoemaker v. State*, this court applied *Palmer* to crimes arising under NRS 202.360 and explained that "[t]o possess a firearm, a person must 'knowingly' do so." No. 80375-COA, 2020 WL 6204322, *5 (Nev. Ct. App. Oct. 21, 2020) (Order of Affirmance) (quoting *Palmer*, 112 Nev. at 768, 920 P.2d at 115). Because "possession" is an

element of the charged crime and because possession requires actual knowledge, Fleming's proposed instruction was an accurate statement of the law.

Next, the State contends that Fleming's proposed instruction was unnecessary because Jury Instruction 10 already contained *Palmer*'s definition of possession. However, the district court could not have properly refused Fleming's instruction on the basis that it was already covered by another positively-worded elements instruction. *See Crawford*, 121 Nev. at 753, 121 P.3d at 588 (stating that a "positive instruction as to the elements of the crime does not justify refusing a properly worded negatively phrased 'position' or 'theory' instruction").

Finally, the State contends that Fleming's proposed instruction "improperly highlighted the non-existent element [of knowledge] as 'essential.'" The State argues that the instruction was "misleading" because it "indicates that 'knowledge is the most important element wherein [sic] reality every element is essential as needs to be proven to obtain a conviction." But the very purpose of a *Crawford* instruction is to "remind jurors that they may not convict the defendant if proof of a particular element is lacking." 121 Nev. at 753, 121 P.3d at 588. In light of this purpose, Fleming's proposed instruction appropriately highlighted the knowledge element of the charged crime. Therefore, the district court abused its discretion when it denied Fleming's proposed *Crawford* instruction.

"This court evaluates appellate claims concerning jury instructions using a harmless error standard of review." *Mathews*, 134 Nev. at 517, 424 P.3d at 639 (internal quotation marks omitted). We can only find the district court's error in refusing Fleming's proposed jury instruction

to be harmless if "we are convinced beyond a reasonable doubt that the jury's verdict was not attributable to the error and that the error was harmless under the facts and circumstances of this case." *Honea*, 136 Nev. at 289-90, 466 P.3d at 526 (quoting *Crawford*, 121 Nev. at 756, 121 P.3d at 590). Furthermore, "'[i]f a defendant has contested the omitted element [of a criminal offense] and there is sufficient evidence to support a contrary finding,' the instructional error is not harmless." *Id.* (second alteration in original) (quoting *Mathews*, 134 Nev. at 517, 424 P.3d at 639).

In its answering brief, the State makes two limited arguments as to why the district court's instructional error was harmless: (1) "Jury Instruction 10 defined actual and constructive possession," and (2) "Appellant admitted his DNA was on the firearm, clearly indicating he was in possession of the firearm." Although the jury received an instruction on actual and constructive possession, that instruction did not clearly inform jurors that the State bore the burden of proving, beyond a reasonable doubt, that Fleming knew the firearm was present in the vehicle, such that he actually or constructively possessed it.

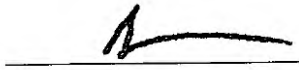
Additionally, while Fleming admitted his DNA would be on the gun, this statement does not establish that Fleming possessed the gun on the night of his arrest, as opposed to some prior day. Fleming's girlfriend, Williestein Jackson, testified that she lawfully purchased the firearm and owned it for "a few months" before Fleming's arrest.

Crucially, Fleming contested the omitted element of knowledge as the *pivotal* issue in the case. After the district court denied Fleming's proposed *Crawford* instruction, the court expressly allowed Fleming to argue the knowledge requirement if he chose to do so. Throughout his closing argument, Fleming repeatedly emphasized the lack of actual

knowledge as the core issue in this case. Based on these facts, we cannot conclude the error in denying the requested jury instruction was harmless beyond a reasonable doubt. *Honea*, 136 Nev. at 289-90, 466 P.3d at 526. Accordingly, we

ORDER the judgment of conviction REVERSED AND REMAND this matter to the district court for a new trial and proceedings consistent with this order.

_____, C.J.
Gibbons



_____, J.
Bulla

_____, J.
Westbrook

cc: Hon. Christy L. Craig, District Judge
Clark County Public Defender
Attorney General/Carson City
Clark County District Attorney
Eighth District Court Clerk