

IN THE SUPREME COURT OF THE STATE OF NEVADA

GREGORY HARRIS,  
Appellant,  
vs.  
THE STATE OF NEVADA,  
Respondent.

No. 40344

FILED

MAY 05 2004

ORDER OF AFFIRMANCE

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

This is an appeal from a judgment of conviction pursuant to a jury verdict. The jury found appellant Gregory Harris guilty of home invasion, burglary, conspiracy to commit robbery, robbery, trafficking in a controlled substance, and living from the earnings of a prostitute. Because Harris had four prior felony convictions in California, the district court adjudicated Harris as a habitual criminal and imposed four life sentences with the possibility of parole and two life sentences without the possibility of parole.

On January 19, 2002, Gary Arrington traveled to Las Vegas for a vacation. Arrington checked into the Somerset Motel that afternoon. At approximately 7 p.m., he solicited the services of a prostitute. Arrington paid Julie Heger fifty dollars for sex. After he paid her, Heger got up and quickly left. Arrington noticed his drawer was open and discovered \$1,100.00 was missing.

Arrington quickly put on his pants and ran after Heger. He grabbed her purse, attempting to get his money back. After Arrington took his money back, he returned Heger's bag. Arrington testified that the majority of his money was in fifty-dollar denominations and about \$180.00 was in twenty-dollar denominations. Arrington went to his room and put the money into his front pocket. Then, a man kicked in Arrington's door.

Arrington testified that Harris was the man who kicked down the door and attacked him. Harris grabbed Arrington's neck, threw him to the ground, punched, and kicked him. While Harris was beating Arrington, Heger came into the room and told Harris to take Arrington's wallet. Heger took Arrington's money, cell phone, keys, and leather jacket, while Harris held him down. Both Heger and Harris then ran out of Arrington's room.

Arrington went to the front desk and called the police. The police arrived; and while taking Arrington's statement, the police noticed two women walking in the parking lot. The police recognized the description of Heger's bag and stopped them. The women were Julie Heger and Meta Snyder. Officers Crane and Baker then interviewed Heger. Heger signed a consent to search card for Villa Roma Motel Room 136. Officers Baker and Crane testified that Room 136 was registered to Heger.

Officers Baker, Crane, Gagnon, Herbert, and Lopez then went to search Room 136. As a result of their interviews with Heger, the police suspected firearms might be present in the room. Officer Baker testified that when the police prepared to enter Room 136, he heard the sound of a dropping toilet lid. In Baker's experience, this indicated that someone placed drugs in the toilet. The police forced entry into Room 136 by kicking in the door.

Upon entry, Officers Crane and Herbert apprehended Harris in front of the bathroom. Officer Crane impounded Harris' shoes, \$990.00 in cash, of which \$850.00 was in fifty-dollar denominations. Officer Crane also impounded a Bersa handgun that he found in a clothes hamper two or three feet from Harris. The police also discovered seventy grams of an off-

white substance, later identified as rock cocaine. The police found the cocaine hidden in the water tank of the toilet. Additionally, the police collected a cell phone, a black leather jacket, and some keys from the room. Officer Crane later returned the money, cell phone, leather jacket, and keys to Arrington after Arrington identified them.

On February, 15, 2002, a grand jury indicted Harris with home invasion, burglary, conspiracy to commit robbery, robbery, trafficking in controlled substance, and living from the earnings of a prostitute. After a four-day trial, the jury found Harris guilty on all six counts. On September 6, 2002, the district court sentenced Harris to serve four life sentences with the possibility of parole and two life sentences without the possibility of parole. Harris is to serve three of the life sentences concurrently and two consecutively. At sentencing, the district court adjudicated Harris as a habitual criminal because he had four prior felony convictions in California.

On October 23, 2002, the district court entered the judgment of conviction. The district court did not include language in the judgment of conviction stating Harris was a habitual criminal. Therefore, on March 14, 2002, the district court entered an amended judgment of conviction to reflect Harris' status as a habitual criminal.

Harris appeals, contending that the district court committed eight errors: (1) the district court allowed evidence of the firearm at trial; (2) the district court admitted shoe print testimony into evidence; (3) the district court admitted Meta Snyder's hearsay testimony; (4) the district court permitted use of Snyder's testimony when the State did not disclose Snyder as a witness prior to trial; (5) the district court admitted evidence obtained from Room 136 because the search was illegal; (6) the district

court upheld the verdict when the State failed to provide sufficient evidence for a reasonable jury to find Harris guilty of all charges; (7) the district court amended Harris' judgment of conviction, outside his presence, to reflect Harris' adjudication as a habitual criminal, in violation of NRS 178.388; and (8) the district court permitted a fundamental miscarriage of justice at trial.

Admission of firearm evidence

Admission of evidence is within the district court's sound discretion, and we will respect the court's decision unless it is manifestly wrong.<sup>1</sup> The purpose of a Petrocelli hearing is to determine whether a collateral offense or prior "bad acts" are admissible under NRS 48.045(2).<sup>2</sup> Prior to trial, Harris orally moved the court to preclude the State from admitting any evidence of a firearm. Harris based this motion on the fact that he was not charged with any firearm offense and that it was prejudicial. The State opposed the motion and argued that the firearm evidence was admissible to corroborate evidence. The district court denied the motion because there was no "bad act" that evidence of the firearm would bring to the jury and the firearm evidence was more probative than prejudicial.

Harris contends that the district court erred by admitting evidence of a firearm and failing to hold a Petrocelli hearing. We disagree.

The district court found that the firearm evidence was neither a "bad act" nor a collateral offense. Because the State did not present

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<sup>1</sup>Petrocelli v. State, 101 Nev. 46, 52, 692 P.2d 503, 508 (1985).

<sup>2</sup>Id. at 51, 692 P.2d at 507.

evidence of any of Harris' prior "bad acts" or collateral offenses during trial, we hold that a Petrocelli hearing would have been unnecessary. The firearm evidence may not have been relevant for the reasons suggested by the State. However, if there was an error in admitting the firearm into evidence, it was harmless. The firearm evidence was not prejudicial.

Shoe print evidence

Harris argues that the district court erred by admitting evidence of a shoe print without scientific corroboration. We disagree.

The district court granted Harris' motion in limine to exclude any reference that the footprint lifted from Mr. Arlington's door matched Harris' shoes without expert testimony. The prosecutor asked Officer Crane why he impounded Harris' shoes. Crane said, "Because the footprint matched the footprint that was on the door that was kicked in." Harris' counsel promptly objected. The court sustained the objection, ordered the answer stricken, and directed the jury to disregard it.

We have held that "[t]here is a presumption that jurors follow jury instructions."<sup>3</sup> In the instant case, the district court specifically instructed the jury to disregard Crane's comment that the footprint matched the defendant's shoes. Because the court struck Crane's answer from the record, the court did not admit the "shoe evidence." Also, since we presume the jury follows the district court's instructions, the jury did not consider it during deliberations. Therefore, Harris' argument is without merit.

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<sup>3</sup>Lisle v. State, 113 Nev. 540, 558, 937 P.2d 473, 484 (1997).

### Hearsay statements

Harris argues that admitting Snyder's hearsay statements during trial constitutes reversible error. Harris contends that the State should have offered Heger as a witness as opposed to Snyder to admit the statement. We disagree.

The prosecutor questioned Snyder about her personal knowledge of the events that occurred on the day of the crimes. Harris, Snyder, and Heger were together in Heger's room that day. Snyder testified that she saw cocaine and a gun on the bed in Heger's room at the Villa Roma Motel. Snyder also testified that Harris had all the money and put some into his pocket and some into a bag, along with a gun. Snyder made these statements during direct and cross-examination and said that Heger told her "they robbed a trick."<sup>4</sup> On cross-examination by counsel for Harris, Snyder again testified that Heger told her that Heger had robbed a trick.

Failure to object to an issue below will generally preclude appellate review of that issue.<sup>5</sup> We have discretion to address issues where defense counsel did not object if plain error exists.<sup>6</sup> Plain error is that "which affects the defendant's substantial rights, if the error either: '(1) had a prejudicial impact on the verdict when viewed in context of the

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<sup>4</sup>A trick refers to a person who engages in the services of a prostitute.

<sup>5</sup>Leonard v. State, 117 Nev. 53, 63, 17 P.3d 397, 403 (2001).

<sup>6</sup>Id. at 63, 17 P.3d at 403-04.

trial as a whole, or (2) seriously affects the integrity or public reputation of the judicial proceedings."<sup>7</sup>

The evidence suggested that Heger and Harris were co-conspirators because they worked together to steal from Arrington. Heger's statements were made to Snyder while Harris, Heger, and Snyder were in the motel room together and also immediately after Arrington's assault and robbery. A statement of a co-conspirator is not hearsay if it is made during the course and in furtherance of the conspiracy.<sup>8</sup> In addition, Heger's statement is against her interest because it subjects her to criminal liability.<sup>9</sup> Finally, Heger's statements were made in Harris' presence and his failure to correct her statements may be taken as an adoption of her statement. Therefore, Heger's statements were properly admitted as non-hearsay and do not constitute error, let alone plain error.

#### Disclosure of Meta Snyder

Harris contends that the State failed to identify Snyder as a witness for trial and should have presented Heger as a witness instead. Harris also argues that the State violated his Sixth Amendment confrontation rights because Heger did not testify. We hold that these arguments are wholly without merit.

The facts indicate that the State did not surprise Harris when it presented Snyder as a witness. Snyder was listed as a witness to the indictment. She did not testify at the grand jury proceedings. At trial,

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<sup>7</sup>Rowland v. State, 118 Nev. 31, 38, 39 P.3d 114, 118 (2002) (quoting Libby v. State, 109 Nev. 905, 911, 859 P.2d 1050, 1054 (1993)).

<sup>8</sup>NRS 51.035(3)(e).

<sup>9</sup>NRS 51.345(1)(b).

Harris' counsel questioned Snyder about her written statement to the police. Because counsel knew about Snyder's written statement and cross-examined her about it, we hold that counsel was not surprised that Snyder testified as a witness. Therefore, we hold that the State properly disclosed Snyder as a witness.

#### Violation of Confrontation Clause

The Sixth Amendment's confrontation clause provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."<sup>10</sup> In the instant case, Heger did not testify against Harris and the State did not violate Harris' Sixth Amendment right of confrontation.

#### Consent to search

Harris argues that the district court should have suppressed all the evidence obtained from the search of Villa Roma Motel Room 136, sua sponte. Harris contends that he was not a resident of Room 136 and did not give his consent to a search. The motel registered Room 136 to Heger, and she consented to a search. Because Harris was not a resident of Room 136, he lacks standing to bring this claim.<sup>11</sup>

Even if Harris had standing, we have held that a search is valid if a "cohabitant consents to the search and the cohabitant 'possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected.'"<sup>12</sup> In the instant case, Officer Crane

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<sup>10</sup>U.S. Const. amend. VI.

<sup>11</sup>Rakas v. Illinois, 439 U.S. 128, 137 (1978).

<sup>12</sup>Johnson v. State, 118 Nev. 787, 794, 59 P.3d 450, 455 (2002) (quoting United States v. Matlock, 415 U.S. 164, 171 (1974)).



testified that the motel Room 136 was registered to Heger. He also testified that Heger consented to the search and signed a consent-to-search card. We hold that the police properly searched Heger's room because Heger consented to the search and the room was in her name.

#### Sufficient evidence

Harris contends that there was no evidence to support the jury's verdict. Specifically, Harris argues that insufficient evidence existed to find him guilty for trafficking, conspiracy to commit robbery, and living off the earnings of a prostitute.

Determining the weight and credibility of testimony is a question for the jury.<sup>13</sup> The jury's verdict will not be disturbed on appeal when substantial evidence supports the verdict.<sup>14</sup> The question for the reviewing court is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."<sup>15</sup> "This court is not a fact-finding tribunal; that function is best performed by the district court."<sup>16</sup>

#### Trafficking

Harris contends that there was insufficient evidence to convict him of drug trafficking. We disagree.

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<sup>13</sup>Mason v. State, 118 Nev. 554, 559, 51 P.3d 521, 524 (2002).

<sup>14</sup>Id.

<sup>15</sup>Id. (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)).

<sup>16</sup>Peck v. State, 116 Nev. 840, 846, 7 P.3d 470, 474 (2000) (quoting Zugel v. Miller, 99 Nev. 100, 101, 659 P.2d 296, 297 (1983)).

In the instant case, Snyder testified that she purchased cocaine from Harris. Snyder also testified that cocaine was on the bed next to Harris. Officer Baker testified that when the police prepared to enter the room, he heard the sound of a toilet lid dropping. In Baker's experience, this indicated that someone placed drugs in the toilet. Upon entry, the police took Harris into custody in front of the bathroom and impounded over seventy grams of rock cocaine from the room. The amount of cocaine indicates trafficking.

The jury determined the credibility of Snyder and the other witnesses. We hold that sufficient evidence existed for a rational jury to convict Harris of trafficking.

Conspiracy to commit robbery

Harris argues that there was insufficient evidence for a jury to convict him of conspiracy to commit robbery. We disagree.

Snyder testified that she questioned Heger about where Heger obtained the money. Heger told her "they robbed a trick." In a room close to Arrington's, Jeannette Espinosa heard a woman say three or four times, "[B]aby get his wallet." Arrington also testified that Heger told Harris to "take his wallet." Arrington identified Harris as the individual who beat him, kicked him, held him to the ground, and choked him while Heger stole his wallet. The jury heard this evidence and found that Harris was guilty of conspiracy to commit robbery. This evidence is sufficient for a reasonable jury to find Harris guilty beyond a reasonable doubt.

Living off the earnings of a prostitute

Harris contends that there was no evidence that he received money from Heger to support his living expenses. We disagree.

Harris was living in a motel room registered to and presumably paid for by Heger. Additionally, Snyder testified that Harris would send Heger out to work as a prostitute and that Harris did not have a job. Heger solicited Arrington for an act of prostitution and enlisted Harris' aid in robbing Arrington. This evidence is sufficient for a reasonable jury to convict Harris of living off the earnings of a prostitute.

Amended judgment of conviction

Harris contends that the district court erred in entering an amended judgment of conviction without a hearing and outside his presence. We disagree.

The jury found Harris guilty of all six counts. Harris' pre-sentencing investigation report revealed that he would buy and sell drugs again and that he had five previous felony convictions in California. At the sentencing hearing, the district court adjudicated Harris as a habitual criminal. Harris was physically present at the sentencing hearing. However, the October 22, 2002, judgment of conviction signed subsequent to the sentencing hearing did not contain the wording that the district court adjudicated Harris as a habitual criminal. Therefore, the district court entered the amended judgment of conviction to reflect the correct wording. Harris knew the district court found him to be a habitual criminal during sentencing. The amended judgment corrected a clerical error. Therefore, we hold that the entry of the amended judgment is not tantamount to a sentencing proceeding.


Fundamental miscarriage of justice

Harris argues that error undermined the district court proceedings and his conviction is a fundamental miscarriage of justice. We disagree.

We have stated that "a fundamental miscarriage of justice can be demonstrated by a showing that the defendant 'is actually innocent of the crime.'"<sup>17</sup> Harris has failed to show that he is innocent of the crimes. The jury heard testimony from nine witnesses and examined over twenty exhibits. The jury unanimously found Harris guilty on all six counts. The record contains no evidence of Harris' innocence. Based on these facts, we hold that Harris failed to prove that the district court committed error resulting in a fundamental miscarriage of justice.

Therefore, we ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, J.  
Becker

  
\_\_\_\_\_, J.  
Agosti

  
\_\_\_\_\_, J.  
Gibbons

cc: Hon. Valorie Vega, District Judge  
Goodman Law Firm  
Attorney General Brian Sandoval/Carson City  
Clark County District Attorney David J. Roger  
Clark County Clerk

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<sup>17</sup>Leslie v. Warden, 118 Nev. 773, 780, 59 P.3d 440, 445 (2002).  
(quoting Pellegrini v. State, 117 Nev. 860, 887, 34 P.3d 519, 537 (2001)).