

IN THE SUPREME COURT OF THE STATE OF NEVADA

ANDREW ROBERT ALLEN LASTINE,

Appellant,

vs.

THE STATE OF NEVADA,

Respondent.

**Appeal from a Judgment of Conviction in CR16-0718
The Second Judicial District Court of the State of Nevada
Honorable Patrick Flanagan, District Judge**

APPELLANT'S OPENING BRIEF

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I. STATEMENT OF JURISDICTION

The district court filed a criminal judgment of conviction on May 11, 2017. 1JA 134-35.¹ Appellant, Andrew Robert Allen Lastine (Mr. Lastine or Andrew), filed a notice of appeal on June 8, 2017. 1JA 136-37. This Court’s jurisdiction rests on Rule 4(b) of the Nevada Rules of Appellate Procedure (NRAP) and NRS 177.015(3) (providing that a defendant may appeal from a final judgment in a criminal case).

II. ROUTING STATEMENT

Mr. Lastine was convicted by a jury of a category B felony—leaving the scene of an accident involving personal injury—and therefore this appeal is not assigned to the Court of Appeals. See NRAP 17(b)(2)(A) (exempting from a presumptive assignment to the Court of Appeals those judgments of conviction based on jury verdicts involving either category A or B felonies). Nor is this appeal within the set of appeals that the Nevada Supreme Court must “hear and decide.” See NRAP 17(a) (1)-(11). The Fourth Amendment issue presented in this appeal, which involves third-party consent, is suitable for review and

¹ “JA” in this Opening Brief stands for the Joint Appendix. Pagination conforms to NRAP 30(c)(1). Volume numbers appear immediately before “JA.”

disposition by either the Nevada Supreme Court or the Nevada Court of Appeals.

III. STATEMENT OF THE LEGAL ISSUE PRESENTED

A search of a home requires a warrant or a recognized exception to the warrant requirement. Consent is a recognized exception where applicable. Did the district court err in concluding that a third party—Mr. Lastine’s Uncle—could grant permission to search Mr. Lastine’s room, which was not part of a common area in the shared home?

IV. STATEMENT OF THE CASE

This is an appeal from a judgment of conviction. The State charged Mr. Lastine with leaving the scene of an accident involving personal injury, a violation of NRS 484E.010, a category B felony. 1JA 1-3 (Information). A jury convicted Mr. Lastine of this offense. 1JA 133 (Verdict); 4JA 414-16. The district court sentenced Mr. Lastine to a term of 36 to 120 months in the Nevada Department of Corrections, with credit for 51 days in predisposition custody (time served). The district court also imposed a fine of \$2,000.00, restitution, and statutorily required fees and assessments. 1JA 134-35 (Judgment of Conviction). Mr. Lastine timely filed a notice of appeal. 1JA 136-37 (Notice of Appeal).

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V. STATEMENT OF THE FACTS

1. Trial

A.

In the early evening of January 7, 2016, Gertrude Green was driving home from work in her Kia Sorento when she stopped at the controlled intersection of Sun Valley Boulevard and Fifth Street. As she waited for the light to change so that she could turn right onto Fifth Street, she was rear-ended. 2JA 170-77. Her car veered a little to the right, and she saw a small truck heading down a little embankment and down Fifth Street. 2JA 173-74. When her car was hit from behind Ms. Green went forward, but her seatbelt yanked her back and she felt her neck snap. 2JA 173. Jason Beck, who saw the accident while on his way to pick up his daughter, got out of his car and checked on Ms. Green. Another person called 911. 2JA 174; 3JA 203-06. Ms. Green stayed in her car until help arrived. 2JA 174-75, 178. She was ultimately transported to Renown Medical Center by ambulance. 2JA 178.

Mr. Beck watched the accident happen. Moments earlier the small truck that hit Ms. Green's vehicle had swerved in front of him at the intersection of Sun Valley Boulevard and First Avenue. 3JA 197-98.

The truck was an older Ford pickup truck with a “classic vehicle” license plate. 3JA 198. Mr. Beck testified that the light at the intersection of Sun Valley Boulevard and Fifth Street was red, but the small truck did not slow down, did not attempt to stop, and “rear-ended” Ms. Green’s car. 3JA 199-200. Mr. Beck watched Ms. Green’s car come to a stop while the small truck went over an embankment and through a parking lot before heading down the street. 3JA 200-01. Mr. Beck stayed at the scene until law enforcement and medical personnel arrived. 3JA 206-07.

Ms. Green’s Kia had moderate damage in the rear of the vehicle. Behind it was a debris field caused by the accident. And in the debris field was a license plate. 3JA 215, 264. Nevada Highway Patrol Trooper Alyssa Howald ran the license plate number through her dispatch, and was provided an address for the registered owner. 3JA 217, 259-61, 264-65. And she learned that Washoe County Sheriff Deputies were already at that address. 3JA 265. Trooper Howald left the accident scene and drove to the address she had been provided. 3JA 265. When she arrived she saw an “older model Ford pickup in the driveway.” 3JA 265. Her partner, Sergeant Bowers, completed the investigation on scene and

then also went to the address of the registered owner. 3JA 211-13, 219-21, 265. By the time Sergeant Bowers arrived at the house, Mr. Lastine was already in custody. 3JA 221. Sergeant Bowers testified that the license plate found in the debris field at the accident matched a license plate found on a little pickup truck found at the residence. 3JA 220-21.

At the residence Trooper Howald spoke with a Washoe County Sheriff Deputy. She then entered the house and found Mr. Lastine in handcuffs sitting on a couch. 3JA 266-67. She made the decision to arrest him and after making the arrest, searched him. 3JA 269. She found a set of keys in his right rear pocket. One of the keys appeared to be a vehicle key. 3JA 269-70. Trooper Howald transported Mr. Lastine to the Washoe County Jail. 3JA 271. During the ride Mr. Lastine said out loud (apparently referencing himself), "I was a fucking idiot and that's all that matters. [O]ne, you're a fucking idiot, two, you're a fucking idiot, three, idiot, this guy." 3JA 272-73.

B.

Deputy Sheriff Francisco Gamboa, a seventeen-year veteran of the Washoe County Sheriff's Office, was driving through Sun Valley when he heard a call regarding the accident. 3JA 298-301. Deputy

Gamboa responded to the scene to “help look for the vehicle that left the area.” 3JA 301. Because the vehicle was reported to be driving east on Fifth Street, Deputy Gamboa headed in that direction. 3JA 301-02. As he drove he received an update on the potential address associated with the vehicle (based on the license plate that had been found at the scene). 3JA 303. When he arrived at the address he saw a light colored small truck. 3JA 304. And he saw steam coming from the front engine area. 3JA 305. The truck appeared to have been in a car accident. 3JA 306. Deputy Gamboa also saw footprints in the snow that led from the truck to the side of a house that was on the property. 3JA 307, 309.

Deputy Gamboa testified that he went to the front door of the house and knocked. Mr. Robert Lastine answered. 3JA 310. According to the deputy he identified himself to Mr. Lastine and told him that the truck had involved in an accident. Mr. Lastine told him that the truck belonged to his nephew, and that he was in the back bedroom. 3JA 311. Deputy Gamboa testified that he asked Mr. Lastine for permission “to find the owner of the truck,” and Mr. Lastine said “go get him, he’s in the back room.” 3JA 313. Deputy Gamboa waited for Deputy Marty Obos to arrive, and then they walked through a small living room area,

through the kitchen, and then through a doorway into a hallway. 3JA 313. Deputy Obos recalled it a little differently. According to this deputy he and Deputy Gamboa walked together to the front door of the house. There they both met with Mr. Lastine who told them that there was a bedroom in the back. They walked through the main front room to a small hallway to a bedroom door that was closed. 3JA 280, 282-85.

According to Deputy Gamboa, the door was only almost all the way closed. So he pushed it open and announced their presence.² The room was dark, but he could tell that there was a person on the bed under a blanket. 3JA 314. Mr. Lastine did not respond to their commands so, in the deputy's words, "[i]mmediately, both of us entered the room and placed him in handcuffs." 3JA 315. Next to the bed was a pair of wet black tennis shoes with a distinctive tread. 3JA 315-16. Deputy Obos testified that Mr. Lastine was taken from the bedroom and put in the front room, still in handcuffs. 3JA 289-90.

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² Deputy Obos testified that the door "was closed up," and that he "couldn't see inside." They opened the door, and then he saw "somebody laying on top of the bed covered in blankets." 3JA 286.

C.

Robert Lastine testified that Andrew was his nephew, and that Andrew was living in his home, paying a small rent for the use of a back bedroom, which was an extension to the house. Mr. Lastine testified that he built the add-on. 3JA 235-38, and 249 (noting that the add-on is 20-by-20).

On January 7, 2016, Mr. Lastine “heard a loud knock.” He opened the front door, but there was nobody at the door. He stepped outside and saw an officer standing next to the truck “pointing a flashlight at me and ask[ing] me to come out.” 3JA 241. Mr. Lastine didn’t see any smoke coming from the truck. 3JA 242, 253.

Mr. Lastine invited the officers to come into his house. 3JA 242. He told them that Andrew was probably there and “go back to the back of the house and go get him.” 3JA 243.

2. Pretrial

Prior to trial Mr. Lastine filed a motion to suppress evidence seized in violation of the Fourth Amendment. 1JA 4-17 (Motion to Dismiss). Specifically, the motion sought to suppress (1) the shoes found in his bedroom; (2) his statement to Trooper Howald; (3) the key found

in his pocket; and (4) the fact that Trooper Howald had started the truck with the key before transporting Mr. Lastine to the Washoe County Jail. 1JA 5. The State opposed the motion. 1JA 18-30.

After an evidentiary hearing the district court orally denied all of the requested relief except for the last one—the trooper’s starting the truck—concluding there that the trooper “entered the defendant’s vehicle without a warrant and without probable cause to believe that there was contraband or evidence of a crime located in the vehicle.” 1JA 127-28 (Transcript of Proceedings: Evidentiary Hearing). As for the other three claims for relief, the district court concluded that Mr. Robert Lastine gave “voluntary consent to the officers to enter the home and arrest the defendant.” 1JA 123. Adding that the arrest, discovery of the shoes, and discovery of the keys, did not violate the Fourth Amendment because the deputies had cause to arrest Mr. Lastine (because he would not cooperate), the shoes were in plain view, and the keys were found during a search of Mr. Lastine incident to his arrest. 1JA 123-27.

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VI. SUMMARY OF ARGUMENT

“Warrantless home entries” are “the chief evil against which the Fourth Amendment protects.” *Hannon v. State*, 125 Nev. 142, 145, 207 P.3d 344, 346 (2009) (citations omitted). The protection extends to private rooms in otherwise shared quarters. Mr. Lastine rents a room in his uncle’s house, and his uncle respects his privacy—his space. On January 7, 2016, sheriff deputies came to the uncle’s home while investigating a hit-and-run accident. After some conversation with Mr. Lastine he allowed them into his home, and were allowed to walk down a hallway leading Andrew’s bedroom door. That was as far as the uncle’s permission could extend; he had no authority to grant them permission to enter Andrew’s room. At that point the deputies should have obtained a search warrant; they did not. Instead they opened the door, took custody of Andrew, and obtained items of evidentiary value (including statements from Andrew) as a result of the illegal entry. These items of evidence were used to convict Mr. Lastine at trial.

Prior to trial the district court below was presented a motion to suppress the evidence seized in violation of the Fourth Amendment. The district court erred in denying the motion. This Court should

reverse and remand for a new trial with instructions to suppress all items of evidence seized as a result of the warrantless entry into Andrew's bedroom.

VII. ARGUMENT

The district court erred in concluding that a third party—Mr. Lastine's uncle—could grant permission to search Mr. Lastine's room, which was not part of a common area in the shared home.

Evidentiary Hearing Facts

At a pretrial hearing Mr. Robert Lastine identified Andrew Lastine as his nephew. 1JA 35 (Transcript of Proceedings: Evidentiary Hearing). As relevant here Mr. Robert Lastine testified that he owned a home in Sun Valley and that he added a room—20-by-20 feet—“off the back of the home.” 1JA 35.³ He also made a hallway and “a door to enter into the addition.” *Id.* The addition “is separate from the main house.” *Id.* at 36. Andrew was living in the addition, and was paying rent to stay there. *Id.* at 36-37, 58-59 (noting that his children were living there too). If Mr. Robert Lastine wanted to go back there, he “knocked on the door just out of courtesy, *because it was his space.*” *Id.* at 37 (italics added).

³ The addition has its own foundation for all four walls; it is attached to the main house “by an existing roof.” 1JA 52.

In the early evening of January 7, 2016, Mr. Lastine “heard a severe pounding on the front door.” When he went to answer it, there was nobody there. He went outside and there was a flashlight shining on him. *Id.* at 40-41. He saw an officer who asked him who owned the truck he was standing next to. Eventually two officers “came into the house, and asked me if Andrew was there.” Mr. Lastine said, “if he’s there, he would be in the back room.” *Id.* at 42. Mr. Lastine testified that the door to the addition “is always closed.” *Id.* at 46. Mr. Lastine testified that he did not know if Andrew was home that night, until the deputies went “back to the room to check on him.” *Id.* at 55. Asked by the prosecutor if he said to the deputies: “you can go get him,” Mr. Lastine answered, “I might have said that.” *Id.*

Deputy Francisco Gamboa testified that Mr. Lastine gave him permission to enter the home. *Id.* at 65. When Deputy Obos arrived they went to the back bedroom of the house. *Id.* at 66. Deputy Gamboa testified that the door to the bedroom “was closed except for maybe approximately an inch.” *Id.* So he looked inside and “saw Andrew hiding under a blanket on the bed.” *Id.* at 67. The deputies announced their presence and then entered the room and handcuffed him. *Id.* at 68.

Deputy Gamboa testified on cross-examination that he did not recall if they knocked; he said they did not ask for consent to enter; they opened the door; and then they entered. *Id.* at 86.

Standard of Review

“This Court reviews the lawfulness of a search de novo because such review requires consideration of both factual circumstances and legal issues. A warrantless search is valid if the police acquire consent from a cohabitant who possesses common authority over the property to be search.” *Castell v. State*, 122 Nev. 356, 360, 131 P.3d 1, 3 (2006) (internal quotation marks and footnotes omitted); *State v. Taylor*, 114 Nev. 1071, 1078, 968 P.2d 315 (1998) (noting that review of a trial court’s “determinations of authority to consent requires consideration of both factual circumstances and legal issues.” Thus, the Court reviews “de novo the district court’s decisions regarding the authority to consent.”) (citations omitted). Similarly, the Court reviews de novo whether an emergency exception justifies a warrantless entry into a home. *Hannon v. State*, 125 Nev. 142, 145, 207 P.3d 344, 346 (2009).

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Discussion

The Fourth Amendment of the United States Constitution (and Nev. Const. Art. 1, § 18) forbids unreasonable searches and seizures.

“Warrantless searches and seizures in a home are presumptively unreasonable.” *Doleman v. State*, 107 Nev. 409, 413, 812 P.2d 1287, 1289 (1991) (citing *Payton v. New York*, 445 U.S. 573, 587 (1980)).

“[W]arrantless searches are permitted if based upon probable cause and exigent circumstances.” *Id.* Or, if based upon lawful consent.

Schneckloth v. Bustamonte, 412 U.S. 218 (1973). “When considering our citizens’ constitutional right to be secure in their homes and free from unreasonable searches and seizures, *this court, on review, must be careful not to permit the exception to swallow the rule.*” *Howe v. State*, 112 Nev. 458, 463, 916 P.2d 153, 157 (1996) (internal quotation marks omitted, italics in the original) (citing *Phillips v. State*, 106 Nev. 763, 765-66, 801 P.2d 1363, 1365 (1990) (in turn quoting *Nelson v. State*, 96 Nev. 363, 365, 609 P.2d 717, 719 (1980)). “The State bears the burden of proving consent by [c]lear and persuasive evidence.” *Id.* (citing *McIntosh v. State*, 86 Nev. 133, 136, 466 P.2d 656, 658 (1970) (internal

quotation marks omitted, alteration in the original) (citing *Thurlow v. State*, 81 Nev. 510, 515, 406 P.2d 918, 921 (1965).

No valid consent

In order for a third party to be able to give valid consent to search a shared area, that third party must “possess[] actual authority over or other sufficient relationship to the premises or effects sought to be inspected.” *State v. Taylor*, 114 Nev. at 1079, 968 P.2d at 321 (citing *United States v. Matlock*, 415 U.S. 164 (1974). See also *Casteel v. State*, 122 Nev. at 360, 131 P.3d at 3 (finding that Casteel’s “live-in girlfriend” had “equal control over the apartment she shared with Casteel” and could give valid consent to search because Casteel took “no special steps to secure a privacy interest in his ... property or explicitly denie[d]” the live-in girlfriend “all access to the property.”). In contrast, here Andrew’s room was *his* room and was not a commonly shared area. Andrew, unlike Casteel, had secured a privacy interest in his room. Mr. Robert Lastine made this point when he testified at the pretrial hearing that Andrew paid rent for the room; that the door was always closed; and that if he wanted to go back there, he “knocked on the door just out of courtesy, *because it was his space*.” Thus, while Mr. Lastine could

properly allow the deputies into his home, he could not allow them into Andrew's room. They arguably were allowed to go down the hallway but no farther than the closed bedroom door.⁴ Entry into the room itself required a warrant, which they lacked. Thus, the deputies' entry into Andrew's room violated the Fourth Amendment and the coextensive provision of the Nevada Constitution. As a result, all evidence obtained following the illegal entry into Andrew's room must be suppressed.

No exigent circumstance

In *Hannon v. State*, 125 Nev. 142, 207 P.3d 344, the Nevada Supreme Court adopted the standard announced in *Brigham City v. Stuart*, 547 U.S. 398 (2006) for emergency home entries. In doing so the Court abandoned its previously used two-step approach that allowed an emergency home entry without a warrant if law enforcement officers (1) reasonably believed that emergency assistance was needed, and (2) they lacked an accompanying intent to either arrest or search. 125 Nev. at 146-47, 207 P.3d at 346-47. Now the subjective motivations of the

⁴ On de novo review this Court should consider how much credit to afford Deputy Gamboa's testimony that Andrew's door was "was closed except for maybe approximately an inch," in light of Mr. Lastine's testimony that the door was *always* closed, and Deputy Obos' testimony (at trial—he did not testify at the pretrial hearing) that the door was closed and that they opened the door to enter the room.

officer(s) is irrelevant, and “the reasonableness of an emergency home entry depends on whether the circumstances viewed *objectively* justify [the] action.” 125 Nev. at 147, 2017 P.3d d at 347 (internal quotation marks omitted, italics and alteration in the original) (citation omitted).

Here there was no objective basis to believe that Mr. Lastine was injured or that he (an adult) needed help or that there was any immediate threat. Considered in the totality of the circumstances, Deputy Gamboa had no cause to ignore the warrant application process; a process that includes telephonic warrants. Thus, this Court should conclude that the warrantless entry into Andrew’s separate bedroom was not justified by an objectively reasonable belief that there was an emergency of some sort. And because “no emergency reason existed for forgoing a warrant,” *Hannon v. State*, 125 Nev. at 148, 207 P.3d at 348, this Court should conclude that the district court erred in denying Mr. Lastine’s motion to suppress.

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VIII. CONCLUSION

For the reasons given, this Court should reverse Mr. Lastine's conviction and remand for a new trial with instructions to suppress all evidence obtained after the officers' illegal entry into Mr. Lastine's room.

Dated this 7th day of December 2017.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because: This brief has been prepared in a proportionally spaced typeface using Century Schoolbook in 14-point font.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, even including the parts of the brief though exempted by NRAP 32(a)(7)(C), it is proportionately

spaced, has a typeface of 14 points and contains a total of 3,858 words.

NRAP 32(a)(7)(A)(i), (ii).

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied upon is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 7th day of December 2017.

/s/ *John Reese Petty*

JOHN REESE PETTY

Chief Deputy, Nevada State Bar No.10

CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 7th day of December 2017. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Terrence P. McCarthy, Chief Appellate Deputy
Washoe County District Attorney's Office

I further certify that on this date a copy of this document was mailed to:

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