

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	No. 66376-3-I
	)	
Respondent,	)	DIVISION ONE
	)	
v.	)	
	)	UNPUBLISHED OPINION
RASHID ALI HASSAN,	)	
	)	
Appellant.	)	FILED: June 11, 2012

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Schindler, J. — Rashid Ali Hassan appeals his conviction of possession of cocaine with intent to deliver in violation of the Uniform Controlled Substances Act (VUCSA), RCW 69.50.401.<sup>1</sup> Hassan claims the trial court erred in denying his motion to suppress the cocaine the police found in the search incident to his arrest. Hassan asserts that the search was unauthorized because the arresting officers did not have the authority to arrest him for misdemeanor drug traffic loitering under RCW 10.31.100. We rejected the same argument in a recent case, State v. Ortega, 159 Wn. App. 889, 248 P.3d 1062, rev. granted, 171 Wn.2d 1031 (2011).<sup>2</sup> We adhere to our decision in Ortega. We also conclude that the admission of testimony that Hassan also possessed

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<sup>1</sup> Hassan was arrested during a street narcotics operation where one officer observed him engage in three drug transactions, then directed two other officers to detain him.

<sup>2</sup> Our Supreme Court heard oral argument on March 15, 2012.

marijuana was harmless, and affirm.

## FACTS

Hassan does not challenge the testimony at the CrR 3.6 suppression hearing. On August 27, 2009, at approximately 9:30 p.m., Seattle Police Sergeant Mark Hazard, Officer David Blackmer, and Officer Martin Harris were participating in a street narcotics operation with the Anti-Crime Team. During the narcotics operation, Sergeant Hazard worked as the observation officer. Sergeant Hazard has been involved in approximately one thousand narcotics arrests, including supervising hundreds of narcotics buy-bust operations, and has received extensive training in narcotics recognition and enforcement.

Sergeant Hazard said that he had a clear and unobstructed view of the corner of Third Avenue and Bell Street, an area known for street narcotics activity. Sergeant Hazard observed a group of six individuals spending time at the corner near the entrance to Kelly's Tavern. One person, later identified as Rashid Hassan, was at the center of the group. Sergeant Hazard watched Hassan three separate times reach into the left breast pocket of his shirt to make "three hand-to-hand transactions." Sergeant Hazard said that Hassan "removed items from the left breast pocket of his shirt and handed them to three individuals, two of whom placed the items received in their mouths before immediately departing the area." Based on his experience, Sergeant Hazard knew that placing the items "into the mouth is indicative that a substance is crack cocaine because saliva does not affect the drug and the drug can be easily swallowed to avoid detection." Sergeant Hazard testified that he has observed

individuals carry crack cocaine in their mouth “at least a hundred times.”

Sergeant Hazard communicated with Officer Blackmer and Officer Harris about the transactions. Officer Blackmer testified that Sergeant Hazard “would relay via radio what was going on,” and “gave us updates that there was a black male with dreadlock hair in a white dress shirt and blue jeans and was selling – or what he thought selling narcotics in front of Kelly’s Tavern.”

After the third drug transaction, Hassan went into the tavern. Sergeant Hazard directed Officer Blackmer and Officer Harris to arrest Hassan for drug traffic loitering. Officer Blackmer testified that Hassan was the only person in the tavern who matched the description Sergeant Hazard provided. After Officer Blackmer and Officer Harris escorted Hassan outside, Sergeant Hazard “positively identified him as the same individual who he observed in the suspicious transactions.” Officer Blackmer testified that it was “[a] typical practice that we do, we have the observation officer just to verify, yes, this is the correct person I was observing. Then it was go ahead and make the arrest.”

The police arrested Hassan for drug traffic loitering under the Seattle Municipal Code (SMC) 12A.20.050.<sup>3</sup> In a search incident to arrest, Officer Blackmer found two rocks of suspected crack cocaine in Hassan's left breast pocket and 0.8 grams of marijuana in his front pants pocket. A field test of the two rocks indicated the substance was cocaine.

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<sup>3</sup> Under SMC 12A.20.050(B), “[a] person is guilty of drug-traffic loitering if he or she remains in a public place and intentionally solicits, induces, entices, or procures another to engage in unlawful conduct contrary to Chapter 69.50, Chapter 69.41, or Chapter 69.52, Revised Code of Washington.”

The State charged Hassan with felony possession of cocaine with intent to deliver in violation of RCW 69.50.401. Hassan moved to suppress the cocaine, arguing the officers lacked probable cause to believe he committed the misdemeanor of drug traffic loitering.

The only witnesses to testify at the CrR 3.6 suppression hearing were Sergeant Hazard and Officer Blackmer. The trial court denied Hassan's motion to suppress. The court concluded that because "it was reasonable for [Sergeant Hazard] to conclude that the Defendant had enticed other persons to use or possess crack cocaine[, t]he drugs found on the Defendant during the search incident to his arrest are admissible because the arrest was supported by probable cause."

At trial, Hassan testified and admitted that he possessed crack cocaine. However, Hassan denied engaging in any hand-to-hand drug transactions. The jury found Hassan guilty of possession of cocaine with intent to deliver. Based on an offender score of six, the court sentenced Hassan according to a Drug Offender Sentencing Alternative.

Hassan appeals.

## ANALYSIS

### Authority to Arrest

Hassan seeks reversal of his conviction on the grounds that the arresting officers did not have the authority to arrest him under RCW 10.31.100 because he did not commit the misdemeanor offense of drug traffic loitering in the presence of the arresting officer.

The Fourth Amendment of the United States Constitution and article I, section 7 of the Washington State Constitution prohibit unreasonable searches and seizures. State v. Day, 161 Wn.2d 889, 893, 168 P.3d 1265 (2007). As a general rule, warrantless searches and seizures are per se unreasonable, unless the State can show that the search falls under one of the exceptions to the warrant requirement. Day, 161 Wn.2d at 893-94. Search incident to a lawful arrest is an exception to the warrant requirement. State v. Tibbles, 169 Wn.2d 364, 369, 236 P.3d 885 (2010). Under RCW 10.31.100, a police officer may arrest a person without a warrant for committing a misdemeanor when the offense is committed in the presence of the officer. Courts give consideration to the arresting officer's special expertise in identifying criminal behavior. State v. Scott, 93 Wn.2d 7, 11, 604 P.2d 943 (1980). Unchallenged findings of fact are verities on appeal. State v. Acrey, 148 Wn.2d 738, 745, 64 P.3d 594 (2003).

There is no dispute that Sergeant Hazard had probable cause to arrest Hassan for drug traffic loitering.<sup>4</sup> But for the first time on appeal, Hassan claims that because the misdemeanor offense was not committed in the presence of the arresting officers, the police did not have the authority to arrest him under RCW 10.31.100. This court recently considered and rejected the same argument in Ortega.

In Ortega, after the observation officer watched the defendant conduct three hand-to-hand transactions, the officer informed the arresting officers that there was

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<sup>4</sup> Although Hassan initially assigned error to the trial court's failure to enter written findings of fact and conclusions of law regarding the CrR 3.6 hearing, written findings and conclusions were entered before the State filed its response brief. Hassan did not argue that he was prejudiced by the late filing in his reply brief. We conclude, therefore, that he has abandoned his claim. State v. Cannon, 130 Wn.2d 313, 329-30, 922 P.2d 1293 (1996).

probable cause to arrest Ortega for drug traffic loitering. Ortega, 159 Wn. App. at 892-93. The observation officer described the location and appearance of Ortega. Ortega, 159 Wn. App. at 893. In a search incident to arrest, the officers found drugs and cash. After the arrest, the observation officer confirmed the identity of Ortega.

Responding immediately by patrol car, Hockett arrested and searched Ortega, locating small rocks of cocaine and \$780 in cash on his person. McLaughlin maintained visual contact with the suspects up to the time of the arrest, which occurred approximately 30 seconds after he radioed the arrest team. McLaughlin packed up his surveillance gear and met with Hockett and Gaedcke, immediately confirming that the suspects were the individuals he had observed.

Ortega, 159 Wn. App. at 893.

On appeal, Ortega argued that because the arresting officers did not observe the commission of the misdemeanor offense, his arrest violated RCW 10.31.100.

Based on the facts, we rejected Ortega's argument.

[W]e hold that RCW 10.31.100 is not violated under these facts. The observing officer viewed the conduct, directed the arrest, kept the suspects and officers in view, and proceeded immediately to the location of the arrest to confirm that the arresting officers had stopped the correct suspects. McLaughlin's continuous contact rendered him a participant in the arrest. Although McLaughlin was not the officer who actually put his hands on Ortega, McLaughlin was an arresting officer in the sense that he directed the arrest and maintained continuous visual and radio contact with the arrest team.

Ortega, 159 Wn. App. at 898.

Here, as in Ortega, Sergeant Hazard observed Hassan commit the misdemeanor offense of drug traffic loitering and directed the arrest. Sergeant Hazard testified that he directed Officer Blackmer and Officer Harris to arrest Hassan.

I waited for a short period of time to see if he was going to come back outside. I believe it's according to my statement 2149 hours, after not seeing him coming back outside, I directed Officers Blackmer and Harris

to go inside the tavern and place him under arrest for drug traffic loitering. Officer Blackmer also testified that Sergeant Hazard communicated with the arresting officers about his observation of the drug transactions, and provided a detailed description of Hassan. Officer Blackmer testified, in pertinent part:

He gave us updates that there was a black male with dreadlock hair in a white dress shirt and blue jeans and was selling -- or what he thought selling narcotics . . . and he had been watching him for a while. Then this person had gone inside [a tavern]. And at that point, Sergeant Hazard had asked us to go in and contact him.

Officer Blackmer testified that the arresting officers asked Hassan to go outside so that Sergeant Hazard could identify him. Officer Blackmer testified, in pertinent part:

[Officer Blackmer]: The defendant, Rashid Hassan, was there and we asked him to come out and step out with us out onto the street level. That way Sergeant Hazard could verify that we did have a correct person.

. . . .

A typical practice that we do, we have the observation officer just to verify, yes, this is the correct person I was observing. Then it was go ahead and make the arrest. I went ahead and arrested him at that point.

[Prosecutor]: So Sergeant Hazard made the identification indicating that it was the same person he had observed?

[Officer Blackmer]: Yes. That's the one that he wanted arrested.

Sergeant Hazard testified that he positively identified Hassan. "They walked him outside, and I confirmed over [sic] radio that it was the correct person."

As in Ortega, the record establishes that Sergeant Hazard directed Hassan's arrest, maintained radio contact with the arresting officers while viewing the suspect, and confirmed that the arresting officers had detained the correct suspect. On these facts, the police had the authority to arrest Hassan for drug traffic loitering under RCW

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10.31.100.

## Marijuana Evidence

Hassan also argues that his conviction must be reversed based on the admission of testimony that he possessed marijuana as well as cocaine.

An evidentiary error which is not of constitutional magnitude requires reversal only if the error, within reasonable probability, materially affected the outcome of the trial. State v. Gogolin, 45 Wn. App. 640, 645-46, 727 P.2d 683 (1986) (citing State v. Jackson, 102 Wn.2d 689, 695-96, 689 P.2d 76 (1984)). An error is harmless if the outcome of the trial would not have been different if the error had not occurred. Jackson, 102 Wn.2d at 695-96 (citing State v. Robtoy, 98 Wn.2d 30, 653 P.2d 284 (1982)).

Before trial, the trial court granted Hassan's motion to suppress evidence that Officer Blackmer performed a field test on the cocaine. At trial, Officer Blackmer testified about the field test and the marijuana found in Hassan's pants pocket. The court overruled the defense objection to the marijuana found in Hassan's pocket.

[Officer Blackmer]: I found two crack cocaine rocks in his upper left breast pocket of his shirt. And then in his right front pant pocket was—

[Defense Counsel]: Objection, Your Honor. Relevancy.

THE COURT: Overruled.

[Officer Blackmer]: In his right front pants pocket was .8 grams of marijuana.

[Prosecutor]: And what did you -- what did you do with what you found in the upper left breast pocket?

[Officer Blackmer]: The crack cocaine rocks I went and field tested. It came back positive for cocaine. I packaged those up along with the marijuana.

Afterwards, defense counsel conceded that the defense did not move to exclude testimony about the marijuana.

THE COURT: [Defense counsel] indicated some concern that there might have been some pretrial rulings on the marijuana .8 grams that was in the pocket. I didn't remember any of those. Also, there might have been a pretrial ruling on the field testing. I don't really remember that either, but [the prosecutor] says yes.

[Defense Counsel]: Your Honor, I believe I might be mistaken about the marijuana. I'm not seeing it in my trial brief. However, I do believe there was a motion to exclude evidence of the field test that the Court had granted.

The court then asked the attorneys to address the "appropriate remedy."

THE COURT: Thank you. Okay. So that came in. What would be the appropriate remedy? I would be happy to hear from either side.

[Prosecutor]: I will respond to whatever may be requested.

[Defense Counsel]: Your Honor, I'm not actually prepared to suggest a remedy at this point.

THE COURT: I'm not sure there is one. I'm not sure how much damage it is when you have a forensic scientist that testifies it's, in fact, cocaine.

In a motion for a mistrial, Hassan argued that the officer's testimony regarding the field test of cocaine contravened the pre-trial ruling. The State conceded that the field test testimony violated the motion in limine. The trial court ruled that testimony about the field test of the cocaine did not prejudice Hassan's right to a fair trial. The trial court also concluded, "I should have sustained the objection" to the admission of the marijuana evidence, though "I don't think it comes anywhere near prejudicing the case of Mr. Hassan sufficient to warrant a dismissal or a mistrial."

We conclude any error in admitting testimony about the marijuana was harmless. Officer Blackmer's passing reference to the marijuana was brief and isolated. The State did not otherwise refer to the marijuana either in its case in chief, during cross-examination of Hassan, or in its closing argument.

Because the untainted evidence overwhelmingly established that Hassan possessed cocaine with intent to deliver, we conclude that the outcome of his trial would not have been different had his objection to the marijuana evidence been sustained.

Affirmed.<sup>5</sup>

Schiveller, J.

WE CONCUR:

Leach, C. J.

Cox, J.

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<sup>5</sup> In his statement of additional grounds for review, Hassan raises numerous issues, including judicial misconduct, prosecutorial misconduct, ineffective assistance of counsel, and insufficiency of the evidence to support his conviction. None of his arguments has merit.