COLORADO COURT OF APPEALS

DATE FILED: September 11, 2014
CASE NUMBER: 2011CA1271

Court of Appeals No. 11CA1271
Grand County District Court No. 10CR67
Honorable Mary C. Hoak, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Susan Leigh Stock,

Defendant-Appellant.

JUDGMENT REVERSED AND CASE
REMANDED WITH DIRECTIONS

Division VII
Opinion by JUDGE KAPELKE*
Furman and Lichtenstein, JJ., concur

Prior Opinion Announced July 3, 2014, WITHDRAWN
Petition for Rehearing GRANTED

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)
Announced September 11, 2014

John W. Suthers, Attorney General, Carmen Moraleda, Assistant Attorney General, Denver, Colorado, for Plaintiff-Appellee

Douglas K. Wilson, Colorado State Public Defender, Kielly Dunn, Deputy State Public Defender, Denver, Colorado, for Defendant-Appellant

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3) and § 24-51-1105, C.R.S. 2013.

Defendant, Susan Leigh Stock, appeals the judgment of conviction entered on a jury verdict finding her guilty of one count of third-degree burglary and one count of theft of cash with a value of $1000 or more, but less than $20,000. We reverse and remand for a new trial.

I. Background

Defendant worked for the Best Western Hotel in Winter Park, Colorado, as a desk clerk and lived in a room at the hotel. Between March 15, 2010, and April 15, 2010, defendant took cash from three vending machines located in the hotel. She admitted to taking the money without permission, but maintained that she intended to return it once she received a commission check she was expecting for ski rental equipment referrals.

When questioned by law enforcement, defendant initially denied any knowledge of the theft. She later confessed to the owner of the hotel that she had taken the money. Shortly thereafter, a police officer came to defendant's hotel room and questioned her. She also admitted to the officer that she had taken the money from the vending machines.

Prior to trial, defendant moved to suppress the evidence relating to the officer's interview on the basis that the officer's entry to the hotel room had been unlawful. The trial court denied the motion, concluding that the officer's entry and interrogation had been consensual.

II. Denial of the Motion to Suppress

Defendant contends that the trial court erred in denying her motion to suppress. We agree.

A. Standard of Review

In reviewing a trial court's denial of a motion to suppress evidence, we defer to the trial court's factual findings if they are supported by competent evidence in the record. *People v. Funez-Paiagua*, 2010 CO 37, ¶ 6, 276 P.3d 576, 578. We review de novo the trial court's ultimate legal conclusion. *Id.*

B. Trial Court's Findings and Suppression Order

Following the hearing on the motion to suppress, the court made an oral ruling denying the motion, but also ordered supplemental briefing. The court thereafter issued a written order containing the following findings regarding the officer's entry:

- Defendant lived in room number 121 at the Best Western Hotel in Winter Park, Colorado, and was in her room at the time the officer knocked on her door.
- When the officer knocked on the door, defendant's father opened it and stepped back to allow the officer into the room.
- Defendant's father did not use any words to invite the officer into defendant's room, and the officer testified that he inferred that, by the father's actions, he was inviting the officer into defendant's room.
- The officer took two steps into the room, introduced himself to defendant's father, and asked the father to leave. The father then left the room.
- The officer did not believe that defendant's father lived in the hotel room.
- Defendant's father did not live in the hotel room and was a guest in the room.
- After defendant's father left, the officer introduced himself to defendant and asked if he might speak with her. Defendant said "yes," and cleared off a seat for him.

- The officer had no warrant to enter the room.

Each of these findings has record support. Based on these findings, the trial court denied the motion to suppress, concluding that the officer's entry of defendant's hotel room was consensual and therefore lawful.

C. Applicable Law

Under the Fourth Amendment to the United States Constitution and Article II, section 7 of the Colorado Constitution, warrantless searches and seizures by law enforcement officers are presumptively unreasonable unless justified by an established exception to the warrant requirement. *People v. Prescott*, 205 P.3d 416, 419 (Colo. App. 2008). These constitutional provisions generally prohibit a warrantless entry of a person's home, whether to make an arrest or to complete a search, *Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990), as "the Fourth Amendment has drawn a firm line at the entrance to the house," *Payton v. New York*, 445 U.S. 573, 590 (1980). Thus, in determining the legality of an officer's entry of a person's home, we presume that the officer violated the Fourth Amendment if he or she crossed the threshold of the home

without a warrant, and in the absence of exigent circumstances, or pursuant to some other established exception to the warrant requirement. *Id.*

An officer may lawfully cross the threshold of a person's home without an warrant, however, where voluntary consent has been obtained, either from the individual whose property is searched or from a third party who possesses actual common authority over the premises. *People v. McKinstrey*, 852 P.2d 467, 470 (Colo. 1993); *see also United States v. Matlock*, 415 U.S. 164, 171 n.7 (1974) (defining common authority as "mutual use of the property by persons generally having joint access or control for most purposes").

In addition, an officer's entry may be lawful where the purported consent was by a third party who the officer reasonably, but mistakenly, believed to possess actual common authority over the property. *Petersen v. People*, 939 P.2d 824, 830 (Colo. 1997) (citing *Rodriguez*, 497 U.S. at 181-82).

Allowing an entry as lawful where an officer has the reasonable but mistaken belief that the third person has the authority to consent is based on the legal doctrine of apparent authority. *Petersen*, 939 P.2d at 830. The doctrine of apparent

authority is well established in Colorado. *People v. White*, 64 P.3d 864, 872 (Colo. App. 2002). A search justified under the apparent authority doctrine is not one authorized by consent from one with authority to give it, but is instead based on the premise that the determination of a third party's authority to consent is a factual determination, and that mistakes of fact can be reasonable under certain circumstances. *Petersen*, 939 P.2d at 830-31.

When a law enforcement officer enters a home without a warrant or a valid consent and without a reasonable belief that the person consenting to entry has the actual authority to do so, the entry is unlawful. Accordingly, any evidence found as a result of such an unlawful entry must be suppressed. *See Rodriguez*, 497 U.S. at 184, 188-89 (any evidence seized from a defendant's home without his or her consent or pursuant to an exception to the warrant requirement must be suppressed because the Fourth Amendment is violated when law enforcement officers accept a person's invitation to enter premises when "the surrounding circumstances could . . . be such that a reasonable person would doubt its truth").

D. Analysis

Here, defendant contends that the officer could not have had a reasonable belief that defendant's father had authority to consent to his entry because the officer knew at the time he knocked on defendant's door that the father did not live in the hotel room. The trial court's finding that the officer knew that the father did not reside with defendant in the hotel room is supported by the record. Thus, we will defer to it. *Funez-Paiagua*, ¶ 6, 276 P.3d at 578.

We conclude, however, that the court relied on an erroneous interpretation of the law in denying the motion to suppress. In determining that defendant's father had authority to consent to the officer's entry of defendant's hotel room, the court relied on the fact that defendant's father was "not a casual visitor . . . [but] a close relative of . . . defendant." *See White*, 64 P.3d at 872. However, *White* does not stand for the legal proposition that any visitor who is more than a casual visitor has the authority to allow law enforcement officers into another person's home without that person's consent. A third-party consent complies with the Fourth Amendment only if that third person has actual authority, *see People v. Kellum*, 907 P.2d 712, 714 (Colo. App. 1995), or, pursuant to the doctrine of apparent authority, if the officer has a reasonable

belief that the third person allowing entry has actual authority to consent. *See Petersen*, 939 P.2d at 830.

Here, the court made an express finding that the officer knew that defendant's father did not live in the hotel room and was, in fact, only a guest in the room. Thus, there is no basis in the record to show that defendant's father had actual authority to give a lawful consent to the entry. *See Kellum*, 907 P.2d at 714.

As to the apparent authority, because Fourth Amendment protections attach at the threshold of the home, *Payton*, 445 U.S. at 590, we are concerned only with whether the officer here reasonably believed that the father had authority to consent to the entry at the time he knocked on the door. In light of the court's finding that the officer knew that defendant's father did not reside in the room, the record does not support an argument that the officer might have had a reasonable, albeit mistaken, belief that the father possessed such common authority over the hotel room. *See Petersen*, 939 P.2d at 830.

Thus, the record does not support a conclusion that the officer's entry into defendant's room was lawful under either a theory of actual or apparent authority. *Cf. Rodriguez*, 497 U.S. at

181-82 (officers reasonably believed woman who consented lived at the premises and possessed common authority, and thus search was reasonable, despite fact that woman lacked actual authority). Moreover, the fact that the father was a relative and not merely a casual visitor does not provide a legal basis for the officer's entry.

Further, the trial court's error in denying the motion to suppress was not harmless beyond a reasonable doubt, *see Chapman v. California*, 386 U.S. 18, 24 (1967), because the defendant's statements during the officer's interrogation were used by the prosecution at trial to prove defendant's guilt on both the theft and burglary counts – to prove the amount taken for the theft count, and to prove defendant's mental state for the burglary count. Further, the only evidence showing that the money taken by defendant exceeded $1000 was based on the information obtained by the officer in the course of his interrogation of defendant following the unlawful entry.

Accordingly, we conclude that the trial court erred in denying defendant's motion to suppress and that the convictions must therefore be reversed and the case remanded for a new trial on the third-degree burglary count and the felony theft count.

III. Sufficiency of the Evidence

Defendant next contends that there was insufficient evidence to support her conviction for theft of cash with a value of $1000 or more, but less than $20,000. We disagree.

A. Standard of Review

We review the record de novo to determine whether the evidence presented at trial was sufficient to sustain a defendant's conviction. *Dempsey v. People*, 117 P.3d 800, 807 (Colo. 2005). In reviewing the sufficiency of the evidence, we consider whether both direct and circumstantial evidence, when viewed as a whole and in the light most favorable to the prosecution, is substantial and sufficient to support a conclusion by a reasonable juror that a defendant is guilty of the charge beyond a reasonable doubt. *Clark v. People*, 232 P.3d 1287, 1291 (Colo. 2010); *People v. Davis*, 2012 COA 56, ¶ 12, 296 P.3d 219, 225.

It is not our role to determine what weight we would have given to the evidence. *People v. Jaramillo*, 183 P.3d 665, 670 (Colo. App. 2008). Instead, it is the fact finder who determines the credibility of witnesses, weighs the evidence, and resolves conflicts, inconsistencies, and disputes in the evidence. *People v. Poe*, 2012

COA 166, ¶ 14, 316 P.3d 13, 15-16; *People v. Duran*, 272 P.3d 1084, 1090 (Colo. App. 2011).

> In undertaking this analysis, we recognize that: (1) an actor's state of mind is normally not subject to direct proof and must be inferred from his or her actions and the circumstances surrounding the occurrence; (2) if there is evidence upon which one may reasonably infer an element of the crime, the evidence is sufficient to sustain that element; and (3) where reasonable minds could differ, the evidence is sufficient to sustain a conviction.

People v. Thompson, 121 P.3d 273, 278-79 (Colo. App. 2005) (citations omitted). However, "a 'modicum' of relevant evidence will not rationally support a conviction beyond a reasonable doubt." *People v. Gonzales*, 666 P.2d 123, 128 (Colo. 1983) (quoting *Jackson v. Virginia*, 443 U.S. 307, 320 (1979)); *see also People v. Espinoza*, 195 P.3d 1122, 1128 (Colo. App. 2008) ("A verdict in a criminal case may not be based on speculation or conjecture.").

B. Analysis

Defendant was convicted under the following statute:

> A person commits theft when he or she knowingly obtains, retains, or exercises control over anything of value of another without authorization . . . and . . . [i]ntends to deprive the other person permanently of the use or

> benefit of the thing of value. . . . Theft is . . . a class 4 felony if the value of the thing involved is one thousand dollars or more but less than twenty thousand dollars.

Ch. 384, sec. 3, § 18-4-401(2)(c), 2007 Colo. Sess. Laws 1691.

At trial, defendant admitted that she took the money out of the vending machine, and the hotel owner testified that she had so confessed to him. Defendant herself testified that she spent the money from the vending machines on a loan payment for car repairs, a rental car, gasoline for the rental car, dental work, medications, and groceries. She said that the amount of the cash she took totaled $780.

The police officer who interviewed her in her hotel room, however, testified that she admitted having made the following expenditures with the money she took: $500 to repair her car; $350 on a rental car; $250 for a deposit for a dental root canal; $100 on gasoline; $100 for state taxes and $75 for federal taxes. He went on to testify that her admitted expenditures from the vending machine cash totaled $1375.

As discussed, we have concluded that the officer's testimony regarding defendant's statements was improperly admitted and, as

a result, we must remand for a new trial. We recognize that the only trial evidence that defendant took more than $1000 was from the officer's testimony. Nevertheless, where the evidence admitted at trial, even if admitted erroneously, would have been sufficient to support a guilty verdict, the prosecution is entitled to a retrial on remand. *Lockhart v. Nelson*, 488 U.S. 33, 34 (1988); *People v. Marciano, 2014 COA 92,* ¶ 47; *People v. Sisneros,* 44 Colo. App. 65, 67-68, 606 P.2d 1317, 1319 (1980).

Viewed in the light most favorable to the prosecution, the evidence at trial, including the improperly admitted evidence, was substantial and sufficient to support a conclusion by a reasonable juror that defendant was guilty beyond a reasonable doubt. *Clark, supra,* 232 P.3d at 1291; *People v. Bennett*, 515 P.2d 466, 469 (Colo. 1973).

Therefore, we remand for a new trial on the felony theft count.

IV. Other Arguments on Appeal

In light of our holding on the issue of the denial of the motion to suppress, we need not address the additional issues raised by defendant, which appear unlikely to arise on retrial.

V. Conclusion

The judgment of conviction is reversed, and the case is remanded for a new trial.

JUDGE FURMAN and JUDGE LICHTENSTEIN concur.

Court of Appeals

STATE OF COLORADO
2 East 14th Avenue
Denver, CO 80203
(720) 625-5150

CHRIS RYAN
CLERK OF THE COURT

PAULINE BROCK
CHIEF DEPUTY CLERK

NOTICE CONCERNING ISSUANCE OF THE MANDATE

Pursuant to C.A.R. 41(b), the mandate of the Court of Appeals may issue forty-three days after entry of the judgment. In worker's compensation and unemployment insurance cases, the mandate of the Court of Appeals may issue thirty-one days after entry of the judgment. Pursuant to C.A.R. 3.4(I), the mandate of the Court of Appeals may issue twenty-nine days after the entry of the judgment in appeals from proceedings in dependency or neglect.

Filing of a Petition for Rehearing, within the time permitted by C.A.R. 40, will stay the mandate until the court has ruled on the petition. Filing a Petition for Writ of Certiorari with the Supreme Court, within the time permitted by C.A.R. 52(b) will also stay the mandate until the Supreme Court has ruled on the Petition.

BY THE COURT: Alan M. Loeb
Chief Judge

DATED: October 10, 2013

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