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Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. BARON DEL ASHLEY JR., aka MIKE ALLEN, aka MICHAEL JONES ASHLEY, aka BARON D EDINGTON, Appellant.	No. 81369-2-I DIVISION ONE UNPUBLISHED OPINION

LEACH, J. — A jury convicted Baron Del Ashley Jr. of two counts felony violation of a domestic violence no-contact order. Ashley appeals. He asserts the trial court should have suppressed surveillance video evidence because law enforcement violated his constitutional right to privacy. He also asserts the State failed to prove he committed a felony violation of the domestic violence no-contact order because it failed to show he had two valid prior convictions for violating a domestic violence no-contact order. Because the surveillance did not violate Ashley's right to privacy under article I, section 7, and because Ashley does not have standing under the Fourth Amendment, his privacy violation claim fails. Ashley's 2017 two prior misdemeanor convictions are constitutionally valid. So, we affirm his conviction.

BACKGROUND

Baron Del Ashley Jr. and Lorrie Marie Brookshire were married in November 2016. Brookshire has three children.

On August 7, 2017, the trial court entered a two-year domestic violence no-contact order protecting Brookshire against Ashley. The order prohibited Ashley from knowingly entering, remaining, or coming within 250 feet of Brookshire's home or work. It also prohibited face-to-face contact, but permitted Ashley and Brookshire to talk on the phone, text message, and email. The order explicitly warned:

> **Warning:** Violation of the provisions of this order with actual notice of its terms is a criminal offense under chapter 26.50 RCW and will subject a violator to arrest; any assault, drive-by shooting, or reckless endangerment that is a violation of this order is a felony. **You can be arrested even if the person protected by this order invites or allows you to violate the order's prohibitions.** You have the sole responsibility to avoid or refrain from violating the order's provisions. Only the court can change the order upon written application.

Without success, both Ashley and Brookshire asked the trial court to lift the no-contact order. Two days later, Ashley pleaded guilty to three counts of violating an earlier domestic violence no-contact order. In his plea agreement, Ashley stated, "On June 16, 17, and 18, 2017, I violated a No Contact Order in Clark County, Washington when I responded to telephone calls from my wife. Even though she was trying to get the no-contact orders dismissed, I should not have responded." Ashley was convicted of three misdemeanor violations of a domestic violence no-contact order.

In October 2017, Brookshire and two of her children moved into an apartment complex in Vancouver, Washington. Brookshire gave Ashley a key to

her apartment. At that time, Ashley was homeless. When Brookshire was not home, Ashley would go to the apartment to sleep, shower, and spend time with Brookshire's children.

On January 10, 2018, John DeGroat, an investigator with the Clark County Prosecuting Attorney's Office came into contact with Ashley in the parking lot 99 feet from Brookshire's apartment door.

Vancouver Police Department (VPD) Detective Sandra Aldridge began an investigation to locate Ashley. Aldridge determined that Ashley was not living with other relatives. Then, VPD began surveillance of Brookshire's apartment to determine if Ashley was living there. On March 9, Aldridge instructed Sargent Joseph Graaff to install surveillance cameras on a telephone pole outside Brookshire's apartment complex overlooking the apartment's parking lot. Aldridge watched the surveillance videos and saw a person who she believed was Ashley walking towards Brookshire's apartment.

On April 2, 2018, Aldridge obtained a warrant to search Brookshire's apartment for Ashley or for evidence that he lived there. The next day, the VPD executed the warrant. A VPD officer knocked on the apartment door, but no one answered. VPD officers entered the apartment and found Ashley standing outside an open bedroom window. In the bedroom, they found mail addressed to Ashley and his clothes. The officers arrested him. The State charged Ashley with one count of residential burglary and two counts of felony violation of a domestic violence court order.

Before trial, Ashley asked the trial court to suppress evidence obtained from the surveillance cameras. Ashley argued VPD violated his rights under article I, section 7 of the Washington State Constitution and the Fourth Amendment when it conducted video surveillance without a warrant. He also argued the VPD was not permitted to hang the surveillance cameras from the telephone poles. The trial court denied Ashley's request to suppress the videos because the cameras were focused on areas open to the public and the apartment complex's parking lot rather than Brookshire's apartment. The trial court also determined that Ashley did not have standing to raise the issue that VPD unlawfully used the telephone poles.

Ashley contested the constitutionality of his August 2017 guilty plea and misdemeanor convictions. He argued the convictions should not be used to elevate his current offense to a felony violation of a domestic violence no-contact order. The trial court found "that the State has proven beyond a reasonable doubt the constitutional validity of the Judgment and Sentence" and admitted a certified copy as evidence.

At trial, Ashley testified that he was inside Brookshire's apartment on April 3. He testified that he did not intend to commit a crime against Brookshire. Instead, he went "To help my family; to help my kids."

The jury convicted Ashley of two counts of felony violation of a no-contact order but acquitted him of residential burglary.

Ashley appeals.

ANALYSIS

I. Suppression Motion

Ashley asserts the trial court should have suppressed the surveillance video because VPD violated his right to privacy under article I, section 7 of the Washington State Constitution, and his reasonable expectation of privacy under the Fourth Amendment, when it recorded the parking lot. We review the denial of a request to suppress evidence by determining whether substantial evidence supports the trial court's findings of fact and whether those findings support the trial court's conclusions of law.[1] Substantial evidence exists if it is sufficient to persuade a fair-minded, rational person of the truth of the matter asserted.[2] We review conclusions of law de novo.[3]

First, Ashley claims the video surveillance violated his right to privacy under article I, section 7 of the Washington State Constitution. Article I, section 7 provides, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." Article I, section 7 provides greater protection than the Fourth Amendment.[4]

"Under article I, section 7, a search occurs when the government disturbs 'those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant.'"[5] A valid

[1] State v. Levy, 156 Wn.2d 709, 733, 132 P.3d 1076 (2006).
[2] Levy, 156 Wn.2d at 733.
[3] State v. Carneh, 153 Wn.2d 274, 281, 103 P.3d 743 (2004).
[4] State v. Muhammad, 194 Wn.2d 577, 586, 451 P.3d 1060 (2019).
[5] Muhammad, 194 Wn.2d 577, 586, 451 P.3d 1060 (2019) (citing State v. Myrick, 102 Wn.2d 506, 511, 688 P.2d 151 (1984).

warrant is required to search unless the State demonstrates that an exception to the warrant requirement applies.[6]

"To determine whether governmental conduct intrudes on a private affair, we look at the 'nature and extent of the information which may be obtained as a result of the governmental conduct' and at the historical treatment of the interest asserted."[7] "What is voluntarily exposed to the general public and observable without the use of enhancement devices from an unprotected area is not considered part of a person's private affairs."[8] When law enforcement officers can detect something at a lawful vantage point with their own senses, no search occurs under article I, section 7.[9] Use of binoculars and flashlights to better see something already visible is lawful.[10]

Technological substitutes that do more than enhancing a law enforcement officer's natural sense are intrusive and impermissible without a warrant under article I, section 7.[11] For example, use of infrared thermal devices to view heat patterns within a home that are not visible to the naked eye[12] and attaching a GPS device to a private vehicle to track its location[13] are intrusive and require a warrant.

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[6] Muhammad, 194 Wn.2d at 586 (citing State v. Miles, 160 Wn.2d 236, 244, 156 P.3d 864 (2007)); State v. Rife, 133 Wn.2d 140, 150-51, 943 P.2d 266 (1997).

[7] Muhammad, 194 Wn.2d at 586 (citing Miles, 160 Wn.2d at 244)).

[8] State v. Young, 123 Wn.2d 173, 182, 867 P.2d 593 (1994).

[9] State v. Jackson, 150 Wn.2d 251, 260, 76 P.3d 217 (2003) (citing State v. Seagull, 95 Wn.2d 898, 901,632 P.2d 44 (1981)).

[10] Jackson, 150 Wn.2d at 260 (citing Young, 123 Wn.2d at 183)).

[11] Muhammad, 194 Wn.2d at 586-87.

[12] Young, 123 Wn.2d at 182-84.

[13] Jackson, 150 Wn.2d at 264.

The trial court denied Ashley's motion to suppress the surveillance video because:

> The focus here [wa]s to put a camera on a particular place that's solely open to the public and to record everything that goes on there, hoping that Mr. Ashley or Ms. Brookshire or both go through, but not focusing the camera on only the areas where they would be. So it's an open area -- open to the public, anybody could see day or night what's going on. The camera is pointed at that area and recording passively whatever is going on there.

The surveillance camera did not allow VPD to see something more than they would have seen with the naked eye. A camera aimed at the parking lot, rather than at Brookshire's apartment door or through a window, is not impermissively intrusive. No violation of Ashley's state privacy right occurred.

Second, Ashley claims the surveillance cameras violated his reasonable expectation of privacy under the Fourth Amendment. The State counters that Ashley does not have standing to claim a Fourth Amendment violation because he had no legal right to be present in Brookshire's apartment and therefore no reasonable expectation of privacy there.

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[14] A "Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable."[15] "To qualify for Fourth Amendment protection, a criminal defendant must, at a minimum,

[14] U.S. CONST. amend. IV.

[15] Kyllo v. United States, 533 U.S. 27, 32-3, 121 S.Ct. 2038, 150 L.Ed.2d 94 (2001).

show that he or she has standing to contest the invasion of privacy."[16] Standing depends on whether the person claiming protection has a legitimate expectation of privacy in the space.[17]

In State v. Jacobs, we determined that a person does not have a reasonable expectation of privacy in a place where they are illegally present.[18] A domestic violence no-contact order restrained Jacobs from having any contact with the victim. Despite testimony that Jacobs kept an overnight bag at the house and stayed there regularly, his violation of the court order made his presence illegal. So, he lacked standing to challenge the legality of the search.[19]

Here, the domestic violence no-contact order prohibited Ashley from knowingly entering, remaining, or coming within 250 feet of Brookshire's apartment. Although, with Brookshire's permission, Ashley kept personal items and regularly showered at her apartment. Ashley violated the domestic violence no-contact order when he was in the parking lot and apartment.[20] His violation made his presence illegal. So, Ashley lacks standing to challenge the surveillance under the Fourth Amendment.

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[16] State v. Jacobs, 101 Wn. App. 80, 87, 2 P.3d 974 (2000) (citing State v. Jackson, 82 Wn. App. 594, 601-02, 918 P.2d 945 (1996)).

[17] Jacobs, 101 Wn. App. at 87 (citing Rakas v. Illinois, 439 U.S. 128, 143, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978)).

[18] 101 Wn. App. 80, 87, 2 P.3d 974 (2000).

[19] Jacobs, 101 Wn. App. at 88.

[20] Jacobs, 101 Wn. App. at 88 (citing State v. Dejarlais, 88 Wn. App. 297, 302-03, 944 P.2d 1110 (1997)).

Because the surveillance did not violate Ashley's right to privacy under article I, section 7, and because Ashley does not have standing under the Fourth Amendment, the trial court did not err in denying the request to suppress evidence.

II. Prior Convictions

RCW 26.50.110(5) elevates a violation of a no-contact order from a misdemeanor to a felony if the defendant has at least two prior convictions for violating a no-contact order.[21] RCW 26.50.110 punishes each separate contact with a protected party as a separate violation of a no-contact order.[22]

Under RCW 26.50.110(5), Ashley's 2017 misdemeanor convictions for violating a domestic violence no-contact order elevated his convictions here to felony violations of a domestic violence no-contact order. Ashley challenges the validity of his 2017 convictions and the sufficiency of the State's evidence to prove their validity. He claims that the convictions are constitutionally defective for three reasons. First, his statement on plea of guilty does not describe all the elements of the crime. Second, the record does not show the trial court had sufficient evidence to accept his plea. And finally, the record does not show his plea was voluntary because it does not affirmatively show he was advised that the court could have imposed three consecutive sentences for his three convictions.

A defendant may challenge the validity of a prior conviction when the existence of that conviction is an element of the current charged crime.[23] Once the defendant offers a "colorable, fact-specific argument" supporting the challenge,

[21] RCW 26.50.110(5).
[22] State v. Brown, 159 Wn. App. 1, 10-11, 248 P.3d 518 (2010).
[23] State v. Summers, 120 Wn.2d 801, 810, 846 P.2d 490 (1993).

the State has the burden to prove beyond a reasonable doubt that the prior convictions are constitutional.[24] The constitutional validity of a prior conviction is a question of law that we review de novo.[25] To prove the guilty plea is constitutionally valid, the State must show that Ashley entered it knowingly, intelligently, and voluntarily.[26]

In the 2017 guilty plea agreement, Ashley wrote that, "On June 16, 17, and 18, 2017, I violated a No Contact Order." The paragraph immediately above Ashley's signature states, "My lawyer has explained to me, and we have fully discussed, all of the above paragraphs. I understand them all."

The trial court found:

> The elements of the offense are not included in the paragraph 4 of the Change of Plea, but that paragraph is checked with a box that says the elements are as set forth in the charging document and the charging document is attached to the Plea Form. So, therefore, he was properly advised of the elements of the offense involved.

It also determined, "The plea was knowingly and voluntarily made and there was a factual basis laid out in the forms for it and, therefore, the State has proven that it was constitutionally done." We agree.

A defendant must be apprised of the nature of the offense and the consequences of pleading guilty for his guilty plea to be accepted as knowing, intelligent and voluntary.[27] Ashley first argues that his Statement of Defendant on

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[24] State v. Summers, 120 Wn.2d at 811-12 (citing State v. Swindell, 93 Wn.2d 192, 197, 607 P.2d 852 (1980); State v. Gore, 101 Wn.2d 481, 486, 681 P.2d 227 (1984)).

[25] State v. Miller, 156 Wn. 2d 23, 27, 31, 123 P.3d 827 (2015).

[26] State v. Branch, 129 Wn.2d 635, 642, 919 P.2d 1228 (1996).

[27] Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).

Plea of Guilty to the misdemeanors does not show that he was aware of the elements of the admitted crimes because it does not state the required mental element that he knowingly violated the no contact order. But, a defendant's statement on a guilty plea does not need to list each element of the admitted crime if other documents referenced in the statement do.[28] Here, Ashley's guilty plea statement specifically referenced an attached charging document that identified the requisite mental intent as "knowingly violating the restraint provisions therein", referring to a previously issued no contact order pursuant to RCW Ch. 10.99. This provides sufficient evidence that Ashley knew the requisite mental state and voluntarily pleaded guilty.

Ashley also claims the court accepting his plea did not have a sufficient factual basis to accept his plea. In determining whether a sufficient factual basis exists, a court does not need to be convinced of the defendant's guilt beyond a reasonable doubt.[29] Instead, the record before the court must include sufficient evidence for a jury to conclude the defendant is guilty.[30] Ashley admitted to facts sufficient to establish the elements of the crime of violation of a no contact order. Ashley admitted he violated a no contact order by responding to telephone calls from his wife. So, he admitted the existence of a no contact order, his knowledge of its existence, and that he violated it by having contact with his wife. This

[28] Personal Restraint of Keene, 95 Wn.2d 203, 207, 622 P.2d 360 (1980) (citing Henderson v. Morgan, 426 U.S. 637, 645, 96 S.Ct. 2253, 49 L.Ed.2d 108 (1976).

[29] State v. Saas, 118 Wn.2d 37, 43, 820 P.2d 505 (1991).

[30] State v. Saas, 118 Wn.2d at 43.

evidence is sufficient to support a jury's conclusion that Ashley was guilty. The court had a sufficient factual basis to accept Ashley's guilty pleas.

Finally, Ashley claims he was not informed of all the direct consequences of his guilty plea because his guilty plea statement does not state the court could impose consecutive sentences for the three violations he admitted. For a guilty plea to be knowing and voluntary, the person pleading guilty must understand the plea's consequences, including possible sentencing consequences.[31] "[A] guilty plea may be deemed involuntary when based on misinformation regarding a direct consequence of the plea, regardless of whether the actual sentencing range is lower or higher than anticipated."[32] Ashley was not misinformed about the sentencing consequences of his plea. He was correctly informed that the crimes he was charged with each carried a maximum sentence of 364 days in jail. Each crime listed on the first page of his plea statement showed the standard range of each count was up to 364 days, and he was notified that the crime to which he pled guilty had a maximum sentence of 364 days. These notifications sufficiently advised Ashley about the direct consequences of his pleas. Ashley cites no authority that requires more.

CONCLUSION

We affirm. Because the surveillance did not violate Ashley's right to privacy under article I, section 7, and because Ashley does not have standing under the

[31] Personal Restraint of Stockwell, 179 Wn.2d 588, 594-95, 316 P.3d 1007 (2014).

[32] State v. Mendoza, 157 Wn.2d 582, 591, 141 P.3d 49 (2006).

Fourth Amendment, the search warrant affidavit was not defective. So, the trial court did not err in denying the motion to suppress. Because Ashley's 2017 guilty plea and misdemeanor convictions are constitutionally valid, we affirm his conviction.

Leach, J.

WE CONCUR: