IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MYRTIS TYRONE JAMES, A/K/A JAMES TYRONE MYRTIS, Appellant, vs. THE STATE OF NEVADA, Respondent.	No. 83439-COA

JUL 08 2022

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY [signature]
DEPUTY CLERK

ORDER OF AFFIRMANCE

Myrtis Tyrone James appeals from a judgment of conviction, entered pursuant to a jury verdict, of felony driving or being in actual physical control of a vehicle while being under the influence of intoxicating liquor (DUI). Seventh Judicial District Court, White Pine County; Gary Fairman, Judge.

First, James argues the district court erred by denying his motion to suppress evidence obtained from an unlawful search and seizure. Specifically, James argues Sheriff's Sergeant Luke Shady did not have reasonable suspicion that he was engaged in criminal activity and, thus, Sgt. Shady could not stop him or ask for identification. James further contends Sgt. Shady was obligated to leave the scene once James indicated he did not need assistance.

"In the ordinary course a police officer is free to ask a person for identification without implicating the Fourth Amendment." *Hiibel v. Sixth Judicial Dist. Court*, 542 U.S. 177, 185 (2004). "Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." *Florida v. Bostick*, 501 U.S. 429, 434 (1991) (quotation marks omitted). The

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appropriate inquiry is whether, given the totality of the circumstances, a reasonable person in the defendant's position "would have felt free to decline the officers' requests or otherwise terminate the encounter." *Id.* at 438; *accord State v. Burkholder*, 112 Nev. 535, 539, 915 P.2d 886, 888 (1996). "A motion to suppress presents mixed questions of law and fact." *State v. Lloyd*, 129 Nev. 739, 743, 312 P.3d 467, 469 (2013). We review the district court's findings of fact for clear error and the legal consequences of those facts de novo. *State v. Beckman*, 129 Nev. 481, 486, 305 P.3d 912, 916 (2013).

James was parked in a public place, and Sgt. Shady's questions were neither coercive nor threatening. Sgt. Shady did not turn on the police vehicle's emergency lights, and he did not draw his weapon. There is no indication James's brief conversation with Sgt. Shady was anything other than voluntary. Under these circumstances, a reasonable person would have felt free to terminate the encounter with Sgt. Shady, and James has not demonstrated he was subjected to a Fourth Amendment seizure.

Moreover, even if a seizure had occurred, "a law enforcement officer's reasonable suspicion that a person may be involved in criminal activity permits the officer to stop the person for a brief time and take additional steps to investigate further." *Hiibel*, 542 U.S. at 185. The record reveals Sgt. Shady reasonably believed James may have been involved in criminal activity such as a burglary, and therefore, Sgt. Shady was permitted to stop James and ask for his identification. Accordingly, we conclude the district court did not err by denying the motion to suppress.

Second, James argues defendants cannot defend against "actual physical control" claims in DUI cases because jurors are given no direction on how to consider the actual-physical-control factors articulated by the

Nevada Supreme Court in *Rogers v. State*, 105 Nev. 230, 773 P.2d 1226 (1989).[1] In particular, James argues it is unclear what burden of proof applies to the *Rogers* factors and that jurors might presume a factor supports a finding of actual physical control when no evidence is presented.

The supreme court addressed this issue in *Barnier v. State*, 119 Nev. 129, 67 P.3d 320 (2003). There, the supreme court declined to provide further instruction on how the *Rogers* factors should be weighed by the jury, stating the proper balancing of those factors should be left to the jury's discretion and that "[t]he result will differ based on an application of the *Rogers* factors to specific factual situations." *Barnier*, 119 Nev. at 134, 67 P.3d at 323. Therefore, James has not demonstrated he is entitled to relief.

Finally, James argues the district court improperly refused to give his proposed jury instruction on direct and circumstantial evidence and the reasonable doubt standard. "District courts have broad discretion to settle jury instructions." *Cortinas v. State*, 124 Nev. 1013, 1019, 195 P.3d

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[1]In *Rogers*, the supreme court held that a trier of fact must consider several factors in determining whether a person is in actual physical control of a vehicle, including

> where, and in what position, the person is found in the vehicle; whether the vehicle's engine is running or not; whether the occupant is awake or asleep; whether, if the person is apprehended at night, the vehicle's lights are on; the location of the vehicle's keys; whether the person was trying to move the vehicle or moved the vehicle; whether the property on which the vehicle is located is public or private; and whether the person must, of necessity, have driven to the location where apprehended.

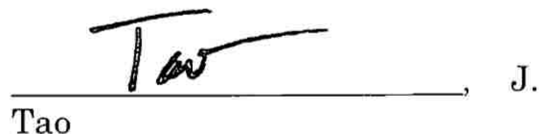
Rogers, 105 Nev. at 233-34, 773 P.2d at 1228.

315, 319 (2008). We "review a district court's refusal to give a jury instruction for an abuse of discretion or judicial error." *Nay v. State*, 123 Nev. 326, 330, 167 P.3d 430, 433 (2007).

The district court determined James's proposed jury instruction was "very wordy" and "covered by other instructions that the Court has given." James proposed a lengthy jury instruction that was substantially covered by other instructions addressing direct and circumstantial evidence and the reasonable doubt standard. We conclude the district court did not abuse its discretion in refusing to give the instruction. *See Vallery v. State*, 118 Nev. 357, 372, 46 P.3d 66, 77 (2002) (stating the district court may refuse a jury instruction that is "substantially covered by other instructions"); *see also* NRS 175.211(2) (stating no other definition of reasonable doubt may be given than the statutory one). Accordingly, we

ORDER the judgment of conviction AFFIRMED.

_______________, C.J.
Gibbons


_______________, J.
Tao

_______________, J.
Bulla

cc: Hon. Gary Fairman, District Judge
Sears Law Firm, Ltd.
Attorney General/Carson City

White Pine County District Attorney
White Pine County Clerk