IN THE COURT OF APPEALS OF THE STATE OF NEVADA

JEROME AUSTIN LINDESMITH,
Appellant,
vs.
THE STATE OF NEVADA,
Respondent.

No. 85640-COA

ORDER OF AFFIRMANCE

Jerome Austin Lindesmith appeals from a judgment of conviction entered pursuant to a jury verdict of driving under the influence (DUI) with a prior felony DUI. Second Judicial District Court, Washoe County; Connie J. Steinheimer, Judge.

Lindesmith argues that the district court committed plain error by admitting testimonial hearsay regarding blood-test results concerning methamphetamine. Lindesmith contends that the test results were created by a non-testifying witness and the district court improperly permitted a different expert to testify regarding those results. Lindesmith asserts that admission of that testimony and the test results violated his right to confrontation.

Lindesmith did not raise a Confrontation Clause objection to the admission of the challenged testimony or evidence below, and thus, Lindesmith is not entitled to relief absent a demonstration of plain error. *See Flowers v. State*, 136 Nev. 1, 8, 456 P.3d 1037, 1045 (2020) (recognizing "[t]he right to confrontation may, of course, be waived, including by failure

to object to the offending evidence" but that plain error review may apply "to an otherwise forfeited Confrontation Clause objection" (emphasis and quotation marks omitted)); *Grey v. State*, 124 Nev. 110, 120, 178 P.3d 154, 161 (2008) (recognizing that, in order to properly preserve an objection, a defendant must object at trial on the same ground he asserts on appeal). To demonstrate plain error, Lindesmith must show "(1) there was an error; (2) the error is plain, meaning that it is clear under current law from a casual inspection of the record; and (3) the error affected [his] substantial rights." *Jeremias v. State*, 134 Nev. 46, 50, 412 P.3d 43, 48 (2018) (internal quotation marks omitted). "[A] plain error affects a defendant's substantial rights when it causes actual prejudice or a miscarriage of justice (defined as a 'grossly unfair' outcome)." *Id.* at 51, 412 P.3d at 49.

An expert witness was questioned concerning testing of the blood samples for methamphetamine but the expert acknowledged that he did not conduct the testing himself and did not reach his own conclusions regarding the testing. The State concedes on appeal that the evidence concerning the methamphetamine contained testimonial statements. Lindesmith's right to confrontation was violated by the admission of the testimonial statements of a non-testifying witness when Lindesmith did not have an opportunity to cross-examine that witness regarding those statements. *See Vega v. State*, 126 Nev. 332, 338-40, 236 P.3d 632, 637-38 (2010); *cf. Flowers*, 136 Nev. at 9, 456 P.3d at 1046 ("An expert witness may rely on hearsay, including testimonial hearsay, without violating the Confrontation Clause, so long as the testifying expert does not 'effectively' introduce the un-cross-examined testimonial hearsay into evidence.").

Thus, improper admission of the testimonial statements regarding the methamphetamine testing amounted to error plain from the record.

However, Lindesmith does not demonstrate he suffered actual prejudice or a miscarriage of justice stemming from admission of the statements concerning the methamphetamine testing. Lindesmith's amended information charged him with DUI under alternative theories of liability: He drove (1) "under the influence of a controlled substance to a degree rendering him incapable of safely driving or exercising actual physical control of a vehicle," and/or (2) with more than the statutory maximum of methamphetamine in his blood, and/or (3) with more than the statutory maximum of marijuana or marijuana metabolite in his blood.

The expert witness testified that he also conducted blood testing to ascertain whether marijuana or its metabolite were contained within Lindesmith's blood samples. The witness testified that testing revealed 7.1 nanograms of the active ingredient in marijuana per milliliter of blood, plus or minus 1.4 nanograms per milliliter. The witness also testified that testing revealed 8.0 nanograms of the marijuana metabolite per milliliter of blood, plus or minus 1.6 nanograms per milliliter. Thus, Lindesmith's levels of marijuana and its metabolite were well above the legal limits provided by NRS 484C.110(4).

The additional evidence presented at trial demonstrated that Lindesmith drove or was in actual physical control of his vehicle while he was under the influence of a controlled substance: marijuana. Based on that information, and excluding the improperly admitted evidence concerning the methamphetamine testing, there was significant evidence of

Lindesmith's guilt presented at trial. Thus, Lindesmith does not demonstrate error affecting his substantial rights. Accordingly, we

ORDER the judgment of conviction AFFIRMED.[1]

_____, C.J.
Gibbons

_____, J.
Westbrook

_____, Sr.J.
Silver

cc: Hon. Connie J. Steinheimer, District Judge
Washoe County Public Defender
Attorney General/Carson City
Washoe County District Attorney
Washoe District Court Clerk

---

[1]The Honorable Abbi Silver, Senior Justice, participated in the decision of this matter under a general order of assignment.