NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2011 KA 0477

STATE OF LOUISIANA

VERSUS

ROBERT STEWARD

Judgment rendered November 9, 2011.

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Appealed from the
32nd Judicial District Court
in and for the Parish of Terrebonne, Louisiana
Trial Court No. 531,849
Honorable Randall L. Bethancourt, Judge

* * * * * *

HON. JOSEPH L. WAITZ, JR.
DISTRICT ATTORNEY
J. CHRISTOPHER ERNY
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HOUMA, LA

ATTORNEYS FOR
STATE OF LOUISIANA

BERTHA M. HILLMAN
THIBODAUX, LA

ATTORNEY FOR
DEFENDANT-APPELLANT
ROBERT STEWARD

* * * * * *

BEFORE: PETTIGREW, McCLENDON, AND WELCH, JJ.

Welch J. concurs in result

PETTIGREW, J.

The defendant, Robert Steward, was charged by bill of information with possession with intent to distribute marijuana, a violation of La. R.S. 40:966(A)(1); and unlawful possession of a firearm while in possession of a controlled dangerous substance (marijuana), a violation of La. R.S. 14:95(E). The defendant pled not guilty to the charges. The defendant filed a motion to suppress the evidence and, following a hearing on the matter, the motion was denied. Following a jury trial, the defendant was found guilty as charged on both counts. For the possession with intent to distribute marijuana conviction, the defendant was sentenced to twenty years imprisonment at hard labor; for the unlawful possession of a firearm while in possession of marijuana conviction, the defendant was sentenced to ten years imprisonment at hard labor without the benefit of probation, parole, or suspension of sentence. The trial court ordered the sentences to run consecutively. The defendant now appeals, designating two assignments of error. We affirm the convictions and sentences.

FACTS

On the night of November 23, 2008, Sergeant Billy Dupre, Jr. and Deputy Tracy Smith, both with the Terrebonne Parish Sheriff's Office, were patrolling together in the area of Martin Luther King Boulevard in Houma. At an intersection, Sergeant Dupre observed the defendant in a white Cadillac veer to the wrong lane into oncoming traffic. Sergeant Dupre got behind the defendant and turned on his siren and emergency lights. The defendant did not stop, but continued to drive into the driveway of The Landing apartment complex. While the defendant made his way around the driveway, Sergeant Dupre observed an object being thrown out of the driver's side front window. Shortly thereafter, Sergeant Dupre observed an object being thrown out of the passenger's side front window. The defendant was alone. Before the defendant could exit the apartment complex, another police unit blocked his way. The defendant was removed from the vehicle. The defendant was **Mirandized** and asked what he threw out of the window. The defendant said he threw out a "blunt" (marijuana in cigar wrapping). Deputy Smith walked to where the defendant threw the other object and

found an M&M's mini-bottle containing about twenty-three Ecstasy pills. The defendant was arrested. Sergeant Dupre searched the defendant and found on his person cash and a hotel room key (a swipe card). At this point, Agent Russell Hornsby, Jr., who at the time was a narcotics agent with the Terrebonne Parish Sheriff's Office, took over the case.

Agent Hornsby asked the defendant to which hotel room his key belonged. The defendant told him the Hampton Inn. Police officers went to verify this and discovered the defendant was lying. The police then searched several hotels around the area until they discovered that the defendant's room key was for the Plantation Inn. Although room 247 was registered in the defendant's name, the defendant told Agent Hornsby that he had rented it for Dana Jacobs and that he had nothing to do with the room. Sergeant Dupre and Lieutenant Enos Thibodeaux, with the Terrebonne Parish Sheriff's Office, went to room 247 to speak with Dana, while Agent Hornsby stayed with the defendant in a police unit in the Plantation Inn parking lot. Dana invited the officers inside the hotel room. Sergeant Dupre immediately smelled marijuana and observed a blunt in an ashtray. Sergeant Dupre went downstairs to tell Agent Hornsby of his findings. Agent Hornsby went to the hotel room while Sergeant Dupre stayed down in the police unit with the defendant.

Agent Hornsby observed the blunt in the ashtray. Near the ashtray, Agent Hornsby saw a box of sandwich bags. Dana denied that it was hers. Agent Hornsby searched Dana's purse and found another room key for the room they were in. Agent Hornsby walked around the room and saw a red Scooby-Doo duffel bag under a chair. He grabbed the duffel bag, which was closed, placed it on the bed and asked Dana if it was hers. Dana said that it was not and that she had never seen it before. Agent Hornsby unzipped the duffel bag and found a sandwich bag that contained about one-half pound of marijuana, a Ruger 9mm handgun with eight live rounds in the magazine, two scales, a Nextel cell phone, a Blackberry cell phone, and several other items. Agent Hornsby went downstairs to the defendant and asked him if he had any personal items in the hotel room. The defendant told Agent Hornsby that he had a red duffel bag with

Scooby-Doo emblems on it. Agent Hornsby told the defendant that he found the duffel bag and also found what was inside of it. At that point, the defendant stopped speaking to Agent Hornsby.

The defendant did not testify at the trial or motion to suppress hearing.

ASSIGNMENT OF ERROR NO. 1

In his first assignment of error, the defendant argues the trial court erred in denying his motion to suppress the evidence. Specifically, the defendant contends that the warrantless search of his duffel bag was not justified under the plain view doctrine, or any of the other exceptions to the rule requiring a search warrant.

When a trial court denies a motion to suppress, factual and credibility determinations should not be reversed in the absence of a clear abuse of the trial court's discretion; i.e., unless such ruling is not supported by the evidence. See **State v. Green**, 94-0887, p. 11 (La. 5/22/95), 655 So.2d 272, 280-281. However, a trial court's legal findings are subject to a *de novo* standard of review. See **State v. Hunt**, 2009-1589, p. 6 (La. 12/1/09), 25 So.3d 746, 751.[1]

The Fourth Amendment to the United States Constitution and article I, § 5 of the Louisiana Constitution protect people against unreasonable searches and seizures. Subject only to a few well-established exceptions, a search or seizure conducted without a warrant issued upon probable cause is constitutionally prohibited. Once a defendant makes an initial showing that a warrantless search or seizure occurred, the burden of proof shifts to the State to affirmatively show it was justified under one of the narrow exceptions to the rule requiring a search warrant. See La. Code Crim. P. art. 703(D). The constitutional protection provided in the Fourth Amendment also applies to hotel rooms. **State v. Warren**, 2005-2248, p. 9 (La. 2/22/07), 949 So.2d 1215, 1223. See **Stoner v. California**, 376 U.S. 483, 490, 84 S.Ct. 889, 893, 11 L.Ed.2d 856 (1964).

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[1] In determining whether the ruling on defendant's motion to suppress was correct, we are not limited to the evidence adduced at the hearing on the motion. We may consider all pertinent evidence given at the trial of the case. **State v. Chopin**, 372 So.2d 1222, 1223 n.2 (La. 1979).

"Knock and Talk" is a law enforcement tactic where police officers, who possess some information that they believe warrants further investigation, but that is insufficient to constitute probable cause for a search warrant, approach the person suspected of engaging in illegal activity at the person's residence (even knock on the front door), identify themselves as police officers, and request consent to search for the suspected illegality or illicit items. Louisiana jurisprudence allows the "knock and talk" approach of police. Knocking on a door is an "age old request for permission to speak to the occupant." When a door is opened in response to a knock, it is consent of the occupant to confront the caller, and there is no compulsion, force, or coercion involved. **Warren**, 2005-2248 at 5-7, 949 So.2d at 1221-1222.

The defendant was in possession of illegal drugs, which were seized by the police; the defendant was renting a hotel room in the same parish in which he lived; and the defendant lied to the police about the hotel room key found on his person. The police also discovered that the defendant's hotel room at the Plantation Inn was registered in his name. Accordingly, the police possessed enough information to conduct a knock and talk at the defendant's hotel room. Upon conducting the knock and talk, which the defendant does not contest, Sergeant Dupre smelled marijuana from inside the room when Dana Jacobs opened the door. Sergeant Dupre and Lieutenant Thibodeaux asked Dana if they could enter the room, and she allowed them inside. Upon entering, Sergeant Dupre observed a blunt in the ash tray on the nightstand next to the bed. Sergeant Dupre went downstairs and communicated this information to Agent Hornsby, who entered the room and observed the blunt, himself. To this point, the actions of the police were proper under the Fourth Amendment.

Based on his observation of the blunt, Agent Hornsby conducted a search of the hotel room. According to his testimony at both the trial and motion to suppress hearing, Agent Hornsby did not need a search warrant to search the room because of the plain view doctrine. Agent Hornsby explained that his observation of the blunt in plain view allowed him to search the entire room, including the zipped-up duffel bag he found under the chair.

Agent Hornsby was incorrect, and his subsequent actions based on his faulty appreciation of the plain view doctrine violated the Fourth Amendment. Under the plain view doctrine, if police are lawfully in a position from which they view an object, if its incriminating character is immediately apparent, and if the officers have a lawful right of access to the object, they may seize it without a warrant. See **Horton v. California**, 496 U.S. 128, 136-137, 110 S.Ct. 2301, 2307-2308, 110 L.Ed.2d 112 (1990). Thus, since the illegality of the marijuana blunt in this case was immediately apparent from the mere observation (and smell) of it, and Agent Hornsby was in a place he had a right to be, the plain view doctrine allowed Agent Hornsby to seize the marijuana blunt, but nothing more, without a warrant.

However, for any subsequent search of the hotel room for narcotics or other evidence of illegality to be valid, it must fall under one of the well-established exceptions to a warrantless search. Neither the defendant nor Dana gave the police consent to search the hotel room. A search conducted with the consent of a defendant is an exception to both the warrant and the probable cause requirements of the law. **State v. Tennant**, 352 So.2d 629, 633 (La. 1977), cert. denied, 435 U.S. 945, 98 S.Ct. 1529, 55 L.Ed.2d 543 (1978). Further, the search of the defendant's duffel bag could not be legitimately considered a search incident to arrest. After making an arrest, an officer has the right to much more thoroughly search a defendant and his wing span, or lunge space, for weapons or evidence incident to a valid arrest. This rule is justified by the need to remove any weapon the arrestee might seek to use to resist arrest or to escape, and the need to prevent the concealment or destruction of evidence. **Warren**, 2005-2248 at 14, 949 So.2d at 1226. See **Chimel v. California**, 395 U.S. 752, 763, 89 S.Ct. 2034, 2040, 23 L.Ed.2d 685 (1969).

The defendant's wing span or lunge space was not a factor in this case. Sergeant Dupre was with the defendant, who was downstairs in the hotel parking lot handcuffed in the back of a police unit. Thus, there was clearly no item in the duffel bag upstairs that was in the immediate control of the defendant. The defendant's complete lack of access to the duffel bag assured he could not seek a weapon from it or get to it to conceal or

destroy evidence. Cf. **Warren**, 2005-2248 at 14-20, 949 So.2d at 1226-1230 (in which the supreme court found the search of a duffel bag in a motel room incident to arrest valid, where the handcuffed defendant was seated at the doorway of the motel room six feet away from the duffel bag).

Another exception to the warrantless search is the existence of probable cause and exigent circumstances. See **Warren**, 2005-2248 at 9, 949 So.2d at 1224. Probable cause to believe contraband is present is necessary to justify a warrantless search, but it alone is not sufficient. Mere probable cause does not provide the exigent circumstances necessary to justify a search without a warrant. Probable cause is defined as reasonable grounds for belief, supported by less than prima facie proof but more than mere suspicion. This determination must be made from the totality of the circumstances, based on the objective facts known to the officer at the time. In determining whether sufficient exigent circumstances exist to justify the warrantless entry and search or seizure, the court must consider the totality of the circumstances and the inherent necessities of the situation at the time. Further, the scope of the intrusion must be circumscribed by the exigencies that justified the warrantless search. **Warren**, 2005-2248 at 10, 949 So.2d at 1224. Exigent circumstances may arise from the need to prevent the offender's escape, minimize the possibility of a violent confrontation that could cause injury to the officers and the public, and preserve evidence from destruction or concealment. **State v. Brisban**, 2000-3437 (La. 2/26/02), 809 So.2d 923, 927-928.

In this case, even assuming Agent Hornsby had probable cause to believe there were other narcotics in the hotel room after observing the blunt in plain view, we find nothing in the record to indicate exigent circumstances to justify Agent Hornsby's search of the defendant's duffel bag. As noted, the defendant was downstairs handcuffed in a police unit. Dana denied that the blunt was hers and was not charged with possession of the blunt. Agent Hornsby testified at trial that, regarding any connection to the hotel room, the defendant and Dana were the only two people he saw that night and that, to his knowledge, no one else had entered or gone through the room besides the defendant and Dana. As such, we find that Agent Hornsby could not have reasonably believed that

a search of the defendant's duffel bag was necessary at the time he searched it to prevent the imminent destruction of evidence or contraband, or because the defendant posed a risk of danger to him or others. Cf. **Warren**, 2005-2248 at 13, 949 So.2d at 1226 (the supreme court found exigent circumstances existed to search the duffel bag because the defendant informed the officers that two other people staying with him in the motel room were downstairs in the motel bar and would return soon; one of the officers ran a criminal history on one of the men who was to return to the room soon and discovered he had an extensive criminal record, including multiple charges for burglary, second degree battery, illegal possession of firearms, and two previous offenses of possession of a controlled dangerous substance and, further, that the motel room was registered to this particular individual).

The State suggests in its brief that the defendant's duffel bag was abandoned because the defendant stated that he had nothing to do with the hotel room. Accordingly, the State asserts, "the search of the duffel bag was reasonable as a search of abandoned property." Agent Hornsby gave similar testimony. At the motion to suppress hearing, he stated the defendant told him "he had just bought the room for the female and he had nothing to do with the room." Later, Agent Hornsby testified the defendant "abandoned the room." At trial, Agent Hornsby testified that, just prior to the officers going to the hotel room to speak with Dana, the defendant told him (Hornsby) "he had just rented the room for the female, and he had nothing to do with the room, distancing himself from the room." On cross-examination at trial, Agent Hornsby testified as follows:

> Q. I see. Why did you not ask [Dana] if you could search the duffle bag?
> A. When I placed it on the bed I asked her if it was for her. She said no. She distanced herself from the bag which means it's not hers. [The defendant] distanced himself from the room, which at that time meant nothing in that room was for him.
> Q. Okay.
> A. It is left abandoned, abandoned property. If something is abandoned property we don't need a search warrant.

The warrantless search of abandoned property does not constitute an unreasonable search and does not violate the Fourth Amendment, because when individuals voluntarily abandon property, they forfeit any expectation of privacy in it that

they might have had. Generally, an individual enjoys a reasonable expectation of privacy in personal luggage that is protected by the Fourth Amendment. However, an individual who abandons or denies ownership of personal property may not contest the constitutionality of its subsequent acquisition by police. The issue in abandonment cases is whether the defendant in leaving the property has relinquished his reasonable expectation of privacy so that the search and seizure is valid. **State v. Stephens**, 40,343, p. 5 (La. App. 2 Cir. 12/14/05), 917 So.2d 667, 672-673, writ denied, 2006-0441 (La. 9/22/06), 937 So.2d 376.

Under the facts of this case, we do not find that the duffel bag was abandoned. The defendant's "distancing" himself from the hotel room or telling Agent Hornsby he had nothing to do with the room is not tantamount to abandoning any and all possessory or ownership interest in his duffel bag inside that hotel room. The mere denial of ownership of an item in one's possession is not sufficient proof of intent of disassociation to prove abandonment. Cf. **Stephens**, 40,343 at 6-7, 917 So.2d at 673. While the defendant claimed he had nothing to do with the hotel room, he never denied ownership of the duffel bag or of anything else in the hotel room.

Even had both the defendant and Dana explicitly denied ownership of the duffel bag, it is still not clear that Agent Hornsby would have had the right to open the bag. Had the bag been abandoned in a public area, there would be no Fourth Amendment impediment to seizing and searching the bag; however, an ostensibly abandoned bag inside of a hotel room would still have an owner, albeit unknown, who maintains a privacy interest in that bag. See **Stephens**, 40,343 at 6-7, 917 So.2d at 673. Moreover, Agent Hornsby could have, prior to searching the bag, just as easily walked downstairs and asked the defendant if the duffel bag belonged to him. (In fact, this is precisely what Agent Hornsby did *after* he opened the bag.) Deliberate ignorance of conclusive ownership of the duffel bag does not excuse the warrantless search of the duffel bag, especially when actual ownership could easily have been confirmed. See **U.S. v. Waller**, 426 F.3d 838, 849 (6th Cir. 2005).

Accordingly, we find the State has not shown that the search of the duffel bag was justified under one of the narrow exceptions to the rule requiring a search warrant. See La. Code Crim. P. art. 703(D). Nevertheless, given that the defendant was properly under arrest for possession of drugs, the hotel room was registered in the defendant's name, marijuana was found in the hotel room, and Agent Hornsby had legal access to the hotel room, we conclude the police would have inevitably discovered the marijuana and the gun inside of the defendant's duffel bag. The United States Supreme Court has held that unconstitutionally obtained evidence may be admitted at trial if it would inevitably have been seized by the police in a constitutional manner. **Nix v. Williams**, 467 U.S. 431, 441-448, 104 S.Ct. 2501, 2507-2511, 81 L.Ed.2d 377 (1984).

The defendant's arrest for possessing illegal drugs did not bring the case to a conclusion. Instead, Agent Hornsby took over the case as a narcotics investigation. At both the trial and motion to suppress hearing, Agent Hornsby testified that it was his experience that drug dealers use hotel rooms as a meeting place for people to buy drugs to avoid conducting such transactions in their homes. It also sparked Agent Hornsby's interest that the defendant would be renting a hotel room in the same parish in which he lived. Further, the defendant lied to Agent Hornsby about which hotel the room key he had in his possession belonged to. Accordingly, based on all these factors, it was Agent Hornsby's objective to proceed to the hotel room the defendant was renting "to further the investigation." Thus, it is clear that pursuant to lawful means, Agent Hornsby would have found the duffel bag in the hotel room, ascertained that it belonged to the defendant, and that, if he could not have obtained consent from the defendant to search the duffel bag, he would have obtained a search warrant to search it. Agent Hornsby testified to this effect at the motion to suppress hearing when he was asked if it was his predisposition to search the hotel room when he went in there:

> My predisposition was to ask for consent. If consent wasn't given I was going to approach a judge with a search warrant. If the judge signed it, good; if he didn't, then I wasn't able to get the search warrant. But because of plain view I was able to search.

Accordingly, the trial court did not err in denying the defendant's motion to suppress the evidence. This assignment of error is without merit.

ASSIGNMENT OF ERROR NO. 2

In his second assignment of error, the defendant argues the trial court erred in exempting Agent Hornsby from the sequestration order. Specifically, the defendant contends that Agent Hornsby, the State's designated case agent, should have testified before Sergeant Dupre testified at the motion to suppress hearing.

At the motion to suppress hearing, Sergeant Dupre testified while Agent Hornsby remained in the courtroom. Subsequently, Agent Hornsby testified. According to the defendant, Agent Hornsby was the principal witness against the defendant and allowing Agent Hornsby to remain in the courtroom during Sergeant Dupre's testimony made it impossible for the defendant to effectively cross-examine either witness.

The purpose of sequestration is to assure that a witness will testify as to his own knowledge of the events, to prevent the testimony of one witness from influencing the testimony of others, and to strengthen the role of cross-examination in developing facts. The resolution of sequestration problems is within the sound discretion of the trial court. On appeal, the reviewing court will look at the facts of each case to determine whether or not a sequestration violation resulted in prejudice to the accused. **State v. Johnson**, 604 So.2d 685, 689-690 (La. App. 1 Cir. 1992), writ denied, 610 So.2d 795 (La. 1993).

Louisiana Code of Evidence article 615 provides, in pertinent part:

> **A. As a matter of right.** On its own motion the court may, and on request of a party the court shall, order that the witnesses be excluded from the courtroom or from a place where they can see or hear the proceedings, and refrain from discussing the facts of the case with anyone other than counsel in the case. In the interests of justice, the court may exempt any witness from its order of exclusion.
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> **B. Exceptions.** This Article does not authorize exclusion of any of the following:
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> . . . .
>
> (2) A single officer or single employee of a party which is not a natural person designated as its representative or case agent by its attorney.

The defendant relies on **State v. Lopez**, 562 So.2d 1064, 1066 (La. App. 1 Cir. 1990), where we considered a similar situation when the defendant objected to the presence during the trial of a law enforcement officer who had been designated as the State's case agent under Article 615. We noted that Comment (d) to Article 615[2] reflected a clear intention that fact witnesses designated as the case agent should testify before the other witnesses; in that case, the order of trial was especially critical because the State's case depended almost completely on the credibility of law enforcement officers. Because the trial court permitted the case agent (who was the principal witness against the defendant) to testify after listening to the testimony of some of the other State witnesses, we reversed the conviction and sentence and remanded the case to the district court for further proceedings. See **Johnson**, 604 So.2d at 690.

Lopez is distinguishable. The State's case in the instant matter was presented in sequential order based on the witness's involvement. See **State v. Holden**, 45,038, p. 12 (La. App. 2 Cir. 1/27/10), 30 So.3d 1053, 1063, writ denied, 2010-0491 (La. 9/24/10), 45 So.3d 1072. Moreover, there was minimal overlap between the facts provided by Sergeant Dupre and Agent Hornsby. Thus, the narrative provided by Agent Hornsby in his testimony picked up from where Sergeant Dupre's narrative left off. Sergeant Dupre's involvement in the case as the officer conducting the traffic stop was practically at an end when Agent Hornsby took over the case as a narcotics investigation. While it is preferable that a case agent testify first, failure to adhere to this procedure is not an absolute prejudice to the defendant. **Holden**, 45,038 at 13, 30 So.3d at 1063. Based on the facts and the particular circumstances, we cannot say that the defendant was prejudiced by

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[2] Comment (d) to Article 615 provides, in pertinent part:

> On the other hand, the exemption of representatives may, if mechanically applied, result in manifest unfairness such as by undermining the right to meaningful cross-examination. Nothing in this Article is intended to deprive the trial court of the power to sequester witnesses in such cases in the interests of justice. [See La. Code Crim. P. art. 17.] Such a potentially prejudicial situation is presented, of course, in criminal cases when a law enforcement officer who is designated as the state's representative is expected also to testify as a fact witness. In such a situation the court should take appropriate measures to minimize the possibility of prejudice, such as permitting the case agent to be designated as the state's representative only if he testifies prior to all other fact witnesses.

allowing Agent Hornsby to testify after hearing the testimony of Sergeant Dupre. Moreover, even if we did find that under **Lopez** the trial court erred, we find that any error in allowing Agent Hornsby to remain in the courtroom during Sergeant Dupre's testimony was harmless beyond a reasonable doubt. See La. Code Crim. P. art. 921; **Johnson**, 604 So.2d at 691.

This assignment of error is without merit.

CONVICTIONS AND SENTENCES AFFIRMED.