SUPREME COURT NO. 98845-5
COA NO. 51589-0-II

IN THE SUPREME COURT OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ALBERTO COLT SARMIENTO,

Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Kitty-Ann van Doorninck, Judge

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Alberto Colt Sarmiento asks the Supreme Court to accept review of the Court of Appeals decision designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Sarmiento requests review of the decision in State v. Alberto Colt Sarmiento, Court of Appeals No. 51589-0-II (slip op. filed June 30, 2020).

C. ISSUES PRESENTED FOR REVIEW

1. Whether the trial court erred when it denied Sarmiento's motion to suppress evidence obtained with overbroad warrants, and, if so, whether the State cannot prove harmlessness beyond a reasonable doubt?

2. Whether trial counsel provided ineffective assistance in failing to request jury instruction on defense of others?

3. Whether cumulative error violated Sarmiento's due process right to a fair trial?

4. Whether the evidence is insufficient to support the conviction for unlawful possession of a firearm?

D. STATEMENT OF THE CASE

Sarmiento faced charges of first degree murder, second degree murder, two counts of first degree assault, and second degree unlawful possession of a firearm, accompanied by gang aggravators and firearm enhancements. CP 27-30. Defense counsel moved to suppress evidence

obtained from cell phones and Facebook records because the warrants authorizing these searches were overbroad. CP 34, 50-61, 76-85, 388-405; RP 5, 31-32, 40-47. The court denied the suppression motion. RP 48-49.

Evidence at trial showed a shooting took place in Tacoma on November 2, 2015, resulting in the death of Elijah Crawford. RP 553, 556-57, 1152, 1156. Isaac Fogalele was shot but survived. RP 782. Eddie Contreras ran off unharmed. RP 893-95. Juan Zuniga was the shooter. RP 1822. The State theorized Sarmiento planned an ambush shooting in gang retaliation for disrespect from Contreras. RP 1960-65, 1973-79. The defense theory was that Sarmiento planned a fistfight with Contreras, but Zuniga shot at the three men because he mistakenly thought they were rival gang members that posed a danger to Sarmiento. RP 2013-14, 2021-23, 2031-33.

In the beginning of October 2015, Contreras and Sarmiento had a fistfight, after which they shook hands. RP 814-18. Sarmiento said he was from the "VSL" gang. RP 819, 832. Contreras identified with the 18th Street gang. RP 819-20, 849. The two subsequently socialized on Facebook but their interaction became strained after Sarmiento suspected Contreras was not a real gang member and Contreras made a perceived joke about his genitals. RP 824-25; Ex. 32.

The two agreed to another fistfight on November 2. Ex. 32 at 19-25. Before the fight, Sarmiento, Zuniga and Trino Martinez gathered at Steven Gamez's residence. RP 966-67 1008. Gamez, Zuniga, and Martinez were affiliated with the Southside Criminals gang. RP 962-66, 1057. Sarmiento expressed anger at the person posing as a gang member and who had disrespected him. RP 1009-11, 1032-33, 1178-79, 1082. Martinez took out a gun. RP 1009, 1013-15. At some point Martinez said, "let's go put in work." RP 1010, 1016-17. Sarmiento, Zuniga, and Martinez left Gamez's residence in Sarmiento's truck. RP 1812, 1855 1858. Martinez gave Zuniga the gun after making a brief stop and told him to "earn his stripes." RP 1816, 1857, 1880, 1923. They drove to the location of the planned fistfight. RP 1818.

Contreras, meanwhile, picked up his friends, Fogalele and Crawford, in his van and drove to the fight location. RP 812-13, 871-72, 887-88. Contreras testified that he saw Sarmiento standing at his truck. RP 888. As Contreras walked toward him, he saw somebody with a bandana over his face running in his direction. RP 892-96. He heard Sarmiento say, "You talking shit, huh?" RP 892-94. Sarmiento stood there while the other person advanced and Contreras backed up. RP 910-11. Contreras ran off and heard gunshots. RP 893-95, 897, 920. Fogalele testified that he saw someone pointing a gun. RP 769-70, 774, 783-84.

According to Fogalele, Sarmiento did not say anything. RP 775, 786, 804. Sarmiento stood there, but Fogalele only saw the shooter for a split second before turning away. RP 782, 785-86, 794. 804-05, 1612-13.

After the shooting, Sarmiento stayed with Raymundo Gomez in Centralia, where he was eventually arrested by police after Gomez turned him in. RP 1301, 1304-06, 1313-16, 1332, 1388-1402. Gomez claimed Sarmiento confessed to him that he planned the shooting in some fashion. RP 1331, 1339, 1362, 1367, 1385-86, 1397.

A summary of the various messages extracted from the cell phones and Facebook accounts obtained via warrants was admitted into evidence as Exhibit 98. In addition to the exchange between Sarmiento and Contreras, this evidence showed: (1) Sarmiento's desire to strengthen the VSL gang in the area and his displeasure with Contreras's dubiously claimed gang affiliation; (2) Martinez had a gun and he went with Sarmiento to the woods to teach Zuniga how to shoot; (3) Sarmiento or those in his group had firearms; (4) Sarmiento expressly tied his anger with Contreras to gang affiliation and his desire to end the "shit" Contreras started, stating "VSL AND SSC RUN IT."; (5) in this connection, Martinez said "Ill smoke em" and "KILLKILLKILL." Ex. 98.

Zuniga, the shooter, testified he had a conflict with the Southside Psychos (SSP) gang. RP 1816. Zuniga took Martinez's gun that night due

to his conflict with the SSP. RP 1817. He had been in a shootout with van-driving SSP members on October 28. RP 1076, 1180-81.

Zuniga denied that Sarmiento told or encouraged him to shoot at the people he was there to fight that night. RP 1917. Zuniga explained he saw a van pull up and three guys hop out and surround Sarmiento. RP 1822, 1910. He heard Sarmiento and one of the men "talking shit" back and forth. RP 1885-86, 1929. Sarmiento called out Zuniga's nickname, "Mobster," which Zuniga interpreted as meaning come down and protect him with the gun. RP 1864-65, 1884, 1911, 1916, 1930-31, 1936, 1938, 1950-51. Zuniga started firing to protect Sarmiento. RP 1822, 1829, 1835, 1910-11. The van looked like it belonged to the SSP gang and he thought the people he was shooting at were SSP members. RP 1817, 1822-23, 1869. Zuniga denied the shooting was planned. RP 1886, 1910.

The jury found Sarmiento guilty of first degree manslaughter as a lesser offense to murder by extreme indifference. CP 252-53. It otherwise found him guilty as charged. CP 254-71. The court imposed an exceptional sentence of 60 years in prison. CP 324-27, 335.

Sarmiento argued on appeal that the court erroneously denied the suppression motion, that counsel was ineffective in failing to seek instruction on defense of others, and the evidence was insufficient for the firearm possession charge. The Court of Appeals affirmed. Slip op. at 1-2.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. THE SEARCH WARRANTS ARE OVERBROAD, REQUIRING SUPPRESSION OF EVIDENCE OBTAINED FROM THEM AND REVERSAL OF THE CONVICTIONS.

Police obtained search warrants for two phones associated with Sarmiento, Sarmiento's Facebook account, and a Facebook account belonging to Martinez,[1] which revealed a trove of private information about Sarmiento. The warrants authorizing search of this information violated the Fourth Amendment of the U.S. Constitution and article I, section 7 of the Washington Constitution because they are overbroad. This case presents a significant question of constitutional law warranting review under RAP 13.4(b)(3).

a. The warrants are overbroad because they authorize search and seizure of things for which there is no probable cause and do not satisfy the particularity requirement.

The Fourth Amendment and article I, section 7 "impose two requirements for search warrants that are 'closely intertwined.'" State v. Higgs, 177 Wn. App. 414, 425, 311 P.3d 1266 (2013) (quoting State v. Perrone, 119 Wn.2d 538, 545, 834 P.2d 611 (1992)). First, a warrant must be supported by probable cause, which requires "a nexus both between

[1] The trial court did not admit any evidence derived from the search warrants for Sarmiento's phone records or Salinas's Facebook account, so no further argument is advanced on those warrants. Slip op. at 8.

criminal activity and the item to be seized and between the item to be seized and the place to be searched." Id. at 425-256. Second, a search warrant must be sufficiently particular, which means "sufficiently definite so that the officer executing the warrant can identify the property sought with reasonable certainty." Higgs, 177 Wn. App. at 426 (quoting State v. Stenson, 132 Wn.2d 668, 692, 940 P.2d 1239 (1997)).

"Therefore, a warrant can be overbroad 'either because it fails to describe with particularity items for which probable cause exists, or because it describes, particularly or otherwise, items for which probable cause does not exist.'" Higgs, 177 Wn. App. at 426 (quoting State v. Maddox, 116 Wn. App. 796, 805, 67 P.3d 1135 (2003), aff'd, 152 Wn.2d 499, 98 P.3d 1199 (2004)). "Further, a warrant will be found overbroad if some portions are supported by probable cause and other portions are not." Higgs, 177 Wn. App. at 426.

Of note, the affidavits in this case were not incorporated into the warrants. "[B]oth an attachment and suitable words of reference are necessary for an affidavit to cure an overbroad warrant." State v. Higgins, 136 Wn. App. 87, 92, 147 P.3d 649 (2006) (citing State v. Riley, 121 Wn.2d 22, 29, 846 P.2d 1365 (1993)).

The warrants are overbroad because they permit the police to search the entire contents of the cell phones and all of the information in

the Facebook records without meaningfully limiting the search to evidence for which police had probable cause. Pre-trial Ex. 1 (cell phones); Pre-trial Ex. 3 (Sarmiento Facebook); Pre-trial Ex. 5 (Martinez Facebook).

To summarize, defects in the cell phone warrant include permitting the police to search "any and all stored data." Pre-trial Ex. 1. A search warrant allowing for a "top-to-bottom search" of a cell phone fails to meet the particularity requirement. State v. Fairley, 12 Wn. App. 2d 315, 457 P.3d 1150 (2020). Additional overbreadth defects in the cell phone warrant: (1) no temporal limitation; (2) no facts showing communication with unnamed co-conspirators would be found on phone; (3) no facts showing communication with Fogalele and Crawford would be found on phone; (4) warrant could have been more specific in terms of what was being sought, including the names of co-conspirators and participants in the homicide; (5) the general reference to the murder statute authorized search of items for which there was no probable cause. See State v. Keodara, 191 Wn. App. 305, 315-16, 364 P.3d 777 (2015); State v. McKee, 3 Wn. App. 2d 11, 25-26, 413 P.3d 1049 (2018), rev'd in part, 193 Wn.2d 271, 438 P.3d 528 (2019); Higgins, 136 Wn. App. at 93.

The warrant for Sarmiento's Facebook record is similarly overbroad because (1) it permits police to search every nook and cranny of the account; (2) the warrant does not limit a search to communications

with those involved in the shooting, and Contreras, Fogalele, Crawford are not named in warrant; (3) no probable cause to search for evidence of communications with co-conspirators; (4) the warrant could have been more specific regarding the dates of communication between Contreras and Sarmiento; (5) citation to the murder statute covers a means of committing the crime for which there is no probable cause. Pre-trial Ex. 3. The warrant for Martinez's Facebook records is overbroad for much the same reason, as it uses language identical or similar to that contained in the warrant for Sarmiento's Facebook records. Pre-trial Ex. 5.

There is no Washington precedent addressing an overbreadth challenge to a warrant for Facebook records. And the cases addressing overbreadth challenges to warrants for electronic devices are in tension. See State v. Vance, 9 Wn. App. 2d 357, 367, 444 P.3d 1214 (2019) (disagreeing with McKee). The problem that continues to bedevil courts is how to reconcile the temptation to treat "over-seizing" as an "inherent part of the electronic search process," United States v. Comprehensive Drug Testing, Inc., 621 F.3d 1162, 1177 (9th Cir. 2010), with the need to apply heightened particularity demands to sensitive information protected by the First Amendment. Keodara, 191 Wn. App. at 314. Sarmiento's case provides an opportunity for this Court to confront a difficult issue and

clarify the law by putting teeth into the constitutional protections against overbroad warrants for electronic data and communication.

b. The error is not harmless beyond a reasonable doubt.

Evidence obtained directly or indirectly from an unlawful search or seizure must be suppressed under the fruit of the poisonous tree doctrine. State v. Mayfield, 192 Wn.2d 871, 889-90, 434 P.3d 58 (2019). The Court of Appeals held any error in admitting evidence from the warrants was harmless, slip op. at 8-10, but its analysis reads as if it were looking for sufficient evidence, where all reasonable inferences are drawn in favor of the State and most strongly against the defendant. See State v. Dreewes, 192 Wn.2d 812, 822, 432 P.3d 795 (2019) (describing sufficiency of evidence standard).

Chapman v. California, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967) sets forth the standard for assessing constitutional harmless error. The Chapman standard represents the "constitutional minimum protection for the rights of accused persons." State v. Coristine, 177 Wn.2d 370, 380, 300 P.3d 400 (2013). Under this standard, reversal is required unless the evidence shows beyond a reasonable doubt "that any reasonable jury would reach the same result absent the error and where the untainted evidence is so overwhelming it necessarily leads to a finding of guilt." State v. Burke, 163 Wn.2d 204, 222, 181 P.3d 1 (2008).

The Court of Appeals contorted harmless error review by essentially conducting a sufficiency of evidence analysis. For example, it pointed to Zuniga's testimony that Sarmiento gave Zuniga a signal as he confronted Contreras, whereupon Zuniga immediately came running out of the bushes and started firing multiple shots at Contreras and his companions. Slip op. at 9. The Court of Appeals ignored exculpatory aspects of Zuniga's testimony. Zuniga denied that Sarmiento planned the shooting. RP 1859, 1882, 1886, 1910. He testified that Sarmiento did not tell him to shoot at the people he was there to fight or encourage him to do so. RP 1917. Zuniga fired the gun because he thought Sarmiento needed protection from attack, mistakenly believing he was being surrounded by rival gang members. RP 1817, 1822-23, 1869, 1910, 1920, 1950. Although reasonable minds can differ about the believability of his testimony, "[a]n appellate court ordinarily does not make credibility determinations" in conducting its harmless error analysis. State v. Maupin, 128 Wn.2d 918, 929, 913 P.2d 808 (1996).

The Court of Appeals cited to testimony from Contreras that Sarmiento just stood there as the shooting happened without ducking for cover, as if he "know what was going on." Slip op. at 9. From this, the Court of Appeals believed the jury would necessarily have inferred that Sarmiento ambushed Contreras and his friends. Another available

inference is that Sarmiento, surprised by Zuniga's sudden gunfire, was too shocked to move in the moment. Commonsense tells us that different people will exhibit a range of different reactions to sudden gunfire. The flaw in the Court of Appeals' harmless error argument is that it takes evidence susceptible to differing interpretations and draws the interpretation in the light most favorable to the State.

The Court of Appeals pointed to the testimony of Raymundo Gomez and Steven Gamez as evidence that Sarmiento was an accomplice to the murder and firearm assaults committed by Zuniga. Slip op. at 9-10. The evidence that should have been suppressed bolstered and lent credibility to inculpatory trial testimony from Gomez and Gamez regarding Sarmiento's role in the affair. Moreover, their testimony does not necessarily lead to a finding of guilt in the absence of the evidence that should have been suppressed.

Gomez's claim that Sarmiento confessed to setting up the shooting was subject to doubt. Gomez had credibility issues because of the delayed disclosure to police and an opportunity to tailor his claim based on what he heard in the courtroom. RP 1333-35, 1362-63. He also gave inconsistent accounts of what Sarmiento supposedly told him. RP 1339, RP 1362, 1367, 1385-86, 1397.

Gamez's testimony was inconsistent. At one point he claimed Sarmiento had an issue with Contreras posing as a gang member. RP 1011. But he also testified that Sarmiento was mad because Contreras disrespected him in referring to his genitals, and that Sarmiento was not mad at him for posing as a gang member. RP 1009-10, 1178-79, 1082. At Gamez's residence, Martinez said something about "putting in work" for the gang. RP 1010, 1016-17. But they did not say what was going to happen or that this meant a plan to shoot Contreras. RP 1019. Gamez did not think Sarmiento was going to put in "work." RP 1078-79.

The electronic communications between Sarmiento and Contreras were provided by Contreras to police and so would have been properly admitted despite the error involving the warrants. But those communications provide no insight into whether Sarmiento was planning to shoot Contreras and his friends because of a gang vendetta. The tainted evidence from the warrants supplies fodder for an inculpatory theory of what Sarmiento planned to do and why he did it.

Much of the gang evidence and its relation to the shooting, as well as evidence related to the firearm possession charge, derived from the phone and Facebook records that should have been suppressed. Ex. 98. The trial prosecutor argued the phone and Facebook communications showed Sarmiento possessed a firearm. RP 1965-66, 2001-02. This

evidence also heavily contributed to the State's gang aggravator theory, and the motivation to shoot Contreras because of perceived disrespect over gang affiliation is laid out in no uncertain terms. Ex. 98. The untainted evidence clearly shows Sarmiento identified as a gang member, but it is less clear what his motivation was in interacting with Contreras on the night in question. Was it because he wanted to teach a poseur a lesson or was it because Contreras made a dumb reference to genitals? The phone and Facebook evidence provided fertile ground for the argument that the shooting was gang motivated and contributed to the jury's verdict on the gang aggravators.

Witnesses who do not present well on the stand may be doubted by jurors. Biases can be harbored, testimony manipulated. Memories fade. Details of what happened or what was said become forgotten or misremembered. The jury may wonder about the veracity of witness testimony accordingly. But documentary evidence of the kind at issue here — evidence that never should have been presented to the jury because it was obtained as a result of unlawful search and seizure — is qualitatively different. It represents the participants' words and actions in real time, free of distorting circumstance. That is why it was so damaging to the defense.

The constitutional harmless error standard requires the reviewing court to view the evidence from the standpoint of a reasonable jury and

consider how the error may have affected its resolution of the factual issues before it. The inferences drawn by the Court of Appeals are not necessary inferences. Rather, there are competing inferences, and those are for the jury to decide. The danger is that the jury drew inferences unfavorable to Sarmiento because it was influenced by evidence that should have been suppressed.

2. COUNSEL'S FAILURE TO REQUEST DEFENSE OF OTHERS INSTRUCTION DENIED SARMIENTO HIS RIGHT TO EFFECTIVE REPRESENTATION.

The right to the effective assistance of counsel is guaranteed. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); U.S. Const. amend. VI. Defense counsel's failure to ensure that the State was required to prove beyond a reasonable doubt that Zuniga did not act in defense of Sarmiento amounted to ineffective assistance. Sarmiento seeks review under RAP 13.4(b)(3).

The right to effective assistance of counsel is violated where (1) counsel's performance was deficient and (2) the deficiency prejudiced the defendant. Strickland, 466 U.S. at 687. Deficient performance is that which falls below an objective standard of reasonableness. State v. Thomas, 109 Wn.2d 222, 226, 743 P.2d 816 (1987). A defendant is entitled to a jury instruction supporting his theory of the case when supported by evidence. State v. Powell, 150 Wn. App. 139, 154, 206 P.3d

703 (2009). "Effective assistance of counsel includes a request for pertinent instructions which the evidence supports." State v. Kruger, 116 Wn. App. 685, 688, 67 P.3d 1147 (2003).

As Sarmiento was not the shooter, the State sought convictions for the murder/manslaughter and assault charges under an accomplice liability theory. To be legally accountable as an accomplice, Sarmiento "must be an accomplice to a *crime*." State v. Laico, 97 Wn. App. 759, 765, 987 P.2d 638 (1999). A person acting in lawful defense of another commits no crime. Thus, if Zuniga acted in lawful defense of Sarmiento, there was no crime committed to which Sarmiento would be an accomplice. Id.

The Court of Appeals did not dispute that Sarmiento was entitled to the instruction. Instead, it held counsel had a legitimate reason for not seeking such instruction, contending the defense was that Sarmiento had no knowledge a shooting would occur and if counsel had requested a defense of others instruction, the jury might have inferred that Zuniga was acting at Sarmiento's request to defend him. Slip op. at 12.

Counsel argued Zuniga "is the shooter and is the killer," there was no agreement to have Zuniga shoot, and Zuniga did it on his own. RP 2028, 2032, 2035. This argument, though, was embedded within the defense theory that Sarmiento planned a fist fight with Contreras but Zuniga shot because he mistakenly thought the men were rival gang

members that posed a danger to Sarmiento. RP 2013-14, 2021-23, 2031-33. The defense of others theory is consistent with the argument that Sarmiento did not plan or agree to the shooting, as Zuniga could be found to act in defense of Sarmiento even though Sarmiento did not know Zuniga was going to shoot. Cf. State v. Woo Won Choi, 55 Wn. App. 895, 905-06, 781 P.2d 505 (1989) (counsel had legitimate reason not to seek voluntary intoxication instruction where it would have presented a theory that was "mutually exclusive" to the one argued).

At the same time, the defense of others theory accounts for and counteracts the evidence of accomplice liability presented to the jury. Instruction on defense of others was crucial because evidence that Zuniga lawfully acted to protect Sarmiento rebutted the evidence and State's argument that Sarmiento acted as an accomplice to the charged crimes.

Prejudice means confidence in the outcome is undermined. Powell, 150 Wn. App. at 153. Had the jury been correctly instructed, the jury may have determined that Zuniga acted in lawful defense of another, which means Zuniga committed no crime, and Sarmiento could not be found guilty as an accomplice to Zuniga's shooting. There is a reasonable probability that the lack of instruction prejudiced the outcome.

3. CUMULATIVE ERROR VIOLATED SARMIENTO'S DUE PROCESS RIGHT TO A FAIR TRIAL.

Under the cumulative error doctrine, a defendant is entitled to a new trial when it is reasonably probable that errors, even though individually not reversible error, cumulatively produce an unfair trial by affecting the outcome. State v. Coe, 101 Wn.2d 772, 788-89, 684 P.2d 668 (1984); Parle v. Runnels, 505 F.3d 922, 927 (9th Cir. 2007); U.S. Const. Amend. XIV; Wash. Const. art. I, § 3. An accumulation of errors affected the outcome and produced an unfair trial in Sarmiento's case. These errors include (1) failure to suppress evidence due to constitutionally invalid warrants (section E.1., supra); and (2) ineffective assistance in failing to request defense of others instruction (section E.2., supra). Sarmiento seeks review under RAP 13.4(b)(3).

4. THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE CONVICTION FOR UNLAWFUL POSSESSION OF A FIREARM.

Due process requires the State to prove all necessary facts of the crime beyond a reasonable doubt. In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. XIV; Wash. Const. art. I, § 3. Evidence is sufficient only if, after viewing the evidence and all reasonable inferences in a light most favorable to the State, a rational trier

of fact could find each element of the crime proven beyond a reasonable doubt. State v. Green, 94 Wn.2d 216, 221, 616 P.2d 628 (1980).

To convict Sarmiento of unlawful possession of a firearm, the State needed to prove he "knowingly had a firearm in his possession or control." CP 241 (to-convict instruction). Zuniga told detectives that he was pretty sure everybody touched the gun at Gamez's house, including Sarmiento. RP 1876-77. But no detail was elicited showing the touching was anything more than a momentary handling, which does not establish actual possession. State v. Davis, 182 Wn.2d 222, 237, 340 P.3d 820 (2014) (Stephens, J., dissenting). Sarmiento knew the gun was in Gamez's house. RP 1020, 1877. Knowledge of its presence does not establish constructive possession. State v. Chouinard, 169 Wn. App. 895, 899, 903, 282 P.3d 117 (2012).

Possession must be knowing. State v. Hartzell, 156 Wn. App. 918, 944, 237 P.3d 928 (2010). "[W]here the owner/operator of a vehicle has dominion and control of a vehicle and knows a firearm is inside the vehicle, there is sufficient evidence of constructive possession of a firearm for the crime of unlawfully possessing a firearm." State v. Turner, 103 Wn. App. 515, 518, 13 P.3d 234 (2000). Sarmiento drove his truck, so he had dominion and control over the vehicle. RP 1812-13. But the knowledge requirement remains unmet.

The evidence does not show Sarmiento knew Martinez brought the gun into the truck. There was no testimony on this point. RP 1812, 1855 1858. Martinez handed Zuniga the gun outside the truck when they stopped at BJ's Bingo in Fife, at which point Sarmiento was on the other side of the truck. RP 1912. Zuniga did not remember if Sarmiento was looking. RP 1912. Sarmiento told Zuniga "don't be afraid," "you know what it is" and "just be ready." RP 1881, 1912-13, 1924-25. But contrary to the Court of Appeals' description, there is no evidence that this was said "when Martinez gave Zuniga the gun at a stop." Slip op. at 16. Zuniga's testimony only shows that these things were said when Sarmiento was in the truck, and Sarmiento made no reference to the firearm. RP 1924-25. Looked at in the light most favorable to the State, the evidence does not establish Sarmiento knowingly possessed the firearm. Sarmiento seeks review under RAP 13.4(b)(3).

F. CONCLUSION

For the reasons stated, Sarmiento requests review.

DATED this 30th day of July 2020.

Respectfully submitted,

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July 30, 2020 - 2:00 PM

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Appellate Court Case Number:	51589-0
Appellate Court Case Title:	State of Washington, Respondent v Alberto Colt Sarmiento, Appellant
Superior Court Case Number:	15-1-04435-6

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