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DIVISION II

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STATE OF WASHINGTON
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No. 35640-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Anthony W. Fellas,

Appellant.

Clallam County Superior Court

Cause No. 06-1-00403-4

The Honorable Judge Ken Williams

Appellant's Reply Brief

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ARGUMENT

I. RESPONDENT'S CONCESSION OF ERROR REQUIRES REVERSAL BECAUSE THE ERROR WAS NOT HARMLESS BEYOND A REASONABLE DOUBT.

Respondent concedes that the prosecutor commented on Mr. Fellas's right to remain silent and that the error is subject to the strict constitutional harmless error standard. Brief of Respondent, p. 4-5. Reversal is therefore required unless the state convinces this Court beyond a reasonable doubt that "any reasonable jury would reach the same result absent the error, [and that] the untainted evidence is so overwhelming it necessarily leads to a finding of guilt."[1] *State v. Easter,* 130 Wn.2d 228 at 242, 922 P.2d 1285 (1996).

Here, the evidence was not overwhelming. Mr. Fellas did not claim ownership of the backpack; nor were there any indicia of ownership found within. Respondent relies on three pieces of evidence to argue harmless error: (1) Mr. Fellas' proximity to the backpack, (2) the driver's apparent denial of ownership,[2] and (3) a fingerprint taken from cigarette

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[1] Inexplicably, Respondent sets forth the standard for determining the sufficiency of the evidence. Brief of Respondent, p. 5. That standard has no application here.

[2] Established indirectly through implied hearsay admitted through the officer's testimony.

papers in the backpack and found to match Mr. Fellas. Brief of Respondent, p. 6-8. These three pieces of evidence can hardly be characterized as overwhelming.

First, contrary to Respondent's assertion,[3] "mere proximity is not enough to establish possession." *State v. Jones*, 146 Wn.2d 328 at 333, 45 P.3d 1062, 45 P.3d 1062 (2002). Respondent's claim (without citation to the record) that the backpack could have been stored elsewhere in the pickup's cab is irrelevant, since the passenger-side floor is at least a logical place for a driver to put her or his belongings. A reasonable jury could have concluded that the backpack belonged to the driver, or that the state failed to disprove the driver's ownership of it.

Second, the driver's out-of-court denial of ownership lacked any indicia of reliability.[4] A reasonable jury could have discounted the driver's self-serving denials, even if he had come to court in person and testified that he was not the backpack's owner.

Third, the alleged discovery of Mr. Fellas's fingerprint on cigarette papers inside the backpack does not establish that he possessed the

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[3] Respondent's assertion (that Mr. Fellas's proximity "is enough for a reasonable jury...") is legally incorrect; it also inverts the harmless error standard, turning it into a question of sufficiency of the evidence.

[4] A proper objection to the hearsay would have been sustained.

backpack. A reasonable jury could have believed the expert was mistaken when he concluded that Mr. Fellas left the fingerprint. In the alternative, a reasonable jury could have found that the state did not disprove innocent explanations for the fingerprint's location. [5]

The jury had difficulty with the issue of possession: they asked about ownership of the cell phone, asked for a definition of "dominion," and indicated they were unable to reach a verdict. Inquiries from the Jury, Supp. CP. Respondent's argument that the trial court's denial of Mr. Fellas's mistrial motion somehow changes the standard-- from one of constitutional harmless error to a matter reviewed for abuse of discretion-- is incorrect. Brief of Respondent, pp. 10-11. *See, e.g., Easter, spura, at* 242 (analyzing violation under constitutional harmless error standard despite trial court's denial of defendant's motion for a mistrial).

Nor did the court's curative instruction solve the problem. The prosecutor twice rang a bell that should never have been rung; the court's curative instruction did not unring the bell. *Easter,* at 238. This is

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[5] For example, the cigarette papers could have belonged to Mr. Fellas even if the backpack did not, or he could have borrowed a cigarette paper from the driver and left a fingerprint. *See, e.g., State v. Bridge*, 91 Wn. App. 98 at 100, 955 P.2d 418 (1998) ("Fingerprint evidence is sufficient to support a conviction if the trier of fact... could infer from the circumstances that the fingerprint could have been impressed only at the time of the crime.")

especially so where the jury was permitted to consider the improper testimony overnight. *See, e.g., State v. Davenport*, 100 Wn.2d 757 at 764, 375 P.2d 1213 (1984).

Respondent has conceded constitutional error; accordingly, prejudice is presumed, and the constitutional standard for harmless error applies. Because the evidence was not overwhelming, a reasonable jury might have voted to acquit Mr. Fellas in the absence of the prosecutor's misconduct. His conviction must be reversed, and the case remanded for a new trial. *Easter, supra.*

II. THE BACKPACK CONTAINING CONTRABAND WAS ILLEGALLY SEIZED AND SHOULD HAVE BEEN SUPPRESSED.

The officer seized Mr. Fellas by asking him to wait nearby pending a warrant check. *See, e.g., State v. Brown*, 154 Wn.2d 787 at 798, 117 P.3d 336 (2005). Respondent seeks to avoid this conclusion by asserting that Mr. Fellas may have been free to leave. Brief of Respondent, p. 15. This is incorrect; a reasonable person would not feel free to leave if asked to remain for a warrant check after a companion is arrested. *See State v. Barnes*, 96 Wn. App. 217, 223, 978 P.2d 1131(1999); *State v. Ellwood*, 52 Wn. App. 70, 757 P.2d 547 (1988).

The officer did not have a reasonable suspicion of criminal activity. Respondent relies on the officer's view of a "huge knife," when

Mr. Fellas got out of the truck. RP (10/31/06) 26. But possession of a "huge knife" is not a crime, even for those with criminal history.[6] *See, e.g,* RCW 9.41.250 (Possession of a Dangerous weapon only applies to those who furtively carry a dangerous weapon with intent to conceal it.)

The evidence here was not admissible under the doctrine of inevitable discovery. Brief of Respondent, p. 16-17. First, the inevitable discovery rule cannot be applied in these circumstances, because to do so would defeat the requirement that a lawful custodial arrest precede a search incident to arrest. *State v. O'Neill,* 148 Wn.2d 564 at 592, 62 P.3d 489 (2003). Second, had the police followed lawful procedures by locking the truck and allowing Mr. Fellas to leave the scene, any subsequent arrest (after discovery of the warrant) could not justify a search of the truck, since Mr. Fellas would no longer be near the truck. *See, e.g, State v. Rathbun*, 124 Wn. App. 372, 101 P.3d 119 (2004) (police may not search a vehicle unless it is within the area of the suspect's immediate control at the time the arrest is initiated).

Respondent has failed to address Mr. Fellas's argument that his arrest could not justify a search of the truck because he was arrested at

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[6] Respondent's concern that Mr. Fellas needed to be separated from the knife to further officer safety did not justify detaining Mr. Fellas. After Mr. Fellas left the truck, the officer could have locked the truck while Mr. Fellas left the scene.

some distance from the truck "by a picnic table that's under an awning there by the [deli]." RP (10/31/06) 27. Appellant's Opening Brief, pp. 11-12. Nor has Respondent attempted to justify the search as incident to Lynch's arrest inside the deli.

Because the officer's lacked a reasonable suspicion to seize Mr. Fellas, his subsequent arrest was unlawful. In addition, since the arrest occurred at some distance from the truck, it could not justify a search of the truck. The backpack was illegally seized, and its contents should not have been admitted at trial. Mr. Fellas's conviction must be reversed and the evidence suppressed.

III. MR. FELLAS WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.

Mr. Fellas stands on the arguments made in the opening brief.

CONCLUSION

For the foregoing reasons, the conviction must be reversed, the evidence suppressed, and the case remanded to the trial court.

Respectfully submitted on August 2, 2007.

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CERTIFICATE OF MAILING

I certify that I mailed a copy of Appellant's Reply Brief to:

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and to:

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And that I sent the original and one copy to the Court of Appeals, Division II, for filing;

All postage prepaid, on August 2, 2007.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on August 2, 2007.

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