

FILED  
March 29, 2013  
Court of Appeals  
Division III  
State of Washington

NO. 31079-5-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION THREE

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STATE OF WASHINGTON,

Respondent,

v.

ELIO CARCAMO LOPEZ,

Appellant.

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

The Honorable Vic L. VanderSchoor, Judge

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BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

The trial court violated appellant's Sixth Amendment right to confront the witnesses against him and denied him a fair trial.

Issue Pertaining to Assignment of Error

The Sixth Amendment guarantees defendants the right to cross-examine witnesses with evidence of any motive to be less than truthful, including bias against the defendant. Appellant was denied this very right regarding a key prosecution witness. Is he entitled to a new trial?

B. STATEMENT OF THE CASE

1. Procedural Facts

The Benton County Prosecutor's Office charged Elio Carcamo Lopez with Burglary in the Second Degree and Felony Possession of Marijuana. CP 30. A jury found Lopez<sup>1</sup> guilty on both counts, the court imposed a standard-range sentence of three months, and Lopez timely filed his notice of appeal. CP 28-29, 34, 40.

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<sup>1</sup> Appellant uses Carcamo as his last name. RP 126. However, because his nephew – another participant in this case – also has the last name Carcamo, this brief refers to appellant as Lopez to avoid confusion between the two. Also, some trial witnesses refer to appellant as "David," one of his middle names. See RP 20.

2. Substantive Facts

a. *Evidence of the crimes*

On January 10, 2012, Sheril Stokey was walking to the park with her dog when she noticed a tan Cadillac parked on the street. She saw one individual – later identified as Lopez – exit the car and walk to a nearby house, heading directly to the rear of that house. RP<sup>2</sup> 6-8. The house belonged to James and Donna Kammeyer. RP 8, 20. James Kammeyer owns a construction company, and Lopez had worked for him in the past. RP 30, 36-38.

As Stokey approached the Cadillac, she could see the driver and a passenger, and she heard the doors lock from the inside. RP 7. Stokey watched the Cadillac as it pulled into the Kammeyer's driveway. RP 8-9. Lopez came out from behind the house, made a hand gesture to those in the Cadillac, and a second, smaller individual exited from the rear seat of the Cadillac. RP 9, 18-19. Lopez did not appear to be carrying anything. RP 16.

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<sup>2</sup> "RP" refers to the verbatim report of proceedings for July 25-26, 2012.

Donna Kammeyer's car was parked near the front of the house and clearly visible. While the smaller individual walked around to the rear of the home, Stokey watched as Lopez knocked on the front door and "kept banging on it." RP 9. Donna Kammeyer was in the bathroom when she heard someone knocking. RP 21. She did not go to the door, however. At some point, she looked out a window and saw a car parked near the house. She watched as someone got in the car and it drove away. RP 21, 23-26.

Stokey was suspicious, called 911, and provided dispatch with the Cadillac's description and license plate number. RP 9-11. Kennewick police stopped the car. RP 48. Lopez was in the rear passenger seat. The driver was Joel Vasquez. And the front passenger was Lopez's nephew, Jose Edward Carcamo. RP 52, 111. The Cadillac smelled of marijuana, and inside police found some dried marijuana and several marijuana plants, with roots and soil still attached, in the front and rear passenger areas. RP 50, 53-54. Lopez had dirt on his shoes and pieces of marijuana adhering to his clothing. RP 88.

The marijuana had been taken from a shed behind the Kammeyer's home. RP 26. James Kammeyer maintains a marijuana grow operation in that shed and uses the marijuana for medicinal purposes. RP 33, 39-40, 44. A window air conditioning unit had been kicked in to gain entry to the shed. RP 26, 57-58. Neither Lopez, nor the two men with him, had permission to enter the shed. RP 39.

Two detectives interviewed Lopez. During the first interview, with lead detective John Davis, Lopez explained that he and the other two men went to the Kammeyer residence to pick up some plywood. RP 87-88, 91. When he arrived, he saw Donna Kammeyer's car and believed she was home. He knocked on the front door for several minutes, but got no response. When he returned to the car, he became angry when he saw that his nephew had taken the marijuana and put it in the car. He got in the back seat with some of the plants, and the three drove away. RP 91.

When challenged on how he failed to see the theft of the marijuana, Lopez indicated he had knocked on both the front and back doors of the home. Moreover, his view of what was going on around him was partially obscured by some bushes. RP 91. He indicated there had been prior discussions about the marijuana on the property and the possibility of stealing it, but a decision had been made not to take it. RP 92. Lopez lamented his decision to bring his nephew with him that day because he figured something like this would happen. RP 92.

In a subsequent interview with Detective William Dramis, Lopez indicated he had "masterminded" the events that day. RP 70. He knocked on the door of the home and intended to mention the plywood if anyone answered. RP 71. As he continued to knock, he saw his nephew jump out of the car and push in the air conditioning unit to gain access to the shed. Lopez then saw his nephew with plants in his hands. RP 72. Lopez denied entering the shed himself, but indicated he was to be compensated with some of the marijuana. RP 72-73. He also said that although they had previously discussed taking the plants, he did not think they were going to do it that day. RP 77-78.

After the prosecution rested, the defense called Jose Carcamo, who had already been convicted for his part in the burglary. RP 110-111. Carcamo testified that he, his uncle, and Vasquez had gone to the Kammeyer home only to get plywood. RP 111. But while Lopez was knocking at the house, Carcamo got out of the Cadillac, kicked in the air conditioner, and stole the marijuana plants and dried marijuana from the shed. RP 112, 117-119. He put the marijuana in the car before Lopez returned and Lopez could not see what Carcamo was doing. When Lopez returned to the car, he was shocked at what his nephew had done. RP 112-113, 120-123. Carcamo testified that Lopez never approached the shed and never handled the marijuana plants prior to his return to the Cadillac. RP 119. In contrast, Carcamo testified that Vasquez was in on the plan and was to receive half of the proceeds from the theft. RP 122.

Lopez also took the stand in his own defense. RP 126. He testified he had worked for James Kammeyer for years but was laid off several weeks before the incident. He had called Kammeyer

weekly to inquire if there was any new work. RP 127-128. During one such call – about a week before the burglary – Lopez asked Kammeyer for plywood, which he hoped to use for a project in his trailer. Kammeyer responded that he had some plywood at the back of his house and Lopez was free to use some of it. Kammeyer also offered to leave an electric saw by the side of the shed for Lopez's use. RP 128-130.

According to Lopez, on January 10, 2012, he accepted his nephew's offer to provide him with a ride to the Kammeyer home to pick up the wood, and Carcamo arrived in Vasquez's car. RP 130-131. Once at the Kammeyer home, Lopez instructed the other two to stay in the car. Lopez went to the back of the house to confirm the saw was there and then knocked on the front and back doors in an attempt to alert Donna Kammeyer to his presence. RP 131-132. At one point, he did see Carcamo walking in the back yard, but he did not see the marijuana until he returned to the car. RP 132.

Lopez testified that he was upset. There had not been a plan to steal the plants; nor had he ever discussed a plan. RP 132-133. Lopez ultimately did not take the wood that day because, in order to gain access to an electrical outlet for the saw, he needed Donna to open the shed for him. RP 133-135. He was covered in organic material when arrested because he had moved the plants off of his seat once in the car. RP 139.

In rebuttal, the prosecution called Joel Vasquez, who also had been convicted for his part in the burglary by the time of Lopez's trial. RP 143. Vasquez downplayed his own involvement, testifying that once they arrived at the Kammeyer home, Carcamo exited the car and went to the front door. Lopez exited the car thereafter. When the two returned, they had marijuana plants in their hands and put them in the car. RP 146-148.

*b. Evidence of bias*

Lopez's defense depended on jurors believing his only intent on January 10, 2012, was to obtain plywood that James Kammeyer left for him on the property. Although Kammeyer agreed that he did

indeed store extra construction materials behind his shed, he denied he had a conversation with Lopez the week prior to the burglary in which he offered him wood. RP 41. He testified that he does not give away these materials to anyone. RP 45.

Prior to the start of the prosecution's case, the defense sought permission to cross-examine Kammeyer on an incident that occurred about a month after the alleged crimes. Kammeyer attempted to shoot Lopez, resulting in a criminal charge for which Kammeyer was awaiting trial. RP 2-3. The defense argued this was relevant to whether Kammeyer was being truthful about events surrounding the charged burglary. RP 3. The trial court excluded this evidence as irrelevant. RP 4.

Lopez now appeals.

C. ARGUMENT

LOPEZ WAS DENIED HIS SIXTH AMENDMENT RIGHT TO CONFRONT A KEY WITNESS AGAINST HIM.

The Sixth Amendment to the United States Constitution guarantees that in all criminal cases, the accused shall have the right "to be confronted with the witnesses against him." Key to this right is the opportunity for cross-examination. State v. Monson, 113 Wn.2d 833, 840, 784 P.2d 485 (1989). "The law allows cross examination

of a witness into matters that will affect credibility by showing bias, ill will, interest, or corruption.” State v. Russell, 125 Wn.2d 24, 92, 882 P.2d 747 (1994), cert. denied, 514 U.S. 1129, 115 S. Ct. 2004, 131 L. Ed. 2d 1005 (1995).

This Court reviews alleged violations of the Sixth Amendment confrontation clause de novo. State v. Medina, 112 Wn. App. 40, 48, 48 P.3d 1005, review denied, 147 Wn.2d 1025, 60 P.3d 93 (2002).

The seminal case on impeachment with evidence of bias is Davis v. Alaska, 415 U.S. 308, 94 S. Ct. 1105, 39 L. Ed. 2d 347 (1974). In Davis, the defendant faced charges of grand larceny and burglary. A key prosecution witness was on probation, and defense counsel sought to elicit this fact and argue the witness was acting out of fear his probation might be revoked if he did not deny his own involvement and incriminate Davis. Davis, 415 U.S. at 310-311. The trial court barred any reference to the witness’ probationary status and Davis was convicted. Id. at 311-314.

The United States Supreme Court held this was a violation of Davis’ confrontation rights and reversed his conviction. “We have recognized that the exposure of a witness’ motivation in testifying is a proper and important function of the constitutionally protected right of

cross-examination.” Davis, 415 U.S. at 316-317. “The partiality of a witness is subject to exploration at trial, and is ‘always relevant as discrediting the witness and affecting the weight of his testimony.’” Id. at 316 (quoting 3A J. Wigmore, Evidence sec. 940, p. 775 (Chadbourn rev. 1970)).

In the present case, James Kammeyer was a key witness against Lopez, and Lopez wished to cross-examine him to show bias – that he was motivated to be untruthful about events surrounding theft of the marijuana. The trial court’s decision that this evidence was irrelevant does not survive even minimal scrutiny.

It is well established that outside litigation involving the defendant and a witness in a criminal trial is relevant to demonstrate witness bias. See State v. Dolan, 118 Wn. App. 323, 327-328, 73 P.3d 1011 (2003). The Sixth Amendment guarantees the defendant’s use of this evidence to test the witness’ accuracy even where the outside litigation postdates the criminal charge. Id. at 328. Indeed, a defendant has the right to impeach a witness with even the mere *possibility* of litigation. State v. Smits, 58 Wn. App. 333, 337-338, 792 P.2d 565 (1990); State v. Whyde, 30 Wn. App. 162, 166-167, 632 P.2d 913 (1981).

While the cases dealing with this issue tend to involve outside *civil* litigation, there is no reason to treat criminal litigation differently. A pending criminal matter, like a civil case, can reveal a potential gain for the witness if the defendant is convicted and reveal ill will toward the defendant, “both recognized manifestations of a witness’s bias.” Smits, 58 Wn. App. at 339 n.1 (citing 2 C. Tortia, *Wharton on Criminal Evidence* §§ 435-36 (13<sup>th</sup> ed. 1972)). Indeed, the “other proceeding” the defense sought to use in Davis v. Alaska was not a civil lawsuit. It was a criminal probation revocation. Davis, 415 U.S. at 310-311.

In Kammeyer’s pending assault case, Lopez and Kammeyer had switched roles as defendant and alleged victim. Lopez would obviously be a key witness against him. And what better way to reduce Lopez’s credibility at that upcoming trial than to ensure Lopez was convicted of burglary at his own trial? Under ER 609(a)(2),<sup>3</sup> a conviction for burglary – where the intended crime is theft – is a crime of dishonesty and admissible for impeachment.

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<sup>3</sup> Under ER 609(a)(2), evidence of conviction is admissible to attack the credibility of a witness where the crime “involved dishonesty or false statement, regardless of punishment.”

State v. Black, 86 Wn. App. 791, 792-795, 938 P.2d 362 (1997), review denied, 133 Wn.2d 1032, 950 P.2d 475 (1998). Thus, Kammeyer had every incentive to ensure Lopez was convicted of the burglary, which could then be used at Kammeyer's trial to undermine Lopez and his claim of assault.

Because the trial court precluded relevant and admissible evidence of Kammeyer's bias, Lopez was denied his Sixth Amendment right to confront a critical witness against him. The only question remaining is whether that violation can be deemed harmless:

Any error in excluding such evidence is presumed prejudicial but is subject to harmless error analysis: reversal is required unless no rational jury could have a reasonable doubt that the defendant would have been convicted even if the error had not taken place.

State v. Spencer, 111 Wn. App. 401, 408, 45 P.3d 209 (2002) (citing State v. Johnson, 90 Wn. App. 54, 69, 950 P.2d 981 (1998)), review denied, 148 Wn.2d 1009, 62 P.3d 889 (2003).

Had jurors learned of Kammeyer's strong motive to lie, Lopez's conviction was far from certain. While Detective Dramas testified that Lopez made incriminating statements, Lopez's statement to Detective Davis was exculpatory. So was Lopez's trial testimony, which indicated he was simply at the home for the

promised plywood and did not participate in, or have knowledge of, the burglary until after the fact; nor did he assist in placing the marijuana in the car. Carcamo's testimony also fully supported this version of events. And while Vasquez indicated he saw Lopez carrying some of the marijuana, it is apparent from his testimony that he sought to downplay his own role in the crimes.

Kammeyer's testimony was critical because he flatly denied that Lopez had a valid reason (the plywood) for being on his property generally and near his shed specifically. In light of this testimony, jurors were far more likely to accept the prosecution argument that Lopez's sole reason for coming to the property was to burglarize the shed and steal the marijuana. Indeed, the prosecutor used Kammeyer's testimony for this very purpose during closing argument. RP 168 (referring to Kammeyer's denial he offered plywood to Lopez). Therefore, it was imperative that jurors know about Kammeyer's strong incentive to ensure Lopez's conviction. Under these circumstances, the State cannot show, as it must, that the violation of Lopez's right to confront Kammeyer with this evidence was harmless beyond a reasonable doubt.

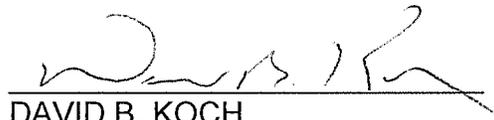
D. CONCLUSION

This Court should reverse Lopez's convictions and remand for a new and fair trial.

DATED this 29<sup>th</sup> day of March, 2013.

Respectfully submitted,

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Certificate of Service by email

I Patrick Mayovsky, declare under penalty of perjury under the laws of the state of Washington that the following is true and correct:

That on the 29<sup>th</sup> day of March, 2013, I caused a true and correct copy of the **Brief of Appellant** to be served on the party / parties designated below by email per agreement of the parties pursuant to GR30(b)(4) and/or by depositing said document in the United States mail.

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Signed in Seattle, Washington this 29<sup>th</sup> day of March, 2013.

x  \_\_\_\_\_