NO. 35583-3

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

FILED
COURT OF APPEALS
DIVISION II
08 JAN 14 PM 1:44
STATE OF WASHINGTON
BY DEPUTY

STATE OF WASHINGTON, RESPONDENT

v.

SANDRA L. KILBY, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Frank E. Cuthbertson

No. 06-1-01014-2

BRIEF OF RESPONDENT

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Table of Contents

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR. 1

1. Did the trial court properly exercise its discretion in admitting the rental agreement and was any error in admitting the agreement harmless? (Appellant's Assignment of Error No. 2). 1

2. Did the trial court properly exercise its discretion in admitting testimony regarding Niemi's incarceration and was any error committed in admitting such testimony harmless? (Appellant's Assignment of Error No. 1). 1

3. Is the defendant entitled to relief under the cumulative error doctrine when she has not established any that any prejudicial errors occurred? 1

B. STATEMENT OF THE CASE. 1

1. Procedure 1

2. Facts 2

C. ARGUMENT 4

1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN ADMITTING THE RENTAL AGREEMENT BELOW, AND ANY ERROR THAT MAY HAVE BEEN COMMITTED WAS HARMLESS. 4

2. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN ADMITTNIG EVIDENCE REGARDING NIEMI'S INCARCERATION AND ANY ERROR COMMITTED IN ADMITTING SUCH TESTIMONY WAS HARMLESS 6

3. DEFENDANT IS NOT ENTITLED TO RELIEF UNDER THE DOCTRINE OF CUMULATIVE ERROR. 8

D. CONCLUSION. 12

Table of Authorities

Federal Cases

Brown v. United States, 411 U.S. 223, 232, 93 S. Ct. 1565, 36 L. Ed. 2d 208 (1973) 9

Neder v. United States, 527 U.S. 1, 17, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999) 9

Rose v. Clark, 478 U.S. 570, 577, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986) 8, 9

State Cases

In re Lord, 123 Wn.2d 296, 332, 868 P.2d 835 (1994) 9

State v. Alexander, 64 Wn. App. 147, 822 P.2d 1250 (1992) 11

State v. Badda, 63 Wn.2d 176, 385 P.2d 859 (1963) 11

State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) 7

State v. Castellanos, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997) 4

State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984) 9, 11

State v. Johnson, 90 Wn. App. 54, 74, 950 P.2d 981, 991 (1998) 9, 10

State v. Kinard, 21 Wn. App. 587, 592-93, 585 P.2d 836 (1979), review denied, 92 Wn.2d 1002 (1979) 11

State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988) 9

State v. McCray, 15 Wn. App. 810, 551 P.2d 1376 (1976) 6

State v. Powell, 126 Wn.2d 244, 267, 893 P.2d 615 (1995) 7

State v. Rehak, 67 Wn. App. 157, 162, 834 P.2d 651 (1992), review denied, 120 Wn.2d 1022 (1993) 4

State v. Russell, 125 Wn.2d 24, 93-94, 882 P.2d 747 (1994), cert. denied, 574 U.S. 1129, 115 S. Ct. 2004, 131 L. Ed. 2d 1005 (1995).....10

State v. Stevens, 58 Wn. App. 478, 498, 795 P.2d 38, review denied, 115 Wn.2d 1025, 802 P.2d 38 (1990).....10, 12

State v. Swan, 114 Wn.2d 613, 658, 700 P.2d 610 (1990).....4

State v. Torres, 16 Wn. App. 254, 554 P.2d 1069 (1976).....12

State v. Wall, 52 Wn. App. 665, 679, 763 P.2d 462 (1988), review denied, 112 Wn.2d 1008 (1989).....11

State v. Whalon, 1 Wn. App. 785, 804, 464 P.2d 730 (1970), review denied, 78 Wn.2d 992 (1970) 10-11

State v. White, 74 Wn.2d 386, 444 P.2d 661 (1968).....6

A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court properly exercise its discretion in admitting the rental agreement and was any error in admitting the agreement harmless? (Appellant's Assignment of Error No. 2).

2. Did the trial court properly exercise its discretion in admitting testimony regarding Niemi's incarceration and was any error committed in admitting such testimony harmless? (Appellant's Assignment of Error No. 1).

3. Is the defendant entitled to relief under the cumulative error doctrine when she has not established any that any prejudicial errors occurred?

B. STATEMENT OF THE CASE.

1. Procedure

On May 30, 2006, Sandra Lorri Kilby, hereinafter "defendant" was charged by amended information with unlawful possession of a controlled substance, methamphetamine, possession of forty grams or less or marijuana, and unlawful possession of a controlled substance oxycodone. CP 17-19. On September 28, 2006, both parties appeared for

trial. 9/28/06[1] RP 1. The defendant was convicted as charged on October 6, 2006. CP 97-99.

On November 8, 2006, the defendant was sentenced to six months and one day on the two felony counts, and was given a suspended sentence on the misdemeanor count of unlawful possession of forty grams or less of marijuana. CP 109-120, 121-126. The defendant filed a timely notice of appeal on November 8, 2006. CP 127.

2. Facts

On March 2, 2006, the Pierce County Sheriff's Department executed a search warrant at 202 228th Street in Pierce County. 10/2/06 RP 33. The residence that was searched was a trailer occupied by the defendant and Mr. Kilby. 10/2/06 RP 33-35. There was no one else inside the trailer at the time the warrant was executed. 10/2/06 RP 35.

Deputy Messineo, who was the case officer for the search, discovered a smoking device in the kitchen of the trailer. 10/2/06 RP 36, 38. In the kitchen area a plate with a razor blade and a brown powdery substance was found. 10/2/06 RP 56. The substance contained methamphetamine. 10/3/06 RP 182. An electronic scale was located on the kitchen countertop. 10/2/06 RP 58.

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[1] There are ten volumes of the verbatim report of proceedings, some of which are consecutively numbered, some of which are independently numbered. For convenience of reference, the respondent will refer to the verbatim report of proceedings by date.

In the master bedroom, pipes, a pyrex dish, an electronic gram scale, and marijuana were located. 10/2/06 RP 38, 67. The suspected marijuana that was recovered was verified to be marijuana. 10/3/06 RP 165-166. The pipe was a suspected methamphetamine pipe based on the blackish residue that was on the inside of it. 10/2/06 RP 70. In a nightstand in the bedroom was a piece of plastic with five white pills in it. 10/2/06 RP 96-97. The pills were analyzed and found to be oxycodone. 10/3/06 RP 181. Under the mattress were straws with residue on them, which are commonly used for snorting drugs. 10/2/06 RP 94, 98. In the closet on a shelf was a wooden box that contained a coffee filter with a brown stain on it and some aluminum foil. 10/2/06 RP 94, 96. The residue that was on the coffee filter was analyzed and was found to contain methamphetamine. 10/3/06 RP 178-180. Three surveillance cameras were found in a hutch in the dining room. 10/2/06 RP 57.

The defense called Angela Gentele as a witness. 10/3/06 RP 191. Gentele, the defendant's daughter, testified that she previously dropped a bottle of oxycodone on the floor of the defendant's trailer. 10/3/06 RP 192-195.

The defendant testified on her own behalf. 10/3/06 RP 208. She stated that she found her daughter's pills on the ground when she was vacuuming, and put them on the fireplace to keep them safe. 10/3/06 RP 212-213. The defendant indicated that on March 1st she returned from a

vacation to find "Allen[2]" Niemi in her house. 10/3/06 RP 215-216. The defendant indicated that it appeared that there had been a party in the house and that Niemi had used drugs in the past. 10/3/06 RP 216-217. The defendant denied knowledge of the wooden box that contained methamphetamine. 10/3/06 RP 220, 247.

C. ARGUMENT.

1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN ADMITTING THE RENTAL AGREEMENT BELOW, AND ANY ERROR THAT MAY HAVE BEEN COMMITTED WAS HARMLESS.

The admission or exclusion of relevant evidence is within the discretion of the trial court. State v. Swan, 114 Wn.2d 613, 658, 700 P.2d 610 (1990); State v. Rehak, 67 Wn. App. 157, 162, 834 P.2d 651 (1992), review denied, 120 Wn.2d 1022 (1993). The trial court's decision will not be reversed on appeal absent an abuse of discretion, which exists only when no reasonable person would have taken the position adopted by the trial court. State v. Castellanos, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997); Rehak, 67 Wn. App. at 162.

The State sought to introduce a rental agreement at trial which suggested that the defendant lived at an address in Auburn after the

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[2] "Allen" is later identified as Allen Niemi, and will be referred to by last name for convenience of reference. See 10/4/06 RP 269.

defendant testified that she had been a resident of Roy for over three years. 10/3/06 RP 230. While the rental agreement likely qualified as a business record, the record below does not include any testimony that the record was kept in the normal course of a business. Any error in admitting the rental agreement, however, was harmless.

The defendant's theory below was that the drugs found in her residence belonged to Niemi, who had been staying at the house while the defendant was on vacation. Evidence that the defendant may have had a different residence *after* the drugs had been found is of little relevance. Given the overwhelming evidence that was presented in the present case, any error in admitting a rental agreement that established that the defendant may have had a different address after incident is harmless.

The jury heard testimony that drugs were found in several rooms of the defendant's residence, including the bedroom closet. 10/2/06 RP 35-36, 38, 56, 67, 70, 94, 96-98; 10/3/06 RP 178-182. In total, a smoking device, electronic scale, and plate with methamphetamine on it were found in the kitchen. 10/2/06 RP 36, 38, 56, 58; 10/3/06 RP 182. In the bedroom pipes, a pyrex dish, an electronic gram scale, straws with residue, and marijuana were found. 10/2/06 RP 38, 67, 70, 94, 98. In the bedside table were five oxycodone pills. 10/2/06 RP 96-97; 10/3/06 RP 181. In the bedroom closet was a box with a coffee filter containing methamphetamine. 10/2/06 RP 94, 96; 10/3/06 RP 178-180. Clearly, the jury did not find it credible that a houseguest would hide drugs in various

locations throughout the home. The defendant also acknowledged having possession of the oxycodone, although she denied knowledge as to what the pills were. 10/3/06 RP 212-213. Evidence of the rental agreement would not have changed the outcome of the case, given the evidence presented. Therefore, any error was harmless.

The defendant asserts that the evidence of the rental agreement cast the defendant in a bad light. Brief of Appellant at page 15. The rental agreement did not damage the defendant's credibility, however, because the defendant denied signing the agreement, and denied living at the alternative address. 10/3/06 RP 235-237. The State did not call anyone to contradict the defendant's denial, and therefore did not impeach her. Any error in admitting the rental agreement was harmless.

2. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN ADMITTNIG EVIDENCE REGARDING NIEMI'S INCARCERATION AND ANY ERROR COMMITTED IN ADMITTING SUCH TESTIMONY WAS HARMLESS.

The admission and the determination of the propriety of rebuttal evidence rests within the discretion of the trial court. State v. White, 74 Wn.2d 386, 444 P.2d 661 (1968); State v. McCray, 15 Wn. App. 810, 551 P.2d 1376 (1976).

In the present case, the defendant has not established that the trial court abused its discretion in allowing the rebuttal evidence. The defendant testified that when she returned home on the morning of March

2nd, Niemi was in her home and it was a mess. 10/3/06 RP 215. The State was permitted to elicit testimony that Niemi was in custody from January 13th to February 27th. 10/4/06 RP 269. The State's theory was that Niemi could not have left drugs and paraphernalia all over the residence in such a short amount of time. 10/4/06 RP 263. The trial court properly admitted the evidence to rebut the inference created by the defendant that Niemi left drugs all over her home.

Assuming, arguendo, that this court finds that the trial court did abuse its discretion in allowing such rebuttal testimony, any error was harmless. The test to determine whether an error is harmless is "whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." State v. Brown, 147 Wn.2d 330, 341, 58 P.3d 889 (2002). Stated another way:

> An error is not harmless beyond a reasonable doubt where there is a reasonable probability that the outcome of the trial would have been different had the error not occurred . . . A reasonable probability exists when confidence in the outcome of the trial is undermined.

State v. Powell, 126 Wn.2d 244, 267, 893 P.2d 615 (1995)(citations omitted). In the present case, the jury was free to give whatever weight it wanted to the evidence that Niemi was incarcerated during a period of time before the incident. Given the evidence that was presented, it is clear that evidence of Niemi's incarceration did not effect the outcome of the case. The defendant asserts that the evidence prejudiced the defendant

because ". . . it placed further emphasis on the time of Allen's incarceration." Brief of Appellant at page 11. It is unclear what the defendant is alleging is the prejudice that resulted. Evidence that Niemi was in custody several days before the drugs were found, while marginally relevant, did not prejudice the defendant.

The jury was presented with evidence that drugs were found in multiple locations within the defendant's home. The defendant testified that when she returned from vacation on March 2nd, Niemi was present. 10/3/06 RP 215-216. That testimony was not rebutted, as Niemi had been released from custody at that time. Testimony about Niemi's incarceration did not effect the result of the trial, and any error that was committed was harmless.

3. DEFENDANT IS NOT ENTITLED TO RELIEF UNDER THE DOCTRINE OF CUMULATIVE ERROR.

The doctrine of cumulative error is the counter balance to the doctrine of harmless error. Harmless error is based on the premise that "an otherwise valid conviction should not be set aside if the reviewing court may confidently say, on the whole record, that the constitutional error was harmless beyond a reasonable doubt." Rose v. Clark, 478 U.S. 570, 577, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986). The central purpose of a criminal trial is to determine guilt or innocence. Id. "Reversal for error, regardless of its effect on the judgment, encourages litigants to

abuse the judicial process and bestirs the public to ridicule it." Neder v. United States, 527 U.S. 1, 17, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999) (internal quotation omitted). "[A] defendant is entitled to a fair trial but not a perfect one, for there are no perfect trials." Brown v. United States, 411 U.S. 223, 232, 93 S. Ct. 1565, 36 L. Ed. 2d 208 (1973)(internal quotation omitted).

Allowing for harmless error promotes public respect for the law and the criminal process by ensuring a defendant gets a fair trial, but not requiring or highlighting the fact that all trials inevitably contain errors. Rose, 478 U.S. at 577. Thus, the harmless error doctrine allows the court to affirm a conviction when the court can determine that the error did not contribute to the verdict that was obtained. Id. at 578; see also, State v. Kitchen, 110 Wn.2d 403, 409, 756 P.2d 105 (1988)("The harmless error rule preserves an accused's right to a fair trial without sacrificing judicial economy in the inevitable presence of immaterial error.").

The doctrine of cumulative error, however, recognizes the reality that sometime numerous errors, each of which standing alone might have been harmless error, can combine to deny a defendant not only a perfect trial, but also a fair trial. In re Lord, 123 Wn.2d 296, 332, 868 P.2d 835 (1994); State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); see also, State v. Johnson, 90 Wn. App. 54, 74, 950 P.2d 981, 991 (1998)("although none of the errors discussed above alone mandate reversal...."). The analysis is intertwined with the harmless error doctrine in that the type of

error will affect the court's weighing those errors. State v. Russell, 125 Wn.2d 24, 93-94, 882 P.2d 747 (1994), cert. denied, 574 U.S. 1129, 115 S. Ct. 2004, 131 L. Ed. 2d 1005 (1995).

There are two dichotomies of harmless errors that are relevant to the cumulative error doctrine. First, there are constitutional and nonconstitutional errors. Constitutional errors have a more stringent harmless error test and therefore they will weigh more on the scale when accumulated. Id. Conversely, nonconstitutional errors have a lower harmless error test and weigh less on the scale. Id. Second, there are errors that are harmless because of the strength of the untainted evidence and there are errors that are harmless because they were not prejudicial. Errors that are harmless because of the weight of the untainted evidence can add up to cumulative error. See e.g., Johnson, 90 Wn. App. at 74. Conversely, errors that individually are not prejudicial can never add up to cumulative error that mandates reversal because when the individual error is not prejudicial, there can be no accumulation of prejudice. See e.g., State v. Stevens, 58 Wn. App. 478, 498, 795 P.2d 38, review denied, 115 Wn.2d 1025, 802 P.2d 38 (1990)("Stevens argues that cumulative error deprived him of a fair trial. We disagree, since we find that no prejudicial error occurred.").

As these two dichotomies imply, cumulative error does not turn on whether a certain number of errors occurred. Compare, State v. Whalon, 1 Wn. App. 785, 804, 464 P.2d 730 (1970), review denied, 78 Wn.2d 992

(1970)(holding that three errors amounted to cumulative error and required reversal), with State v. Wall, 52 Wn. App. 665, 679, 763 P.2d 462 (1988), review denied, 112 Wn.2d 1008 (1989)(holding that three errors did not amount to cumulative error), and State v. Kinard, 21 Wn. App. 587, 592-93, 585 P.2d 836 (1979), review denied, 92 Wn.2d 1002 (1979)(holding that three errors did not amount to cumulative error). Rather, reversals for cumulative error are reserved for truly egregious circumstances when defendant is truly denied a fair trial, either because of the enormity of the errors, see e.g., State v. Badda, 63 Wn.2d 176, 385 P.2d 859 (1963)(holding that failure to instruct the jury (1) not to use codefendant's confession against Badda, (2) to disregard the prosecutor's statement that the State was forced to file charges against defendant because it believed defendant had committed a felony, (3) to weigh testimony of accomplice who was State's sole, uncorroborated witness with caution, and (4) to be unanimous in their verdicts was to cumulative error), or because the errors centered around a key issue, see e.g., State v. Coe, 101 Wn.2d 772, 684 P.2d 668 (1984)(holding that four errors relating to defendant's credibility combined with two errors relating to credibility of State witnesses amounted to cumulative error because credibility was central to the State's and defendant's case); State v. Alexander, 64 Wn. App. 147, 822 P.2d 1250 (1992) (holding that repeated improper bolstering of child-rape victim's testimony was cumulative error because child's credibility was a crucial issue), or because the same conduct was

repeated so many times that a curative instruction lost all effect, see e.g., State v. Torres, 16 Wn. App. 254, 554 P.2d 1069 (1976)(holding that seven separate incidents of prosecutorial misconduct was cumulative error and could not have been cured by curative instructions). Finally, as noted, the accumulation of just any error will not amount to cumulative error—the errors must be prejudicial errors. See Stevens, 58 Wn. App. at 498.

In the instant case, for the reasons set forth above, defendant has failed to establish that his trial was so flawed with prejudicial error as to warrant relief. She has failed to show that there was any prejudicial error much less an accumulation of it. Defendant is not entitled to relief under the cumulative error doctrine.

D. CONCLUSION.

For the above stated reason, the State respectfully requests that the defendant's convictions be affirmed.

DATED: January 10, 2008.

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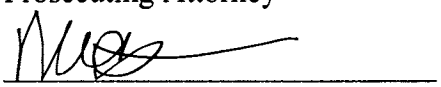
Prosecuting Attorney



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Certificate of Service:
The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

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