

FILED  
May 28, 2013  
Court of Appeals  
Division III  
State of Washington

NO. 310795-III

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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THE STATE OF WASHINGTON, Respondent

v.

ELIO DAVID CARCAMO LOPEZ, Appellant

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APPEAL FROM THE SUPERIOR COURT  
FOR BENTON COUNTY

NO. 12-1-00065-8

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BRIEF OF RESPONDENT

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**I. RESPONSE TO DEFENDANT’S ASSIGNMENT OF ERROR**

The State concedes that the trial court erred by not allowing the defense to cross examine Mr. Kammeyer about his pending criminal charges; however, the error was harmless.

**II. ISSUE PRESENTED**

**1. WAS THE STATE’S UNTAINTED EVIDENCE SUFFICIENTLY OVERWHELMING AS TO NECESSARILY LEAD TO A FINDING OF GUILT?**

**III. STATEMENT OF FACTS**

The defendant and his companions parked their car across the park from the Kammeyers’ house. (RP<sup>1</sup> 6, 116-17). The defendant got out of the car and walked across the park to the rear of the house. (RP 6). The two men remaining in the car then moved the car into the Kammeryers’ driveway. (RP 8-9). The defendant came out from behind the house and gestured to the men in the car, and the defendant’s nephew, Jose Carcamo, got out of the car. (RP 9, 18-19). Jose Carcamo walked up to the shed where Mr. Kammeryer grew his marijuana, and kicked the air conditioning unit until it fell inside. (RP 119). Jose Carcamo then gained

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<sup>1</sup> Unless dated, “RP” refers to the July 25-26, 2013, Jury Trial verbatim report of proceedings.

access to the inside of the shed through the small, chest-high opening where the unit had been. (RP 119). After a few minutes, according to the testimony of the third companion Joel Vasquez, the defendant and his nephew both came back to the car carrying marijuana. (RP 146). Their load consisted of, among other things, 19 plants, with roots and dirt still attached, and a glass container full of dried marijuana. (RP 53-54, 98, 118).

When the three men were stopped by Officer Littrell, he could plainly see a “whole bunch of marijuana plants, roots, dirt and all” in the front and back seats of the car. (RP 53). The defendant was seated in the rear passenger seat along with several marijuana plants. (RP 53, 148). Once at the police station, detectives observed that the defendant had marijuana flakes down the front of his sweatshirt, and a copious amount of dirt on his shoes. (RP 64-68). So much dirt, in fact, that he left a trail from the interview room to the bathroom and back. (RP 64-68).

The defendant was interviewed by detectives, and told Detective Dramis that he had “masterminded” the burglary. (RP 70). The defendant said that he knocked on the door, and if someone answered he planned to use the excuse of asking for plywood. (RP 71). He explained to Detective Dramis that his nephew pushed the air conditioning unit out of the wall, and he stayed outside while his nephew was inside handing the plants out.

(RP 72). The defendant stated that he helped carry the plants, and was to receive some marijuana in exchange for his assistance. (RP 73, 76).

On July 26, 2012, the defendant was convicted of Burglary in the Second Degree, and Felony Possession of Marijuana. (CP 28, 29). An instruction for accomplice liability was included in the court's instructions. (CP 17).

#### **IV. ARGUMENT**

The State agrees that it was error to deny the defendant the ability to cross-examine Mr. Kammeyer about his pending assault charges, wherein the defendant was the alleged victim. Despite this conceded error, however, the defendant's convictions should not be reversed since said error was harmless. Although a constitutional error, as complained of here, is presumed to be prejudicial, it can be deemed harmless if the State shows beyond a reasonable doubt that the error did not contribute to the verdict. *State v. Stephens*, 93 Wn.2d 186, 190-91, 607 P.2d 304 (1980).

In Washington, the "overwhelming untainted evidence" test is employed to determine whether the constitutional error is harmless. *State v. Guloy*, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985), *cert. den'd*, 475 U.S. 1020, 106 S.Ct. 1208, 89 L.Ed.2d 321 (1986). Under this test, the

Appellate Court looks only at the untainted evidence to determine if it is so overwhelming that it necessarily leads to a finding of guilt. *Id.* at 426.

In *State v. Dickenson*, Division I found that although the trial court had committed error by disallowing impeachment evidence of a State's key witness, the error was harmless. *Dickenson*, 48 Wn. App. 457, 458, 740 P.2d 312 (1987). The issue in that case had been one of identity. *Id.* at 468-70. The State's witness testified that the victim had been the only friend of hers to recently die. *Id.* at 464. She also denied having told police that another friend of hers had been recently killed by police. *Id.* Police reports indicated the contrary. *Id.* The trial court denied the defense's request to impeach this witness with proof of her inconsistent statements. *Id.* at 464-65. The Court of Appeals held that the trial court's exclusion of this impeachment evidence was error, since the proposed impeachment testimony would have called the witness's credibility into question with regard her identification of a killer on a different occasion. *Id.* at 468. However, despite the error, the Court upheld the defendant's conviction based upon the strength of the State's remaining evidence. *Id.*, 470-71.

In the present case, the State's evidence, exclusive of Mr. Kammeyer's testimony, overwhelmingly supports the jury's verdict. The defendant acted suspiciously when he walked directly to the rear of the

Kammeyers' residence after having parked a considerable distance away. After that, he and his two companions were found with a considerable amount of marijuana in the car when stopped by police, making it likely that more than one person had carried it from the shed. (RP 53). The defendant had marijuana on his clothing, and dirt on his shoes. (RP 64-68). He admitted to Detective Dramis that he had helped his nephew carry the marijuana from the shed, and Joel Vasquez testified that both the defendant and the defendant's nephew carried the marijuana to the car. (RP 73, 76, 146). Moreover, the defendant also told Detective Dramis that he had "masterminded" the events. (RP 70).

The only information of import offered by the testimony of Mr. Kammeyer was the fact that he had not given the defendant permission to take his marijuana or plywood. (RP 40, 45). However, these facts were well proved without Mr. Kammeyer's testimony. First, the men gained access to the marijuana by breaking into the shed; which is wholly inconsistent with having permission to take the marijuana. Second, the defendant admitted to Detective Dramis that the plywood was only a cover story in the event one of the Kammeyers answered the door. (RP 71). Absent the testimony of Mr. Kammeyer, the State's remaining untainted evidence is overwhelming, and it supports the defendant's convictions, as either a principal or accomplice, beyond a reasonable doubt.

Finally, even if the Court were to conclude that the error in this case is not harmless, the defendant's conviction for Felony Possession of Marijuana should not be overturned, as it was completely unrelated to Mr. Kammeyer's testimony.

**V. CONCLUSION**

The State's evidence in this case is overwhelming, and necessarily leads to a finding of guilt. Consequently, it is clear beyond a reasonable doubt that the error in this case did not contribute to the jury's verdict.

**RESPECTFULLY SUBMITTED** this 28 day of May 2013.

**ANDY MILLER**

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**CERTIFICATE OF SERVICE**

I certify under penalty of perjury under the laws of the State of Washington that on this day I served, in the manner indicated below, a true and correct copy of the Brief of Respondent as follows:

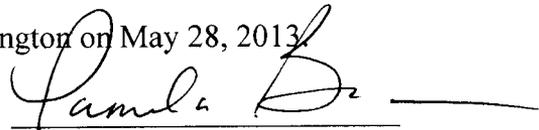
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Signed at Kennewick, Washington on May 28, 2013



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