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STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV
Case No. 2011AP1653-CR

STATE OF WISCONSIN,
Plaintiff-Respondent,
vs.
CARLOS A. CUMMINGS,
Defendant-Appellant.

**ON APPEAL FROM A JUDGMENT OF CONVICTION,
AND A MOTION DENYING POSTCONVICTION
RELIEF, BOTH ENTERED IN THE CIRCUIT COURT,
FOR PORTAGE COUNTY, HONORABLE THOMAS T.
FLUGAUR PRESIDING**

REPLY BRIEF OF DEFENDANT-APPELLANT

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Argument

I. The Sentence Was Unduly Harsh.

Mr. Cummings admitted in his main brief that this was a serious case, and he did not argue that he should have received

probation or a county jail sentence. However, Mr. Cummings contests that his individual characteristics cry out for a near-maximum sentence. In fixing a near-maximum sentence, the sentencing court did not give adequate weight to Mr. Cummings's personal history, including his "horrible childhood" and his "significant alcohol and drug issues" and "mental health issues" (R56:37-38).

The sentencing court saw Mr. Cummings as dangerous and culpable because he supposedly put a cognitively impaired individual up to carry out the shooting. Mr. Cummings is far from a Svengali, and he certainly is not very intelligent. He may have been operating at a slightly higher level than Ms. Dietze, but that he enlisted her does not speak favorably of Mr. Cummings's savvy. In any case, she pulled the trigger five times, aiming for the victim's head, which shows her to be more dangerous and prone to violence than Mr. Cummings.

The sentencing court could have made the sentence more acceptable by ordering a Risk Reduction Sentence (RRS), which was appropriate due to Mr. Cummings's mental illness and drug abuse history. The sentencing court's *sua sponte* denial of RRS was itself unduly harsh.

II. The Denial of Suppression of Mr. Cummings's Post-*Miranda* Statements was Reversible Error.

The State maintains that “Well, then, take me to my cell. Why waste your time? Ya know?” is ambiguous. Mr. Cummings disagrees. By contrast, the focus of the defendant’s statement in *State v. Markwardt*, 2007 WI App 242, ¶1, 306 Wis.2d 420, 742 N.W.2d 546 (“Then put me in jail. Just get me out of here. I don’t want to sit here anymore, alright? I’ve been through enough today”) was her being tired of sitting and having had a tough day. Mr. Cummings’s motive was to end the conversation because the conversation was a waste of time for both him and the detective.

The denial of the suppression motion was not harmless error, and the State has not met its burden to prove beyond a reasonable doubt that Mr. Cummings’s statements and the fruits thereof contributed in no way to the conviction. An error is harmless only if the State proves beyond a reasonable doubt that the error complained of did not contribute to the result. *State v. Rockette*, 2005 WI App 205, ¶26, 287 Wis.2d 257, 704 N.W.2d 382. The *Rockette* court specifically declined to apply the

“reasonable possibility that the erroneous admission of the disputed evidence contributed to the conviction” test of *State v. Semrau*, 2000 WI App 54, ¶22, 233 Wis. 2d 508, 608 N.W.2d 376. See *Rockette*, 2005 WI App 205 at ¶26.

The court may consider, among other factors, the frequency of the error, the importance of the erroneously admitted evidence, the presence or absence of evidence corroborating or contradicting the erroneously admitted evidence, whether the improperly admitted evidence duplicates untainted evidence, the nature of the defense, and the nature and overall strength of the State’s case.

Id.

Mr. Cummings’s statement was important and only partly corroborated. He confessed to the police that he had a relationship with Ms. Glodowski, which supported the State’s theory about the motive. He admitted that he had driven Ms. Dietze to the park and picked her up. He admitted Ms. Dietze had given him a backpack either to hold onto or get rid of. Mr. Cummings consented to police searches of his house without warrants. The State does not argue that there was attenuation of the consent obtained to these searches which produced a pistol, a magazine and bullets.

There is no way Mr. Cummings would have pleaded no

contest if the circuit court had suppressed his statements and their fruits. Without those, the whole case against him rose or fell on the credibility of the co-defendants. And those co-defendants were not very credible both due to their own mental health issues and their own motives to want to cover their tracks and spread the blame.

CONCLUSION

For the reasons stated above, the Court of Appeals should reverse the decision of the circuit court denying the defense motions to modify sentence and to suppress the appellant's statements to police.

Respectfully submitted this 27th day of February, 2012.

*/s/*David R. Karpe

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SECTION 809.19(8) CERTIFICATE

I hereby certify that this brief and appendix conforms to the rules contained in s. 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 1,063 words.

Signed,

/s/David R. Karpe

David R. Karpe

CERTIFICATE OF COMPLIANCE WITH RULE 809.19(12)

I hereby certify that I have submitted an electronic copy of this brief which complies with the requirements of s. 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date. A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Signed,

/s/David R. Karpe

David R. Karpe