

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**June 3, 2014**

Diane M. Fremgen  
Clerk of Court of Appeals

**NOTICE**

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2012AP1685-CR**

**Cir. Ct. No. 2009CF807**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**v.**

**VICTOR GARCIA,**

**DEFENDANT-APPELLANT.**

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APPEAL from a judgment and an order of the circuit court for Rock County: JAMES P. DALEY, Judge. *Affirmed.*

Before Curley, P.J., Fine and Brennan, JJ.

¶1 PER CURIAM. Victor Garcia appeals a judgment convicting him after a jury trial of two counts of armed robbery with use of force, one count of substantial battery with use of a dangerous weapon, one count of armed burglary with a dangerous weapon, and one count of felony bail jumping, all as a repeater

and all as a party to a crime except for bail jumping. Victor Garcia also appeals an order denying his postconviction motion.<sup>1</sup> He argues that his trial lawyer provided him with constitutionally ineffective assistance. We affirm.

¶2 Victor Garcia, Fernando Garcia and Isaac Cortez were charged with armed robbery and other counts for entering the apartment of Scott Lynch and Mark Brown in the middle of the night, robbing them and beating them. The State argued at trial that Cortez was angry at Brown and wanted to hurt him for alleged improprieties with Cortez's girlfriend. The State contended Cortez enlisted the help of Victor and Fernando Garcia by telling them they could steal drugs and money at the apartment. Victor Garcia's defense at trial was that he was not involved at all; his brother Fernando Garcia committed the crimes with Cortez, but he was not present. The jury convicted him of all of the charges against him.

¶3 Victor Garcia moved for postconviction relief, arguing that he received constitutionally ineffective assistance from his trial lawyer. He contended that his lawyer should have moved to suppress a pair of Nike tennis shoes he was wearing when he was arrested at his mother's house. The shoes tied Victor Garcia to the crime scene because they had paint splatters on them that were consistent with paint found at the victims' apartment. Victor Garcia argued that the shoes should not have been admitted because the police did not have a warrant to enter his mother's home where they arrested him and his mother did not consent to the police entering and searching her home. After an evidentiary hearing, the circuit court denied the postconviction motion.

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<sup>1</sup> Victor Garcia and his brother Fernando Garcia were both involved in these crimes. We use their full names throughout most of the opinion to avoid confusion.

¶4 On appeal, Victor Garcia contends that his trial lawyer provided constitutionally ineffective representation by failing to move to suppress admission of the Nike shoes. Assuming, without deciding, that Victor Garcia’s lawyer should have moved to suppress the shoes and would have been successful had he done so, we conclude that any error was harmless. An error is harmless if it does not affect the defendant’s substantial rights. WIS. STAT. § 805.18(2). The State bears the burden of showing that an error is harmless. *State v. Sherman*, 2008 WI App 57, ¶8, 310 Wis. 2d 248, 254, 750 N.W.2d 500, 504. An error is harmless if “it is ‘clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.’” *State v. Harris*, 2008 WI 15, ¶43, 307 Wis. 2d 555, 579, 745 N.W.2d 397, 409 (citation and footnote omitted). In deciding whether an error is harmless, we look at “the importance of the erroneously admitted evidence, the presence or absence of evidence corroborating or contradicting the erroneously admitted evidence, whether the erroneously admitted evidence duplicates untainted evidence, the nature of the defense, the nature of the State’s case, and the overall strength of the State’s case.” *Id.*, 2008 WI 15, ¶45, 307 Wis. 2d at 579–580, 745 N.W.2d at 409 (footnote omitted). Whether an error is harmless is a question of law that we review *de novo*. *State v. Harrell*, 2008 WI App 37, ¶37, 308 Wis. 2d 166, 187, 747 N.W.2d 770, 780.

¶5 Cortez testified at trial that he committed the crimes with Victor and Fernando Garcia, and two other individuals. Cortez gave a detailed account of events that included Victor and Fernando Garcia. Cortez testified that he did not receive any concession from the prosecutor for testifying that Victor and Fernando Garcia participated in the crimes with him, although he hoped the trial court would consider his cooperation favorably when it sentenced him.

¶6 Fernando Garcia told his probation agent that Victor Garcia participated in the robbery with him, along with Cortez and Cortez's friends. Fernando Garcia recanted this allegation at Victor Garcia's trial, however, denying that his brother was involved. Fernando Garcia explained his recantation by saying that his probation agent misunderstood his description of what happened.

¶7 Art Coleman, Fernando Garcia's probation agent, testified that Fernando Garcia told him that his brother, Cortez, and two other people participated in the robbery and beatings. Coleman testified that Fernando Garcia told him about this when Coleman was preparing a presentence investigation report after Fernando Garcia pled guilty to charges in connection with this incident. Coleman testified that Fernando Garcia has a younger brother in addition to Victor Garcia, so Coleman specifically asked Fernando Garcia which brother he was referring to, and Fernando Garcia told him he was referring to Victor Garcia.

¶8 Mark Brown testified at trial that he was severely beaten in the middle of the night by Cortez and other men who broke into his apartment demanding money and drugs. Brown testified that Cortez was angry because he mistakenly believed Brown was romantically involved with Cortez's girlfriend. Brown testified that he was repeatedly kicked and hit, and his four front teeth were knocked out when one of the men struck him in the face with a rifle butt. Brown testified that his injuries were extensive; his jaw was fractured, his orbital socket was broken in three places, his nose was broken in several places, and he needed thirty-six stitches on his face.

¶9 Brown testified that the men were masked when they entered, but that Cortez eventually took off his mask. Brown knew Cortez because Cortez had

previously lived with him. Brown testified that the men were of Hispanic descent, and said that one of the masked men had a distinctive “poofy” hairstyle. Brown identified Victor Garcia in court as the masked intruder with the unusual hairstyle, but noted that Victor Garcia’s hair had changed since the night of the robbery. On cross-examination, Brown acknowledged that he never saw the faces of the men with masks, but said that he recognized Victor Garcia’s unusual hairstyle when he saw Victor Garcia in court about a month after the robbery. Brown clarified on further questioning that his identification of Victor Garcia was based on Victor Garcia’s unusual hairstyle and the fact that the police found Victor Garcia with items taken from his apartment.

¶10 Scott Lynch testified that masked men woke him up in the middle of the night to rob him. Lynch testified that the men hit him and demanded money and drugs. Lynch testified that there were five men, one of whom was Cortez. Lynch testified that one of the men was about 6 feet tall and 175-180 pounds with a recognizable “poofy” hairstyle, which he characterized a skater cut or a bowl cut. After describing the height, weight and unique hairstyle of one of his assailants, Lynch identified Victor Garcia in court as a person consistent with that description, although he was unable to identify Victor Garcia’s face. Lynch also testified that Victor Garcia had changed his hairstyle a bit since the crime. When Lynch was shown a picture of Victor Garcia taken in court about a month after the robberies, Lynch said that the picture showed the hairstyle of the masked man as he remembered it.

¶11 Detective Mark Johnson testified he was assigned to investigate the home invasion on the day it occurred. He knew that Cortez was a suspect, so he got information from Cortez’s girlfriend that Cortez was calling her from a particular phone number, which he tracked to the house of Victor Garcia’s mother.

Johnson was watching the mother's residence for Cortez when he saw Victor Garcia arrive in a car. Johnson knew Victor Garcia from prior contacts. Johnson testified that a woman got in the car and Victor Garcia drove away, with Johnson following in his unmarked police car. Johnson testified that he radioed for a marked squad because he wanted to pull Victor Garcia over to ask about Cortez but, before the marked squad arrived, Victor Garcia suddenly sped up, pulled into a driveway, and jumped out of his running car. Victor Garcia ran through some backyards toward his mother's house, leaving his passenger in the car. Johnson testified that he ran after Victor Garcia, who went into his mother's house and refused to answer the door. Johnson also testified that Victor Garcia would not answer the phone in the house, which Johnson tried to call.

¶12 As previously explained, in determining whether an error is harmless, we look at the presence or absence of evidence corroborating the erroneously admitted evidence. *See Harris*, 2008 WI 15, ¶45, 307 Wis. 2d at 579, 745 N.W.2d at 409. The testimony recounted above shows that there was substantial testimony corroborating the inference provided by the tennis shoes that Victor Garcia was present at the crime scene. Cortez testified at trial that Victor Garcia was one of the men who participated in robbing and beating Brown and Lynch. Fernando Garcia told his probation agent that his brother Victor Garcia participated in the robbery and battery. Brown testified that he recognized Victor Garcia in court as one of the men who beat and robbed him. Lynch testified that one of his assailants had an unusual hairstyle and was about 6 feet tall and 175-180 pounds, and testified that Victor Garcia's physical appearance was consistent with that of the masked robber.

¶13 Looking next at the importance of the erroneously admitted evidence, *see id.*, another significant consideration when we are deciding whether

an error is harmless, the defense argued in closing that little significance should be assigned to the fact that Victor Garcia was wearing the shoes when he was arrested because DNA analysis of the shoes showed DNA consistent with *both* Victor and Fernando Garcia in the shoes. The defense also pointed out that Susan Garcia, the mother of Victor and Fernando Garcia, testified that they shared clothing. In light of the DNA evidence and Susan Garcia's testimony, an inference could be drawn from the paint-splattered shoes that Victor Garcia was at the crime scene, but an equally strong inference could be drawn that Fernando Garcia was at the crime scene, a fact that Fernando Garcia freely admitted. Thus, the shoes were not particularly strong evidence of Victor Garcia's guilt because they did not definitely tie him to the crime.

¶14 Finally, turning to the overall strength of the State's case, a key factor in determining whether an error is harmless, the State's case against Garcia was strong. *See Harris*, 2008 WI 15, ¶45, 307 Wis. 2d at 580, 745 N.W.2d at 409. Victor Garcia fled when he saw the police, even though Victor Garcia was not the person they wanted to question, which is suggestive of Victor Garcia's involvement in the robbery and beatings earlier that day. Cortez and Fernando Garcia said Victor Garcia was with them, one of the victims identified Victor Garcia as a perpetrator, and another victim said Victor Garcia's physical appearance was consistent with the masked perpetrator. Given the strength of the State's case, the relative weakness of the shoe evidence due to the conflicting inferences that could be drawn from the DNA in the shoes, and the testimony corroborating the inference from the shoes that Victor Garcia was at the scene, we conclude that any error in admitting the shoes was harmless. It is clear beyond a reasonable doubt that a rational jury would have found Victor Garcia guilty even if

the shoes had not been introduced by the State as evidence against Victor Garcia at trial.<sup>2</sup>

*By the Court.*—Judgment and order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

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<sup>2</sup> After this appeal was submitted to the court, Garcia filed a motion asking the court to take note of the fact that he cited to the wrong statute in his reply brief. We have considered the correct statute, as requested by Garcia. Garcia also moved for remand to allow the trial court to consider additional information related to his Fourth Amendment claim. We deny the motion because we have concluded that any potential error was harmless.



