No. 69044-2-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

CHARLES FELD,

Appellant.

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

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Supreme Court Decisions

Washington Court of Appeals Decisions

United States Supreme Court Decisions

Decisions of Other Jurisdictions

Constitutional Provisions

A. ARGUMENT

1. The trial court violated Mr. Feld's rights under the Fourteenth Amendment and article I, section 22 by ordering him to wear shackles on his legs during trial.

As explained in Mr. Feld's opening brief, the trial court violated his constitutional rights by ordering him to wear shackles visible to the jury during the first four days of trial in the absence of a compelling necessity. It is clear from the record that the trial court granted the State's motion to shackle Mr. Feld only because Mr. Feld at first chose to wear jail clothing, and the trial judge thought under such circumstances shackling was not prejudicial. 4/11/12 RP 20-21, 65. As soon as Mr. Feld decided to switch to street clothes, the trial court ordered the shackles removed. 4/16/12 RP 5. The trial court erred, because the propriety of physical restraints does not depend on whether the defendant is wearing jail clothes.

Shackling may be ordered only under extraordinary circumstances because it undermines the Fourteenth Amendment right to the presumption of innocence and article I, section 22 right to appear and defend in person. U.S. Const. amend. XIV; Const. art. I, § 22. Thus, our Supreme Court has reversed for improper shackling even in capital cases where the defendants were alleged to have committed the most violent crime possible and even where one capital defendant had threatened to kill

a victim-witness. *See In re Personal Restraint of Davis*, 152 Wn.2d 647, 693, 101 P.3d 1 (2004); *State v. Finch*, 137 Wn.2d 792, 844, 975 P.2d 967 (1999). If reversal was required in those cases, it is certainly required here. *See* Brief of Appellant at 9-18.

The State acknowledges that the trial court relied heavily on Mr. Feld's choice of clothing in making its decisions regarding physical restraints. Brief of Respondent at 11. Yet it claims the shackling order was proper because "it was necessary to prevent injury to those in the courtroom and to prevent disorderly conduct while at trial." Brief of Respondent at 24. The State is wrong.

Mr. Feld had not injured or even attempted to injure anyone during the years charges had been pending, even though he had the opportunity to do so at numerous hearings, meetings with attorneys, and interviews with experts. 4/11/12 RP 25-26. He had never threatened anyone, though he certainly expressed his wish that everyone would "kill themselves." 5/13/10 RP 6; 4/11/18 RP 18; CP 67, 78. There is no question that he engaged in repeated *verbal* outbursts, but the State fails to explain why shackling a person's *legs* would cause the person to be quiet, and also fails to explain why verbal outbursts present the type of *danger* necessary to justify shackling. The State's claim that Mr. Feld made threatening *physical* movements is wholly unsupported by any citation to the record

and should be stricken. Brief of Respondent at 25. The trial court made no such claim in issuing its ruling, instead relying primarily on Mr. Feld's choice of clothing and secondarily on his verbal outbursts, the seriousness of the charges, and the jail guard's testimony that Mr. Feld *could* physically reach his attorneys or the judge if he wanted to – *not* that he had done so or tried to do so. 4/11/12 RP 65; *see also* 4/11/12 RP 23-24 (jail guard testifies that he *fears* Mr. Feld *would* act out in a physical manner during one of his "verbal tirades").

Mr. Feld had never escaped or attempted to escape, had never attempted suicide, had no co-defendants or other cohorts who may have aided him if he were violent and unrestrained, and had *no* criminal history. CP 309, 323. All of these factors must be considered in determining whether there is an "impelling necessity" for shackling. *State v. Hartzog*, 96 Wn.2d 383, 400, 635 P.2d 694 (1981). Furthermore, during the hearing on the shackling motion, the court noted that Mr. Feld was behaving in a "calm and collected" manner and had also been "calm and collected" at the previous hearing. 4/11/12 RP 15.[1]

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[1] The State also claims that the court properly ordered Mr. Feld shackled because he was "athletic and young." Brief of Respondent at 19. Mr. Feld was born in May of 1956. CP 321. Not only does this mean he was not young relative to most criminal defendants, it makes the absence of prior criminal history all the more relevant.

The fact that Mr. Feld agreed to wear jail clothing – which seemed to be the primary basis for the court's shackling order – is not a proper consideration. *Hartzog* is instructive. There, the superior court assumed shackling did not prejudice the jury against the defendants because it was well-known that the defendants and witnesses were prison inmates, as the crimes alleged were committed in prison. The Supreme Court said, "we cannot agree." *Hartzog,* 96 Wn.2d at 399-400. The Court held that shackling must be justified by an individualized determination of *dangerousness*, not an assumption that shackling is not prejudicial because the jury already knows the defendant is in jail or prison. *See id.*

The *Hartzog* court was correct. Indeed, a defendant's wearing jail clothing may simply indicate that he is too poor to afford bail, not that he is dangerous. Shackles, on the other hand, are extremely prejudicial because they imply a high level of dangerousness. *Finch*, 137 Wn.2d at 845. This, in turn, indicates that the defendant is guilty of the violent crimes with which he is charged. *Id.* This is why shackling is allowed in only the most extraordinary circumstances - circumstances not present here. Mr. Feld was annoying and may well have been incompetent to stand trial, but neither of these characteristics justifies shackling under the relevant caselaw. *See* Brief of Appellant at 9-18.

In addition to relying on the cases cited in the opening brief, Mr. Feld agrees with the State that *Illinois v. Allen* is instructive. *See* Brief of Respondent at 20 (citing *Illinois v. Allen*, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970)). There, the U.S. Supreme Court endorsed a trial court's decision to remove the defendant from the courtroom after he argued with the judge "in a most abusive and disrespectful manner," tore his attorney's files and threw the papers on the floor, and told the judge "you're going to be a corpse." *Id.* at 339-40. The trial court had also warned the defendant that he would be removed if he engaged in such outbursts. *Id.*

The Supreme Court noted that imposing physical restraints was an alternative approach to removal, but one that should be adopted only "as a last resort." *Id.* at 344. "Not only is it possible that the sight of shackles and gags might have a significant effect on the jury's feelings about the defendant, but the use of this technique is itself something of an affront to the very dignity and decorum of judicial proceedings that the judge is seeking to uphold." *Id.* Thus, shackling is "surely the least acceptable" option. *Id.* at 350 (Brennan, J., concurring).

The trial court in Mr. Feld's case at first seemed to understand that shackling was supposed to be a last resort and that removal from the

courtroom following an outburst would be the appropriate less-restrictive alternative:

> THE COURT: Well, I tell you what I'm going to do. I have been in court with Mr. Feld on numerous occasions, and I have seen him act out, and I have seen him sit passively as he is doing today. I don't know what Mr. Feld is going to do in front of the jury. I wouldn't guess. It's my hope that Mr. Feld sits quietly and lets the process evolve around him and lets his attorneys do their job.
>
> If Mr. Feld doesn't, and acts out, and there are outbursts in front of the jury, I will excuse the jury immediately, and severely warn Mr. Feld that any further outbursts will result in removal from the courtroom.
>
> The jury will come back in, if Mr. Feld sits quietly, all is good. If Mr. Feld outbursts again, I will remove the jury for a second, and remove Mr. Feld from the courtroom – there's already, I think, procedures set up to remove Mr. Feld from the courtroom to another spot – and inform Mr. Feld that at any time he can come back into the courtroom upon a pledge to remain in good standing and no further outbursts. So that's the process I think we will do, and hopefully Mr. Feld understands that.

4/11/12 RP 20-21.

The above would have been the appropriate process. *See Allen*, 397 U.S. 337. However, the court then indicated that if Mr. Feld was going to wear jail clothing, the judge would order him shackled instead of following the procedures outlined above.

> As far as the shackling goes, there's an issue here that we normally don't ever have to face regarding shackling, and that is, Mr. Feld, if he is truly passing up the offer extended by the Court and his attorneys to wear civilian clothes, and

> is going to insist to come to trial in the red suit, then the shacklings really aren't as big an issue as they would be if he was in civilian clothes.

4/11/12 RP 21. The jail guard then explained his concerns, and Mr. Feld's attorneys vehemently objected to shackling, explaining that it was not warranted in this case. 4/11/12 RP 23-26. The court concluded, "we will see what we're going to do once we see what Mr. Feld is going to wear." 4/11/12 RP 26. Mr. Feld decided to wear jail clothing and the court ordered him shackled. 4/11/12 RP 64-65.

That Mr. Feld's choice of clothing was the primary basis for the shackling order is clear not only from the above discussion, but also from what occurred five days later:

> MR. RICHARDS: For the record, I just wanted to indicate that Mr. Feld has chosen to wear appropriate street clothing today. He is wearing a sports coat and slacks and a tie.
>
> And I guess I should also note for the record that Wednesday through Friday of last week, that Mr. Feld was wearing jail clothing and had his feet shackled, and that today he has no shackles whatsoever.
>
> THE COURT: Thank you, Mr. Richards. Yeah, Mr. Feld, for the previous week's trial was in red jail clothing due to his decision to dress that way. *His feet were shackled at the time since he was in the red jail garb.*

4/16/12 RP 5 (emphasis added).[2] This basis for shackling Mr. Feld is improper as explained above and in the opening brief. *See Hartzog*, 96 Wn.2d at 399-400; Brief of Appellant at 9-18.

Because the State does not even attempt to meet its burden to prove beyond a reasonable doubt that the constitutional violation did not contribute to the verdict, this Court should reverse and remand for a new trial. *See* Brief of Appellant at 17-18; *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); *Finch*, 137 Wn.2d at 859.

2. The trial court violated Mr. Feld's right to counsel under the Sixth and Fourteenth Amendments and RCW 10.77.020 by holding a competency hearing in the absence of Mr. Feld's attorney.

As Mr. Feld noted in his opening brief, the trial court violated his constitutional and statutory right to counsel by holding a hearing to determine whether the State proved his competency had been restored in the absence of Mr. Feld's attorney. Mr. Feld's attorney, Wes Richards, called his office after his car slid off the road and asked someone to go to court and request a continuance of the hearing. Adam Yanasak obliged, and made clear to the court that he knew nothing about the case and was

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[2] The State's claim that the trial court removed the shackles in part because "Mr. Feld had demonstrated that he could control himself" is not supported by the record, which indicates the shackles were removed only because Mr. Feld decided not to continue wearing jail garb. *Compare* Brief of Respondent at 19-20 & 26 *with* 4/16/12 RP 5.

simply delivering a message to the court that Mr. Richards was in an accident and needed a continuance. The court denied the request and proceeded to find Mr. Feld's competence had been restored – without holding a contested hearing and without Mr. Feld's attorney. The error is structural, requiring reversal and remand for a new trial. Brief of Appellant at 18-25.

The State appears to make three arguments in response, none of which is valid. First, the State implies that because Mr. Feld said he did not care that Mr. Richards was absent he somehow waived his right to counsel. Brief of Respondent at 29, 31-32. The reason the State merely implies this argument rather than making it outright is that Mr. Feld *was not competent to waive* his right to counsel at this point. The most recent finding was one of *incompetence*, and the whole point of the hearing was to determine whether the State could prove competence had been restored. 12/3/10 RP 26-43; CP 353; 2/24/11 RP 4-11; CP 361. Thus, at the time Mr. Feld allegedly waived his right to counsel, the "waiver" was invalid. *See Indiana v. Edwards*, 554 U.S. 164, 177, 128 S. Ct. 2379, 2387, 171 L. Ed. 2d 345 (2008) (standard for competence to waive counsel is *at least* as high as standard for competence to stand trial); *State v. Hahn*, 106 Wn. 2d 885, 893, 726 P.2d 25, 29 (1986) (only a defendant who is competent to

stand trial may waive the assistance of counsel, and may do so if the waiver is made knowingly and intelligently).

Second, the State claims that Mr. Feld was not denied his right to counsel because Adam Yanasak was present. Brief of Respondent at 31, 32. This argument is offensive. A defendant's constitutional right to counsel is not satisfied simply because a person with a bar card who knows nothing about the case appears and delivers a message for the defendant's actual attorney. Mr. Yanasak made clear he was in court as a messenger, not to represent Mr. Feld: "I do not know anything about this case other than I was handed this file, was told that Mr. Richards was asking if we could just continue his matters for a week. He's out today I believe due to the weather, so, your honor, I am not prepared to adequately address these matters...." 2/24/11 RP 4. The court denied the motion for a continuance, *and no contested hearing was held.* The court simply found competency had been restored after the prosecutor stated it was his "desire" that the court agree with the report the State filed, and Mr. Feld said "I am well" after the court said, "How are you doing?" 2/24/11 RP 7-8. Mr. Yanasak renewed his objection to the court's holding the hearing without Mr. Feld's attorney, to no avail. 2/24/11 RP 10. Mr. Yanasak never challenged the State's evidence of competency because he knew

nothing about the case. The State's argument that Mr. Feld was not deprived of his right to counsel is without merit.

Finally, the State avers that the issue was forfeited because Wes Richards failed to move to reconsider the denial of the motion for a continuance the next time he appeared in court. Brief of Respondent at 32. Not surprisingly, the State cites no authority for this proposition. There is no requirement that a party move to reconsider prior rulings in order to preserve an issue for appeal. *See State v. Hortman*, 76 Wn. App. 454, 459, 886 P.2d 234 (1994) (rejecting defendant's contention that State forfeited right to appeal exceptional sentence by not renewing its objection). Mr. Yanasak had already made quite clear, both before and after the finding of competency restoration, that he knew nothing about the case and that the court should continue the hearing until Mr. Feld could be represented by counsel. The court nevertheless denied the request for a continuance. The fact that the court proceeded to hold a nonadversarial competency restoration hearing in the absence of Mr. Feld's attorney is certainly an error preserved for appeal. For the reasons set forth in the opening brief at pages 18-25, this Court should reverse and remand for a new trial.[3]

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[3] The State also implies the violation was harmless because there were subsequent competency hearings in the case. Brief of Respondent at

3. The State concedes the trial court violated Mr. Feld's Fifth Amendment right to be free from double jeopardy.

As explained in Mr. Feld's opening brief, the convictions for counts one and two violated his constitutional right not to be punished twice for the same offense, requiring reversal of the conviction on count two. Brief of Appellant at 25-27. The State concedes the error. Brief of Respondent at 32-33. The State also argues that the conviction on count four violates double jeopardy, and that this conviction should also be vacated. *Id.* Mr. Feld asks this Court to accept the State's concessions.

4. The trial court violated Mr. Feld's Sixth Amendment right to present a defense by excluding evidence of the alleged victim's prior acts of violence.

In his opening brief, Mr. Feld further argued that the trial court violated his Sixth Amendment right to present a defense as to counts one and two by excluding evidence of the alleged victim's prior violent behavior, which was highly relevant to his claim of self-defense. The State presented evidence of this witness's "gentle, mild-mannered" demeanor, yet Mr. Feld was not allowed to rebut this evidence with his

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32. There are two problems with this argument: (1) the complete deprivation of counsel is structural error not subject to harmless error analysis; *State v. Heddrick*, 166 Wn.2d 898, 910, 215 P.3d 201 (2009); and (2) the hearing at which Mr. Feld was deprived of his attorney was the only one for which the *State* bore the burden of proof. *See State v. P.E.T.*, 174 Wn. App. 590, 596-97, 300 P.3d 456, 459 (2013). At subsequent hearings, competence was presumed.

wife's proffered testimony regarding the witness's prior violent conduct and Mr. Feld's knowledge of that conduct. 4/18/12 RP 59-61. The violation requires reversal of the convictions on counts one and two, and remand for a new trial. Brief of Appellant at 28-32 (citing, inter alia, U.S. Const. amend. VI; *State v. Jones*, 168 Wn.2d 713, 230 P.3d 576 (2010); *State v. Wanrow*, 88 Wn.2d 221, 559 P.2d 548 (1977); *State v. Cloud*, 7 Wn. App. 211, 498 P.2d 907 (1972)).

The State in response cites the wrong standard of review, claiming that this is a mere evidentiary issue which the Court reviews for abuse of discretion. Brief of Respondent at 35. That is incorrect. This Court reviews *de novo* the question of whether the trial court violated a defendant's Sixth Amendment right to present a defense. *Jones*, 168 Wn.2d at 719.

The State then claims that the ruling was proper under *Cloud* because the proffered testimony involved only "one occasion" of violence and Mr. Feld was unaware of it. Brief of Respondent at 37. The former contention is legally incorrect and the latter is factually inaccurate. Mr. Feld made an offer of proof stating that Phyllis Feld would testify that she told Mr. Feld about the violent incident she witnessed and that Mr. Feld was aware of that particular incident with the baseball bat as well as Mr. Callero's generally "violent tendencies". 4/18/12 RP 59-61. In *Cloud*, in

contrast, this Court affirmed the exclusion of evidence of a victim's prior violent act because that information had been "uncommunicated to the defendant" and therefore was not relevant to self-defense. *Cloud*, 7 Wn. App. at 218.

Nor does the fact that Phyllis Feld would have testified about a specific violent incident render the evidence excludable. Although a single incident does not establish a "reputation" and therefore may not be presented to prove character, it *is* relevant and admissible in a self-defense case to support the defense:

> In proving the character of the [alleged victim], specific acts of violence may not be shown. Such is the rule in any kind of case where there is an effort to show character. *However, where the person accused is defending, in whole or in part, on the ground that at the time of the [alleged crime] he believed, and had good reason to believe, that he was in danger ... he may, in addition to the character evidence, show specific acts of the [alleged victim] which are not too remote and of which he had knowledge at the time of the [crime] with which he is charged.*

Cloud, 7 Wn. App. at 218 (emphasis added).

The State cannot prove beyond a reasonable doubt that the error was harmless. The State avers that the error is harmless because the trial court offered to strike the testimony regarding the alleged victim's gentle manner. Brief of Respondent at 37. But as Mr. Feld's attorney noted, that only would have made the problem worse by re-emphasizing the remarks

in question. 4/18/12 RP 57. The State does not explain the relevance of this exchange to the *Chapman* inquiry.

The State notes that Mr. Feld's statement to police included a reference to Mr. Callero as a bully, but this evidence is surely not as powerful as testimony from Phyllis Feld that the alleged victim took a baseball bat to confront someone in a dispute and that Mr. Feld was aware of it. It was especially important that Phyllis Feld be allowed to testify about this incident after the State was allowed to present testimony that Mr. Callero was peaceful. The State cannot prove Phyllis Feld's testimony would not have made a difference under these circumstances. Accordingly, Mr. Feld asks this Court to reverse the convictions on counts one and two, and remand for a new trial.

5. The trial court violated Mr. Feld's rights under article I, section 7 of the Washington Constitution by denying his motion to suppress recordings of private telephone conversations he had with his wife while he was in jail.

For this issue, Mr. Feld relies on his opening brief at pages 32-37.

6. The trial court violated Mr. Feld's right to due process by providing erroneous instructions to the jury.

a. <u>The to-convict instructions for counts one through four omitted the essential element that the State had to prove the absence of self-defense</u>.

As explained in the opening brief, the trial court violated his right to due process by denying motions to include the absence of self-defense

as an element in the to-convict instructions for counts one through four. A to-convict instruction must contain all of the elements of the crime because it serves as the yardstick by which the jury measures the evidence to determine guilt or innocence. Where the issue of self-defense is raised, the absence of self-defense becomes an essential element of the offense which the State must prove beyond a reasonable doubt. Thus, the failure to include the absence of self-defense in the to-convict instructions violated Mr. Feld's right to due process, and the convictions on counts one through four should be reversed and the case remanded for a new trial. Brief of Appellant at 38-41 (citing, inter alia, U.S. Const. amend. XIV; *State v. Smith*, 131 Wn.2d 258, 930 P.2d 917 (1997); *State v. Aumick*, 126 Wn.2d 422, 894 P.2d 1325 (1995); *State v. Acosta*, 101 Wn.2d 612, 683 P.2d 1069 (1984)).

The State fails to present argument in response. The failure should be deemed a concession of error. *See United States v. Real Property Known as 22249 Dolorosa Street*, 190 F.3d 977, 983 (9th Cir. 1999) ("on appeal, the government did not defend the district court's rationale, implicitly conceding the error").

b. The trial court erred in overruling Mr. Feld's objection to the reasonable-doubt instruction, because the Supreme Court has held the jury's job is not to find the truth but to determine whether the State proved its case.

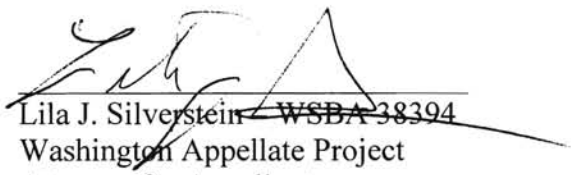
For this issue, Mr. Feld relies on his opening brief at pages 41-44.

E. CONCLUSION

For the reasons set forth above and in his opening brief, Mr. Feld asks this Court to reverse and remand for a new trial.

DATED this 26th day of September, 2013.

Respectfully submitted,



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

STATE OF WASHINGTON, Respondent, v. CHARLES FELD, Appellant.	)))))))))	NO. 69044-2-I

DECLARATION OF DOCUMENT FILING AND SERVICE

I, MARIA ARRANZA RILEY, STATE THAT ON THE 26TH DAY OF SEPTEMBER, 2013, I CAUSED THE ORIGINAL **REPLY BRIEF OF APPELLANT** TO BE FILED IN THE **COURT OF APPEALS – DIVISION ONE** AND A TRUE COPY OF THE SAME TO BE SERVED ON THE FOLLOWING IN THE MANNER INDICATED BELOW:

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