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Court of Appeals
Division I
State of Washington

NO. 74144-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

IVORY TYQUAN BUTLER,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MONICA J. BENTON

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. The State provided the business records in Exhibits 3 and 4 to the defense in discovery months before trial, along with the certificate of the custodian of those records, pursuant to RCW 10.96.030. Did the trial court properly exercise its discretion in concluding that was sufficient to satisfy the notice requirement of RCW 10.96.030, allowing a fair opportunity to challenge the records?

2. If the trial court erred in admitting the administrative records in Exhibits 3 and 4, was that evidentiary error harmless, where the evidence of Butler's guilt was overwhelming?

3. A second jail officer sat quietly in the front of the spectator section of the courtroom during the beginning of the exploited child's testimony. Did the trial court properly deny a mistrial when the officer was there not because of security concerns but due to a change in personnel, and when the court so advised the jury?

4. Should this court impose appellate court costs (if the State prevails and requests imposition) where there is no information indicating that the defendant will not have the future ability to pay those costs?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The defendant, Ivory Tyquan Butler, was charged with promoting commercial sexual abuse of a minor, contrary to RCW 9.68A.101, between December 1 and December 13, 2014. CP 1. The Honorable Monica Benton presided over a jury trial that began on August 12, 2015. RP 15-16.[1] Trial concluded on August 27, 2015, and the jury found Butler guilty as charged. CP 38; RP 894. The court imposed a standard range sentence. CP 60-70.

2. SUBSTANTIVE FACTS

N.C.[2] was 14 years old when she met defendant Ivory Tyquan Butler on Thanksgiving Day in 2014, while she was at the movies with her 12-year-old stepsister T.J. RP 386, 669. N.C. was in eighth grade. RP 668. Butler was 22 years old. CP 80. By December 2014, Butler was promoting N.C.'s services as a prostitute and collecting the money she earned by providing sexual services to strangers. RP 680-87.

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[1] The Report of Proceedings is in six volumes, consecutively paginated. It will be referred to simply by page number, RP ___.

[2] N.C. and T.J. are referred to by initials to protect their privacy. For the same reason, their relatives are referred to by their relationship to the girls, not by name.

N.C. lived in Federal Way with her parents and siblings and although she was interested in boys, she was forbidden from dating boys, or even texting them. RP 390-91, 663-64. But after she met Butler at Thanksgiving, they continued to see each other and text; N.C. liked Butler. RP 671-73. Text messages between their telephones referred to love and to sexual relations. RP 615. Monday, December 1, N.C. and T.J. skipped school and spent the day with defendant Butler and Dequiton Butler,[3] who was about 29 years old. RP 394-97, 442, 674. The girls' mother found out they had skipped school and punished them. RP 398-99, 402-03, 675.

N.C. was mad at her mother and told Butler she wanted to run away; he said she could go with him. RP 616-17, 676-77. When N.C. and T.J. ran away from home on December 6, Butler and Dequiton picked them up. RP 402-03, 678-79. Butler put N.C. in a motel room.[4] RP 676-80. Butler arranged for her to meet men for sex and she gave the money she received to Butler. RP 685-87. This ended only when the police arrived at the door of the motel room and rescued her. RP 576-81, 691.

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[3] All further references to Dequiton Butler will be by his first name only, to avoid confusion with defendant Ivory Tyquan Butler. No disrespect is intended.

[4] T.J. left with Dequiton. RP 681.

N.C.'s testimony was corroborated by the text messages between Butler's telephone ((206) 468-7007) and N.C. Ex. 22, 27; RP 605-08, 611-18. After his arrest, Butler admitted the telephone was his and that he had the telephone in his possession that day (the same day N.C. was rescued). RP 586-87. N.C. had that telephone number memorized as Butler's number. RP 746. The texts describe their relationship and include discussion of the sale of N.C.'s sexual services, for which Butler would receive money. Ex. 22, 27; RP 605, 611-17, 619-22.

On December 12, 2014, Detective Unsworth found internet ads for female escort services with Butler's telephone number ((206) 468-7007) as the contact number. RP 339-40. The ads included photographs of a young woman posed provocatively in only underclothes (without showing her face) and described sexual services that would be provided (in a commonly understood code) and the prices that would be charged. Ex. 3, 4; RP 342-43, 564, 770, 773. When Unsworth showed the pictures in the ads for prostitution services to N.C.'s mother, she recognized N.C. as one of the girls pictured, and recognized the distinctive undergarments N.C. was wearing. RP 354-55, 422-23.

When Federal Way Detective Baker took on an undercover role and contacted Butler's number in response to the Backpage ad that contained Butler's telephone number, arrangements were made for the purported customer to obtain sexual services for $300 from a woman in Room 201 of the New Horizon Motel. Ex. 33; RP 767-81. Shortly after, N.C. was rescued from that room; there were no other occupants. RP 576-80, 635.

In the room where N.C. was rescued, police found a disposable cellular phone hidden under the mattress, condoms in a Crown Royal bag, and a knife in the bedside table. RP 580-82. N.C. testified that Butler provided all of these items for her use in her prostitution enterprise. RP 687-90. In Butler's telephone, the contact name assigned to the telephone found in the motel room was "Money Baby Money Baby." RP 617. Texts between Butler's telephone and the telephone found in the motel room communicated details relating to providing prostitution services. RP 619-25. Those texts also include the instruction to put the telephone in the toilet if the police came. RP 619.

C. ARGUMENT

1. THE RECORDS FROM BACKPAGE.COM WERE PROPERLY ADMITTED.

Butler claims that because the State did not explicitly provide notice pretrial that it would be relying on RCW 10.96.030 to admit business records, the court erred in admitting those records. This claim should be rejected. The State provided the records and the certification of the custodian long before trial. This satisfied the notice requirement in the statute. Defense trial counsel rejected the offer to call the custodian as a witness and did not question the authenticity or reliability of the records. The trial court did not err in admitting the records. If it was error, Butler has not established that it probably affected the verdict, so any error was harmless.

a. Relevant Facts.

At issue are Exhibits 3, 4, and 5. Exhibits 3 and 4 are business records of Backpage.com, an internet advertising business. RP 340, 561. Each of the two exhibits relates to an ad for escort services. Ex. 3, 4; RP 342-43. Detective Unsworth found each ad on the Backpage.com public website. RP 339-43. Each ad included pictures of a young woman's body (without showing the head), information about the sexual services that could be

provided, the price, and Butler's telephone number as the contact. RP 342-43, 564-66, 772-73. Unsworth testified without objection as to the content of these ads, which he found on a public website. RP 339-44, 353-55.

Unsworth showed the pictures in the ads that he found on the Backpage.com website to N.C.'s mother, to see if she recognized the person depicted. RP 354-55. N.C.'s mother recognized N.C. in some of the pictures that were posted in the escort ads. RP 354-55, 421-23. This identification related to images publicly posted and no objection was made.

Exhibits 3 and 4 included the ads that were online, more pictures that Unsworth had not seen online, the date each ad was posted, and information that the person posting the ad provided to Backpage, including name, mailing address, and email address. RP 342-45. Exhibit 5 was a certification of the custodian of records of Backpage.com, provided when it responded to a search warrant for business records relating to the ads in Exhibits 3 and 4. Ex. 5; RP 345-46. That certification includes the name of the custodian of records, Nathan Yockey, as well as his mailing address, email address, and telephone number. Ex. 5.

The State provided the defense with a copy of the business records in Exhibits 3 and 4, and the certification that was Exhibit 5, as part of discovery, months before trial. RP 427-28. Defense trial counsel agreed that these documents had been provided in discovery and the trial court made that finding. RP 428-29.

b. The State Satisfied The Notice Requirement Of RCW 10.96.030.

RCW 10.96.030 provides for admission of business records without the testimony of a live witness, where the foundational requirements[5] are satisfied by a certification of a custodian of the records. The statute includes a notice requirement that ensures that the opposing party has "a fair opportunity to challenge" the records and certification. RCW 10.96.030(3). As the trial court found, by including the records and the certification in discovery, the State here satisfied that requirement.

The statutory notice requirement provides in relevant part:

> A party intending to offer a record into evidence under this section must provide written notice of that intention to all adverse parties, and must make the record and affidavit, declaration, or certification available for inspection

[5] Records kept in the ordinary course of business are admissible as an exception to the hearsay rule, pursuant to RCW 5.45.020. Under that statute, a custodian of the records or other qualified witness must testify to the relevant foundation.

> sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them.

RCW 10.96.030(3) (the full statute is attached as Appendix A).

When the certification of the custodian of records is included with the records in discovery, the defense has been put on notice that the State will rely on that certification to admit the records. As the trial court found, that discovery satisfied the notice requirement of the statute. RP 428-29. The trial court's ruling as to the sufficiency of the notice is reviewed for abuse of discretion. State v. Ralph Vernon G., 90 Wn. App. 16, 22, 950 P.2d 971 (1998).

In the trial court, defense counsel did not object to admission of the photographs in Exhibits 3 and 4, but objected to admission of the administrative data on the back pages of each.[6] RP 347, 351. His objection was that someone from Backpage needed to testify; he relied on an unnamed federal case holding that a certification from the Department of Licensing was inadmissible. RP 346. This reference apparently was to the Washington Supreme Court's holding that certifications attesting to the existence or nonexistence of public records are testimonial statements subject to the demands of the confrontation clause of the Sixth Amendment.

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[6] In an abundance of caution, the prosecutor chose not to display the photographs for the jury until the court ruled on the defense objection. RP 352.

State v. Jasper, 174 Wn.2d 96, 100, 271 P.3d 876 (2012) (citing Melendez-Diaz v. Massachusetts, 557 U.S. 305, 129 S. Ct. 2527, 174 L. Ed. 2d 314 (2009)). However, these cases do not limit the admissibility of business records that are kept in the ordinary course of business. Melendez-Diaz, 557 U.S. at 321-23; Jasper, 174 Wn.2d at 110, 112. This Court has specifically held that a document authenticating business records pursuant to RCW 10.96.030(2) is not testimonial and does not violate the confrontation clause. State v. Lee, 159 Wn. App. 795, 816-18, 247 P.3d 470 (2011). Defense trial counsel later appeared to concede that these cases did not support his argument. RP 425.

By including the certification of the custodian of records of Backpage, the State effectively gave notice that it was relying on that certification to establish the admissibility of the records, satisfying the notice requirement of RCW 10.96.030. The certification itself established their admissibility under RCW 10.96.030. Providing these documents allowed the defense to prepare to challenge the records, or their authenticity. The trial court concluded that it was sufficient notice, and defense trial counsel did not suggest that his ability to investigate or respond to those documents was impaired by that form of notice. RP 428-29.

On appeal, Butler errs in asserting that the State did not provide the name of the custodian of records pretrial. App. Br. at 8. The quotation on which he relies is the State's argument that it never identified the custodian of record for Backpage as a witness.[7] RP 430. The State specifically stated that it provided all three documents (Exhibits 3-5) to the defense in discovery, several months before trial. RP 427-28. Defense counsel agreed. RP 429. Exhibit 5, which had been provided in discovery, in its first paragraph states the name, address, telephone number, and email address of Nathan Yockey. Ex. 5. He identifies himself: "I am the custodian of records for Backpage.com" in the second paragraph. Ex. 5.

Defense trial counsel at one point suggested the notice requirement under the child hearsay statute might be analogous. RP 429. But trial counsel later conceded that cases interpreting the child hearsay notice requirement did not support a remedy of suppression. RP 474. Butler declined to request a continuance. RP 474.

The cases addressing the notice requirement under the child hearsay statute are informative. They hold that even if prior notice

[7] A list of the potential witnesses was read to the jury at the beginning of voir dire. RP 118-19.

was not given, admission of the statements is appropriate "so long as the adverse party had or was offered an opportunity to prepare to challenge the statements." State v. Hughes, 56 Wn. App. 172, 175-76, 783 P.2d 99 (1989) (citing United States v. Brown, 770 F.2d 768 (9th Cir. 1985)); accord State v. Lopez, 95 Wn. App. 842, 851, 980 P.2d 224 (1999). The availability of a continuance satisfies this concern. Brown, 770 F.2d at 771; Ralph Vernon G., 90 Wn. App. at 25-26; Hughes, 56 Wn. App. at 175.

On appeal, Butler again attempts to analogize to the child hearsay statute, but ignores the Washington cases interpreting that notice requirement. Instead he asserts that this court should follow the logic of federal courts interpreting the notice requirement in Federal Evidence Rule 807 (formerly Rule 803(24)), the residual hearsay exception, to require a specific statement that the party will rely on that exception. Under the logic of those cases, however, Butler's claim fails. Notice was given in this case – the trial court found that providing the certification required by RCW 10.96.030 in discovery was notice that the State would be using it at trial.

Moreover, the federal courts have found that lack of notice (or late notice, provided at trial) is excused if the adverse party is not prejudiced. United States v. Bachsian, 4 F.3d 796, 799 (9th Cir.

1993); United States v. Panzardi-Lespier, 918 F.2d 313, 317-18 (1st Cir. 1990); Brown, 770 F.2d at 771; United States v. Parker, 749 F.2d 628, 633-34 (11th Cir. 1984); United States v. Medico, 557 F.2d 309, 315-16, 321 (2nd Cir. 1977). There is no prejudice in this case, where all of the documents, including the certification and the name of the custodian of records were provided months before trial. At the time the issue was raised, the prosecutor offered to make the custodian available for interview and noted that, given the trial schedule, there was plenty of time to have the witness brought in to testify if there was a question regarding authenticity.[8] RP 428. Butler alleged no prejudice to his ability to challenge the evidence in the trial court and he declined to request a continuance. RP 474.

Butler does not dispute that the certification in Exhibit 5 complied with the requirements of RCW 10.96.030. The Backpage records were properly admitted.

c. Any Error In Admitting The Backpage Exhibits Was Harmless.

The evidence at issue, fictitious contact information for the person posting the Backpage ads, is of minor significance in the trial, so if its admission was error, it was harmless. Evidentiary

[8] The issue was raised on August 19, 2015, and the defense did not rest until August 27. RP 428, 855.

error is reversible only if there is a reasonable probability that it materially affected the outcome of the trial. State v. Thomas, 150 Wn.2d 821, 871, 83 P.3d 970 (2004).

N.C. testified that she was 14 when Butler exploited her by arranging for her prostitution. RP 653, 680-87. She described her meeting with Butler, their exchange of text messages, and eventual sexual relationship. RP 669-73, 683. When N.C. ran away from home, Butler picked her up and put her in a motel room. RP 676-80. He arranged for her to meet men for sex and she gave the money she received to Butler. RP 685-87. This ended only when the police arrived at the door of the motel room and rescued her. RP 576-81, 691.

N.C. admitted that on the day she was rescued she told police that a woman named Aliyah was the person marketing N.C.'s sexual services. RP 691. At trial, she explained that she had made up that person to keep Butler out of jail because she loved him at times. RP 692.

N.C.'s testimony was corroborated by the texts between Butler's telephone and N.C. RP 605, 611-17. The texts describe their relationship and include discussion of the sale of N.C.'s sexual services, for which Butler would receive money. RP 605, 611-17.

Butler admitted the telephone was his and that he had it in his possession on the day he was arrested (the same day N.C. was rescued). RP 586-87.

Butler was arrested on December 12, when a car in which he rode was stopped by police. RP 570-72. Another person in the car was Eva,[9] who was detained briefly and released. RP 572, 792-93. Recordings of jail telephone calls established that after he was booked that night, Butler began calling his own telephone ((206) 468-7007) trying to reach Eva. RP 821-22, 826. When he finally reached her at that number, he angrily demanded to know why she had not been answering his telephone. RP 822. During this call, Eva repeatedly refers to the telephone as "your phone" and Butler refers to it as "my phone" as they discuss what should be deleted from Butler's telephone. RP 822, 826, 828-30, 833.

Telephone records from T-Mobile established that the account with telephone number (206) 468-7007 was prepaid, with no contract, so no identifying information is associated with the account. RP 472. The email user name associated with the telephone itself was "butlerivory1@gmail.com." RP 603.

[9] Eva is a pseudonym, used in this brief because this person was a juvenile at the time of these events. RP 479.

Detective Unsworth found Backpage ads with Butler's telephone number ((206) 468-7007) as the contact number. RP 339-40. When Unsworth showed the pictures to N.C.'s mother, she recognized N.C. as one of the girls pictured. RP 354-55, 422-23. This Backpage evidence was viewed on its public website, and was admitted without objection at trial. RP 339-40, 354-55, 422-23.

When Detective Baker took on an undercover role and contacted Butler's number in response to the Backpage ad that contained Butler's telephone number, arrangements were made for the purported customer to obtain sexual services for $300 from a woman in Room 201 of the New Horizon Motel. Ex. 33; RP 767-81. Soon after, N.C. was rescued from that room. RP 576-80, 635. The record of other text messages exchanged with Butler's telephone reflect communication with a number of other people seeking to hire a woman for sexual services. Ex. 21; RP 625-26.

In the room where N.C. was rescued, police found a disposable cellular telephone hidden under the mattress, condoms in a Crown Royal bag, and a knife in the bedside table. RP 580-82. N.C. testified that Butler provided all of these items for her use in her prostitution enterprise. RP 687-90. Texts between Butler's telephone and the telephone found in the motel room

communicated details relating to providing prostitution services. RP 619-25. Those texts also include the instruction to put the phone in the toilet if the police came. RP 619.

The Backpage administrative information to which Butler objected provide only two minor elements tying Butler to the ads. First was the use of an address that had components of two prior addresses of Butler. RP 627-31. Second, the user name on the ad in Exhibit 4 was "Ty" and the email address was "Tycoon1 6469@gmail.com" – N.C. testified her nickname for Butler was "Ty" and a message from N.C.'s original telephone referred to Butler as "tycoon." Ex. 4; RP 615, 734. The user name on the ad in Ex. 3 was "Fhgf" and the email address was "vjghyfff@gmail.com" – no one tied these nonsense details to Butler. Ex. 3. The date on which each ad was placed was irrelevant because the detectives saw the ads on the public website on December 12, 2014, the same date they arranged to purchase sexual services from a woman in room 201 of the New Horizon Motel, who was N.C. RP 333, 339-344.

The information in the Backpage ad that was consistent with information about Butler added little to what had otherwise been established – the telephone that had the number used in the ad to

arrange the prostitution ((206) 468-7007) was Butler's telephone, and that was the telephone number that was used to arrange the prostitution of N.C.

Defense trial counsel used the administrative information in the ads in Exhibits 3 and 4 to argue that Butler was not guilty. RP 887. On appeal, he has failed to establish a reasonable probability that any error in admitting Exhibits 3-5 had a material effect on the outcome of the trial.

The physical evidence and record of text messages was direct evidence that Butler promoted the prostitution of N.C. and with N.C.'s testimony was overwhelming evidence of Butler's guilt.

2. THE PRESENCE OF A SECOND OFFICER DURING A CHANGE OF JAIL PERSONNEL DID NOT DEPRIVE BUTLER OF A FAIR TRIAL.

Butler contends that the presence of a second jail officer during part of N.C.'s testimony deprived him of a fair trial. The trial court did not abuse its discretion in denying Butler's motion for a mistrial, based on its observation that the second officer sat quietly on a bench some distance from Butler and did not communicate that Butler was particularly dangerous. Although Butler frames the issue as relating to the need (or lack of need) for additional

security, the trial court concluded that the additional officer was due to a routine change in personnel. The court's limiting instruction (CP 48) refuted any inference that security was deliberately heightened and eliminated any potential prejudice.

a. Relevant Facts.

During the course of this trial, Butler was in custody and a jail officer was present in the courtroom. RP 17, 715-16.

N.C.'s testimony began late in the day on August 20, 2015. RP 652. After her testimony was completed for the day, Butler moved for a mistrial, complaining that a second jail officer had appeared and was present during N.C.'s testimony, shielding the witness from Butler, which he argued sent a message that Butler was dangerous. RP 694.

As part of the briefing on the motion, the prosecutor submitted an affidavit regarding the events that he had observed, including a diagram of the courtroom.[10] CP 26-29. Defense counsel agreed with the prosecutor's statement of where the two officers had been: one in the back by the door and one in the front

[10] The affidavit also addressed Butler's objection to a detective walking into the courtroom and up to the witness stand with N.C., then leaving the courtroom. CP 26-29. The court concluded that it was obvious that the very immature N.C. was reluctant to come in and the detective was reassuring her. RP 716-17. Butler has raised no objection to that escort on appeal.

row, all the way to one side, about eight feet away from Butler. CP 28-29; RP 707-08, 713. The trial court agreed, describing the event:

> Very little that happened with the second officer entering the courtroom the Court believes created any sort of alarm for dangerousness by the defendant or even particular tension in the courtroom, and the Court treated it as though it were routine. The defense didn't raise a motion to alert the Court to any prejudice or possible prejudice that they believe it produced. The officer was unobtrusive. He sat directly in front of the witness stand but some 20 feet away. He was eight feet away from the defendant -- I would say that's a fair estimate -- and six from the defense counsel. He was in a position to prevent any harm, but he also was not obtrusive. No weapon was displayed. There was no fidgetiness. There was nothing to suggest that this was anything other than just another security measure.

RP 715-16. The court noted that there was no second officer present on the next morning of trial, when the motion was addressed, and when N.C.'s testimony would resume. RP 716.

The court denied the motion for mistrial. RP 718.

The parties and the court agreed that there had been no advance notice that an extra officer would be present. CP 27-28; RP 703, 714. Later, jail staff informed both counsel that the additional officer appeared because of a routine change in personnel. RP 798-800. A limiting instruction was drafted with that information included. RP 799, 843.

The court included the following instruction in its written instructions to the jury:

> Security staff in the courtroom has not been deliberately heightened at any time during this trial. Additional security staff may have appeared because of a routine change in personnel. The jury should not make any assumptions or draw any conclusions based upon the presence of security staff.

CP 48 (Instruction 6); RP 861.

b. The Trial Court Did Not Abuse Its Discretion In Denying a Mistrial.

The right to a fair trial encompasses the right to be presumed innocent. Estelle v. Williams, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976). Courts closely scrutinize practices that may threaten the fairness of the trial. Id. at 504; Holbrook v. Flynn, 475 U.S. 560, 568, 106 S. Ct. 1340, 89 L. Ed. 2d 525 (1986).

When the State creates courtroom arrangements that inherently prejudice the factfinding process, due process is violated unless the arrangements are required by an essential state interest. Flynn, 475 U.S. at 568-72; Williams, 425 U.S. at 503-07. An arrangement is inherently prejudicial if it creates an unacceptable risk of impermissible factors influencing the jury's verdict. Flynn,

475 U.S. at 570; Williams, 425 U.S. at 505. Courts will evaluate the likely effects of a particular procedure "based on reason, principle, and common human experience." Williams, 425 U.S. at 504.

The Supreme Court in Flynn[11] held that the presence of conspicuous security guards at trial is not so inherently prejudicial that it need be justified by an essential state interest specific to each trial. 475 U.S. at 568-69. The circumstances in each case must be reviewed to determine if the particular use of security guards was inherently prejudicial. Id. at 569. The Court held that the presence of four uniformed, armed state troopers sitting quietly in the front row of that trial did not pose an unacceptable risk of prejudice. Id. at 571. It observed that the troopers were "unlikely to be taken as a sign of anything other than a normal official concern for the safety and order of the proceedings." Id. The Court also noted (in 1986) that our society has become inured to the presence of armed guards in most public places, which is truer today than ever.

[11] Holbrook v. Flynn is referred to in short form as "Holbrook" by both the trial court and by Butler on appeal. However, Holbrook was named only as the prison superintendent, so using accepted citation rules, the State's short form citation refers to Flynn. The Bluebook: A Uniform System of Citation rule 10.9(a)(i) (17th ed. 2000).

If a juror could draw any inference from the addition of a second officer during N.C.'s testimony, any possible prejudice was eliminated when the court informed the jury that security had not been heightened at any point and, "Additional security staff may have appeared because of a routine change in personnel." CP 48. The court directed jurors to "not make any assumptions or draw any conclusions based upon the presence of security staff." CP 48. Jurors are presumed to follow the court's instructions. State v. Lough, 125 Wn.2d 847, 864, 889 P.2d 487 (1995).

The officer was quiet, relaxed, and not particularly close to the defendant. RP 715-16. Any juror who was paying special attention to the officers also would have noted that there was only one officer during the remainder of N.C.'s testimony, which occurred the next court day. Given the logical and innocuous explanation given for the presence of the second officer, Butler has failed to rebut the presumption that any juror who noticed the second officer would have followed the court's limiting instruction.

Butler's reliance on State v. Jaime[12] is misplaced. The court in Jaime concluded that, unlike security guards, a courtroom that is within a jail is inherently prejudicial and if a trial is held in that jail

[12] 168 Wn.2d 857, 233 P.3d 554 (2010).

courtroom, that location must be justified by an essential state interest. 168 Wn.2d at 863-64. The court did not disagree with the premise of Flynn that armed guards are doubtless taken for granted in most public places unless their numbers or weaponry suggest particular official alarm. Id. at 863.

The presence of a second jail officer sitting calmly in a corner spectator seat did not suggest official alarm in this case, particularly as the jurors were instructed that security was not heightened at any point and that any extra personnel was due to a routine change in personnel. Butler has not established that the trial court abused its discretion in denying a mistrial on this basis.

3. THERE IS NO BASIS TO DENY APPELLATE COSTS.

Butler asks that this Court deny any State request for imposition of costs of this appeal, in the event the State prevails, on the grounds of "his continued indigency." App. Br. at 17. This claim should be rejected. Because the record contains no information from which this Court could reasonably conclude that Butler has no likely future ability to pay, this Court should not forbid the imposition of appellate costs.

As in most cases, Brown's ability to pay was not litigated in the trial court because it was not relevant to the issues at trial. The record contains no information about his financial status or employment prospects (except by exploiting children), and the State did not have the right to obtain that information.

On October 20, 2015, Butler sought an ex-parte order authorizing appeal in forma pauperis. CP 91-93. The record presented to the judge in support of that finding is a form with check marks asserting among other things that Butler has absolutely no property or money, and has no debts other than legal financial obligations, which are unspecified. CP 92. There is no information in the record about Butler's employment history, potential for future employment, or likely future income, nor did the trial court make any findings regarding his likely future ability to pay financial obligations.

It is a defendant's future ability to pay, rather than simply his current ability, that is most relevant in determining whether the imposition of financial obligations is appropriate. See State v. Blank, 131 Wn.2d 230, 241, 930 P.2d 1213 (1997) (indigence is a constitutional bar to the collection of monetary assessments only if the defendant is unable to pay at the time the government seeks to

enforce collection of the assessments). The record is devoid of any information that would support a finding that the defendant is unlikely to have any future ability to pay appellate costs.

In State v. Sinclair, 192 Wn. App. 380, 393, 367 P.3d 612 (2016), this court held that costs should not be awarded because the defendant was 66 years-old and was facing a 24-year sentence, meaning there was "no realistic possibility" that he could pay appellate costs in the future. This Court also recognized, however, that "[t]o decide that appellate costs should never be imposed as a matter of policy no more comports with a responsible exercise of discretion than to decide that they should always be imposed as a matter of policy." Sinclair, 192 Wn. App. at 391.

Butler received a prison sentence, but will be released at the absolute latest when he is 33 years old.[13] CP 4, 13-14. He is eligible for early release under RCW 9.94A.729(3)(c), but this calculation assumes that he is awarded none. Thus, upon the latest possible release he will have the vast majority of his working years ahead of him. Because the record in this case contains no evidence from which this Court could reasonably conclude that the

[13] Butler was taken into custody on December 12, 2014. CP 8. The term imposed was 138 months. CP 63. Thus, the latest possible release date is June 12, 2026. Butler's birthdate is August 4, 1992. CP 80.

defendant has no future ability to pay appellate costs, any exercise of discretion by this Court to prohibit an award of appellate costs in this case would be unreasonable and arbitrary.

The record is devoid in this case of any information that would support a finding that there is "no realistic possibility" Butler will be able to pay appellate costs in the future. In such circumstances, appellate costs should be awarded. State v. Caver, No. 73761-9-1, 2016 WL 4626243, *5 (Wash. Ct. App. Sept. 6, 2016).

D. CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to affirm Butler's conviction and sentence.

DATED this 29TH day of September, 2016.

Respectfully submitted,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: _____
DONNA L. WISE, WSBA #13224
Senior Deputy Prosecuting Attorney
Attorneys for Respondent
Office WSBA #91002

RCW 10.96.030

(1) Upon written request from the applicant, or if ordered by the court, the recipient of criminal process shall verify the authenticity of records that it produces by providing an affidavit, declaration, or certification that complies with subsection (2) of this section. The requirements of RCW 5.45.020 regarding business records as evidence may be satisfied by an affidavit, declaration, or certification that complies with subsection (2) of this section, without the need for testimony from the custodian of records, regardless of whether the business records were produced by a foreign or Washington state entity.

(2) To be admissible without testimony from the custodian of records, business records must be accompanied by an affidavit, declaration, or certification by its record custodian or other qualified person that includes contact information for the witness completing the document and attests to the following:

(a) The witness is the custodian of the record or sets forth evidence that the witness is qualified to testify about the record;

(b) The record was made at or near the time of the act, condition, or event set forth in the record by, or from information transmitted by, a person with knowledge of those matters;

(c) The record was made in the regular course of business;

(d) The identity of the record and the mode of its preparation; and

(e) Either that the record is the original or that it is a duplicate that accurately reproduces the original.

(3) A party intending to offer a record into evidence under this section must provide written notice of that intention to all adverse parties, and must make the record and affidavit, declaration, or certification available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them. A motion opposing admission in evidence of the record shall be made and determined by the court before trial and with sufficient time to allow the party offering the record time, if the motion is granted, to produce the custodian of the record or other qualified person at trial, without creating hardship on the party or on the custodian or other qualified person.

(4) Failure by a party to timely file a motion under subsection (4) of this section shall constitute a waiver of objection to admission of the evidence, but the court for good cause shown may grant relief from the waiver. When the court grants relief from the waiver, and thereafter determines the custodian of the record shall appear, a continuance of the trial may be granted to provide the proponent of the record sufficient time to arrange for the necessary witness to appear.

(5) Nothing in this section precludes either party from calling the custodian of record of the record or other witness to testify regarding the record.

APPENDIX A

Certificate of Service by Electronic Mail

Today I directed electronic mail addressed to the attorney for the appellant, Thomas M. Kummerow, containing a copy of the Brief Of Respondent in State v. Ivory Tyquan Butler, Cause No. 74144-6-I, in the Court of Appeals, Division I, for the State of Washington.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Name

Done in Seattle, Washington

09-29-16
Date