No. 94461-0
COA No. 74144-6-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

IVORY BUTLER,

Petitioner.

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

The Honorable Monica J. Benton

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Ivory Butler asks this Court to accept review of the Court of Appeals decision terminating review designated in part B of this petition.

B. COURT OF APPEALS DECISION

Pursuant to RAP 13.4(b), petitioner seeks review of the published Court of Appeals decision in *State v. Ivory Butler*, ___ Wn.App. ___, 2017 WL 1314219 (April 3, 2017). A copy of the decision is in the Appendix.

C. ISSUES PRESENTED FOR REVIEW

1. RCW 10.96.030 allows for the admission of business records by declaration of the custodian of records provided that sufficient advance notice of the intent to rely on the declaration is given to the opposing party. Here, it was undisputed no such advance notice was given other than the fact the documents were provided as part of pretrial discovery. Is an issue of substantial public interest presented where in a case of first impression the trial court erred in admitting the hearsay exhibits by declaration in violation of RCW 10.96.030 thus requiring reversal of Mr. Butler's conviction?

2. A defendant has the constitutional rights to the presumption of innocence and a fair trial. Additional security in the courtroom at trial that is inherently prejudicial denies one those rights. Is a significant issue of law under the United States and Washington Constitutions involved when the additional deputy stationed near Mr. Butler only for the testimony of the complainant was inherently prejudicial and the trial court erred in failing to grant a mistrial for a violation of Mr. Butler's rights to the presumption of innocence and a fair trial?

D. STATEMENT OF THE CASE

Twenty-four year old Ivory Butler met 15 year old N.C. in November 2014. RP 669-71. N.C. admitted she had a crush on Mr. Butler and the two began spending time together. RP 671. N.C. was having trouble at home with her mother, and she liked Mr. Butler because he was nice to her. RP 672. Mr. Butler and N.C. would often text each other. RP 672.

One day, Mr. Butler and N.C. skipped school and went to "hang out" at the Barnes & Noble Bookstore in Federal Way. RP 674. When N.C.'s mother discovered her daughter had not gone to school and had been with a young man, she was angry at N.C. and gave her a

"whooping." RP 675. This made N.C. angry and she texted Mr. Butler telling him she wanted to run away from home. RP 676. Mr. Butler told N.C. she could run away with him and that he would pick her up. RP 676-77. N.C. told Mr. Butler she would run away from home on Saturday, December 6, 2014. RP 677.

Still angry with her mother, on December 6, N.C. packed some clothing and met Mr. Butler, and the two went to the New Horizon Hotel in SeaTac, where they had sex. RP 679-84. N.C. wanted to be Mr. Butler's girlfriend. RP 684.

According to N.C., at the hotel, Mr. Butler took pictures of her in her underwear. RP 682. She claimed Mr. Butler gave her a cellphone to use to communicate with him, gave her condoms and, instructed her to have sex with three different men that day for money, which she gave to Mr. Butler. RP 685-89.

Later that day, the police found N.C. in the hotel room and took her into custody. RP 691. At the station, N.C. told the police that a woman named Aliyah, not Mr. Butler, had directed her actions as a prostitute, a statement she later recanted at trial. RP 691.

Mr. Butler was subsequently charged with one count of Promoting Commercial Sexual Abuse of a Minor. CP 1. At his trial, the

State sought to admit copies of photographs of a scantily clad N.C. and correspondence allegedly made by Mr. Butler regarding a post on Backpage as a business record, but without having the custodian of records appear and testify. Mr. Butler objected, arguing the records were hearsay and violated his right to confrontation, and also that the State had failed to provide the proper notice for admitting the records without the testimony of the custodian of records. RP 346-50, 425-31. The trial court overruled Mr. Butler's objections and admitted the Backpage exhibits. RP 475.

At the conclusion of N.C.'s direct testimony, Mr. Butler moved for a mistrial, noting that during N.C.'s testimony, an additional deputy was placed directly behind defense counsel. RP 694, 705. The trial court denied the motion for mistrial. RP 714-17. Despite Mr. Butler's argument that the taint to the trial from this action by the deputy could not be cleansed, the court nevertheless agreed to give a curative instruction. RP 716-17. The curative instruction was included with the other instructions. CP 48.

Mr. Butler was convicted as charged. CP 38.

In a case of first impression dealing with this state, the Court of Appeals ruled that that providing the hearsay evidence in discovery was

sufficient notice under the statute and Mr. Butler failed in his burden of showing any prejudice. Slip op. at 7. In addition, the Court rejected Mr. Butler's argument regarding the additional security in the courtroom. Slip op. at 9-10.

E. ARGUMENT ON WHY REVIEW SHOULD BE GRANTED

1. **The plain language of RCW 10.96.030 specifically requires advance notice and there is no provision for substantial compliance.**

Business records are admissible under an exception to the hearsay rule. RCW 5.45.020. "Testimony by one who has custody of the record as a regular part of his work or has supervision of its creation ('other qualified witness' under the statute) will suffice." *State v. Ben-Neth,* 34 Wn.App. 600, 603, 663 P.2d 156 (1983).

RCW 10.96.030 allows admission of business records by affidavit or declaration without the testimony of the custodian where certain conditions are met. In order to be admissible under RCW 10.96.030,

> [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.

RCW 10.96.030(3).

It is undisputed that the State failed to provide any advance notice of its intent to admit the Backpage evidence by declaration of the custodian. All that the State did was to turn over its discovery pretrial; the State did not provide the name of the custodian of records whose declaration it ultimately provided at trial. The trial court found the fact the documents were provided as part of discovery was sufficient notice. RP 428-29.

As the Court of Appeals noted, there is no current caselaw defining the notice requirement of RCW 10.96.030, an analogy can be made to the child hearsay rule under RCW 9A.44.120. But, the Court of Appeals ruled that Mr. Butler did not suffer any prejudice from the State's failure to comply with the statute. Slip op. at 7.

The decision renders the requirements of advance notice in the statute meaningless since it essentially provides that discovery is sufficient unless the defendant can show any prejudice. In addition, the decision reads into the statute a substantial compliance standard which the Legislature specifically omitted.

As noted, this is a case of first impression involving this statute. Further, this issue will undoubtedly reoccur as more parties attempt to

utilize this procedure to admit business records at criminal trials. Thus, this Court should grant review to determine whether the advance requirement must be complied with prior to a party moving for admission of business records by declaration under the statutory procedure.

2. **The additional deputy during N.C.'s testimony violated Mr. Butler's rights to the presumption of innocence and to a fair trial.**

The Defendant enjoys the fundamental right to a fair trial. U.S. Const. amends. VI and XIV; Const. art. I, § 22. The United States Supreme Court has held that "[c]entral to the right to a fair trial, guaranteed by the Sixth and Fourteenth Amendments, is the principle that 'one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial.'" *Holbrook v. Flynn,* 475 U.S. 560, 567, 106 S.Ct. 1340, 89 L.Ed.2d 525 (1986), *quoting Taylor v. Kentucky,* 436 U.S. 478, 485, 98 S.Ct. 1930, 56 L.Ed.2d 468 (1978). This presumption of innocence is considered a basic component of a fair and impartial trial in our criminal justice system. *Estelle v. Williams,* 425 U.S. 501, 503, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976).

"Courtroom practices that unnecessarily mark the defendant as dangerous or guilty undermine the presumption of innocence." *State v. Flieger,* 91 Wn.App. 236, 240, 955 P.2d 872 (1998), *review denied,* 137 Wn.2d 1003 (1999).

Any measures that "single out" a defendant as a particularly dangerous or guilty person threaten his constitutional right to a fair trial. *State v. Finch,* 137 Wn.2d 792, 844, 975 P.2d 967, *cert. denied,* 528 U.S. 922 (1999). In particular, courts have universally held that the appearance of restraints should "be used only when necessary to prevent injury to those in the courtroom, to prevent disorderly conduct at trial, or to prevent an escape." *State v. Hartzog,* 96 Wn.2d 383, 398, 635 P.2d 694 (1981).

But the issue here is not whether the State physically restrained Mr. Butler in front of the jury, but whether the presence of the additional deputy stationed near Mr. Butler after the trial had started and only during the testimony of N.C. was inherently prejudicial. Thus, the question is whether "'an unacceptable risk is presented of impermissible factors coming into play.'" *Holbrook,* 475 U.S. at 570, *quoting Estelle v. Williams,* 425 U.S. at 505. "A courtroom practice might present an unacceptable risk of impermissible factors coming

into play because of 'the wider range of inferences that a juror might reasonably draw' from the practice." *State v. Jaime,* 168 Wn.2d 857, 862, 233 P.3d 554 (2010), *quoting Holbrook,* 475 U.S. at 569.

The defendant need only show the security arrangement was inherently prejudicial and is not required to show that jurors "actually articulated a consciousness of some prejudicial effect." *Jaime*, 174 Wn.2d at 864 n.4, *quoting Holbrook*, 475 U.S. at 570.

"When a defendant's constitutional right to a fair trial has been violated and he moves for mistrial, the motion should be granted." *State v. Rodriguez*, 146 Wn.2d 260, 273, 45 P.3d 541, 547 (2002).

The question here is not whether the mere presence of the additional guard was inherently prejudicial, but whether the particular arrangement of the guard and how that might be viewed by the average juror was inherently prejudicial. There was no evidence that Mr. Butler had been any security concern; no evidence he had made threatening gestures, had been obstreperous or exhibiting any negative behavior at trial, which the trial court highlighted in its decision. In order to justify additional restraints or security, there must be "specific facts relating to the individual" that justify the additional restraint. *Jaime*, 174 Wn.2d at 866, *quoting Hartzog*, 96 Wn.2d at 399-400. Here there was nothing

that would lead to the need for additional security. The additional security was inherently prejudicial

Mr. Butler asks this Court to grant review and reverse his conviction.

F. CONCLUSION

For the reasons stated, Mr. Butler asks this Court to grant review and reverse his conviction.

DATED this 3rd day of May 2017.

Respectfully submitted,

s/Thomas M. Kummerow

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APPENDIX

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

STATE OF WASHINGTON, Respondent, v. IVORY TYQUAN BUTLER, Appellant.	)	No. 74144-6-I PUBLISHED OPINION FILED: April 3, 2017

VERELLEN, C.J. — The State charged Ivory Tyquan Butler with promoting commercial sexual abuse of a minor. Months before trial, the State provided the defense with business records and a certification from the records custodian. Although the State did not give the required written notice of its intent to rely on the preauthentication provisions of RCW 10.96.030, Butler had a fair opportunity to challenge the business records. Therefore, Butler was not prejudiced by the lack of written notice. Alternatively, any error was harmless in view of the overwhelming evidence of Butler's commercial sexual exploitation of a 14-year-old girl.

The presence of a second jail officer in the courtroom during a portion of the victim's testimony did not deprive Butler of his right to a fair trial. The second officer was not conspicuously close to Butler, did not obstruct Butler's view of the witness, did not attract attention, and was not present for the remainder of the victim's testimony.

Additionally, the trial court instructed the jury about a routine change in security personnel.

We affirm.

FACTS

N.C. was 14 years old when she first met 22-year-old Ivory Butler. N.C. skipped school and spent the day with Butler. N.C.'s mother found out she had skipped school and punished her.

N.C. ran away from home, and Butler picked her up. He took her to a motel room and arranged for her to meet men at the motel for sex. She gave the money she received to Butler.

Text messages to and from N.C. on Butler's cellphone describe their relationship and discuss N.C. selling sexual services and giving the payments to Butler. After his arrest, Butler admitted the phone was his and that he had the phone in his possession the day police found N.C. at the motel. N.C. also testified that she had memorized that same phone number as Butler's number. Recordings of Butler's jail phone calls established that he called his own phone number from jail several times. After failed attempts, someone did answer, and Butler asked, "Why haven't you been [answering] my phone?"[1] And the individual he spoke to referred to the phone as "your phone."[2]

Detective Raymond Unsworth found Internet ads on Backpage.com for female escort services with Butler's phone number listed as the contact number. The ads included photographs of the body, but not the face, of a young woman. The ads alluded

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[1] RP (Aug. 26, 2015) at 822.

[2] Id. at 821-26.

to sexual services that would be provided, with the prices that would be charged. When Detective Unsworth showed the photos in the ads to N.C.'s mother; she recognized N.C.

An undercover detective responded to the Backpage ads by contacting Butler's phone number. The detective, posing as a customer, arranged to obtain sexual services for $300 from a woman in room 201 of the New Horizon Motel. Police found N.C. in that room, together with a disposable cellphone under the mattress, condoms in a Crown Royal bag, and a knife in the bedside table drawer. N.C. testified that Butler provided these items for her use. In Butler's phone, the contact name assigned to the disposable phone found in the motel room was "Money Baby Money Baby."[3] Text messages between Butler's phone and the disposable phone found in the motel room included details about providing sexual services for money.[4] The messages also included instructions from Butler to N.C. to discard the phone in the toilet if the police came.

Butler was arrested and charged under RCW 9.68A.101 with promoting commercial sexual abuse of a minor.

At trial, the State sought to admit three exhibits that are at issue on appeal. Exhibits 3 and 4 relate to Backpage ads for escort services. Exhibit 5 is the certification from the Backpage records custodian.

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[3] RP (Aug. 20, 2015) at 617.

[4] Id. at 619-25; see id. at 621-22 (Detective Maurice Washington testified, "That is the—a conversation between the pimp and trafficker and the person being exploited talking about a date that's on a—that's coming to arrive and letting them know how much money they are to receive for their services.").

The court also noted that there was not a second officer present when N.C. testified the next morning. The court denied Butler's motion. Jail staff subsequently informed both counsel and the court that the additional officer appeared because of a routine change in personnel. The trial court gave a limiting instruction conveying that information:

> 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.[7]

The jury found Butler guilty as charged, and the trial court imposed a standard range sentence.

Butler appeals.

ANALYSIS

I. Evidentiary Objection

Butler argues Exhibits 3, 4, and 5 were inadmissible because the State did not give proper notice under RCW 10.96.030. RCW 10.96.030(3) contains an exception to the general rule requiring witness testimony to admit business records. To ensure the opposing party has a fair opportunity to challenge the business records and certification, the statute provides in 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 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

[7] CP at 48.

> custodian of the record or other qualified person at trial, without creating hardship on the party or on the custodian or other qualified person.[8]

We review the admission of evidence for abuse of discretion.[9] "When a trial court's exercise of its discretion is manifestly unreasonable or based upon untenable grounds or reasons, an abuse of discretion exists."[10]

There are no cases addressing lack of notice under RCW 10.96.030(3),[11] but both parties point to cases addressing a similar notice requirement in the child hearsay statute:

> A statement may not be admitted under this section unless the proponent of the statement makes known to the adverse party his or her intention to offer the statement and the particulars of the statement sufficiently in advance of the proceedings to provide the adverse party with a fair opportunity to prepare to meet the statement.[12]

Cases addressing the child hearsay statute have upheld the admission of statements without prior notice "so long as the adverse party had or was offered an opportunity to prepare to challenge the statements."[13] The cases have also focused on

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[8] RCW 10.96.030(3).

[9] State v. Ralph G., 90 Wn. App. 16, 22, 950 P.2d 971 (1998).

[10] State v. Powell, 126 Wn.2d 244, 258, 893 P.2d 615 (1995).

[11] The only case law regarding RCW 10.96.030 addresses section (2), not the notice requirement at issue here, section (3). State v. Lee, 159 Wn. App. 795, 817, 247 P.3d 247 P.3d 470 (2011).

[12] RCW 9A.44.120.

[13] State v. Hughes, 56 Wn. App. 172, 175, 783 P.2d 99 (1989) (citing United States v. Brown, 770 F.2d 766 (9th Cir. 1987)); see also State v. Lopez, 95 Wn. App. 842, 851, 980 P.2d 224 (1999) ("The notice requirement is derived from the 'catch-all' hearsay exception under Federal Rule of Evidence 803(24). This federal rule has been interpreted as requiring sufficient notice to provide the adverse party with a fair opportunity to prepare to challenge the admissibility of the statement.") (citing Hughes, 56 Wn. App. at 174).

the requirement of prejudice and acknowledged that the availability of a continuance satisfies the statute.[14]

As clarified at oral argument, Butler contends the State was required to provide a separate written notice to inform him that it intended to rely on RCW 10.96.030 for admission of the business records. But months before trial, the State provided the certification of the Backpage records custodian, together with the Backpage business records. Mid-trial, the State also offered to produce the custodian for live testimony and a defense interview. This allowed Butler ample opportunity to prepare to challenge the records. Butler's trial counsel even mentioned that his review of the case law was not helpful to support suppression of the exhibits, and he declined to ask for a continuance.[15]

Consistent with the cases addressing the child hearsay statute, we conclude the lack of written notice required by RCW 10.96.030 did not cause any prejudice to Butler. He had ample opportunity to prepare to challenge the business records when the State provided all of the proposed business records and the certification from the records custodian months prior to trial. The State offered to call the records custodian as a witness and to allow Butler to interview the custodian. And Butler declined to request a continuance. The lack of written notice did not cause any prejudice.

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[14] Hughes, 56 Wn. App. at 175; Brown, 770 F.2d at 771.

[15] RP (Aug. 19, 2015) at 474 ("I have not asked for a continuance to address that issue, so.").

Alternatively, any error was harmless. The admission of evidence is "harmless error if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole."[16]

Butler contends the Backpage ads bolstered N.C.'s testimony tying Butler to the Backpage evidence. But even without the admission of the Backpage ads, overwhelming evidence links Butler to his exploitation of N.C. The physical evidence, text messages, jail phone calls, testimony from N.C., and successful undercover sting operation provide overwhelming evidence that Butler promoted the prostitution of N.C.

We conclude the lack of written notice required by RCW 10.96.030 did not cause prejudice to Butler. Alternatively, any error in admission of the business records themselves was harmless because overwhelming evidence supports Butler's guilt.

II. Second Officer During N.C.'s Testimony

Butler argues the presence of a second jail officer during a portion of N.C.'s testimony deprived him of his right to a fair trial.

A defendant has the fundamental right to a fair trial.[17] The right to a fair trial includes the right to be presumed innocent. "'The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.'"[18]

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[16] Thomas, 150 Wn.2d at 871 (quoting Bourgeois, 133 Wn.2d at 403).

[17] U.S. CONST. amends. VI and XIV; WASH. CONST. art. I, § 22.

[18] Estelle v. Williams, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976) (quoting Coffin v. United States, 156 U.S. 432, 453, 15 S. Ct. 394, 39 L. Ed. 481 (1895)).

Courts closely scrutinize practices that may threaten the fairness of the trial.[19] When courtroom arrangements inherently prejudice the fact-finding process, it violates due process unless the arrangements are required by an essential state interest.[20] An arrangement is inherently prejudicial if it creates an unacceptable risk of impermissible factors influencing the jury's verdict.[21] We evaluate the likely effects of a particular procedure based on "reason, principle, and common human experience."[22]

Butler relies on Holbrook v. Flynn,[23] and argues the particular arrangement of the jail officers and how that might be viewed by the average juror was inherently prejudicial.[24] But in Holbrook, the United States Supreme Court "counsel[ed] against a presumption that any use of identifiable security guards in the courtroom is inherently prejudicial," and found that "[i]n view of the variety of ways in which such guards can be deployed, we believe that a case-by-case approach is more appropriate."[25]

Here, the jail officer was quiet, relaxed, and not particularly close to Butler. The officer did not block Butler's view of the witness, and any juror who was paying attention to the officers also would have noticed that there was only one officer during the

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[19] Id. at 504; Holbrook v. Flynn, 475 U.S. 560, 568, 106 S. Ct. 1340, 89 L. Ed. 2d 525 (1986).

[20] Holbrook, 475 U.S. at 568-72.

[21] Estelle, 425 U.S. at 504-05; Holbrook, 475 U.S. at 570.

[22] Estelle, 425 U.S. at 504.

[23] 475 U.S. 560, 106 S. Ct. 1340, 89 L. Ed. 2d 525 (1986)

[24] Butler cites State v. Jaime, 168 Wn.2d 857, 233 P.3d 554 (2010), where our Supreme Court held that a jury trial in a jailhouse courtroom was inherently prejudicial and infringed on the defendant's right to a fair trial. "Because the courtroom setting itself is essential to a trial's integrity, we should be wary of a setting that impermissibly influences a jury's decision-making process and jeopardizes the presumption of innocence." Jaime, 168 Wn.2d at 862.

[25] Holbrook, 475 U.S. at 569.

remainder of N.C.'s testimony the next day. And the court's instruction about a routine shift change remedied any potential juror confusion or concern with the presence of a second security officer.

We conclude the second officer's presence in the courtroom during a portion of N.C.'s testimony was innocuous.

III. Appellate Costs

Butler asks that no costs be awarded on appeal. Appellate costs are generally awarded to the substantially prevailing party.[26] However, when a trial court makes a finding of indigency, that finding remains throughout review "unless the commissioner or clerk determines by a preponderance of the evidence that the offender's financial circumstances have significantly improved since the last determination of indigency."[27] Here, Butler was found indigent by the trial court. If the State has evidence indicating that Butler's financial circumstances have significantly improved since the trial court's finding, it may file a motion for costs with the commissioner.

Affirmed.

WE CONCUR:

[26] RAP 14.2.

[27] Id.

DECLARATION OF FILING AND MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, the original document **Petition for Review to the Supreme Court** to which this declaration is affixed/attached, was filed in the **Court of Appeals** under **Case No. 74144-6-I**, and a true copy was mailed with first-class postage prepaid or otherwise caused to be delivered to the following attorney(s) or party/parties of record at their regular office or residence address as listed on ACORDS:

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