Supreme Court No. 100702-7
COA No. 82181-4-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

JOSE JUAREZ,

Petitioner.

PETITION FOR REVIEW

OLIVER R. DAVIS
Attorney for Petitioner

WASHINGTON APPELLATE PROJECT
1511 Third Avenue, Suite 610
Seattle, Washington 98101
(206) 587-2711

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A. IDENTITY OF PETITIONER

Jose Juarez was the appellant in COA No. 82181-4-I and the defendant in Snohomish County No. 20-1-01045-1.

B. COURT OF APPEALS DECISION.

Mr. Juarez seeks review of the Court of Appeals decision issued January 31, 2022. See Appendix A.

C. ISSUES PRESENTED ON REVIEW

In Jose Juarez's trial on a charge of second degree assault, the trial court ordered that Mr. Juarez be kept strapped to a restraint chair during a crucial pretrial hearing addressing both competency and multiple in limine issues that greatly determined the course of trial going forward. Does the Court of Appeals decision warrant review by this Court under RAP 13.4(b)(1) and (3), where the Court departed from this Court's harmless error analysis, where the real facts did not permit shackling, and the trial court violated Mr. Juarez's Sixth Amendment rights, his Fourteenth Amendment Due Process guarantee, and Article 1, sections 21 and 22 of the Washington

Constitution, contrary to State v. Jackson, 195 Wn.2d 841, 467 P.3d 97 (2020) and Deck v. Missouri, 544 U.S. 622, 625, 633, 125 S. Ct. 2007, 161 L. Ed. 2d 953 (2005)?

D. STATEMENT OF THE CASE

Jose Juarez, a homeless man, was charged with second degree assault under RCW 9A.36.021(1)(c). CP 150. He was sheltering inside a van parked on Admiralty Way. When the vehicle's owner, Mr. Rivera, arrived, Mr. Juarez exited the van, but Rivera pushed him up against the side of the van, then grabbed Mr. Juarez by his backpack strap when Mr. Juarez tried to run away. Mr. Juarez had a "multi-tool" in his hand with a knife and a screwdriver folded open at one end. 11/3/20(am)RP at 214-16. As Mr. Rivera was trying to keep ahold of Mr. Juarez by his backpack, Mr. Juarez reached behind himself and made a motion with it, which Mr. Rivera said was an attempt to poke or hit him with the item. 11/3/20(am)RP at 218-21. Mr. Juarez broke free and was able to escape the area although he was later apprehended. Mr. Rivera clained he had grabbed

the item out of Mr. Juarez's hand and it was found on the ground. 11/3/20(am)RP at 220-21, 227. Mr. Rivera had been unsure if the item in Mr. Juarez's hand was a tool.

> **Q:** And during this interaction, were you able to see what the tool was?
> **A:** At the time, truly not.

11/3/20(am)RP at 219. Mr. Rivera testified, "It could have been a crayon. It could have been a taco filled with meat." 11/3/20(pm)RP at 228. The jury found Mr. Juarez guilty. 11/4/20RP at 408-11; CP 104. The Court of Appeals affirmed.

E. ARGUMENT

1. REVIEW IS WARRANTED WHERE THE COURT OF APPEALS DEPARTED FROM THE HARMLESS ERROR STANDARD OF STATE V. JACKSON, ENGAGED IN FACT-FINDING ON APPEAL, AND CONDONED THE TRIAL COURT'S DEFERENCE TO THE VIEWS OF JAIL PERSONNEL REGARDING COURT SECURITY.

Review is warranted under RAP 13.4(b)(1) and (3). As expanded upon further infra, this Supreme Court has firmly stated its disapproval and overruling of prior cases which repeatedly found shackling errors to be harmless. State v.

Jackson, 195 Wn.2d 841, 856-58, 467 P.3d 97 (2020). In this case, disregarding this Court's emphatic agreement with the dissenting judge in the Court of Appeals in Jackson who lamented the failure of the Washington Courts to provide any viable standard of reversal for shackling errors - and the resultant practical consequence of condoning unjustified shackling - the Court of Appeals in Mr. Juarez's case excused the trial court's error. The Court of Appeals stated,

> The State may satisfy its burden of proof by showing that, had the trial court conducted an individualized inquiry where it considered the shackling factors, it would have required the defendant to wear restraints. State v. Jackson, 195 Wn.2d 841, 851, [856 n. 4], 467 P.3d 97 (2020)]; see also State v. Lynn, No. 82543-7-I, slip op. at 5–6 (Wash. Ct. App. Oct. 25, 2021) (unpublished).

State v. Juarez, No. 82181-4-I, 2022 WL 277062, at *3 (Wash. Ct. App. Jan. 31, 2022). Relying on a footnote in Jackson which suggested that there "may be a case" where the State could meet its burden to prove harmlessness by showing that

the court *would* have shackled the accused under the multi-factor analysis if it had conducted one, the Court of Appeals excused the trial court's failure to conduct the proper inquiry, and then conducted the analysis itself - albeit inadequately - by engaging in fact-finding and discretionary weighing of facts:

> The record contains information reflecting a risk of disorderly behavior in the courtroom. The shackling factors include the defendant's temperament, the crime charged, and the defendant's criminal record. First, the trial court heard from defense counsel. Then, the trial court elicited information from jail staff about Juarez's behavior and temperament, including the refusal to leave his jail cell and the dropping of his weight, which could have caused injury. Juarez was charged with a violent crime—second degree assault with a deadly weapon. Also, Juarez's criminal history includes a 2018 unlawful possession of a firearm conviction and a 2012 second degree assault domestic violence conviction, as well as nine adult misdemeanors and one juvenile felony for attempted residential burglary. Juarez also had numerous warrants for failure to appear. Finally, On July 13, 2020, Monroe Municipal Court arraigned Juarez and ordered him not to commit new crimes on release. About eight days later, Juarez assaulted Valenzuela Rivera. Given the foregoing, we conclude that, <u>had the trial</u>

> court conducted an individualized inquiry on the record, applying the shackling factors, it would have made the same decision.

(Emphasis added.) State v. Juarez, No. 82181-4-I, at *4. Next, the Court of Appeals despite this exercise simply failed to cite circumstances that warranted shackling based on dangerousness at the juncture of the hearing. The difficulty of jail officers bearing Mr. Juarez's weight does not warrant enchainment. Even the facts as found in the Court of Appeals do not meet Jackson.

This affirmance of the trial court provides a framework which renders the Washington courts' prior repetitive excusing of shackling errors the very norm which this Court made great efforts to discourage. Jackson, at 858 (at "all stages of the proceedings, the court shall make an individualized inquiry into whether shackles or restraints are necessary"). Not only did the Court excuse the trial court's failure, the Court of Appeals endorsed the very evil this Court recognized in Jackson - trial

courts deferring to jail personnel for decisions about how to handle defendants in the court. Jackson, at 854-55, 857.

The defendant's alleged past crimes, current charge, and claims of jail personnel simply failed to show any danger of violence. The jail staff made statements that Mr. Juarez had to be carried from his cell because he refused to ambulate himself personally. Mr. Juarez's conduct was never described as anything more than what would be akin to that of peaceful, non-violent protester, who the police need to drag away by their limp bodies. This may be burdensome, and require effort, but it is not dangerous, and the un-elaborated upon jail claim that this could cause injury to the jail staff, is wholly inadequate in itself. Even if one fills in this empty claim by assuming that the jail staff meant that they could be injured when carrying a heavy weight, this does not show the violent danger necessary to impinge upon an accused's constitutional rights by placing him in chains in a courtroom of the State of Washington.

This Court should grant review under RAP 13.4(b)(1) and (3), as the Court of Appeals decision departs dramatically from this Supreme Court's case law, and a significant question of constitutional rights is involved.

2. JOSE JUAREZ WAS SHACKLED WITH NO CONSTITUTIONAL JUSTIFICATION UNDER THE REQUIRED FACTORS OF STATE V. JACKSON AND HIS CONVICTION MUST BE REVERSED.

a. Unjustified shackling of the accused is constitutionally prohibited at nonjury pretrial hearings.

Mr. Juarez has constitutional protections of his right to appear in court free of any shackles or restraints. In State v. Jackson, our Supreme Court recognized the long-standing principle of Anglo-American jurisprudence that a defendant should not be brought before the bar in irons unless there was evident danger. State v. Jackson, 195 Wn.2d 841, 851, 467 P.3d 97 (2020) (citing 4 W. Blackstone, Commentaries on the Laws of England 317 (1769); and State v. Williams, 18 Wash. 47, 51, 50 P. 580 (1897)); State v. Finch, 137 Wn.2d 792, 842,

975 P.2d 967 (1999); State v. Hartzog, 96 Wn.2d 383, 397, 401, 403, 635 P.2d 694 (1981) (a court may order restraint of defendant in the courtroom only based on an "individualized" showing of danger); U.S. Const. Amend. VI, amend. XIV; Const. art. I, §§ 21, 22.

b. Mr. Juarez was brought to the courtroom in a restraint chair and was kept manacled to the chair for the hearing of October 30.

Before a pretrial hearing set to address issues including the defendant's competency and motions in limine, the State noted that Mr. Juarez had not wanted to leave the jail that morning. 10/30/20RP at 3. The court authorized an order to bring Mr. Juarez to court. See 10/3/20(pm)RP at 20. The prosecutor noted that the first order of business upon Mr. Juarez's arrival should be to "evaluate certain aspects of how he's doing so we can even proceed." 10/30/20RP at 3.

Defense counsel stated that during his prior visits with Mr. Juarez he had seemed fine, but he expressed concerns as to whether Mr. Juarez might have decompensated. 10/30/20RP at

4-5. When the afternoon session commenced, jail corrections officers freighted Mr. Juarez into the courtroom strapped to a restraint chair, without notice to counsel or the court. 10/30/20(pm)RP at 6. Defense counsel immediately asked that Mr. Juarez not be restrained. 10/30/20(pm)RP at 7. As he pointed out, Mr. Juarez had simply engaged at the jail in "passive resistance as opposed to combativeness." 10/30/20(pm)RP at 7, 19. The trial court noted the need to make individualized findings in order to justify Mr. Juarez's restraint. 10/3/20(pm)RP at 7-8; see Jackson, 195 Wn.2d at 852. However, the court failed to address the factors required by Jackson.

c. The court wrongly deferred to the statements and 'prediction' of jail corrections officers.

The court ordered that Mr. Juarez remain bound in the restraint chair for the day's hearing, relying on the statements of the corrections officers. Officer Lundy told the court that Mr. Juarez had "adamantly refused to come out of his cell [and] had

to be physically taken out." 10/30/20(pm)RP at 8. It was unclear from Officer Lundy how many officers were involved in the effort, but he appeared to offer the court a prediction of how the defendant would act in a courtroom:

> He had to be physically taken out of his cell. It took six officers to get him into the chair. So in my 20 years' experience, if you take him out of there with just the three of us, you're going to have an issue.

10/30/20(pm)RP at 8. Lacking, however, was any indication from Officer Lundy that Mr. Juarez had engaged in any violent or assaultive conduct, or that he had attempted to escape. The second officer on which the court relied, Sergeant Mark Jackson, provided a written statement which the court read into the record. 10/30/20(pm)RP at 8-9. Sergeant Jackson stated that the transport officers had to "carry [Mr. Juarez] out" of his cell. 10/30/20(pm)RP at 8. According to the sergeant, Mr. Juarez "took two steps on his own, then dropped his weight, which could have easily injured staff." 10/3/20(pm)RP at 8. For this reason, the sergeant had Mr. Juarez "placed in the

restraint chair in order to transport him to court." 10/30/20(pm)RP at 8-9.

Based on these statements, the court ruled that "there has been more than enough evidence presented to support the conclusion that restraints are appropriate in this case for Mr. Juarez." 10/3/20(pm)RP at 8-9 (also stating that weight had to be given to the fact that the jail officers had at least a decade of experience as custody transport officers).

d. The trial court's ruling failed to follow the constitutional requirements of *Jackson* and thus failed to make any individualized determination of danger regarding Mr. Juarez.

In all instances of restraint at any proceeding, shackling must be an extraordinary measure, not routine, and must be determined by the individualized inquiry that is constitutionally required. Jackson, at 852-54; Deck v. Missouri, 544 U.S. 622, 625, 633, 125 S. Ct. 2007, 161 L. Ed. 2d 953 (2005). See Jackson, at 853-54. A trial court abuses its discretion if its decision to physically restrain a defendant does not rest on

"evidence which indicates that the defendant poses an imminent risk of escape, that the defendant intends to injure someone in the courtroom, or that the defendant cannot behave in an orderly manner while in the courtroom." State v. Madden, 16 Wn. App.2d 327, 337-38, 480 P.3d 1154 (2021) (quoting State v. Finch, 137 Wn.2d at 850). Our courts have identified a series of factors a trial court must address when determining if a defendant needs to be shackled:

> The seriousness of the present charge against the defendant; defendant's temperament and character; his age and physical attributes; his past record; past escapes or attempted escapes, and evidence of a present plan to escape; threats to harm others or cause a disturbance; self-destructive tendencies; the risk of mob violence or of attempted revenge by others; the possibility of rescue by other offenders still at large; the size and mood of the audience; the nature and physical security of the courtroom; and the adequacy and availability of alternative remedies.

State v. Hutchinson, 135 Wn.2d 863, 887-88, 959 P.2d 1061 (1998); accord, Jackson, at 853; State v. Hartzog, 96 Wn.2d 383, 635 P.2d 694 (1981).

Here, the court failed to engage in the individualized inquiry required by our courts. The Court of Appeals then conducted the inquiry itself, but even that failed to establish dangerousness. There was no viable basis for any notion that Mr. Juarez presented a danger of escape or courtroom violence. See Hutchinson, 135 Wn.2d at 877.

Mr. Juarez's resistance while being removed from his cell cannot be deemed a basis to shackle a defendant based on a corrections officer's general opinion, and prediction, that defendants who act as Mr. Juarez did at the jail will be an "issue." See 10/30/20(pm)RP at 8. Without more, the officers' statement that Mr. Juarez might have injured the team of three officers by going limp rather than walking, and when being placed into a restraint chair, does not establish a risk of violence or escape required by Jackson's "extraordinary circumstances" requirement.

e. Under a proper harmless error analysis, the State cannot demonstrate harmlessness beyond a reasonable doubt, and reversal is required.

Mr. Juarez's unlawful shackling is presumed to be prejudicial, and reversal is required unless the State can prove the error was harmless beyond a reasonable doubt. Jackson, at 855-56 (citing State v. Clark, 143 Wn.2d 731, 775-76, 24 P.3d 1006 (2001)). In clarifying this rule, the Jackson Court disavowed prior statements in Hutchinson that suggested the defendant was required to identify a "substantial or injurious effect" on his trial, because that rule has failed to provide "any meaningful remedy" for a grave constitutional violation which continues to occur. Jackson, at 856.

The State cannot show that the shackling of Mr. Juarez did not affect the outcome, including the jury proceedings, all of which were held because of, and in the context of, the rulings made at the October 30 hearing. The constitutional

violation certainly cannot be deemed a "minor blip" with regard to the trial as a whole. See 10/30/20(pm)RP at 20.

In the recent unpublished case of State v. Hernandez, the Court of Appeals rightly noted that restraints are viewed with great disfavor where they may abridge important constitutional rights at stake in pretrial evidentiary hearings, may violate the presumption of innocence, may violate the privilege of testifying in one's own behalf, and may violate the right to consult with counsel during trial - the Court setting these forth as examples from a non-exclusive list. State v. Hernandez, No. 80688-2-I, 2021 WL 863725, at *6 (Wash. Ct. App. Mar. 8, 2021) (unpublished, cited pursuant to GR 14.1(a), petition for review denied, 197 Wn.2d 1021 (2021).

When a practice is "inherently prejudicial," courts should place "little stock" in a claim that it would not have affected the decider. Holbrook v. Flynn, 475 U.S. 560, 570, 106 S. Ct. 1340, 89 L. Ed.2d 525 (1986). A factfinder may not be "fully

conscious of the effect" an inherently prejudicial practice has on their attitude toward the accused. Holbrook, at 570. The proper question is whether an unacceptable risk is presented of impermissible factors coming into play. Holbrook, at 570.

The prejudice from unwarranted pretrial shackling may be at its greatest when the hearing concerns competency. Most every caution passed down through the centuries as to the deleterious effect of appearing in irons applies directly to such a hearing. See generally, People v. Best, 19 N.Y. 3d 739, 744, 955 N.Y.S.2d 860, 979 N.E. 2d 1187 (2012) ("judges are human, and the sight of a defendant in restraints may unconsciously influence even a judicial factfinder").

In applying the rule against unwarranted shackling to nonjury pretrial hearings, the Jackson Court noted that shackling impairs the defendant's right "to appear and defend in person" because the constitution protects not only the right against the accused's body being physically tied down, but also

ensures "the use of [his] mental . . . faculties unfettered." Jackson, at 851 (citing Const. art. 1, § 22).

In this case, can there be any doubt that Mr. Juarez, after being loaded to court and deposited in the courtroom like a crate, could do little else than answer the court's questions posed to him about his competence in an ingratiating, submissive manner, telling the court what he believed it wanted to hear? In this circumstance, from Mr. Juarez' answer when asked what the prosecutor's role was (to "[d]efend the law, basically, right?"); his affirmative response when asked if he knew what amount of prison time he was facing (even though he plainly did not); to his assurance to the court that "I am completely sane," Mr. Juarez unsurprisingly appeared to the trial judge to understand and be willing to submit to the coming proceedings. 10/3/20(pm)RP at 14, 15, 16, 18.

Mr. Juarez was unsure what month it was. 10/3/20(pm)RP at 17. The court's finding that Mr. Juarez was "oriented to time and place," like his answers to the court's

other questions, cannot be said to have been elicited in a reliable manner when Mr. Juarez's time and "place" were the confines of his restraint chair which his limbs were strapped to. 10/3/20(pm)RP at 14, 15, 16, 18.

What occurred below, however, demonstrates a direct line from improper shackling at a competency hearing, through improper shackling at the pretrial evidentiary hearing that same day that set the contours of the trial that followed, to the conviction of a homeless defendant seeking to steal or seeking shelter, being convicted of a strike offense based on reckless waving of a multi-tool behind his back when the rightfully angry property crime victim decided to take Mr. Juarez down rather than let him run away. 11/3/20RP at 220.

The Hernandez Court rightly noted that pretrial evidence hearings are the sort of nonjury proceeding at which unlawful shackling is prejudicial. See 10/30/20(pm)RP at 21-34; State v. Hernandez, at *6. The in limine issues in this case were not limited to the usual rote formalities such as exclusion of

witnesses, no mention of punishment, advising witnesses of the court's in limine rulings, and the like. Nor were the in limine issues mere anodyne, purely legal questions above the defendant's ken, but rather, were in part factual issues relating to the defendant himself. As the record amply demonstrates, at issue were:

> (a). The failure of the prosecutor to timely note a hearing to determine the admissibility of the defendant's statements under CrR 3.5 and Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and the court's excusal of the failure because the possibility of fruitful plea negotiations between the State and Mr. Juarez had broken down, 10/3/20(pm)RP at 21-26;
>
> (b). Mr. Juarez's argument that the 911 calls on the day in question were made by persons not even present at the time and were inadmissible under the hearsay rules, ER 401 and 402, ER 403, and ultimately on grounds of lack of authentication, see CP 139-40, 10/3/20(pm)RP at 32-33;
>
> (c). Mr. Juarez's alleged prior acts or convictions and their admissibility as pertinent to whether Mr. Juarez would decide to testify in his own defense, see CP 140, 10/3/20(pm)RP at 31-32;
>
> (d). The admissibility of opinions of police officers as claimed "experts" who the prosecutor believed

could testify that the multi-tool was used by Mr. Juarez in a manner that rendered it a deadly weapon; see CP 141-42, 10/3/20(pm)RP at 33-36;

(e). The admissibility of any proffered in-court identification of the defendant, see CP 142; 10/3/20(pm)RP at 36-37;

(f). Mr. Juarez's arguments in favor of procedures to ensure a safe trial for all in terms of the risk of COVID-19 while not dispensing with a fair trial, as briefed by the defense at CP 123-37, 10/3/20(pm)RP at 28-29; and specifically:

(g). Mr. Juarez's request that the courtroom be open to the public and that YouTube "live streaming" not be used as a substitute for a public trial, 10/3/20(pm)RP at 42-43;

(h). The issue of prospective jurors wearing COVID-19 masks rather than clear plastic face shields during *voir dire,* which the defense argued would prevent Mr. Juarez from assessing any bias or unfairness of a prospective juror and hinder him in raising challenges for cause under State v. Laureano, 101 Wn.2d 745, 758, 682 P.2d 889 (1984), see CP 126-27, 10/3/20(pm)RP at 44-45;

(i). The issue of prospective jurors wearing COVID-19 masks rather than clear plastic face shields, which would prevent Mr. Juarez from accurately assessing the responses and expressions of jurors and thus impede Mr. Juarez's ability to raise a challenge under Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), if a juror was

attempted to be excused by peremptory challenge by the State, see CP 127-28, 10/3/20(pm)RP at 43-45;

(j). The issue of witnesses wearing COVID-19 masks rather than clear plastic face shields while testifying, which the defense argued would prevent the jury from assessing the demeanor of the witnesses and thus violate Mr. Juarez's Sixth Amendment right to confrontation in his jury trial under Maryland v. Craig, 497 U.S. 836, 845-46, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990), see CP 125-26; and

(k). Mr. Juarez's need to be provided with a tablet computer to be able to send text messages to counsel and/or that counsel and the defendant be permitted brief recesses to confer with each other pursuant to the right of a defendant to confer with counsel and assist in his defense, given that Mr. Juarez and his lawyer would be required to socially distance 6 feet from each other, 10/3/20(pm)RP at 45-46.

10/3/20(pm)RP at 21-29, 31-37, 42-45; see also CP 123-42 (Defense brief regarding COVID-19 protocols) and CP 138-43 (Defense trial brief).

These issues addressed in limine were exactly the sort where the presence of a defendant *unfettered both physically and psychologically* in his ability to assist in his defense, would be crucial in any criminal case, and at any stage thereof.

Hernandez reasoned that the defendant's shackling during a pretrial hearing addressing evidentiary issues is more likely to be prejudicial. Hernandez, at *6 (noting the prejudice resulting from wrongful shackling during an evidentiary hearing). Shackling a defendant impairs his mental ability, may inflict pain, and impedes the free and unrestrained communication that is held between the presumably innocent defendant and his lawyer. See Castillo v. Stainer, 983 F.2d 145, 149 (9th Cir. 1992), amended, 997 F.2d 669, 669 (9th Cir.), cert. denied, U.S., 126 L. Ed. 2d 574, 114 S. Ct. 609 (1993).

Prejudice in shackling cases is presumed, because this is constitutional error, and in shackling cases in particular the error infuses the entire trial, and it can sometimes be difficult to dissect and isolate for inspection. State v. Clark, 143 Wn.2d at 775-76; Jackson, at 845, 856. Not in this case. The prejudice caused by Mr. Juarez being strapped to a restraint chair at counsel table is specific and identifiable. The shackling order itself did not merely fall slightly short of constitutional

requirements, rather, it was issued following a failure to address a majority of the factors from State v. Jackson. The trial court's decision also did exactly what the Jackson Court cautioned against doing – it effectively deferred to the opinions and policies of the jail corrections officers and their demanding standards of non-cooperativeness. Jackson, at 854.

If the Hernandez Court was correct that in limine evidentiary hearings are the very sort of pretrial nonjury proceeding during which having the accused, in error, clapped in irons is particularly prejudicial - and the Court was correct on that point - then reversal should be required on the basis of the magnitude of that error alone, in this case. Keeping Mr. Juarez strapped to a restraint chair during a hearing where unique, fact-specific pretrial evidentiary motions, involving all of Mr. Juarez's specific trial rights in addition to his broad, general right to communicate with his counsel and assist in his defense, was a constitutional wrong that the State cannot prove was harmless beyond a reasonable doubt. Mr. Juarez's improper

shackling during this complex evidentiary hearing was not harmless beyond a reasonable doubt, and reversal of his conviction is required. This Court should reverse.

F. CONCLUSION

Based on the foregoing, this Court should accept review and reverse Mr. Juarez's judgment and sentence.

This pleading contains 4,369 words and is formatted in font Times New Roman 14.

Respectfully submitted this 2ND day of March, 2022.

s/ Oliver R. Davis
Washington Bar Number 24560
Washington Appellate Project
1511 Third Avenue, Suite 610
Seattle, WA 98102
Telephone: (206) 587-2711
Email: oliver@washapp.org

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. JOSE LUIS JUAREZ, Appellant.	No. 82181-4-I DIVISION ONE UNPUBLISHED OPINION

CHUN, J. — The State charged Jose Juarez with second degree assault with a deadly weapon. He refused to leave his jail cell to attend his trial call and pretrial hearing, so jail staff brought him into the court in a restraint chair. After reviewing information concerning the situation, the trial court determined that Juarez should remain restrained for the rest of that hearing, but not at later hearings or trial. The jury found him guilty. Juarez appeals. For the reasons discussed below, we affirm.

I. BACKGROUND

Leonel Valenzuela Rivera parked his van on the street with a "For Sale" sign. Later, Valenzuela Rivera and his son noticed that the sign was missing and approached the van. They found Juarez sitting inside. Valenzuela Rivera tried to restrain Juarez. Juarez tried to hit Valenzuela Rivera with a multi-tool with a knife, and Valenzuela Rivera grabbed the tool and threw it to the ground. Then Juarez ran away. Law enforcement officers found Juarez walking on the street

and took him into custody, and Valenzuela Rivera's son identified him. The State charged Juarez with second degree assault with a deadly weapon.

On the morning of his trial call, Juarez refused to leave his jail cell and appear. During the trial call, without Juarez, the State and defense counsel said they were concerned about his mental health. Defense counsel said, "It might make sense to have a brief hearing this afternoon so the Court can get eyes on him, I can get eyes on him, and we can all do an assessment about whether we should bother to bring in a jury." The trial call judge assigned the case to a different judge for trial.

Later that day, the State moved for a "drag order." The trial court entered the order, which stated, "IT IS HEREBY ORDERED that Snohomish County Jail staff shall use whatever reasonable means necessary to transport the defendant to a hearing in the above captioned case before the Snohomish County Superior Court." Jail staff brought Juarez into the courtroom in a restraint chair for a pretrial hearing on competency and evidence motions.

At the beginning of the hearing, the trial court acknowledged that Juarez "appears in what I am familiar with as a restraint chair" and that there were "three custody officers here in the courtroom." The trial court said that to keep Juarez in restraints during the hearing, it needed to make individualized findings about why the restraints were necessary.

Defense counsel said,

> On my client's behalf, of course, I prefer to see him released from restraints and demonstrate to you that they are not necessary. I, of course, wasn't present when the decision was made to put him in

> these restraints. I had a brief chance to communicate with him just prior to today's hearing while he was in the chair, and he indicated to me that he understands the importance of decorum and self-control. He understands why I want him to demonstrate those behaviors.
>
> I wasn't present for whatever caused the correction officers' concern. Every time I have spoken to him, he's been cordial and he's very deferential to me, basically takes my suggestions. I don't have any personal concerns, but I'm not going to sell the officers short, and I think we should have them say why they made that ruling.

A jail officer told the court what happened before the hearing:

> [Juarez] adamantly refused to come out of his cell. He had to be physically taken out of his cell. It took six officers to get him into the chair. So in my 20 years' experience, if you take him out of there with just the three of us, you're going to have an issue.

The court then read a memorandum written by another jail officer that said,

> Inmate Juarez refused to comply with directives to attend court today even after being shown a drag order. Transport staff had to enter the cell and physically carry him out. Inmate Juarez took two steps on his own, then dropped his weight, which could have easily injured staff. He refused to walk, so we had to carry him down the stairs. We had to place Inmate Juarez in the restraint chair in order to transport him to court.

The court considered the jail officers' statements, and said, "I do think the Court needs to place emphasis or—there is additional weight that needs to be given that we have three very experienced custody transport officers which all have been on transport for at least a decade, at least as far as my memory goes." It then determined, "At this point, I do think that there has been more than enough evidence presented to support the conclusion that restraints are appropriate in this case for Mr. Juarez." The trial court ordered Juarez to remain restrained during the pretrial hearing stating, "I'm only making a finding for today's purposes."

At trial, a jury found Juarez guilty.

Juarez appeals.

II. ANALYSIS

Juarez contends the trial court violated his constitutional rights under article I, sections 21 and 22 of the Washington State Constitution and the Sixth and Fourteenth Amendments to the United States Constitution by restraining him during the pretrial hearing without conducting an individualized inquiry. The trial court conducted an individualized inquiry but did not expressly state its rationale. We conclude that any error was harmless.

Pretrial shackling without an individualized determination of need violates a defendant's rights under the Sixth and Fourteenth Amendments and article I, section 22. State v. Jackson, 195 Wn.2d 841, 852, 467 P.3d 97 (2020). We disfavor restraints "because they may abridge important constitutional rights, including the presumption of innocence, privilege of testifying in one's own behalf, and right to consult with counsel during trial." State v. Hartzog, 96 Wn.2d 383, 398, 635 P.2d 694 (1981).

Trial courts should address these factors to determine whether a defendant needs restraints:

> [T]he seriousness of the present charge against the defendant; defendant's temperament and character; [their] age and physical attributes; [their] past record; past escapes or attempted escapes, and evidence of a present plan to escape; threats to harm others or cause a disturbance; self-destructive tendencies; the risk of mob violence or of attempted revenge by others; the possibility of rescue by other offenders still at large; the size and mood of the audience; the nature and physical security of the courtroom; and the adequacy and availability of alternative remedies.

Id. at 400 (quoting State v. Hartzog, 26 Wn. App. 576, 588, 615 P.2d 480 (1980)). Because a trial judge has "broad discretion to provide for order and security in the courtroom," we review its shackling decision for abuse of discretion. Id. at 401.

> A trial court abuses its discretion if its decision to physically restrain a defendant does not rest on "evidence which indicates that the defendant poses an imminent risk of escape, that the defendant intends to injure someone in the courtroom, or that the defendant cannot behave in an orderly manner while in the courtroom."

State v. Madden, 16 Wn. App. 2d 327, 337–38, 480 P.3d 1154 (2021) (quoting State v. Finch, 137 Wn.2d 792, 850, 975 P.2d 967 (1999)).

Here, the trial court did not expressly state which, if any, of the shackling factors it considered. Nor did it expressly address the concerns of escape, intent to injure, or disorderly behavior. However, the trial court did elicit information that concerned Juarez's temperament and apparently about whether he could behave in an "orderly manner." See Hartzog, 96 Wn.2d at 400; Madden, 16 Wn. App. 2d at 337–38. The trial court first heard from defense counsel who said that he briefly talked with Juarez before the hearing, while he was in the restraint chair. Defense counsel said that Juarez indicated that he understood the "importance of decorum and self-control." Defense counsel also said, "Every time I have spoken to him, he's been cordial and he's very deferential to me, basically takes my suggestions. I don't have any personal concerns, but I'm not going to sell the officers short, and I think we should have them say why they made that ruling." Then the court heard from one jail officer and read a statement from another. The officers said that Juarez refused to leave his jail cell, and "refused to comply

with directives to attend court today even after being shown a drag order." They said jail staff had to physically remove Juarez from his cell. They also said Juarez dropped his weight and refused to walk, which could have injured the staff. Juarez required six officers to get him into the restraint chair to transport him to the court.

Regardless of whether the trial court's treatment of the issue sufficed to satisfy Jackson, any error was harmless. "[U]nconstitutional shackling is subject to a harmless error analysis." Jackson, 195 Wn.2d at 855. The State bears the burden to show the shackling was harmless beyond a reasonable doubt. Id. at 856. The State may satisfy its burden of proof by showing that, had the trial court conducted an individualized inquiry where it considered the shackling factors, it would have required the defendant to wear restraints. Id. at 856 n.4; see also State v. Lynn, No. 82543-7-I, slip op. at 5–6 (Wash. Ct. App. Oct. 25, 2021) (unpublished), https://www.courts.wa.gov/opinions/pdf/825437.pdf (error was harmless in light of factors not expressly considered by trial court, including crime charged and criminal history).[1] We conclude that the trial court would have required restraints if it had applied the shackling factors. And this would have been within the court's discretion.

The record contains information reflecting a risk of disorderly behavior in the courtroom. The shackling factors include the defendant's temperament, the crime charged, and the defendant's criminal record. First, the trial court heard

[1] See GR 14.1(c) ("Washington appellate courts should not, unless necessary for a reasoned decision, cite or discuss unpublished opinions in their opinions.").

from defense counsel. Then, the trial court elicited information from jail staff about Juarez's behavior and temperament, including the refusal to leave his jail cell and the dropping of his weight, which could have caused injury. Juarez was charged with a violent crime—second degree assault with a deadly weapon. Also, Juarez's criminal history includes a 2018 unlawful possession of a firearm conviction and a 2012 second degree assault domestic violence conviction, as well as nine adult misdemeanors and one juvenile felony for attempted residential burglary. Juarez also had numerous warrants for failure to appear. Finally, On July 13, 2020, Monroe Municipal Court arraigned Juarez and ordered him not to commit new crimes on release. About eight days later, Juarez assaulted Valenzuela Rivera. Given the foregoing, we conclude that, had the trial court conducted an individualized inquiry on the record, applying the shackling factors, it would have made the same decision.

We affirm.

Chun, J.

WE CONCUR:

Andrus, A.C.J.

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. 82181-4-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:

☒ respondent Seth Fine
[sfine@snoco.org]
Snohomish County Prosecuting Attorney
[Diane.Kremenich@co.snohomish.wa.us]

☐ petitioner

☐ Attorney for other party

MARIA ANA ARRANZA RILEY, Paralegal
Washington Appellate Project

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