70701-9

70701-9

NO. 70701-9-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

DAVID HINDAL,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE KIMBERLEY PROCHNAU

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Whether this Court should reject Hindal's claim that the trial court erred in denying his motion for a mistrial on grounds that the jury might have seen his leg shackles because Hindal specifically asked to be placed in shackles instead of a less visible alternative, and because any possible error is harmless because the evidence of Hindal's guilt is overwhelming.

2. Whether this case must be remanded because the Washington Supreme Court has held that a defendant's express agreement to his offender score and standard range is not sufficient to establish an affirmative acknowledgement that out-of-state prior convictions are comparable to Washington felonies.

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

The State charged the defendant, David Hindal, with residential burglary for a break-in that occurred on April 9, 2012. CP 1-6. Hindal's jury trial on this charge occurred in May 2013 before the Honorable Kimberley Prochnau. At the conclusion of the trial, the jury convicted Hindal as charged. RP (5/10/13) 3-5; CP 88. The trial court rejected Hindal's request for an exceptional

sentence below the standard range, and imposed a standard-range sentence based on an agreed-upon offender score of 12. CP 90-97; RP (6/28/13) 2-6, 12-13. Hindal now appeals. CP 104-13.

2. SUBSTANTIVE FACTS

At around 8:30 in the evening on April 9, 2012, Juanita Mendoza and her husband heard noises coming from their neighbor's house, and their dog began barking in the direction of that house. Mendoza's husband went into the back yard and told Mendoza to call 911. RP (5/8/13) 54-56. Mendoza also went outside to find out what was going on and heard a window breaking. RP (5/8/13) 58-59.

Deputies from the King County Sheriff's Office began arriving within a few minutes of Mendoza's 911 call. RP (5/6/13) 127-29. Deputy Michael Rayborn went to the rear of the house and saw that the slider was broken. RP (5/7/13) 130-31. While Rayborn was watching, a male tried to exit the house through the broken slider, but as soon as Rayborn turned on his flashlight, the male went back inside the house and began turning the lights on and off. RP (5/7/13) 131.

Rayborn and other deputies entered the house through the broken slider, and they saw that there was a large rock on the floor just inside. RP (5/7/13) 132. Rayborn unlocked the front door of the house, additional deputies came in, and they began searching the house for potential suspects. RP (5/7/13) 133. The deputies quickly located Hindal, who was crouched down in a closet next to the front door. RP (5/7/13) 133-34. In the closet with Hindal were bags containing electronic equipment and packs of "Magic: The Gathering" game cards. RP (5/7/13) 135. These items belonged to the homeowner, Orlando Montoya, who did not keep them in the closet where they were found next to Hindal by the deputies. RP (5/8/13) 92-94, 102-04. The deputies also located a backpack containing items with Hindal's name on them in the back yard. RP (5/9/13) 17-18.

Montoya was out of town when the break-in occurred. RP (5/8/13) 90. When Montoya inspected his home, in addition to the broken slider, he discovered a broken window and found that several planks had been kicked out of the fence. RP (5/8/13) 109. Montoya did not know Hindal, and had not given Hindal permission to enter his home. RP (5/8/13) 91.

Hindal testified at trial. Hindal stated that on the day of the break-in, he had attended a court-ordered "Intense Outpatient Program" for alcohol treatment, and then he went to his fiancée's apartment. RP (5/9/13) 74-76. Hindal said that he left the apartment at around 6:00 p.m. to buy diapers and formula for their daughter. RP (5/9/13) 76. Hindal claimed that he got on a bus to go to a Safeway store, and then decided that he wanted a cigarette, but he did not want to buy an entire pack. Instead, he asked a couple of "tweakers"[1] on the bus if he could bum a cigarette from them. RP (5/9/13) 77. Hindal said these individuals told him that they had cigarettes "stashed" some distance away, so Hindal got off the bus with them. RP (5/9/13) 77-78. Hindal claimed that he followed these two individuals for approximately a mile before giving up. RP (5/9/13) 78.

Hindal claimed he started walking toward Pacific Highway South, but he was falling asleep, so he decided to take a "power nap" in the house. Hindal claimed that he thought the house was abandoned. RP (5/9/13) 80-82. Hindal admitted that he broke into the house, but said that he was disoriented and thought he lived there. RP (5/9/13) 84. Hindal said he hid in the closet because he

[1] "Tweaker" or "tweeker" is slang for a methamphetamine user.

was afraid of being bitten by the K-9 dog. RP (5/9/13) 85. Hindal claimed he did not intend to steal anything from the house; accordingly, he asked the jury to convict him only of criminal trespass. RP (5/9/13) 89; RP (5/9/13) 119-27.

On cross-examination, Hindal admitted that he had prior convictions for robbery and theft. RP (5/9/13) 94. Hindal then volunteered that the robbery was "a shoplifting that went bad," and "that's why you're trying to give me five years in prison for this." RP (5/9/13) 94. Hindal further offered, "That's why I've been sitting in jail." RP (5/9/13) 94-95.

Additional facts will be discussed below as necessary for argument.

C. ARGUMENT

1. HINDAL ASKED TO BE PLACED IN LEG SHACKLES AND THE EVIDENCE OF HIS GUILT IS OVERWHELMING; THEREFORE, HE IS NOT ENTITLED TO A NEW TRIAL.

Hindal first claims that he was deprived of a fair trial because he was wearing leg shackles in the presence of the jury, and thus, the trial court should have granted his motion for a mistrial on this basis. Brief of Appellant, at 6-11. This claim should be rejected for

two reasons. First, although Hindal was initially wearing the "Oregon boot," which apparently was not visible, Hindal specifically asked to be placed in leg shackles because the "Oregon boot" was uncomfortable. Second, the evidence of Hindal's guilt was overwhelming. Accordingly, even if granting Hindal's request to wear leg shackles was error, any possible error is harmless.

The decision to employ security measures in the courtroom, including shackling, is "within the inherent power and discretion of the trial judge," and should be "made on a case-by-case basis after a hearing with a record evidencing the reasons for the action taken." State v. Hartzog, 96 Wn.2d 383, 401, 635 P.2d 694 (1981) (quoting State v. Hartzog, 26 Wn. App. 576, 588-89, 615 P.2d 480 (1980)). The trial court's decision to shackle a defendant must be supported by a tenable factual basis in the record. State v. Finch, 137 Wn.2d 792, 846, 975 P.2d 967 (1999). A trial court abuses its discretion only if its decision is manifestly unreasonable or based on untenable grounds. State v. Enstone, 137 Wn.2d 675, 679-80, 974 P.2d 828 (1999). An appellate court will find an abuse of discretion only if no reasonable person would have ruled as the trial judge did. State v. Atsbeha, 142 Wn.2d 904, 913-14, 16 P.3d 631 (2001). Furthermore, a motion for a mistrial based on shackling

should be granted only when nothing short of a new trial will ensure that the defendant will be tried fairly. State v. Rodriguez, 146 Wn.2d 260, 270-71, 45 P.3d 541 (2002).

The Washington Supreme Court has identified twelve factors for courts to consider when deciding whether to shackle a criminal defendant: 1) the seriousness of the charge; 2) the defendant's "temperament and character"; 3) the defendant's "age and physical attributes"; 4) the defendant's prior record; 5) any past escapes, attempted escapes, or evidence of a present plan to escape; 6) any "threats to harm others or cause a disturbance"; 7) any "self-destructive tendencies"; 8) any risk of "mob violence" or revenge by others; 9) any "possibility of rescue by other offenders still at large"; 10) the number and "mood" of courtroom spectators; 11) "the nature and physical security of the courtroom"; and 12) "the adequacy and availability of alternative remedies." Hartzog, 96 Wn.2d at 400 (quoting Hartzog, 26 Wn. App. at 588-89). Because shackling a defendant in the jury's presence may undermine the presumption of innocence, a trial court's erroneous decision to shackle a defendant is presumptively prejudicial. State v. Clark, 143 Wn.2d 731, 774, 24 P.3d 1006 (2001).

On the other hand, a defendant's agreement or failure to object to shackling is certainly relevant to a court's analysis, and may render any possible error harmless. *See* State v. Elmore, 139 Wn.2d 250, 272-74, 985 P.2d 289 (1999). Moreover, if a defendant does not initially object to shackling, but then later moves for a mistrial based on shackling, a trial court does not abuse its discretion in denying that motion. Rodriguez, 146 Wn.2d at 271-72. Furthermore, "a claim of unconstitutional shackling is subject to a harmless error analysis" based on the facts of the case. Clark, 143 Wn.2d at 775. An error is harmless in these circumstances when "the evidence against the defendant is so overwhelming that no rational conclusion other than guilt can be reached." Id. at 775-76.

In this case, when Hindal initially appeared in court for trial, he had refused to wear civilian clothes. Instead, he was wearing a "medical suicide smock,"[2] and "jail sandals," and he was shackled. RP (5/6/13) 3, 7, 11. The trial court strongly encouraged Hindal to reconsider his decision not to wear civilian clothes, but also stated that the court would not "force" him to wear civilian clothes if he insisted upon wearing jail garb. RP (5/6/13) 3. The trial court also inquired of the corrections officers whether the shackles could be

[2] The trial court described this garment as "a green smock that kind of comes down to your knees[.]" RP (5/6/13) 3.

removed when the jury was present. One of the officers stated that Hindal was shackled due to "his housing location in the jail," and indicated that they would need approval from a sergeant or a lieutenant to remove them. RP (5/6/13) 7. The trial court also acknowledged that the jail employed higher security measures for courtrooms on the second floor of the courthouse because there is an exit to the street on that floor. Nonetheless, the trial court asked that the shackles be removed if possible. RP (5/6/13) 8.

Following a recess, Hindal returned to the courtroom in "traditional red jail garb" and without shackles. RP (5/6/13) 8. A jail captain stated for the record that the jail had no objection to removing Hindal's restraints if Hindal would agree to wear regular jail garb and agree to be fitted with the "Oregon boot" instead of shackles. RP (5/6/13) 11. The captain further explained that if Hindal would agree to wear civilian clothes, he would be transported to court in handcuffs and the "Oregon boot," and the handcuffs would be removed before the jury came into the courtroom. Hindal's trial counsel then expressly stated that she had no objection to the "Oregon boot." RP (5/6/13) 12.

Two days later, Hindal's trial counsel informed the court that Hindal wanted to wear ankle shackles instead of the "Oregon boot"

because the "Oregon boot" was uncomfortable. RP (5/8/13) 88. Immediately thereafter, as the jury was entering the courtroom, Hindal had an outburst during which he informed the jury (among other things) that "[t]hey're going to send me to prison." RP (5/8/13) 89.

During the next recess, after the jury had been excused from the courtroom, Hindal again asked the trial court if he could be put in shackles rather than the "Oregon boot," and he stated that he wanted the jury to know that he was in jail:

> MR. HINDAL: Can you please get this thing off my leg and put the shackles back on? I've been uncomfortable the whole time. That's another lie, been in jail the whole time. Because I'm never going to get a chance to say it. It's something I've been wanting to tell them this for the last three days. And I do apologize for yelling at you, Your Honor, but really, you are pretty unfair.

RP (5/8/13) 119.

The next day, after the presentation of a video deposition of one witness and the testimony of another, Hindal's counsel moved for a mistrial, claiming that "the jury has been able to see Mr. Hindal's ankle bracelets for now a second day in a row."[3] RP (5/9/13) 50-51. The trial court asked what evidence counsel

[3] This claim is puzzling in light of the record, because Hindal did not request shackles in lieu of the "Oregon boot" until the end of the previous day.

had that the jury had actually seen the shackles, and counsel responded that her co-workers in the courtroom had seen them. RP (5/9/13) 51. The court then ruled as follows:

> THE COURT: Thank you. The record reflects that . . . before we brought the jury in, that Mr. Hindal refused to dress in civilian clothing, in fact at one point he came down in a smock and then later in jail clothes. The Court indicated to Mr. Hindal that it would be his choice as to whether to dress in civilian clothes, but it was in his interest to dress in civilian clothes when the jury was present, and the Court made special note of the fact that Mr. Hindal was dressed in jail sandals when he came down. He did thereafter dress in civilian clothes, except that he has apparently chosen to continue to wear jail sandals, so if the jury's been able to see his ankle bracelet, that would be a reason why. He's also made outbursts, despite the Court warning him that this . . . could be unfavorably received by the jury for him to make outbursts in court. He has made outbursts in court in the presence of at least [one] juror, and I think the entire jury, that he is in custody, that he's been in custody. So if they have seen the ankle bracelet, they haven't seen anything . . . other than what Mr. Hindal has chosen voluntarily to provide them by way of information. The court denies the motion for mistrial.

RP (5/9/13) 52.

The trial court's ruling was a proper exercise of discretion, and was based on tenable factual grounds. As the trial court correctly observed, Hindal was put back in shackles at his express request, and it was Hindal's decision to wear jail sandals that apparently made them visible. Hindal had also told the trial court

that he wanted the jury to know that he was in jail, he had outbursts in front of the jury, and he testified that he was in jail. *See* RP (5/9/13) 94-95. The trial court had already discussed with the jail officers before the trial began that security measures were necessary due to Hindal's custody classification and due to the location of the courtroom near an exit to the street. In sum, the trial court did not abuse its discretion in denying Hindal's counsel's motion for a mistrial based on restraints that Hindal himself had specifically requested.

In addition, the evidence of Hindal's guilt was overwhelming. It was undisputed at trial that when the deputies responded to the reported burglary in progress, they located Hindal crouching in a closet just inside the front door of the burglarized home. RP (5/7/13) 133-34. Next to Hindal in the closet were bags containing electronic equipment and packs of "Magic: The Gathering" game cards, all of which belonged to the homeowner. RP (5/8/13) 102-04. The homeowner did not keep those items in the closet where they were found next to Hindal. RP (5/8/13) 92-94. It was also undisputed that the sliding door at the rear of the home had been broken with a large rock. RP (5/7/13) 132. Hindal did not deny breaking into the house. Rather, he concocted a

preposterous story that he had met two "tweakers" on a Metro bus on his way to Safeway to buy diapers and formula for his daughter, and that he got off the bus with these two strangers to bum a cigarette and ended up following them for a mile before deciding to take a "power nap" in the house. RP (5/9/13) 76-82.

Based on this record, "the evidence against the defendant is so overwhelming that no rational conclusion other than guilt can be reached." Clark, 143 Wn.2d at 775-76. Therefore, any possible error is harmless, and the trial court may be affirmed on this basis as well.

2. THE STATE CONCEDES THAT REMAND IS NECESSARY DUE TO STATE V. LUCERO, WHICH HOLDS THAT AN AFFIRMATIVE AGREEMENT TO THE OFFENDER SCORE IS NOT AN AFFIRMATIVE AGREEMENT TO COMPARABILITY.

Hindal also claims that his case should be remanded because the State did not establish that his out-of-state convictions were comparable to Washington felonies. Brief of Appellant, at 11-15. The State concedes that remand is necessary in accordance with State v. Lucero, 168 Wn.2d 785, 230 P.3d 165 (2010).

In Lucero, the defendant agreed that his offender score was "at least six," and he "recited a standard sentencing range that was apparently based on the inclusion of a California burglary conviction in his offender score." Lucero, 168 Wn.2d at 787. On appeal, this Court agreed with the State that the defendant had waived any challenge to the inclusion of the out-of-state conviction in his offender score by agreeing to that score at sentencing. Id. However, the Washington Supreme Court held that a defendant who agrees to the offender score and standard range does not "'affirmatively acknowledge' that his [out-of-state] convictions were comparable to Washington crimes." Id. at 789. Thus, according to Lucero, a defendant who agrees to the State's calculation of his offender score and standard range does not waive his ability to appeal the trial court's failure to conduct a comparability analysis of out-of-state prior convictions. Id.

In this case, Hindal's criminal history includes several out-of-state convictions, including multiple burglaries, which were included in his offender score. CP 90-97, 121. At sentencing, Hindal's trial counsel affirmatively agreed with the prosecutor's representations that Hindal's offender score is 12 and that the applicable standard range is 63 to 84 months. RP (6/28/13) 2-3. However, Hindal's

counsel did not explicitly agree that Hindal's prior out-of-state convictions were comparable to Washington felonies. Therefore, Lucero requires a remand for either 1) a comparability determination, or 2) an explicit agreement from Hindal that his out-of-state convictions are comparable to Washington felonies.[4]

D. CONCLUSION

Hindal's case needs to be remanded for a comparability determination due to Lucero, but in all other respects, this Court should affirm.

DATED this 28th day of February, 2014.

Respectfully submitted,

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[4] Upon remand, if Hindal does not expressly agree to the comparability of his out-of-state convictions, the State may present additional evidence regarding Hindal's prior convictions in order to establish comparability. State v. Calhoun, 163 Wn. App. 153, 257 P.3d 693 (2011), rev. denied, 173 Wn.2d 1018 (2012).

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to Jennifer Winkler, the attorney for the appellant, at Nielsen Broman & Koch, P.L.L.C., 1908 E. Madison Street, Seattle, WA 98122, containing a copy of the Brief of Respondent, in STATE V. DAVID HINDAL, Cause No. 70701-9-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

02-28-14

Date

Done in Seattle, Washington