69732-3

69732-5

NO. 69732-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

VERNON MAURICE WALKER,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE DEAN LUM

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. After Vernon Walker entered a guilty plea to murder and assault charges, he appeared before a judge for sentencing wearing restraints. Is the constitutional due process standard relating to the use of visible restraints before a jury inapplicable to that sentencing hearing?

2. After Walker moved to appear without restraints at his sentencing hearing, the trial court considered evidence presented by the Department of Adult and Juvenile Detention (DAJD) regarding the safety risks presented by Walker, who had fled the country after the homicide, had then been convicted of an aggravated assault in Canada, resisted extradition for years, and had been involved in violence at the jail. Walker's only objection to the restraints was that they would be an indignity. The court concluded that use of restraints had been justified. Were the requirements of due process satisfied?

3. The trial court specifically and repeatedly stated that it was experienced on the bench, had seen many defendants with and without restraints, and that it was not affected by visible restraints being used. Is any error in permitting the use of restraints harmless?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

On June 30, 2003, the defendant, Vernon Walker, was charged with murder in the first degree of Darreion Roche and assault in the first degree of Quency Cummings-Williams,[1] both counts relating to a single incident on June 25, 2003. CP 1-10. After the crimes, Walker fled to Canada. CP 43; 4/30/12RP 13. There he committed a stabbing, and was tried and convicted of aggravated assault in 2005. CP 50, 179.

Walker fought extradition to face the charges at bar. 4/30/12RP 13; 12/11/12RP 86-87. As a result, it took almost eight years to bring him back to Washington to face these charges. 6/22/11RP 3-4; 12/11/12RP 86-87. As a result of evidentiary issues apparently caused at least partly by the passage of time, the State reduced the charges as part of a plea agreement with Walker. 4/30/12RP 20. Walker plead guilty to amended charges of murder in the second degree and assault in the second degree. Id. at 32.

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[1] This victim was identified in the original information as Quency Cummings (CP2), but later was consistently identified as Quency Cummings-Williams. CP 12 (amended information), CP 22 (guilty plea), CP 176 & 181 (Judgment & Sentence);

As part of the plea agreement, Walker agreed not to seek an exceptional sentence downward. CP 36; 12/11/12RP 86.

Based on Walker's offender score of six, the presumptive sentence range on murder in the second degree was 195 to 295 months of confinement, and on the assault, 33 to 43 months. CP 174. The trial court sentenced Walker to 270 months of confinement on the murder and 43 months on the assault, to run concurrently. CP 176; 12/11/12RP 102.

2. SUBSTANTIVE FACTS.

On June 25, 2003, Walker intentionally killed Darreion Roche by shooting him repeatedly. CP 5, 22. In his guilty plea statement, he admitted that "with intent to cause his death and without lawful reason, I caused the death of Darreion Roche." CP22. As to his guilty plea to assault, he admitted, "I intentionally assaulted Quency Cummings-Williams without lawful reason by shooting at him with a handgun." CP 22.

The essential facts were undisputed. The State referred to them without objection during the sentencing hearing, and the only defense expert who considered the facts of the offense (Dr. Natalie Novick Brown) relied on these facts in reaching her conclusions.

12/11/12RP 46-47, 58-61, 65-69, 83-84.[2] During a conversation with Roche, Walker became angry with Roche and left. Id. at 65-67, 83. Walker returned twenty minutes later and asked Roche to go into a secluded alley with Walker. Id. at 67-68, 83. Walker then pulled out a 9mm pistol and shot Roche multiple times. CP 3, 7; 12/11/12RP 83-84. Roche's death was caused by six gunshot wounds, including one in the back and one in the head. CP 3; 12/11/12RP 83-84.

Walker admitted to Dr. Novick Brown that he went into the alley with Roche and shot him to death, and that he shot at Roche's friend (Cummings-Williams). CP 58.

Dr. Novick Brown, the defense expert whose role was to review the facts of the crimes, concluded that it was very clear that Roche did not threaten Walker in any way. 12/11/12RP 46-47. She agreed that both witnesses to the shooting, Cummings-Williams and Walker's friend Goddona Waco, said Roche did nothing threatening. Id. at 65, 69. Waco said that Roche was standing with his hands at his side and looked scared. Id. at 69.

At sentencing, Walker proffered three expert witnesses in support of a sentence at the low end of the presumptive sentencing

[2] Walker objected to other specific facts asserted by the prosecutor, but did not contest any of the facts recited in the Substantive Facts section of this brief. See 12/11/12RP 87.

range. Dr. Paul Connor, a neuropsychologist, tested Walker and concluded that the results of those tests were consistent with a person with a Fetal Alcohol Spectrum Disorder (FASD), specifically Alcohol-Related Neurodevelopmental Disorder (ARND). CP 109; 12/11/12RP 24, 34. Dr. Richard Adler evaluated Walker and diagnosed him as having FASD, specifically Alcohol-Related Neurodevelopmental Disorder. CP 74; 11/30/12RP 20. Dr. Adler testified that FASD affects impulsivity. 11/30/12RP 26. Dr. Adler did not relate the diagnosis to the facts of these crimes – that was Dr. Novick Brown's role. Id. at 40-42.

The third defense expert, Dr. Novick Brown, a psychologist, determined that Walker's behavior across his life was consistent with FASD. 12/11/12RP 44. In her report, she noted that Walker is impaired in his ability "to control strong emotions and impulses," "to exercise good judgment," "to think through and balance the risks and rewards of potential courses of action," and "to conform his conduct to the requirements of the law." CP 58. She opined that these crimes and the Canadian aggravated assault in which Walker stabbed a man involved "impulsive over-reaction" that was consistent with these deficits. CP 58. Dr. Novick Brown testified

that Walker's thinking and behavior tends to fall apart in unfamiliar, stressful situations. 12/11/12RP 45.

3. MOTIONS REGARDING RESTRAINTS.

On April 30, 2012, Walker appeared in court to enter his guilty pleas in this case. As the hearing began, the defense attorney asked that Walker's handcuff s be removed for that hearing; he specified that he was not asking that the leg restraints be removed. 4/30/12RP 2, 4. After being summoned, an attorney for the Department of Adult and Juvenile Detention (DAJD) objected, asserting that there is no constitutional right to be unrestrained where there is no jury. Id. at 7-8. The DAJD attorney had not been given prior notice of the hearing, but had consulted with officials at the jail, who had informed her that Walker was in maximum security at the jail, that the jail had information that Walker is a gang member, that Walker had been collaborating with others in the jail to beat up other inmates, and that it had taken seven years to get Walker to Washington after his flight to Canada. Id. at 7-9. The prosecutor confirmed Walker's flight to Canada, his fighting extradition to Washington, and that it took more than seven years to get him to King County to face the charges. Id. at 13. The

prosecutor also noted that Walker was convicted of an aggravated assault in Canada that occurred after his flight there. Id. The defense attorney agreed that Walker had gotten into trouble at the jail in December. Id. at 15.

At that hearing, Judge Catherine Shaffer denied the motion to compel DAJD officers to unhandcuff Walker, citing the seriousness of the crimes, Walker's flight to Canada, the long battle to avoid returning to Washington, the assault in Canada, and the assault against another inmate in December 2011. 4/30/12RP 16-19. The judge emphasized that she was exercising her independent judgment in making that ruling. Id. at 16, 19.

Sentencing was scheduled for October 26, 2012, before Judge Dean Lum, but the parties appeared before the court that day with an agreed motion to continue the sentencing hearing to complete exchange of information concerning the defense experts. 10/26/12RP 2-3. Walker's assertion on appeal[3] that this was "the initial sentencing hearing" is misleading, because only the agreed motion to continue the sentencing hearing occurred that day. Id. at 2-9. Walker's assertion that at the October 26th hearing he moved

[3] App. Br. at 2.

to appear unshackled[4] also is inaccurate: the issue was mentioned only at the end of this hearing, after the sentencing date had been continued, when defense counsel stated "I'd like to note a motion to have [Walker] unshackled at sentencing." Id. at 9. The court responded that if counsel wished to do so, he should note the motion and notify counsel for DAJD. Id. at 9-10.

Apparently the motion was noted, because a hearing was held before Judge Lum on November 9, 2012, solely to address the issue of restraints. DAJD filed an objection to the motion, relying upon the crimes in this case, Walker's criminal history, his flight to Canada and aggravated assault conviction there, and his repeated misbehavior in the jail. CP 187-210. Walker's criminal history includes juvenile convictions of unlawful possession of a firearm, assault in the third degree, and obstructing law enforcement, in addition to the current crimes and the aggravated assault in Canada. CP 36, 37, 188. His misbehavior in jail included: his admission that he had been involved in fights while being held in Canada, which was confirmed by a Deputy Warden there; a fight with another inmate in the King County Jail in December 2011; a March 2012 infraction for removing his identification bracelet

[4] App. Br. at 2.

(tampering with a security device); another March 2012 infraction for refusing orders; being found attempting to obtain commissary in the name of other inmates in October 2012; threatening behavior toward other inmates in his housing area; and documented history with a criminal street gang. CP 188-90. The factual basis for the objection was supported by a sworn declaration of Major Corinna Hyatt, the Facility Major for the King County Jail. CP 211-21. The jail memorandum described the restraint options available to the court in some detail. CP 195-97. The court heard argument of the parties at the hearing. 11/9/12RP 2-9.

The court concluded that it had the authority to decide what restraints would be used in its courtroom. 11/9/12RP 10. The court also noted that it is wise to take into account the information available to DAJD and the opinion of DAJD as to the security measures that are appropriate. Id. The court stated that it was not prejudiced by viewing a defendant in restraints or in jail uniform, as the court had extensive experience in criminal cases, and regularly saw defendants in a variety of restraints and uniforms. Id. at 11. The court stated that the use of restraints had no bearing on his decisions. Id. The court was not persuaded that there is a constitutional right not to appear in restraints at a non-jury

sentencing. Id. In the alternative, the court concluded that there was ample reason for the use of restraints advocated by DAJD. Id. at 11-12.

The sentencing hearing began on November 30, 2012. At the beginning of this hearing and of the continuation of the hearing on December 11, 2012, the defense attorney renewed his motion that Walker be unrestrained. 11/30/12RP 3; 12/11/12RP 11. The court denied both motions. 11/30/12RP 3; 12/11/12RP 11.

C. ARGUMENT

1. THE CONSTITUTIONAL DUE PROCESS STANDARD FOR THE USE OF VISIBLE RESTRAINTS BEFORE A JURY DOES NOT APPLY TO A JUDICIAL SENTENCING.

Walker argues that a criminal defendant has the constitutional right to appear before the court without restraints at every court hearing. This claim is without merit. While there is a strong presumption that visible restraints are impermissible during proceedings before a jury, Walker cites no case that has extended that principle to every court hearing, or even to the kind of judicial sentencing hearing at issue here. Expansion of the presumption against restraints to judicial sentencing hearings is unwarranted.

a. Due Process Limits The Use Of Restraints That Are Visible to a Jury.

American courts have traditionally followed the ancient English rule that forbids the routine use of visible shackles during the guilt phase of jury trials. Deck v. Missouri, 544 U.S. 622, 626, 125 S. Ct. 2007, 161 L. Ed. 2d 953 (2005). That rule "was meant to protect defendants appearing at trial before a jury." Id. The rule embodies notions of fundamental fairness. Id. at 627.

In Deck v. Missouri, the United States Supreme Court concluded that this principle is a basic element of due process of law under the Fifth and Fourteenth Amendments. U.S. Const. amend. V, XIV; Deck, 544 U.S. at 629. The use of physical restraints visible to the jury is prohibited absent a trial court determination, in the exercise of discretion, that they are justified by a state interest based on the particular trial, considering potential security problems and the risk of escape. Deck, 544 U.S. at 629.

The Court in Deck held that the same constitutional rule applies during the punishment phase of a capital case tried before a jury. Id. at 632-33. That holding was premised on the conclusion

that the policies that motivate the modern rule[5] apply with equal force to a capital penalty proceeding before a jury. Id. at 630-32. Three policies were identified: (1) "visible shackling undermines the presumption of innocence and the related fairness of the factfinding process;" (2) physical restraints can interfere with communication with counsel or the ability to participate in the defense; (3) the use of shackles in the presence of juries would undermine the symbolic objectives of maintaining the formal dignity and gravity of the judicial process. Id. at 630-31. The Court concluded that although the presumption of innocence no longer applies, the decision to impose death is no less important and accuracy in making that decision is no less critical. Id. at 632-33.

The Washington Supreme Court also recognizes that the general prohibition on restraints before a jury is premised on the due process right to a fair trial, in recognition that the use of physical restraints on the defendant will prejudice the jury. In re Pers. Restraint of Davis, 152 Wn.2d 647, 693-94, 101 P.3d 1 (2004)(also notes that the due process rule protects other trial

[5] The Court observed that judicial hostility to shackling may once primarily have reflected concern for the physical suffering caused by painful chains, but that more recent cases do not stress that concern because not all modern restraints are painful. Deck, 544 U.S. at 630.

rights, including the right to testify and the right to confer with counsel).

b. Due Process Does Not Require A Presumption That Restraints Are Inappropriate For Sentencing Hearings Before A Judge.

The policies that motivate the prohibition on routine visible restraints of defendants before juries generally do not apply in sentencing hearings before a judge, so extension of that rule is not required by constitutional due process principles. The high courts of the United States and of this state have adopted a general prohibition on restraints that are visible to juries based on their concern for the prejudicial effect of visible restraints on juries considering critical issues of guilt or innocence, and life or death. That concern does not apply at a judicial sentencing.

The Supreme Court in Deck repeatedly described the existing rule as applicable to "visible" restraints. Deck, supra, 544 U.S. at 626 ("the law has long forbidden routine use of visible shackles during the guilt phase" of trial), 628 (the consensus of courts is that the right to be free of "restraints that are visible to the jury" is of constitutional dimension), 629 (due process prohibits use of "physical restraints visible to the jury" at the guilt phase). Two of

the three policies cited as bases for the rule were related specifically to jurors viewing the restraints. Id. at 630 ("Visible shackling undermines the presumption of innocence"), 631 ("routine use of shackles in the present of juries would undermine" the seriousness of the process). The Court summarized the rule as applying to "use of visible restraints." Id. at 632.

The Court's discussion of extension of the rule to death penalty proceedings before a jury also refers to the rule as applying to "visible shackles." Id. at 632, 633. Finally, in discussing the presumption of prejudice that results from a violation, the Court describes the violation as ordering the defendant to wear "shackles that will be seen by the jury." Id. at 635.

The Supreme Court in Deck noted that the general rule prohibiting physical restraints historically did not apply at arraignment or other proceedings before the judge. Id. at 626. The rule was meant to protect defendants appearing at trial before a jury. Id.

The Second Circuit Court has rejected Walker's argument that the rule prohibiting routine shackling should be extended to a judicial sentencing. United States v. Zuber, 118 F.3d 101, 102 (2nd Cir. 1997). The court observed that juror bias is the paramount

concern underlying that rule. Id. at 103-04. The court stated that "It has never been suggested – and it is not the rule – that every time a person in custody is brought into a courtroom in restraints, a hearing on the record with counsel is required, much less an evidentiary hearing and factfinding by the district judge." Id. at 104.

Two state appellate courts also have rejected the argument that physical restraints are inherently prejudicial at a judicial sentencing. State v. Keck, 111 Hawai'I 457, 142 P.3d 1286, 1288-89 (Haw. App. 2006) (shackling before sentencing judge not inherently prejudicial); State v. Russ, 289 Wis.2d 65, 709 N.W.2d 483, 486-87 (Wis. App. 2005) (hearing-impaired defendant failed to establish that he was unable to communicate effectively with counsel during plea and sentencing hearing because of shackles). These appear to be the only state appellate courts that have addressed use of restraints at judicial sentencing hearings

The Ninth Circuit Court has rejected Walker's argument that the rule prohibiting routine shackling should be extended to every hearing. United States v. Howard, 480 F.3d 1005 (9th Cir. 2007). It concluded that a California federal district court policy allowing routine shackling of defendants at their initial appearance before a judge does not violate due process. Id. at 1013-14. The court

observed that the primary concern underlying the rule applicable to jury trials, as identified in Deck, is the effect on the jury of viewing the defendant in shackles. Id. at 1012. The court stated that fear of prejudice is not an issue in a hearing before a judge. Id.

Many courts have concluded that even if there was a violation of the rule requiring a judicial determination of need before restraints were ordered for a jury trial, the error was harmless because the restraints were not visible to the jury. E.g., Ochoa v. Workman, 669 F.3d 1130, 1145-46 (10th Cir. 2012); Cole v. Roper, 623 F.3d 1183, 1193 (8th Cir. 2010); United States v. Cooper, 591 F.3d 582, 588 (7th Cir. 2010)(shackling also did not impede access to lawyer who sat next to defendant); United States v. Mejia, 559 F.3d 1113, 1117 (9th Cir. 2009)(no prejudice to right to fair trial unless jury saw restraints); State v. Hutchinson, 135 Wn.2d 863, 888, 959 P.2d 1061 (1998); State v. Jennings, 111 Wn. App. 54, 61, 44 P.3d 1 (2002). That analysis indicates that the inherently prejudicial aspect of restraints is the jury's view of those restraints. Where there is no jury, there is no violation of due process.

When there is no jury, there is no inherent prejudice in the use of restraints. Appellate courts presume that a trial judge does not consider inadmissible evidence in rendering a verdict at a

bench trial. State v. Read, 147 Wn.2d 238, 244, 53 P.3d 26 (2002). Judges are asked to exclude probative evidence on grounds that it is unfairly prejudicial, and are presumed to eliminate consideration of that evidence if it is excluded. Id. at 245. The United States Supreme Court has noted that in bench trials, judges "routinely hear inadmissible evidence that they are presumed to ignore when making decisions." Harris v. Rivera, 454 U.S. 339, 346, 102 S. Ct. 460, 70 L. Ed. 2d 530 (1981). A judge is presumed to exclude consideration of even a confession that was obtained without advice of constitutional rights. State v. Jefferson, 74 Wn.2d 787, 792, 446 P.2d 971 (1968). Trial judges are presumed to be able to set aside the improper inflammatory effect of evidence that is admitted in a bench trial. In re Pers. Restraint of Harbert, 85 Wn.2d 719, 729, 538 P.2d 1212 (1975). Based on this well-established principle, judges are presumed to be able to remove from their consideration any improper prejudice that might result from seeing a defendant in restraints.

Walker argues that a defendant has a constitutionally protected right to appear at every court hearing unrestrained unless the trial court finds there is a manifest need for the restraint. App. Brief at 10. As explained above, the federal due process right

recognized in Deck does not apply to hearings before a judge. The due process clause of the Washington Constitution does not afford broader protection than that of the Fourteenth Amendment. State v. McCormick, 166 Wn.2d 689, 699, 213 P.3d 32 (2009).

Walker suggests that two Washington cases compel extension of the rule to all hearings, but both cases involved proceedings before a jury and neither addressed any broader application of the rule. See State v. Hartzog, 96 Wn.2d 383, 635 P.2d 694 (1981)(trial court improperly ordered visible restraints be used during jury trial); State v. Williams, 18 Wash. 47, 50 P. 580 (1897)(right to fair trial was impaired when defendant and his witness appeared in visible restraints during jury trial). The general prohibition on restraints before a jury is premised on the right to a fair trial, in recognition that restraints will prejudice the jury; courts often note that restraints also may affect a variety of other trial rights. Davis, 152 Wn.2d at 693-94 (the rule, based on due process, protects other rights, including the right to testify and the right to confer with counsel); State v. Elmore, 139 Wn.2d 250, 273, 985 P.2d 289 (1999)(only presumption of innocence cited); State v. Thompson, 169 Wn. App. 436, 470, 290 P.3d 996 (2012)(premised on right to fair trial).

The objection that Walker raised in the trial court was that he believed that restraints impair the dignity of defendants, could cause emotional discomfort for the defendant, and affects courtroom decorum. 4/30/12RP 5; 11/9/12RP 5-6. Walker did not allege that his ability to confer with counsel was impaired; he did not make that claim in opposing the use of restraints or during the course of the sentencing hearing. To the extent that he now alleges that his right to counsel was impaired by his restraints, that issue should not be considered for the first time on appeal. RAP 2.5(a)(3). Consideration of such a claim would be impossible on the record presented to this Court, as the specific limitations of the restraints used and the location of Walker with respect to counsel are not part of the record.

Further, according to the DAJD brief, the restraints it intended to use allowed the defendant to easily sign documents. CP 195-96. There is no suggestion anywhere in the record that there was any impediment to Walker speaking with his counsel. While it is possible that in unusual circumstances the right to counsel would be impaired by restraints at sentencing, that issue may be addressed without extending the general prohibition on restraints at trial to every sentencing hearing.

Walker asks this Court to extend the rationale applied in Illinois and California cases to conclude that the prohibition on restraints visible to a jury should be extended to all court hearings. These decisions have no precedential value in this State. State v. Wadsworth, 139 Wn.2d 724, 740, 991 P.2d 80 (2000). Moreover, neither state has adopted the broad rule proposed by Walker, nor have those courts suggested that federal due process requires such a rule.

Walker first cites People v. Boose, 66 Ill.2d 261, 362 N.E.2d 303 (1977), as authority for extending the general prohibition on restraints to all hearings without a jury. However, the competency hearing at issue in that case did occur before a jury. Boose, 362 N.E.2d at 264-65. Soon after Boose the Illinois Supreme Court did hold that restraints should not be used in juvenile delinquency adjudications absent justifications of safety, maintaining order, or to prevent escape. In re Staley, 67 Ill.2d 33, 364 N.E.2d 72 (1977). But, as the Seventh Circuit Court has observed, "nothing in the Staley decision suggests that the rule against physical restraints amounts to a constitutional error." Ashford v. Gilmore, 167 F.3d 1130, 1136 n.2 (7th Cir. 1999). The Illinois Supreme Court in 2010 adopted a court rule providing that the general rule against

restraints without judicial findings of need is "limited to trial proceedings in which the defendant's innocence or guilt is to be determined, and does not apply to bond hearings or other instances where the defendant may be required to appear before the court prior to a trial being commenced." Ill. S. Ct. Rule 430. Thus, that court has not concluded that the general prohibition against restraint is a constitutional requirement for all court hearings, as it has specified that the rule should not be so broadly applied.

Walker cites People v. Fierro, 1 Cal.4th 173, 821 P.2d 1302 (1991), as authority for extending the general prohibition on restraints to all hearings without a jury, noting that case applied the rule to a preliminary hearing. However, the California court's decision was based in part on California's codification of the general rule, applicable to all proceedings before conviction. Fierro, 821 P.2d at 1321 (citing Cal. Penal Code §688, enacted 1872). The court held that a limitation on the use of restraints should apply at the preliminary hearing at issue in Fierro, but held that the dangers of unfair shackling at a preliminary hearing are less substantial than during trial, so a lesser showing is required to justify restraints. Fierro, 821 P.2d at 1322. The court held that reversal is required only if the defendant can show he suffered

prejudice as a result of the irregularity. Id. The court held that the error was harmless in that case, even though a witness identified the defendant as the assailant at the preliminary hearing. Id.

The later California case, Tiffany A. v. Superior Court, 150 Cal. App. 4th 1344, 59 Cal. Rptr. 3d 363 (Cal. App. 2007), which extended the rule of Fierro to juvenile bench trials, also does not support Walker's position. The court in Tiffany A. specified that its holding was based on California law, noting that it was not bound by the contrary rulings of the Second Circuit (in Zuber, supra) and the Ninth Circuit (in Howard, supra). Tiffany A., 150 Cal. App. 4th at 1359-60. Moreover, the court repeated the holding of Fierro that a lesser showing is required to justify the use of restraints in a non-jury proceeding, although an individual determination is required. Id. at 1356-57.

The principles of due process applied by the federal courts and the courts of this state do not require a general prohibition on the use of restraints at judicial sentencing hearings. If there are extraordinary circumstances in a particular case, a defendant can move for removal of the shackles and establish that the restraints that will be used will impair the ability to confer with counsel or

cause other specific prejudice. See Howard, 480 F.3d at 1014. Walker established no prejudice here.

c. Walker's Right To Due Process Was Not Violated When He Appeared At Judicial Sentencing Hearings In Restraints.

Because the use of physical restraints for a judicial sentencing proceeding is not inherently prejudicial, it is not a violation of due process unless the defendant identifies actual prejudice. Holbrook v. Flynn, 475 U.S. 560, 572, 106 S. Ct. 1340, 89 L. Ed. 2d 525 (1986). Walker has not done so here.

Walker did not allege below that his right to counsel was impaired in any way by the physical restraints used. The hearing regarding the use of restraints at sentencing occurred after the hearing at which Walker entered his guilty pleas. Judge Shaffer had held a hearing regarding restraints before the guilty plea colloquy and determined that restraints were appropriate. 4/30/12RP 16-19. Walker participated in the guilty plea colloquy apparently without difficulty. Id. at 21-32. In the later hearing before Judge Lum regarding use of restraints, Walker did not assert that his ability to confer with counsel or to participate in the guilty plea hearing had been affected by the restraints.

Walker did not allege below that his ability to testify or to allocute at sentencing would be impaired by the physical restraints used. Walker did not testify concerning his alleged mental impairment at the sentencing hearing but he did allocute, apparently without difficulty. 12/11/12RP 94-95.

Walker did not contest the assertion by the attorney for DAJD that there was no evidence that he was in any pain because of the restraints. 11/9/12RP 7-9.

Walker's only claim of prejudice in the trial court was that the use of handcuffs would degrade him in the eyes of the judge.[6] 11/9/12RP 5-6. The judge, however, stated that he would not be affected "in any way whatsoever" by the defendant being in physical restraints. Id. at 11. Judges are presumed to eliminate consideration of inflammatory evidence if that evidence is excluded. Read, 147 Wn.2d at 245; accord Harris v. Rivera, 454 U.S. at 346. There is no reason not to credit the judge's assertion in this case that he would not be affected by the restraints.

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[6] Walker did protest to the trial court that the recitation of violent behavior that DAJD presented to the court to justify the use of restraints was prejudicial. 11/9/12RP 8-9. However, it was Walker's own motion to prohibit the restraints that forced DAJD to present that information to the court, as the court noted. 11/9/12RP 12. This objection is not a function of the restraints but of the defense motion.

Walker does not claim on appeal that his ability to confer with counsel, to participate in his defense, or to testify or allocute was impaired. The only claim of prejudice that Walker raises on appeal appears in his discussion of harmless error, in which he asserts that the trial court was affected by DAJD's recitation of Walker's misbehavior in the jail. That claim will be addressed in Section C(3) of this brief. It is not a claim that prejudice was caused by the use of restraints, so it does not implicate due process.

2. IF THERE IS A PRESUMPTION THAT RESTRAINTS ARE INAPPROPRIATE AT A JUDICIAL SENTENCING, THE TRIAL COURT PROPERLY CONCLUDED RESTRAINTS WERE JUSTIFIED IN THIS CASE.

Walker asserts that the trial court did not exercise its discretion in this case because it relied upon information in the DAJD declaration supporting the use of restraints on Walker. This analysis is flawed. If an individualized decision as to restraints is required for a judicial sentencing, the trial court is not permitted to simply defer to the judgment of the security staff that restraints are required, but there is no reason it cannot rely on information provided by that security service in making its own decision.

Certainly the defendant's behavior in custody is a critical indicator of the risks he or she might pose if unrestrained in court.

If an individualized decision as to the use of restraints is required, the trial court's decision is reviewed for abuse of discretion. United States v. Van Sach, 458 F.3d 694, 699 (7th Cir. 2006); State v. Dye, __ Wn.2d __, 309 P.3d 1192, 1196 (2013) (citing State v. Finch, 137 Wn.2d 792, 852, 975 P.2d 967 (1999); Hartzog, 96 Wn.2d at 383). An abuse of discretion will be found only if no reasonable judge would have reached the same conclusion. State v. Pete, 152 Wn.2d 546, 552, 98 P.3d 803 (2004).

If a trial court is determining whether to allow the use of restraints that will be visible to a jury, the court must determine that the restraints are justified by an essential state interest specific to a particular trial, such as physical security, preventing escape, or courtroom decorum. Deck v. Missouri, 544 U.S. 622, 628-29, 125 S. Ct. 2007, 161 L. Ed. 2d 953 (2005). The Washington Supreme Court cited a list of factors to be considered by the trial court before ordering visible shackling in a jury trial in State v. Hartzog,[7] which Walker cites as the standard to be applied in Washington. App. Br.

[7] 96 Wn.2d at 400.

at 10-11. However, the Court appears to have abandoned that list as unhelpful, focusing instead on potential risks that the defendant will attempt escape, may injure others in the courtroom, or will not behave in an orderly manner. Finch, 137 Wn.2d at 848-50.

If this Court concludes that the general prohibition on use of restraints extends to judicial sentencings, a lesser standard should be sufficient to justify those restraints because the danger of prejudice is minimal. In Fierro, the court held that the dangers of unfair shackling at a preliminary hearing are less substantial than during trial, so a lesser showing is required to justify restraints. People v. Fierro, 1 Cal.4th 173, 821 P.2d 1302, 1322 (1991). The same lesser standard later was applied to consideration of the use of restraints at a juvenile bench trial. Tiffany A. v. Superior Court, 150 Cal. App. 4th 1344, 1356-57, 59 Cal. Rptr. 3d 363 (Cal. App. 2007).

The trial court in this case was not convinced that there is an independent constitutional right to be free of restraints at a judicial sentencing in Washington. 12/11/12RP 11. Nevertheless, the court found that if a justification for restraints is required, there was "ample reason" for DAJD to take the security precautions it had

taken based on information provided by DAJD and the State. Id. at 11-12. The court did not abdicate or abuse its discretion.[8]

When the hearing as to restraints occurred, Walker already had been convicted of murder and felony assault in the current case. He had fled the country after the murder, to Canada. 12/11/12RP 84. In Canada, Walker committed and was convicted of an aggravated assault. CP 37, 179; 12/11/12RP 84. He fought extradition, resulting in a delay of more than seven years in bringing him before the courts of Washington to face these charges. CP 211; 12/11/12RP 84, 87. A reasonable judge could conclude that these facts established a greater than typical risk of escape, and Walker's continued dangerousness.

The sworn declaration from DAJD recited Walker's criminal history, including convictions for an additional felony assault in the third degree, unlawful possession of a firearm, and obstructing law enforcement. CP 212. This information was not contested – Walker agreed that this criminal history was accurate in his plea agreement with the State in April. CP 36, 37; 4/30/12RP 32.

The sworn declaration from DAJD also described misbehavior by Walker while in custody, including his admission

[8] Walker's argument that the trial court must have abdicated its discretion because the DAJD brief argued that it should do so is contradicted by the trial court's findings.

that he had been involved in fights while being held in Canada, which was confirmed by a Deputy Warden there; a fight with another inmate in the King County Jail in December 2011; a March 2012 infraction for removing his identification bracelet (tampering with a security device); a March 2012 infraction for refusing orders; being found attempting to obtain commissary in the name of other inmates in October 2012; threatening behavior toward other inmates in his housing area; and documented history with a criminal street gang.[9] CP 212-14. Walker did not contradict these facts, except to argue that there was no proof.[10] 11/9/30RP 3. The judge had no reason to believe that this information from DAJD, most of it based on behavior directly observed by DAJD employees, was unreliable. A reasonable judge could conclude that these facts established that Walker presented an unusual risk of defying authority and of engaging in assaultive behavior.

The risk of escape and the risk of violence presented by Walker satisfy even the higher standard applicable to the use of

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[9] Specific evidence that Walker was affiliated with a gang (verification by his girlfriend and a reported statement by deceased victim Roche the night of his death, reported by Cummings-Williams) was referenced by the prosecutor in arguing that it was a relevant topic for cross-examination as to Walker's sensitivity to being treated with lack of respect, a likely motive for the murder. 11/30/12RP 48-50; 12/11/12RP 5-7.

[10] During his allocution at the sentencing hearing, Walker admitted that he had been involved in fights at the jail. 12/11/12RP 95. He said that is hard to avoid when he is around people who dislike him. Id.

visible shackles in a jury trial: restraints were justified by two essential state interests based on Walker's personal history of violence and flight – physical security and preventing escape. Thus, the trial court's conclusion that the use of restraints was warranted was a proper exercise of discretion.

The trial judge rejected the argument that restraints can be justified only if a defendant already has misbehaved in the courtroom. 11/11/12RP 11-12. Walker cites no case that adopts such a rule, although where trial courts have permitted visible shackling before a jury, an inherently prejudicial situation, defendants usually have disrupted the courtroom previously. E.g., Thompson, 169 Wn. App. at 470-71. A trial court need not be able to predict courtroom misbehavior with certainty before allowing reasonable security precautions at a hearing before a judge, given the lack of inherent prejudice when a jury is not involved.

3. IF THERE WAS ANY ERROR IN PERMITTING THE USE OF RESTRAINTS, IT WAS HARMLESS.

If the trial court erred in allowing the use of restraints at the sentencing hearings in this case, that error was harmless.

Under the standards applicable to the use of restraints that are visible to a jury, there is inherent prejudice if the trial court erred in permitting restraints, but the error is not reversible if the State establishes beyond a reasonable doubt that the error did not contribute to the verdict. Deck v. Missouri, 544 U.S. at 635. If the situation does not involve inherent prejudice, reversal is appropriate only if the defendant establishes actual prejudice. Holbrook v. Flynn, 475 U.S. 560, 572, 106 S. Ct. 1340, 89 L. Ed. 2d 525 (1986). Because the use of physical restraints for a judicial sentencing proceeding is not inherently prejudicial, it is not a violation of due process unless the defendant identifies actual prejudice. People v. Hernandez, 51 Cal.4th 733, 247 P.3d 167, 176 (2011)(citing Flynn, 475 U.S. at 572)(applying actual prejudice standard when security officer was posted behind defendant while he testified in jury trial). Walker has not identified actual prejudice related to the use of restraints at sentencing.

The requirement of a showing of actual prejudice in this situation is consistent with the standards of review traditionally applied to decisions made in a bench trial. Judges regularly are asked to exclude probative evidence on grounds that it is unfairly prejudicial, and are presumed to eliminate consideration of that

evidence if it is excluded. State v. Read, 147 Wn.2d 238, 245, 53 P.3d 26 (2002); accord Harris v. Rivera, 454 U.S. 339, 346, 102 S. Ct. 460, 70 L. Ed. 2d 530 (1981). The presumption can be rebutted if a defendant shows that the remaining evidence is insufficient to support the verdict or that "the trial court relied on the inadmissible evidence to make essential findings it otherwise would not have made." Read, 147 Wn.2d at 245-46.

Walker's only claim of prejudice is that the trial court was affected by DAJD's recitation of Walker's misbehavior in the jail. This is not a claim that prejudice was caused by the use of restraints, so it does not implicate a due process right to be free of restraints.

Moreover, the evidence of prejudice cited by Walker is the trial court's reference to indications of impulsivity in the DAJD records. App. Br. at 13-14 (citing 12/11/12RP at 97-98, 100-01). Far from being an indication of prejudice to Walker, Walker's own experts repeatedly characterized impulsivity as a feature of his FASD. Dr. Adler testified that FASD affects impulsivity. 11/30/12RP 26. In Dr. Novick Brown's report,[11] she noted that

[11] The report was attached to the defense sentencing memorandum and was admitted as Exhibit 6 at sentencing. CP 56-61; 11/30/12RP 3. The court reviewed all three defense expert reports before sentencing. 12/11/12RP 13, 16.

Walker is impaired in his ability "to control strong emotions and impulses," "to exercise good judgment," "to think through and balance the risks and rewards of potential courses of action," and "to conform his conduct to the requirements of the law." CP 58. She opined that these crimes and the Canadian aggravated assault in which Walker stabbed a man involved "impulsive over-reaction" that was consistent with these deficits. CP 58. Defense counsel at sentencing also characterized the murder as an impulsive crime. 12/11/12RP 87-88. Consideration of Walker's impulsivity as a cause of this murder was the defense theory at sentencing; the court's reference to impulsivity as a reason the jail had safety concerns supports that theory, it does not establish prejudice.

The trial court stated that seeing restraints on a defendant has no effect on the court at all. 11/9/12RP 11; 11/30/12RP 97. The court explained that it is very experienced, has seen many defendants in various jail uniforms and restraints, and considers these appearances totally irrelevant to its sentencing decision. 11/9/12RP 11. There is no evidence that the court was affected by these factors, as the sentence it imposed was two years less than the sentence recommended by the State. 12/11/RP 86, 102.

D. CONCLUSION

For the foregoing reasons, the State respectfully asks this Court to affirm Walker's sentences.

DATED this 25th day of November, 2013.

Respectfully submitted,

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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 Thomas M. Kummerow, the attorney for the appellant, at Washington Appellate Project, 701 Melbourne Tower, 1511 Third Avenue, Seattle, WA 98101, containing a copy of the Brief Of Respondent, in STATE V. VERNON MAURICE WALKER, Cause No. 69732-3 -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.

Dated this 25th day of November, 2013.

Name
Done in Seattle, Washington