

NO. 36101-9

SEP 11 2006
COURT OF APPEALS
DIVISION II
STATE OF WASHINGTON
JW

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

RONNIE ARCHIBALD, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable John R. Hickman

No. 06-1-00477-1

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court's offer to instruct the jury cure any potential prejudice stemming from a witness' nonresponsive reference to the fact that defendant was in jail?
2. Did the trial court properly exercise its discretion in allowing a security officer to be present in the courtroom when it took precautions to avoid alerting jurors to the officer's presence and the presence of the officer itself is not inherently prejudicial?

B. STATEMENT OF THE CASE.

1. Procedure
 - a. General Procedure

On January 30, 2006, the Pierce County Prosecuting Attorney's Office filed an information charging appellant, RONNIE JOSEPH ARCHIBALD, hereinafter "defendant", with three counts of rape in the

first degree, and one count of assault in the second degree. CP¹ 1-4. An amended information was filed on November 14, 2006. CP 6-8.

A hearing for defendant's 3.5 motion was held on January 4, 2007. 1RP 26-52. The court granted defendant's motion as it related to defendant's statements to Detective Knutson. CP 235-39.

A jury trial commenced on January 9, 2007, before the Honorable John R. Hickman. 3RP 103. At the conclusion of trial, the jury found defendant guilty of two counts of rape in the second degree and one count of assault in the third degree. CP 188-197, 220-34. Defendant filed a timely appeal. CP 240.

b. Facts Pertaining to Envelope Testimony

At trial, S.W. testified that she later received a letter from defendant. 4RP 178. The state moved to admit the letter, but not the envelope it was delivered in. 4RP 187. The court ruled the letter admissible, and admitted it as Exhibit 1. 4RP 191. The court granted

¹ CP refers to the Clerk's Papers.

1RP refers to the verbatim report of proceedings that occurred on January 4, 2007.

2RP refers to the verbatim report of proceedings that occurred on January 8, 2007.

3RP refers to the verbatim report of proceedings that occurred on January 9, 2007.

4RP refers to the verbatim report of proceedings that occurred on January 16, 2007.

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6RP refers to the verbatim report of proceedings that occurred on January 18, 2007.

7RP refers to the verbatim report of proceedings that occurred on January 22, 2007.

8RP refers to the verbatim report of proceedings that occurred on January 23, 2007.

9RP refers to the verbatim report of proceedings that occurred on January 24, 2007.

10RP refers to the verbatim report of proceedings that occurred on February 23, 2007.

11RP refers to the verbatim report of proceedings that occurred on March 23, 2007.

defense counsel's request for a limitation on references to the envelope, as it bore a Pierce County Jail return address. 5RP 200.

During S.W.'s testimony, the State asked her why she believed the letter was from defendant. 5RP 202. S.W. answered, "Because it came from the prison or jail—whatever it's called—." 5RP 202. Defense counsel requested a sidebar, at which he moved for a mistrial. 5RP 202, 237-38. Outside the presence of the jury, defense counsel placed his motion for a mistrial on the record. 5RP 238. Defense counsel also expressly stated that he did not wish the jury to be instructed to disregard S.W.'s statement, as he did not want to draw further attention to it. 5RP 239. The State indicated that the court could instruct the jury to disregard S.W.'s statement in order to remedy any prejudice. 5RP 239. The court denied defendant's motion for a mistrial on the basis that because a remedy in the form of a jury instruction was available to defendant, a mistrial was not warranted. 5RP 240-41.

c. Facts Pertaining to Courtroom Security

Further into trial, the court informed the parties outside the presence of the jury that it had been notified that the courtroom security officer would need to reposition himself closer to the witness box if defendant decided to testify. 6RP 330. The court expressed concern over giving negative appearances of defendant being a security risk to the jury. 6RP 330. The security officer stated that he would need to move either near the jury box, or "by the swinging gate by Juror Seat No. 1." 6RP

330. The security officer notified the court that he would need to move at the same time as defendant. 6RP 330.

Defense counsel stated that he did not wish to have the officer move at the same time as defendant, but conceded that he would be willing to have the officer posted in a chair near the swinging gate. 6RP 331. The court, expressing deference to the jail and security staff, allowed the officer to sit near the swinging gate and ruled that defendant and the security officer would move on and off the stand out of the presence of the jury in order to avoid “any appearance of security issues”. 6RP 332.

Prior to defendant’s testimony, the court allowed defendant to move to the witness stand, and the security officer to move near the swinging gate. 7RP 458. While on the stand, defendant admitted to assaulting S.W. 7RP 460. Upon conclusion of defendant’s testimony, the court excused the jury stating that it needed to review jury instructions. 7RP 468. Defendant was returned to his seat outside the presence of the jury. 7RP 468.

2. Facts

On January 28, 2006, S.W. returned to her home in Spanaway, Washington with defendant, whom she had been dating since October, 2005. 4RP 138-41. They arrived at approximately 2:30 in the morning. 4RP 138-41. The two had spent the evening out at Grandy’s, a restaurant and bar. 4RP 140. S.W.’s grandmother, who lived in the duplex next door to hers, had taken her children for the evening. 4RP 140. After

arriving home, S.W. began to ready herself for bed and then entered her garage to smoke a cigarette. 4RP 142.

When S.W. re-entered her home, defendant grabbed hold of her pony tail and told her that she would start doing what he told her to. 4RP 144. Over the course of the next several hours, defendant raped her vaginally, orally, and anally. 4RP 146, 156-57, 159. Defendant also placed his arm across her throat and choked her four or five times until she began to lose consciousness. 4RP 148-49. Defendant struck her across the face several times, whipped her repeatedly on her buttocks and thighs with his belt, forced her face into a plate filled with a substance he told her was cocaine, and drug her across her apartment by her hair. 4RP 145-46, 151-52, 154, 156.

An investigation revealed a pair of discarded men's boxer brief underwear, a pair of black pants with the women's underwear still wrapped up in the pants, plastic bags of the type used to store drugs, and other items of discarded clothing in S.W.'s home. 6RP 411, 413.

S.W. was finally able to leave the apartment after defendant fell asleep at approximately 5:30 in the morning. 4RP 161. S.W. called her grandmother, and drove herself to her friend's home. 4RP 162. S.W. arrived at her friend's home crying and refusing to allow herself to be touched. 6RP 256. Her friend was eventually able to convince S.W. to go to the hospital. 4RP 162.

S.W. was examined at the hospital by Mary-Anne Murray, a sexual assault nurse examiner. 6RP 341, 367. S.W. was interviewed by Ms. Murray and gave a statement. 6RP 369. Ms. Murray examined S.W. and discovered several lacerations and contusions on her body, as well as a waffle-like pattern of contusions on S.W.'s left buttocks. 6RP 369, 372. S.W. had a swollen neck, and Ms. Murray found redness and swelling on the walls of S.W.'s vagina. 6RP 373.

C. ARGUMENT.

1. ANY PREJUDICE STEMMING FROM A WITNESS' NONRESPONSIVE REFERENCE TO THE FACT THAT DEFENDANT WAS IN JAIL WAS CURED BY THE TRIAL COURT'S OFFER TO INSTRUCT THE JURY.

When a witness makes an inadvertent remark that the jury is instructed to disregard, a new trial is not required unless the court finds that the remark, when viewed against the backdrop of all the evidence, so tainted the entire proceedings that the accused did not have a fair trial. State v. Johnson, 60 Wn.2d 21, 27-30, 371 P.2d 611 (1962). The court emphasized that not every inadvertent or nonresponsive answer will provide a basis for a new trial because such a rule would become burdensome to the administration of justice and would impeach the intelligence of the jury by assuming that it would return a verdict on

evidence that the court has instructed it to disregard. Johnson, 60 Wn.2d at 29, *citing* State v. Priest, 132 Wash. 580, 584, 232 P. 353 (1925).

A mistrial or new trial should only be given when “nothing the trial court could have said or done would have remedied the harm done to the defendant.” State v. Gilcrist, 91 Wn.2d 603, 612, 590 P.2d 809 (1979).

Only errors which may have affected the outcome of the trial are prejudicial. Id.

The trial court is in the best position to evaluate the prejudicial effect a comment has on the jury. State v. Weber, 99 Wn.2d 158, 166, 659 P.2d 1102 (1983). Here the court assessed the comment and offered to instruct the jury to disregard that portion of the witness’ answer to cure any prejudice. 5RP 241. There is no showing of abuse.

At trial the victim, S.W., testified that she had received a letter from defendant in the mail. 4RP 178. Prior to the letter’s admission, the trial court granted defendant’s request for a limitation on discussion of the envelope in front of the jury. 5RP 200, 204. When the State asked S.W. why she believed the letter was from defendant, she replied, “Because it came from the prison or jail—whatever it’s [sic] called.” 5RP 202. Defendant made a motion for a mistrial in response, which the court denied. 5RP 238- 39, 241. In an effort to cure any potential prejudice to defendant, the court offered to instruct the jury to disregard that portion of the witness’ answer. 5RP 241. However, defense counsel stated that he did not wish the court to instruct the jury because he believed doing so

“would draw further attention to the circumstance.” 5RP 238-39.

Therefore, the court properly denied defendant’s motion for a mistrial, as a remedy for any potential prejudice was available in the form of an instruction to the jury. Defendant’s refusal to accept the remedy does not warrant a mistrial.

Defendant cites authority pertaining to shackling and the defendant’s right to the “physical indicia” of innocence in the courtroom. No Washington case has found the body of law surrounding a defendant appearing in shackles in the courtroom is applicable to the situation now before the court. But even if this court were to consider this body of law, it does not follow that a new trial is warranted. Several Washington cases have affirmed convictions when the jury has had a brief view of the defendant in shackles; in such cases, the defendant must make an affirmative showing of prejudice. State v. Elmore, 139 Wn.2d 250, 273-274, 985 P.2d 289(1999), State v. Early, 70 Wn. App. 452, 462, 853 P.2d 964 (1993), *review denied*, 123 Wn.2d 1004, 868 P.2d 872 (1994), (defendant's mere appearance in handcuffs during jury selection does not indicate the incident "inflamed or prejudiced" the jurors against him). State v. Gosser, 33 Wn. App. 428, 435, 656 P.2d 514 (1982) (it is not reversible error simply because jurors see a defendant wearing shackles). Similarly here, just because a reference was made to defendant’s incarceration, there is no indication that the jury was inflamed or prejudiced. While the jury convicted defendant on two lesser counts of

rape in the second degree, and on one count of assault in the third degree, it did not convict defendant of the three counts of rape in the first degree with which he was charged, nor did it convict him of assault in the second degree as charged. CP 220-234. This indicates that the jury was able to analyze the evidence and hold the State to its burden of proof, rather than act out of passion or prejudice.

Additionally, the record supports the strength of the State's case. S.W. testified to returning to her home with defendant on the evening of January 28, 2006. 4RP 138-41. S.W. testified that after she entered her garage to smoke a cigarette, she returned to the interior of her home at which time defendant grabbed hold of her hair and told her that she would start doing what he told her to do. 4RP 142, 144. S.W. also testified that although she fought defendant, and repeatedly told him no, he assaulted her and raped her. 4RP 145,-60. Over the course of the next several hours, defendant raped S.W. vaginally, orally, and anally. 4RP 146, 156-57, 159. Defendant also choked S.W. by placing his arm across her throat, struck her in the face, and whipped her with his belt. 4RP 148-49, 145-46, 151-52. S.W. testified that defendant forced her face into a plate filled with a substance he described as cocaine and drug her across her apartment. 4RP 154, 156.

Mary-Anne Murray, a sexual assault nurse examiner, testified that she completed a sexual examination of S.W. on January 29, 2006. 6RP 341, 367. Ms. Murray interviewed S.W. and took a statement. 6RP 369.

Ms. Murray also physically examined S.W. and found several lacerations and contusions on her body. 6RP 369. Ms. Murray also discovered a waffle-like pattern of contusions across S.W.'s left buttocks. 6RP 372. S.W.'s neck was very swollen. 6RP 374. During an internal examination, Ms. Murray found redness and swelling on the walls of S.W.'s vagina. 6RP 373.

Deputy Lundborg with the Pierce County Sheriff's Department, testified that he arrested defendant. 6RP 385. At the time of defendant's arrest, he was found wearing a braided belt. 6RP 385.

Deputy Mell, a forensic investigator with the Pierce County Sheriff's Department, testified that he investigated S.W.'s home. 6RP 404. During his investigation, he located a pair of discarded men's boxer brief underwear, a pair of women's black pants with the underwear still wrapped up in the pants, plastic bags of the type typically used to store drugs, and other items of discarded clothing. 6RP 411, 413.

Wendy Graves, a close friend of S.W.'s, testified that when S.W. arrived at her home on the morning of January 29, 2006 she was crying and refused to allow Ms. Graves to hug her. 6RP 256. Ms. Graves witnessed bruising and discoloration on S.W.'s cheeks. RP 256. Ms. Graves testified that she was ultimately able to convince S.W. to go to the hospital. 6RP 261. At trial, while testifying on his own behalf, defendant admitted to assaulting S.W. 7RP 460.

The strength of the State's case, coupled with the court issuing a limiting instruction, could have cured any error.

Therefore, as the court's offer to instruct the jury cured any potential prejudice resulting from S.W.'s non-responsive answer (despite defendant's refusal to accept the court's offer to issue the instruction), and defendant has failed to demonstrate that the court abused its discretion, defendant was not entitled to a mistrial, and this court should not reverse his convictions.

2. THE COURT PROPERLY EXERCISED ITS DISCRETION IN ALLOWING A SECURITY OFFICER TO BE PRESENT IN THE COURTROOM, WHEN IT TOOK PRECAUTIONS TO AVOID ALERTING JURORS TO THE OFFICER'S PRESENCE, AND THE PRESENCE OF THE OFFICER ITSELF IS NOT INHERENTLY PREJUDICIAL.

Appellate courts will not consider issues raised for the first time on appeal unless the error alleged is a manifest error affecting a constitutional right. RAP 2.5(a); State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995) (citing, State v. Scott, 110 Wn.2d 682, 686-87, 757 P.2d 492 (1988)); State v. Lynn, 67 Wn. App. 339, 342, 835 P.2d 251 (1992)). However, if a constitutional error occurs at defendant's invitation, he is precluded from claiming on appeal that it is reversible error. State v. Hunderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990).

In the present case, defendant is precluded from raising any issue pertaining to the officer's presence near the jury box for appeal. While defendant asserts that the security officer's presence near the swinging gate impeded his ability to obtain a fair trial, at trial, defense counsel agreed to the officer being present by the swinging gate so long as he was there at the time defendant was on the stand, and didn't move. 6RP 331. Defense counsel further suggested that the security officer and defendant move outside of the presence of the jury. 6RP 332. The court granted this request, and made accommodations accordingly. 6RP 332. Because any potential error resulting from the court's accommodations is the direct result of defendant's invitation, he is precluded from appellate review by this court. Defendant has also waived any error because he fails to present a factual record to this court, and this court's review is limited to matter in the record. State v. McFarland, 127 Wn.2d 322, 338m, 899 P.2d 1251 (1995).

However, the following law is presented to this court if it elects not to follow the State's procedural arguments above.

The fundamental right to a fair trial is secured by the United States and Washington constitutions. U.S. Const. amends. VI and XIV, and Wash. Const. article I, § 22. Central to the right to a fair trial is the principle that a defendant is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, not official suspicion, indictment, continued custody, or other circumstances

short of proof. Holbrook v. Flynn, 475 U.S. 560, 567, 106 S. Ct. 1340 (1986). In light of the fundamental right to the presumption of innocence, courtroom security measures such as shackling, gagging, or handcuffing can unnecessarily mark the defendant as guilty or dangerous. Holbrook, at 567-68.

The use of security officers in the courtroom can be distinguished from these types of inherently prejudicial practices because a juror may draw any one of a wide range of inferences from the guard's presence. Holbrook, at 569. Jurors may also believe that an alternative explanation for the security officer's presence exists², such as ensuring safety inside of the courtroom or preventing disruptions from outside the courtroom. Id. The potential prejudicial effect of the presence of a guard in the courtroom should be analyzed on a case-by-case basis. Id.

² See also Holbrook v. Flynn, 475 U.S. 560, 567, 106 S. Ct. 1340 (1986):

Jurors may just as easily believe that the officers are there to guard against disruptions emanating from outside the courtroom or to ensure that tense courtroom exchanges do not erupt into violence. Indeed, it is entirely possible that jurors will not infer anything at all from the presence of the guards. If they are placed at some distance from the accused, security officers may well be perceived more as elements of an impressive drama than as reminders of the defendant's special status. Our society has become insured to the presence of armed guards in most public places; they are doubtless taken for granted so long as their numbers or weaponry do not suggest particular official concern or alarm.

The trial court's decision to allow the presence of a uniformed guard in the courtroom is a matter of discretion. State v. Olson, 44 Wn. App. 671, 672, 722 P.2d 887 (1986). In the absence of inherent prejudice, the trial court's decision to allow the officer's presence may be reviewed for manifest abuse of discretion. Id.

Defendant asserts that the security officer's presence in the courtroom is analogous to the facts in Gonzalez. Brief of Appellant at 10. In Gonzalez, the trial court instructed the jury that defendant had been unable to post bail, and therefore was presently in custody, and identified the corrections officer present in the courtroom to supervise defendant. State v. Gonzalez, 129 Wn. App. 895, 898, 120 P.3d 645 (2005). The trial court further instructed the jury that defendant was transported in handcuffs. Id.

However, the present case is more appropriately distinguished from Gonzalez, as the jury was not instructed on defendant's custody status, ability to post bail, placement in handcuffs, or transportation procedures related to his arrival in court. Defendant was not shackled or handcuffed in court, and at no time was the jury informed that he was in custody.

The court's care in shielding the jury from security protocol is supported by the record the court stated that "obviously any appearances are important in terms of not giving negative appearance to the jury." 6RP 330. Upon a request by the corrections officer to move closer to the

witness stand when defendant testified, the court stated that only out of deference to the jail and security staff would it allow the corrections officer to move. 6RP 331-322. However, the court also stated that the defendant's move on and off of the witness stand would be done outside the presence of the jury in order to avoid the appearance of security issues. 6RP 332. The court allowed defendant to move to the witness stand, and the officer to a closer position, outside the presence of the jury in order to avoid attracting attention to the officer's presence. 7RP 458. Upon completion of defendant's testimony, the court stated that it was excusing the jury so that it could review jury instructions, and in this way allowed defendant and the officer to resume their seats outside of the presence of the jury. 7RP 468.

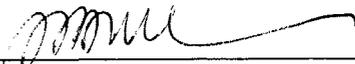
Here, the trial court properly exercised its discretion in allowing the security officer to change seating when defendant testified, as it took extra precautions to avoid alerting the jury to the presence of the guard. Defendant has failed to either assert that the trial court's decision to allow the security officer's presence is a manifest abuse of discretion, or has defendant shown that the presence of the guard resulted in inherent prejudice. Therefore, this court may not reverse defendant's convictions.

D. CONCLUSION

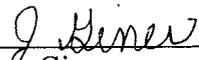
For the foregoing reasons, the State asks this court to affirm the judgment entered below.

DATED: October 22, 2007.

GERALD A. HORNE
Pierce County
Prosecuting Attorney



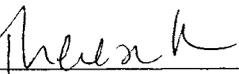
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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

10-23-07 
Date Signature

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BY DEPUTY