

NO. 45788-1-II

COURT OF APPEALS OF THE STATE OF WASHINGTON,

DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

TOMMY MONTENGUISE,

Appellant.

BRIEF OF APPELLANT

**John A. Hays, No. 16654
Attorney for Appellant**

**1402 Broadway
Suite 103
Longview, WA 98632
(360) 423-3084**

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ASSIGNMENT OF ERROR

Assignment of Error

The trial court's decision to allow the jail to put a leg brace on the defendant which could be seen by the jury during the trial without any particularized suspicion that he would disrupt the proceedings, harm anyone or attempt to escape denied the defendant a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment.

Issues Pertaining to Assignment of Error

Does a trial court's decision to allow the jail to put a leg brace on the defendant which could be seen by the jury during the trial without any particularized suspicion that the defendant would disrupt the proceedings, harm anyone or attempt to escape deny that defendant a fair trial under Washington Constitution, Article 1, § 3, and United States Constitution, Fourteenth Amendment?

STATEMENT OF THE CASE

Factual History

Tracy Gage works as a community corrections officer for the Department of Corrections in Olympia. RP 198-199. During June of 2013 one of the offenders on her caseload was the defendant Tommy Montenguise. *Id.* She was supervising the defendant based upon his prior conviction for felony violation of a no contact order which forbid his contact with his girlfriend Anita Vela. RP 241. On June 26, 2013, Ms Gage received a tip from an informant that Ms Vela might be living with the defendant in his fifth wheel trailer located at the Shamrock trailer park in Thurston county. RP 206-207. Based upon this tip Ms Gage decided to take two other officers to the defendant's residence, talk to him and attempt to get his permission to search his residence to see if Ms Vela was present. RP 206-208. In order to aid in this plan Ms Gage had one of the accompanying DOC officers obtain a DOC license photograph of Ms Vela to aid in identification should they find an adult female present. RP 101.

Once over at the defendant address the three officers approached the defendant who was standing near a shed close to his fifth wheel speaking with an adult male. RP 206-207. After explaining their purpose Ms Gage asked for permission to search the shed and the trailer. RP 114-115, 209-211. The defendant consented and Ms Gage looked into the shed. *Id.* She then

had the defendant lead her and the other officers into the fifth-wheel, which was about 35 feet long. *Id.* Inside they encountered a young child and an adult female. *Id.* The young child was associated with the male outside the fifth wheel. RP 117. The adult female identified herself as “Charlotte Thornton.” In fact, as the defendant saw this woman he commented “Oh, you’re still here - there’s Charlotte.” RP 211 At this point Ms Gage took the defendant outside in handcuffs and one of the other officers stayed in the fifth wheel in order to question the female. RP 213. Within a minute or two she identified herself as Anita Vela. RP 221-222. A local deputy sheriff who had responded during this encounter then arrested the defendant and took him to jail. RP 143-144.

Procedural History

By information filed July 1, 2013, the Thurston County Prosecutor charged the defendant with one count of felony violation of a no contact order. CP 3. This case later came on for trial before a jury. RP 1. At the beginning of trial the court granted a state’s request to allow the corrections department to put the defendant in a leg brace during the entirety of the trial based upon the facts that the case involved a domestic violence offense and that the corrections department was understaffed. RP 24-27. The state did not claim that the defendant was disruptive, that he was a danger to anyone, or that would attempt to escape. *Id.* The defense objected to this procedure,

arguing in part that there was no particularized suspicion against the defendant and that the jury would be able to see the leg brace or see evidence that the defendant had been restrained. RP 28-31. The following gives a portion of the defense argument on this point:

MR. PILON : We are opposed to the leg brace in this case . For one thing, it's uncomfortable for my client , who will have to be sitting here throughout the course of the trial, which could be two days.

But more importantly, I'm concerned that the jury may catch a glimpse of the shackle, in particular, around his ankle. He has a sock over it, but it is bulging out , and potentially it is visible, particularly if he were to stand. . . .

And the intelligent juror may put two and two together and realize that it's actually a shackle and will infer from that the jail has some kind of concern that my client is a flight risk or a danger. He certainly isn't. . . .

Currently , Mr. Montenguise , prior to this incident, was very close to having this alleged order lifted. In fact, he had completed most of the DVOP program and was on his last chapter. . . .

So he worked through the system and had been working with the jail, as well as he is currently a trustee, meaning he dresses typically in gray and has broad access to different areas of the jail. So he is someone that the jail has considered to be a safe person to have certain freedoms within the jail. He is not a violent offender, your Honor, and given the fact that the Court will see through the allegations here, Mr. Montenguise was very cooperative with deputies and law enforcement , and I would argue at some point to his detriment, obviously, but he was very respectful and didn't resist, has not had any indication that he would flee or make a scene or do anything that I think the State has concerns he would do .

So based on that, your Honor, and based on the potential here for the jury to see this prosthetic or shackle and the danger of the

prejudicial effect is great,I would very much appreciate that the Court not require him to have a shackle during his trial.

RP 28-31.

At this point the court enquired concerning the defendant's movements which might alert the jury to the existence of the restraint. RP

31. The defense responded as follows:

MR . PILON: Standing and sitting . I do know that is – I haven't seen Mr. Montenguise do it today, because he has been sitting for most of the hearing this morning, but I do know there is a clip that they have to manipulate in order to straighten their leg out completely,, and that is – that, along with the bulges from his sock and on his thigh, I think that may potentially draw a juror's attention and they may see the shackle and wonder what it's about.

RP 31-32.

In spite of these objections, the potential that the jury would perceive the restraint, and that lack of any particularized suspicion against the defendant the court none the less granted the motion. RP 37. The following is taken from the court's ruling on this issue:

I have observed, as Mr. Pilon has described, a different gait when you use the restraint. There is also, I can see from here, a slight bulge on defendant's left ankle that is covered by a sock that appears to be rooted in the – as a result of the restraint that is being used.

There is, as Mr . Juris has pointed out, multiple factors that the Court – is suggested to the Court to consider whether or not a defendant should be wearing a restraint, and those include the seriousness of the charge, the defendant's temperament and character, the defendant's history of disruptive behavior, availability of alternative less restrictive remedies, age and physical attributes of the defendant, past record of defendant, past escapes or attempted

escapes, threat to harm or others, threat to harm others or cause a disturbance, self destructive tendencies, a risk of mob violence, or attempted the defense of others, possibility of rescue by other offenders still at large, the side and lewd of the audience , and the nature of physical security of the courtroom. There has been several cases cited , but the one I would cite is *State v. Monschke* , 133 Wn. App . 313.

There has been no showing in this case that Mr . Montenguisse has a history of disruptive behavior or has planned an escape or has past escapes or necessarily self-destructive tendencies. It has been stated that the corrections is thinly staffed. We do have several trials going on. We also have a small courtroom , and the courtroom has the jury sitting in close proximity to the defendant's table, as well as the witness stand is in close proximity to the jury box.

I note also that the defendant is sitting on the far side of the counsel table from the jury box , and has his counsel, Mr. Pilon , sitting in between him and the jury box.

It is also relevant to the Court that Mr . Montenguisse has a criminal history that includes violation of court orders and malicious mischief as recently as last year.

This is a new issue for the Court to balance the competing interests in this case, and I'm not going to tell – I'm not going to say that my thinking on this will not evolve over time, but at this point, I'm going to permit the use of the restraint on Mr . Montenguisse for the following reasons : The potential for the jury to observe the brace is limited; the brace is covered by his pant completely and covered by his sock; he is sitting on the far side of counsel from the jury box; and any restrictions on his gait can be mitigated by excusing the jury, if Mr. Montenguisse is going to take the stand; this is a domestic violence case; there is the potential for security issues when we have a protected party in the courtroom; *there hasn't been – I want to make this clear – there has been no showing that Mr. Montenguisse personally has exhibited any violence or disruptiveness. His appearance before the Court this morning has been exemplary.* but, nevertheless, it is clear that corrections is thinly staffed, and we have no quick ability to staff many corrections officers within the courtroom to prevent any potential issues.

So I don't want to belabor this, but I'm finding that the use of the restraint is the least restrictive ability to assure safety in the courtroom, given the size of the courtroom we have and given the ability to mitigate the potential consequences of notifying the jury that it's being used.

RP 34-37 (emphasis added).

During the trial in this case the state called four witnesses: Anita Vela, Ms Gage, one of the other DOC officers who had assisted Ms Gage in searching for Ms Vela, and the deputy sheriff who had responded to arrest the defendant. RP 68, 91, 128, 197. They testified to the facts contained in the preceding history. *See Factual History, supra.*

Ms Vela also testified that two days previous she had approached the defendant through her sister Charlotte Thornton and asked to stay with him as she was homeless. RP 71-74. She claimed that he had responded through her sister by refusing to have any contact with her. RP 82-83. However, she said that he had relented and told her sister that Ms Vela could stay at his fifth wheel while he was gone on a job. *Id.* Ms Vela then explained that on the day the probation officers searched the defendant Fifth Wheel, she had snuck in while the defendant was not looking in order to gather up a few possessions. RP 82-83, 88-89. Thus she claimed that the defendant had not violated the no contact order in spite of her efforts to get him to do so and that he did not know she was present. *Id.*

Following the close of the state's case the defendant called Ms Vela

for brief testimony. RP 250-256. The defense then closed its case and the court instructed the jury without objection or exceptions from either party. RP 284, 286-297. Following argument by counsel the jury retired for deliberation and eventually returned a verdict of “guilty.” RP 297-333, 338-344; CP 81-82. The court later imposed a sentence within the standard range, after which the defendant filed timely notice of appeal. RP 1/16/14 1-27; CP 104-113.

ARGUMENT

THE TRIAL COURT'S DECISION TO ALLOW THE JAIL TO PUT A LEG BRACE ON THE DEFENDANT THAT THE JURY COULD SEE DURING THE TRIAL WITHOUT ANY PARTICULARIZED SUSPICION THAT THE DEFENDANT WOULD DISRUPT THE PROCEEDINGS, HARM ANYONE OR ATTEMPT TO ESCAPE DENIED THE DEFENDANT A FAIR TRIAL UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 3, AND UNITED STATES CONSTITUTION, FOURTEENTH AMENDMENT AND HIS RIGHT TO APPEAR AND DEFENDANT IN PERSON UNDER WASHINGTON CONSTITUTION, ARTICLE 1, § 22.

While due process does not guarantee every person a perfect trial, both our state and federal constitutions do guarantee all defendants a fair trial. *State v. Swenson*, 62 Wn.2d 259, 382 P.2d 614 (1963); *Bruton v. United States*, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968). Part and parcel of this due process right to a fair trial is the right “to appear at trial free from all bonds or shackles except in extraordinary circumstances.” *In re the Persona Restraint of Davis*, 152 Wn.2d 647, 693, 101 P.3d 1 (2004); *Illinois v. Allen*, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970). Shackling or handcuffing impinges upon the right to a fair trial in a number of ways, the most important of which is that it violates the right to the presumption of innocence. *State v. Finch*, 137 Wn.2d 792, 844, 975 P.2d 967 (1999). In addition, forcing a defendant to appear in restraints also undermines the “right to appear and defendant in person” guaranteed under Washington Constitution, Article 1, § 22.

In 1981 the Washington Supreme Court explained this principle, stating as follows:

The right here declared is to appear with the use of not only his mental but his physical faculties unfettered, and unless some impelling necessity demands the restraint of a prisoner to secure the safety of others and his own custody, the binding of the prisoner in irons is a plain violation of the constitutional guaranty.

State v. Hartzog, 96 Wn.2d 383, 398, 635 P.2d 694 (1981).

Although constitutional due process generally guarantees the right to appear and defend free of restraints, this right is not absolute. *State v. Jaime*, 168 Wn.2d 857, 233 P.3d 554 (2010). However, restraints may only be ordered for three purposes: “to prevent injury to those in the courtroom, to prevent disorderly conduct at trial, or to prevent an escape.” *State v. Finch*, 137 Wn.2d at 865-866. In addition, the court’s decision to use restraints may only be justified if based upon “specific facts relating to the individual” that are “founded upon a factual basis set forth in the record.” *State v. Finch*, 137 Wn.2d at 866, 233 P.3d 554 (quoting *State v. Hartzog*, 96 Wn.2d at 399-400). Finally, since the right to appear free from restraints derives from both the federal and state constitutions, its violation mandates reversal of conviction and remand for a new trial unless the state proves the error harmless beyond a reasonable doubt. *State v. Damon*, 144 Wn.2d 686, 692, 25 P.3d 418 (2001).

In the case at bar a careful review of the record reveals that the trial

court's decision to grant the state's request to restrain the defendant was not based upon "specific facts relating to the individual" that were "founded upon a factual basis set forth in the record" as was required in *Finch* and *Hartzog*. Rather, the record is clear that the request for restraints was based solely upon the fact that the local correctional authority apparently did not want to pay overtime to properly staff the courtroom. The court's own ruling admits that the state failed to prove any one of the three criteria that would justify restraining the defendant. The court held:

There has been no showing in this case that Mr. Montenguise has a history of disruptive behavior or has planned an escape or has past escapes or necessarily self-destructive tendencies. It has been stated that the corrections is thinly staffed. We do have several trials going on. We also have a small courtroom, and the courtroom has the jury sitting in close proximity to the defendant's table, as well as the witness stand is in close proximity to the jury box.

I note also that the defendant is sitting on the far side of the counsel table from the jury box, and has his counsel, Mr. Pilon, sitting in between him and the jury box.

It is also relevant to the Court that Mr. Montenguise has a criminal history that includes violation of court orders and malicious mischief as recently as last year.

This is a new issue for the Court to balance the competing interests in this case, and I'm not going to tell – I'm not going to say that my thinking on this will not evolve over time, but at this point, I'm going to permit the use of the restraint on Mr. Montenguise for the following reasons: The potential for the jury to observe the brace is limited; the brace is covered by his pant completely and covered by his sock; he is sitting on the far side of counsel from the jury box; and any restrictions on his gait can be mitigated by excusing the jury, if Mr. Montenguise is going to take the stand; this is a domestic

violence case; there is the potential for security issues when we have a protected party in the courtroom; *there hasn't been – I want to make this clear – there has been no showing that Mr. Montenguise personally has exhibited any violence or disruptiveness. His appearance before the Court this morning has been exemplary*, but, nevertheless, it is clear that corrections is thinly staffed, and we have no quick ability to staff many corrections officers within the courtroom to prevent any potential issues.

So I don't want to belabor this, but I'm finding that the use of the restraint is the least restrictive ability to assure safety in the courtroom, given the size of the courtroom we have and given the ability to mitigate the potential consequences of notifying the jury that it's being used.

RP 34-37 (emphasis added).

These findings that “there has been no showing” that the defendant has been disruptive, dangerous or would try to escape and that “there has been no showing that [the defendant] personally has exhibited any violence or disruptiveness” precludes the use of restraints in the courtroom, notwithstanding the fact that the local correctional authority was “thinly staffed.” Thus the trial court's decision to use restraints was made upon an improper basis and constituted an abuse of discretion. *See State v. Lawrence*, 108 Wn.App. 226, 31 P.3d 1198 (2001). (An abuse of discretion occurs when a trial court's decision is manifestly unreasonable or based on untenable grounds or untenable reasons.) It was error.

In this case the evidence presented at trial, while strong, was not overwhelming on the issue of guilt. Ms Vela did testify that she had snuck

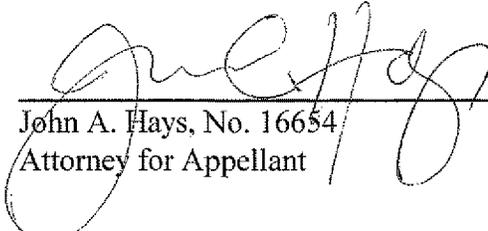
into the Fifth Wheel without the defendant's knowledge and that there had been no contact over the previous two days. The jury was entitled to find this evidence sufficient to raise a reasonable doubt on guilt. Although this court might find the remainder of the state's evidence made the state's theory of the case much more likely, the standard for review is not "much more likely." Rather, for this court to find the constitutional error in this case does not warrant reversal, the evidence at trial must overwhelmingly prove guilt beyond a reasonable doubt. This evidence in this case does not meet this high standard. As a result this court should reverse the defendant's conviction and remand for a new trial.

CONCLUSION

The trial court violated the defendant's constitutional rights to appear and defend free from physical restraints when it granted the state's unjustified motion to put the defendant in a leg brace. As a result this court should reverse the defendant's conviction and remand for a new trial.

DATED this 7th day of July, 2014.

Respectfully submitted,



John A. Hays, No. 16654
Attorney for Appellant

APPENDIX

**WASHINGTON CONSTITUTION
ARTICLE 1, § 3**

No person shall be deprived of life, liberty, or property, without due process of law.

**WASHINGTON CONSTITUTION
ARTICLE 1, § 22**

In criminal prosecutions the accused shall have the right to appear and defend in person, or by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is charged to have been committed and the right to appeal in all cases: Provided, The route traversed by any railway coach, train or public conveyance, and the water traversed by any boat shall be criminal districts; and the jurisdiction of all public offenses committed on any such railway car, coach, train, boat or other public conveyance, or at any station of depot upon such route, shall be in any county through which the said car, coach, train, boat or other public conveyance may pass during the trip or voyage, or in which the trip or voyage may begin or terminate. In no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

**UNITED STATES CONSTITUTION,
FOURTEENTH AMENDMENT**

All persons born or naturalized in the United State, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

COURT OF APPEALS OF WASHINGTON, DIVISION II

STATE OF WASHINGTON,
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TOMMY MONTENGUISE,
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NO. 45788-1-II

**AFFIRMATION OF
OF SERVICE**

The under signed states the following under penalty of perjury under the laws of Washington State. On this, I personally e-filed and/or placed in the United States Mail the Brief of Appellant with this Affirmation of Service Attached with postage paid to the indicated parties:

1. John C. Skinder
Thurston County Prosecutor's Office
2000 Lakeridge Dr. SW
Olympia, WA 98502-6045626
skindej@co.thurston.wa.us
2. Tommy Montenguisse, No. 358522
Washington State Correction Center
P.O. Box 900
Shelton, WA 98502

Dated this 7th day of July, 2014, at Longview, Washington.



DONNA BAKER

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paoappeals@co.thurston.wa.us

donnabaker@qwestoffice.net