

No. 46938-3-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

KYLE STODDARD,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR GRAYS HARBOR COUNTY

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court deprived Mr. Stoddard of a fair trial by requiring him to wear an electric shock restraint.

2. The trial court deprived Mr. Stoddard of a fair trial by placing two prison guards within arm's reach of him and his lawyer.

3. The trial court erred in ordering these restraints after an *ex parte* communication with an unnamed Department of Corrections (DOC) employee and without holding a public hearing on the matter.

5. To the extent defense counsel may not have lodged a sufficient objection to the in-court restraint, Mr. Stoddard received ineffective assistance of counsel in violation of the Sixth Amendment and Fourteenth Amendment.

4. The trial court erred in entering a judgment that Mr. Stoddard assaulted Correctional Officer Daniels, because the evidence on that charge was insufficient as a matter of law.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. The Sixth and Fourteenth Amendments and Article I, section 22 guarantee a defendant the right to appear in trial free from bonds and shackles absent extraordinary circumstances. Restraints are permissible if necessary to prevent injury to persons in the courtroom, disorderly conduct at trial, or escape.

Mr. Stoddard behaved appropriately in court and posed no special escape risk. DOC insisted he be restrained by way of a shock device and extra guard and the trial court accepted the jailers' preferences without even hearing from the parties. Did the court deprive Mr. Stoddard of a fair trial? Must each of the convictions be reversed? If defense counsel failed to lodge a sufficiently specific objection to the in-court restraint, should this Court still reach the issue?

2. To convict a defendant of assault, the State is required to prove beyond a reasonable doubt that the accused intentionally committed a harmful or offensive touching, meaning, that he acted with the objective or purpose to accomplish a result that constitutes a crime. Here, the evidence showed that Mr. Stoddard unintentionally knocked one corrections officer over as he fled from others who had blinded him with pepper spray. Must Mr. Stoddard's conviction for count III be reversed?

C. STATEMENT OF THE CASE

Kyle Stoddard was charged with assaulting three corrections officers: Torey Casey (Count I), William Lane (Count II), and Roland Daniels (Count III). CP 24-25. The charges arose out of a scuffle at the dining hall of the Department of Corrections' Stafford Creek facility where Mr. Stoddard was serving a term of incarceration. A video recording of the incident was admitted as trial Exhibit 1. RP 83.

In its pretrial memorandum, filed October 15, 2014, the prosecution pointed out that Mr. Stoddard had “prior convictions for assaulting police” and a separate pending charge for an alleged assault against a Grays Harbor County jail corrections deputy. CP 47. Because of the Grays Harbor jail incident, pending trial, Mr. Stoddard was “at the Washington Corrections Center’s Intensive Management Unit.” CP 48.

The prosecution added:

The State anticipates that DOC personnel will fit Defendant with an electric shock harness for trial. This device fits under the clothes and is invisible to jurors, but can be used to gain compliance, should Defendant act out. Defendant is not welcome at the Grays Harbor jail or at Stafford Creek because of his previous assaultive behavior. Defendant has never acted out in the courtrooms at Grays Harbor jail.

Supp. CP 48. (Emphasis added)

A court hearing was held on June 23, 2014 and Mr. Stoddard acted appropriately. When the judge told him to behave like “a perfect gentleman,” Mr. Stoddard answered “Yes, sir.” 6/23/14 RP 6-7. On August 18, 2014, Mr. Stoddard again appeared in court on his case and continued to act politely: “Yes, sir... Thank you, sir.” 8/18/14 RP 2-3. A month later, Mr. Stoddard again listened to the judge and caused no problems. 9/15/14 RP 3-4. (“No, sir... Thank you, sir.”)

Shortly before trial, the judge asked whether the lawyers “discussed what security measures will be in place during the trial.” 10/27/14 RP 6. The prosecutor said: “The Department of Corrections will be present with multiple officers. I understand they fit Mr. Stoddard with a device that reaches around his middle and can be activated remotely to shock him, should he cause a problem.” 10/27/14 RP 7-8.

The judge confirmed this device would not be visible, but did not otherwise question the prison officials’ plan. 10/27/14 RP 7. Turning to the accused, the judge said “I expect that you will conduct yourself appropriately... If you do not, then we will take appropriate steps to make sure that the courtroom is secure.” 10/27/14 RP 8. Mr. Stoddard answered “Yes, sir.” 10/27/14 RP 8. The judge did not explicitly say that the DOC proposal would be implemented.

On the day of the jury trial, the judge had an off-the-record discussion with an unnamed DOC employee about the shock device used on Mr. Stoddard.

I was informed this morning by the corrections officer... that the device that Mr. Stoddard is wearing is on the lower part of one of his legs, and while it would, if activated, make it difficult for him to fully use his leg, it would not incapacitate him. Um, so I made a decision this morning, and, I made the decision to move counsel table to allow sufficient room behind the table for two security officers to be present, either standing or sitting behind Mr. Stoddard.

10/30/14 RP 20. (Emphasis added)

The judge then explained the decision he had made: “[T]he charges in this case, involve acts of violence directed at corrections officers... While this case was pending... Mr. Stoddard was housed at the Grays Harbor County Jail... [and] is accused of having assaulted a deputy sheriff at the county jail... I have read in the [State’s] trial memorandum... that Mr. Stoddard has made statements regarding his willingness and intention to continue assaulting corrections officers.” 10/30/14 RP 20-21.

The judge announced: “I concluded that it was necessary to take steps to ensure the safety of everyone in the courtroom today, including the courtroom personnel, clerk bailiff, court reporter, counsel, and that the reasonable step would accomplish that was to position corrections officers near Mr. Stoddard.” 10/30/14 RP 21. (Emphasis added). The judge said the “potential prejudice to Mr. Stoddard by having the jury see that, is minimal, given the fact that due to the nature of the charges, the jury is already going to know that Mr. Stoddard is an inmate at the Department of Corrections... that he is, in fact, an inmate...” 10/30/14 RP 21. The judge did not ask for input from the parties until after issuing the ruling. 10/30/14 RP 22. (“I believe that the security measures I have ordered today are appropriate.”)

Defense counsel pointed out that “there is a difference between testimony indicating that Mr. Stoddard, at some point in the past was in custody, versus seeing the kind of the shock of him being surrounded by the personnel in the courtroom.” 10/30/14 RP 22. Defense counsel repeated that “there is a distinction between the time frames... and the prejudice that does attach with how the jury is seeing Mr. Stoddard at this point.” 10/30/14 RP 23.

Additionally, defense counsel argued: “the other problem that I have with it, is that it limits the attorney/client privilege, or actually eliminates the attorney/client privilege of any sort of communication between me and my client, having the corrections officers sitting so close and right up here at counsel table.” 10/30/14 RP 22-23. (Emphasis added.) Rather than express any personal safety concern, defense counsel asked that the prison guards be further away, so she could talk with her client in private. 10/30/14 RP 23.

The judge asked the two prison guards if they overheard counsel table conversations between Mr. Stoddard and his lawyer that had taken place earlier that morning and they said no. 10/30/14 RP 24. The judge did not respond to defense counsel’s objection that the prison officers’ presence suggested to the jury that almost a year after the charged

incident, Mr. Stoddard remained imprisoned, dangerous, and untrustworthy.

Mr. Stoddard was in court for the jury selection process and there is no indication in the record that his participation was anything out of the ordinary. 10/30/14 Vol.II RP 4-46.

Once trial began, Corrections Officer Torey Casey testified that on December 4, 2013, he was in the Stafford Creek dining hall with Mr. Stoddard. RP 27-28. He said that inmates are not allowed to change seats when eating, but that is what he saw Mr. Stoddard do. RP 29. Officer Casey said he told Mr. Stoddard to go back to his seat, but Mr. Stoddard said "I am not fucking sitting there." RP 29. Mr. Stoddard refused a second command, so Officer Casey told him to leave the dining hall altogether. RP 30. Officer Casey said that Mr. Stoddard put food in his pockets, then threw his tray to the ground, saying, "I am going to kick your fucking ass." RP 30. Officer Casey said he thought Stoddard would assault him; "his fists were clenched." RP 31. (Another corrections officer William Nelson testified he saw Mr. Stoddard go with "his fists clenched" toward Officer Casey. RP 65.)

Mr. Stoddard testified he was in the dining hall to eat breakfast. RP 92. He switched tables to make room for another inmate. RP 93. Officer Casey told him go back to the other row or leave. RP 93. Mr. Stoddard

said Officer Casey cursed at him: “you think you can do whatever the fuck you want.” RP 93. Mr. Stoddard admitted he got mad, threw his tray down and said “bullshit.” RP 94, 101. He testified Officer Casey kept on “using profanity” toward him. RP 94. Mr. Stoddard admitted he was upset and clenched his fists but denied making any statements about hurting people. RP 94.

Officer Casey asserted Mr. Stoddard said “I am going to kick your fucking ass,” to another corrections officer, Sergeant Lane, so Officer Casey pepper-sprayed Mr. Stoddard. RP 31. (Sgt. Lane said he heard this too. RP 43, 46.) Officer Casey pepper-sprayed Mr. Stoddard “across the eyes, and then he went – started throwing punches at Sergeant Lane.” RP 31-32. Sgt. Lane testified that Mr. Stoddard did not hit him, but Sgt. Lane did try to grab Mr. Stoddard. RP 47, 50. To Officer Casey, what happened was “a blur.” RP 32. He too did not think that Mr. Stoddard hit Sgt. Lane. RP 32.

Another corrections officer Roland Daniels, was outside the dining hall, looking in through a door. RP 54. He saw Officer Casey pepper spray Mr. Stoddard. RP 54. The pepper spray “comes in a stream,” it is a powerful irritant, and Officer Daniels saw how it affected Mr. Stoddard: “Once it’s applied to his face, of course, he is very irritated and becomes very raised and very animated.” RP 54. This “OC spray... is designed to

cause pain, that's what it's designed for." RP 61. When applied to the face, "the fluid flows down to the eyes causing a blindness to a person temporarily so they cannot see, not blindness-blindness, but it impairs the vision so the person is easier to be in control of and less combative because they can't see the object they are trying to swing at." RP 61.

Mr. Stoddard testified that getting sprayed in the eyes made him scared, panicked, and anxious. RP 95.¹ He put his hands up and ran into the door. RP 95. Officer Casey and Sgt. Lane saw Mr. Stoddard run at the door and knock down Officer Daniels who was on the other side of it. RP 32, 47-48, 54-55. Officer Daniels said that when he got up, Mr. Stoddard was "swinging wildly." RP 56. Officer Casey had said that it was after knocking down Officer Daniels, Mr. Stoddard punched Officer Casey in the ribs. RP 32.

Mr. Stoddard did not see anybody on the other side of the door but saw that an officer fell down when he came through it. RP 96, 102. Mr. Stoddard said that when he got sprayed in the face, people were trying to grab him. RP 96. "All I was trying to do was get away." RP 96. Outside, he "was struggling not to get any more hurt than [he] already was." RP 97.

¹ DOC investigator Don Blumberg interviewed Mr. Stoddard about a week after the incident. RP 80. Mr. Stoddard told him he had switched tables because someone else had taken his and then he was told to leave the dining hall. RP 81. Mr. Stoddard said he had put food in his pocket and was heading out when he was pepper sprayed and jumped by officers. RP 82. Inv. Blumberg introduced the video of the incident, Exhibit 1. RP 83.

Officer Daniels said he brought Mr. Stoddard to the ground. RP 57. Stoddard “appeared to be unconscious just for a fraction of a second,” and was “swinging back at me again.” RP 58. Officer Casey remembered Officer Daniels kicked Mr. Stoddard to the ground. RP 33. A group of officers restrained him. RP 48, 67.

In closing, the prosecuting attorney argued Mr. Stoddard assaulted Officer Casey by striking him in the ribs. RP 121-22. The prosecuting attorney argued Mr. Stoddard “assaulted Sergeant Lane when he charged him up the ramp.” RP 124. The prosecuting attorney argued that Mr. Stoddard “assaulted Officer Daniels when he smacked him with the door,” whether he could see that the officer was there or not. RP 123-24.

Mr. Stoddard was convicted as charged. CP 2-10.

D. ARGUMENT

1. By requiring him to stand trial under prison guard and while wearing an electric shock device, the trial court deprived Mr. Stoddard of his right to a fair trial.

a. A defendant has the right to appear in court free of restraints, which are a “last resort.”

Criminal defendants have long been entitled to appear in court free from bonds and shackles absent extraordinary circumstances. U.S. Const. amends. VI, XIV; Const. art. 1, § 22; *Illinois v. Allen*, 397 U.S. 337, 338, 90 S. Ct. 1057, 25 L.Ed.2d 353 (1970); *In re Personal Restraint of Davis*,

152 Wn.2d 647, 693, 101 P.3d 1 (2004); *State v. Williams*, 18 Wash. 47, 50, 50 P. 580 (1897) (referring to the “ancient” right to appear in court free from shackles). Physical restraints denigrate the defendant’s constitutional right to a fair trial by reversing the presumption of innocence and prejudicing the jury against him. *Deck v. Missouri*, 544 U.S. 622, 630, 125 S. Ct. 2007, 161 L .Ed. 2d 953 (2005); *Allen*, 397 U.S. at 344; *Davis*, 152 Wn.2d at 693-94. Beyond that, the use of restraints is simply an affront to the dignity accorded to an American courtroom. *Deck*, 544 U.S. at 631-32; *Allen*, 297 at 344.

In addition, restraining a defendant restricts his ability to assist counsel during trial, interferes with the right to testify in one’s own behalf, and may even confuse or embarrass the defendant sufficiently to impair his ability to reason. *Deck*, 544 U.S. at 631; *Allen*, 397 U.S. at 345; *State v. Finch*, 137 Wn.2d 792, 845, 975 P.2d 967 (and cases cited therein), *cert. denied*, 528 U.S. 922 (1999); *Williams*, 18 Wash. at 50-51.

Because of the constitutional rights at stake, a court cannot require a defendant be restrained in court except in extraordinary circumstances. *Finch*, 137 Wn.2d at 846; *Williams*, 18 Wash. at 51.

The trial court must base its decision to physically restrain a defendant on evidence which indicates that the defendant poses an imminent risk of escape, that the defendant intends to injure someone in the courtroom, or that the

defendant cannot behave in an orderly manner in the courtroom.

Davis, 152 Wn.2d at 695 (emphasis added); *Finch* 137 Wn. 2d at 850.

Restraints are a “last resort,” when less restrictive alternatives are not possible. *Allen*, 397 U.S. at 344; *Davis*, 152 Wn.2d at 693. The determination must be based on facts in the record. *State v. Hartzog*, 96 Wn.2d 383, 400, 635 P.2d 684 (1981).

The trial court – not corrections officers – must make the decision of whether a defendant is or is not shackled. *Finch*, 137 Wn.2d at 853; *State v. Walker*, 185 Wn. App. 790, 797, 344 P.3d 227, 231 (2015) (“[R]egardless of the nature of the court proceeding or whether a jury is present, it is particularly within the province of the trial court to determine whether and in what manner, shackles or other restraints should be used.”)

A trial court commits reversible error if it does not conduct a hearing to examine the factual basis for the restraint and simply defers to the jailers’ wishes. *State v. Damon*, 144 Wn. 2d 686, 692, 25 P.3d 418, *as amended* (July 6, 2001), *as modified on denial of reh'g*, 33 P.3d 735 (2001) (“Because the trial court relied solely on the security concerns raised by the officer and failed to conduct a hearing, we conclude that the trial court abused its discretion by requiring Damon to be held in restraints

throughout his trial.”); *State v. Flieger*, 91 Wn. App. 236, 238, 955 P.2d 872 (1998).

b. The trial court ordered Mr. Stoddard to wear an electric shock device not because he presented any extraordinary escape risk or threat to courtroom decorum, but because the jailers favored the restraint.

As set out in *State v. Finch*, an in-court restraint “violates a defendant's presumption of innocence... restricts the defendant's ability to assist his counsel during trial... interferes with the right to testify in one's own behalf, and it offends the dignity of the judicial process.” 137 Wn.2d at 844–45. The use of electronic restraints raises these same – and additional – constitutional concerns. *Gonzalez v. Pliker*, 341 F.3d 897, 899 (9th Cir. 2003). Courts have found that “[g]iven ‘the nature of the device and its effect upon the wearer when activated, requiring an unwilling defendant to wear a stun belt during trial may have significant psychological consequences.’” *Id.* at 900 (quoting *People v. Mar*, 28 Cal.4th 1201, 124 Cal.Rptr.2d 161, 52 P.3d 95, 97 (2002)).

“A stun belt is far more likely to have an impact on a defendant's trial strategy than are shackles, as a belt may interfere with the defendant's ability to direct his own defense.” *United States v. Durham*, 287 F.3d 1297, 1306 (11th Cir. 2002). In fact, “the psychological toll exacted by such constant fear [of electric shock] is one of the selling points made by

the manufacturer of the belt.” *Hawkins v. Comparet-Cassani*, 251 F.3d 1230, 1239 (9th Cir. 2001) (internal citations omitted.).

Someone wearing a shock device is expected to experience intense fear and anxiety: “[o]ne of the great advantages [of the stun belt] ... is its capacity to humiliate the wearer... The stun belt’s intended use, therefore, is to control the mind of the defendant.” Philip H. Yoon, *The “Stunning” Truth: Stun Belts Debilitate, They Prejudice, and They May Even Kill*, 15 *Cap. Def. J.* 383, 386 (2003) (internal citations omitted.). As the manufacturer proudly put it:

‘After all, if you were wearing a contraption around your waist that by the mere push of a button in someone else’s hand could make you defecate or urinate yourself,’ the brochure asks, ‘what would that do to you from the psychological standpoint?’”

Id. at 387, fn. 24.

The anxiety from having to wear a stun belt causes physiological change: “The fear will elevate blood pressure as much as the shock will.”

Id. at 387. (Internal citations omitted.)

Here, there was no basis for the trial court to order Mr. Stoddard to go through trial while strapped to a device known to cause anxiety to the point of making one’s blood boil. The DOC may have had a preference for transporting Mr. Stoddard to court under extra guard, or in some sort of shackles, but the trial court may not simply defer to prison officials on

how to run the courtroom. Furthermore, the trial court should have held a proper hearing on the matter.

In *State v. Flieger*, 91 Wn. App. 236, 238, 955 P.2d 872 (1998), this Court reversed a felony murder conviction, where the defendant was “required to wear a ‘shock box’ strapped to his waist and placed under his shirt,” because the trial court refused to examine the factual basis for the jailers’ request that he wear the device. The *Flieger* opinion reasoned, that the “extent to which security measures are necessary is within a trial judge’s discretion” and that “the trial court must conduct a hearing and make a record before imposing restraints upon a criminal defendant.” *Id.* at 241. This reasoning was reaffirmed a year later in *Finch*, and then again in *Damon*.

In determining whether the use of restraints is justified, the trial court may consider the following factors:

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

State v. Hartzog, 96 Wn.2d 383, 400, 635 P.2d 694 (1981).

Here, there was an insufficient factual basis to order the in-court restraint. By his appropriate in-court behavior, Mr. Stoddard had shown due respect for the tribunal. *See* RP 6/23/14, RP 8/18/14, RP 9/15/14, RP 10/27/14. Even the State acknowledged that Mr. Stoddard “has never acted out in the courtrooms at Grays Harbor jail.” *See* Supp. CP 48. There is nothing in the record to suggest that Mr. Stoddard posed a flight risk any different than any other criminal defendant. *Accord State v. Walker*, 185 Wn. App. at 801-02 (Defendant’s very serious criminal history, street gang affiliation, in-custody fights, history of flight and access to resources that could aid in future flight deemed sufficient to justify restraint at sentencing, but cautioning “this showing may be insufficient to justify shackling a defendant in the presence of the jury.”).

Even if he had threatened harm to corrections officers, Mr. Stoddard had not threatened any of the courtroom staff. *C.f. State v. Afeworki*, ___ Wn. App. ___, ___ P.3d ___, 2015 WL 4724827, at *14 (No. 70762-1-I, filed Aug. 10, 2015) (use of electric shock restraint deemed reasonable, in part because the defendant had threatened a lawyer and the lawyer’s family); *State v. Monschke*, 133 Wn. App. 313, 337, 135 P.3d 966 (2006) (no error in ordering defendant to wear a stun belt, where he had been violent inside the courtroom and a hearing on the restraint revealed that he “had been caught in the county jail possessing makeshift

weapons.”) The custodial assault charge itself cannot give rise to presumption that an in-court restraint is appropriate or necessary.

Mr. Stoddard’s lawyer had no concerns about her safety and the trial court had no basis in fact upon which to express concerns about “the safety of everyone in the courtroom.” 10/30/14 RP 21-23. The trial court did not acknowledge that Mr. Stoddard’s in-court behavior had been appropriate. There were no facts to suggest that Mr. Stoddard posed a flight risk. There were no facts to suggest that he would disrupt the courtroom or aim to injure any courtroom personnel. There was no indication that the case would receive any sort of public notoriety or that Mr. Stoddard would be “rescue[d] by other offenders still at large.” *Hertzog*, at 400.

Separately, when the trial court pronounced its ruling, it did so as a *fait accompli*. 10/30/14 RP 20-21. (“I made a decision this morning.”); 10/30/14 RP 22. (“I believe that the security measures I have ordered today are appropriate.) The trial court erred not only because the ruling was made without a proper hearing, but also because the trial court ruled after an *ex parte* communication with an unnamed DOC employee. 10/30/14 RP 20. (“I was informed this morning by the corrections officer...”) Such abdication of judicial authority to the jailers is forbidden because the decision to shackle in the courtroom must be made by the trial

judge and not corrections officers. *Finch*, 137 Wn.2d at 853; *Flieger*;

Damon.

c. The improper restraint deprived Mr. Stoddard of a fair trial and requires reversal of each of the three custodial assault convictions.

Restraints are supposed to be employed only when nothing else will do. *Allen*, 397 U.S. at 344; *Davis*, 137 Wn.2d at 693. Here, there was no hearing, no weighing of alternatives, and no consideration of prejudice that would ensue to Mr. Stoddard from the security measures ordered. Defense counsel complained that rearranging courtroom furniture to put two prison guards within an arm's reach of the accused would signal to the jury that Mr. Stoddard still remained a prisoner of the State of Washington, but the trial court never even addressed that objection.

10/30/14 RP 23.

Because it infringes on several constitutional rights, improper shackling of a defendant is presumptively prejudicial and requires reversal unless the State can demonstrate beyond a reasonable doubt the error complained of did not contribute to the verdict. *Deck*, 544 U.S. at 635; *Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)).

The State cannot meet this burden merely by pointing out that the electric shock device placed on Mr. Stoddard was not visible to the jury.

For one thing, some of the restraint – the placing of the prison guards – was visible to the jurors. 10/30/14 RP 23 (Defense counsel objecting to “having the corrections officers sitting right up so close and here at counsel table.”); 10/30/14 RP 20 (Trial court stating that he “made the decision to move counsel table” to put the two officers behind Mr. Stoddard’s back). This was a well-taken objection as it is said that

a defendant has a right to be tried in an atmosphere free of partiality created by the use of excessive guards except where special circumstances, which in the discretion of the trial judge, dictate added security precautions.

Kennedy v. Cardwell, 487 F.2d 101, 108 (6th Cir. 1973).

The *Kennedy* opinion noted that “guards seated around or next to the defendant during a jury trial are likely to create the impression in the minds of the jury that the defendant is dangerous or untrustworthy,” and “could materially interfere with his ability to consult with counsel.” *Id.* at 108.

Here, it is reasonable to expect that the jurors would have taken the officers’ unusual proximity to Mr. Stoddard as a sign that he is still and a prisoner, and, potentially, that the trial court itself has ongoing concerns about his proclivity for violence. However, in *Holbrook v. Flynn*, 475 U.S. 560, 569, 106 S. Ct. 1340, 1346, 89 L. Ed. 2d 525 (1986), the United States Supreme Court held that a defendant was not “denied his

constitutional right to a fair trial when, at his trial with five codefendants, the customary courtroom security force was supplemented by four uniformed state troopers sitting in the first row of the spectator's section.” Of course Mr. Stoddard was tried by himself and the extra guards were nearly on top of him. *C.f.* “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.” *Id.* (emphasis added).

By its nature the shock device used here is designed to be worn under a person’s clothing. 10/27/14 RP 7. But, the fact that a shock device may not be visible does not settle the prejudice inquiry. Focusing upon the visibility of restraints addresses only one aspect of the constitutional violations posed by restraints: undercutting the presumption of innocence. However, the use of restraints also deprives a defendant the ability to meaningfully present a defense and “is itself something of an affront to the very dignity and decorum of judicial proceeding.” *Allen*, 397 U.S. at 344. Whether or not restraints are visible is of limited value in measuring the harm caused to the decorum and dignity of the proceedings and is wholly irrelevant in assessing the impact on a defendant’s ability to assist in his defense or to testify.

The effectiveness of traditional shackles lies in their ability to impede the movements of a fleeing person. While electronic shackling could similarly impede a fleeing person, it also creates a psychological deterrent not associated with physical shackles: an omnipresent fear of electric shock and resulting pain. As discussed above, that fear exists whether the restraint is visible or not. Electric shock belts create a risk and resulting fear of accidental shocks or shocks for innocent yet misinterpreted movements or gestures. The Indiana Supreme Court agrees that the psychological impact of these devices is prejudicial:

[W]e... hold that henceforth stun belts may not be used on defendants in the courtrooms of this State... we believe that the other forms of restraint listed above can do the job without inflicting the mental anguish that results from simply wearing the stun belt and the physical pain that results if the belt is activated.

Wrinkles v. State, 749 N.E.2d 1179, 1194-95 (Ind. 2001).

The psychological impact of a shock device affects the defendant's ability to interact with others in court whether that is counsel, a judge, a witness, or a jury. *See Gonzalez*, 341 F.3d at 900; *Durham*, 287 F.3d 1297, 1306 (11th Cir. 2002). At Mr. Stoddard's trial, the jury was instructed that they "are the sole judges of the credibility of each witness." CP 18. The jurors were instructed that "the manner of the witness while testifying" is something they could consider. CP 18.

Mr. Stoddard testified in his own defense. He admitted getting upset over his interaction with Officer Casey, but denied intentionally assaulting the three corrections officers. RP 94-97. In closing, the prosecutor pointedly argued that the jurors should disbelieve his account and trust what the corrections officers said. RP 123-24. The prosecuting attorney specifically directed the jurors to follow the instruction that lets them judge the credibility of a witness by taking into account “[t]he manner in which they testify.” RP 121-22.

While the video, Exhibit 1, documented some of what occurred, it does not resolve much of what was disputed. The jurors, to decide the case, in fact had to weigh Mr. Stoddard’s testimony against the named complainants’ words. But, Mr. Stoddard was the only one to take the witness stand with an electric shock device attached to his body. Grotesquely, when he testified that the DOC complainants had not given an accurate account of what he remembered happening, a fellow DOC officer had his finger on the trigger of a shock device with which Mr. Stoddard could be electrocuted.²

² While the record does not clarify this point, it is reasonable to assume that the State’s witnesses knew that Mr. Stoddard had the electric shock device on him when they took the stand. The subjective courtroom experience of these State’s witness was thus radically different than that of Mr. Stoddard. They would have been liberated, by the knowledge that fellow DOC guards sat within an arm’s reach of the man they accused of assault. He, on the other hand, would have been constrained by the sting of the shock device.

Notably, Mr. Stoddard was not told what conduct of his would or would not result in him being shocked. The trial court was very vague about this. All that Mr. Stoddard was told was to behave “appropriately” or “we will take appropriate steps to make sure that the courtroom is secure.” 10/27/14 RP 8. “The fear of receiving a painful and humiliating shock for any gesture that could be perceived as threatening likely hinders a defendant's participation in defense of the case, ‘chill[ing] [that] defendant's inclination to make any movements during trial-including those movements necessary for effective communication with counsel.’” *Gonzalez v. Pfliler*, 341 F.3d 897, 900-01 (9th Cir. 2003), (quoting *United States v. Durham*, 287 F.3d 1297, 1306 (11th Cir. 2002)). Here, as his lawyer pointed out, Mr. Stoddard’s ability to communicate with counsel during the proceedings was further compromised by the two extra guards placed over his shoulder. 10/30/14 RP 22-23. *See Kennedy*, 487 F.2d at 108.

That experience – of having an alleged victims’ co-worker exert the power to inflict pain – surely generated fear and may have caused a physiological response, for example, increased blood pressure. The right to be a competent witness and to testify in one’s own behalf is fundamental but as the Ninth Circuit Court of Appeals noted:

In the course of litigation, it is “not unusual for a defendant, or any witness, to be nervous while testifying... [I]n view of the nature of a stun belt and the debilitating and humiliating consequences that such a belt can inflict... [] it is reasonable to believe that many if not most persons would experience an increase in anxiety if compelled to wear such a belt while testifying at trial.” [] This “increase in anxiety” may impact a defendant's demeanor on the stand; this demeanor, in turn, impacts a jury's perception of the defendant.

Gonzalez v. Pliker, 341 F.3d 897, 900-01 (9th Cir. 2003) (internal citations and quotations omitted) (emphasis added).

The United States Supreme Court decision in *Nevada v. Riggins*, 504 U.S. 127, 137, 112 S. Ct. 1810, 118 L.Ed.2d 479 (1992), further confirms that visibility cannot be the benchmark of prejudice analysis when an electric shock device is used. In *Riggins*, prior to trial a defendant objected to the continued administration of psychotropic drugs because such drugs would alter the manner in which the jury perceived him. 504 U.S. 130-31. The trial court overruled his objection. *Id.* The Supreme Court reversed, finding the forced medication in that circumstance deprived him of due process. *Id.* at 135-37. Addressing prejudice, the Court said

Efforts to prove or disprove actual prejudice from the record before us would be futile, and guesses whether the outcome of the trial might have been different if Riggins’ motion had been granted would be purely speculative. . . . Like the consequences of compelling a defendant to wear prison clothing, see *Estelle v. Williams*, 425 U.S. 501, 504–505, 96 S. Ct. 1691, 48 L.Ed.2d 126 (1976), or of binding

and gagging an accused during trial, *see* [*Allen*, 397 U.S. at 344] the precise consequences of forcing antipsychotic medication upon Riggins cannot be shown from a trial transcript.

Riggins, 504 U.S. at 137. Not only did the Court recognize the futility of attempting to divine prejudice from the record, it did so by relying upon shackling cases. In doing so, the Court plainly envisioned a prejudice analysis far more searching than simply determining whether the restraint was visible. Mr. Stoddard's claim of error below must be accepted and his convictions reversed.

Admittedly, trial judges must have some ability to control an exceptionally unruly defendant. For example, in *State v. Aferworki*, ___ Wn. App. ___, ___ P.3d ___, 2015 WL 4724827, (No. 70762-1-I, filed Aug. 10, 2015) a panel of Division I of this Court just upheld the use of an electric shock device like the one Mr. Stoddard was ordered to wear. But there, Aferworki's "unruly temperament was on display throughout the proceedings leading up to the trial court's decision to order use of the [electric shock device] Band-It." *Id.* Mr. Stoddard answered the trial court with a *yes, sir, no, sir*, while Aferworki "repeatedly spoke in a rude and aggressive manner to the court," had to be repeatedly reprimanded for "interrupting the court and counsel," and still forced the court to "to recess

the proceedings twice” to control him. *Id.* at 15. Aferworki even threatened his attorney and the attorney’s sister. *Id.*

Unlike Aferworki, Mr. Stoddard was not informed “that mere rudeness or interrupting the court would not trigger [the shock device].” *Id.* at 14. And, the trial judge in Aferworki’s case considered less restrictive alternatives after “input from the parties and jail personnel.” *Id.* at 15. That decision was reasonable; what occurred at Mr. Stoddard’s trial was not.

The trial court erred in deferring to the jailers without holding a hearing to decide whether there was any factual basis for an in-court restraint. The record shows that Mr. Stoddard was not that extraordinary case where that “last resort” should be used. *Deck*, 544 U.S. at 630; *Finch*, 137 Wn.2d at 846; *Williams*, 18 Wash. at 50-51.

The State cannot demonstrate by any standard that requiring Mr. Stoddard to wear a shock device did not detrimentally affect his ability to consult with counsel, to present his defense, and to testify on his own behalf. The State cannot prove that the combination of the electronic restraint along with the additional officers standing guard over him did not impact Mr. Stoddard’s demeanor or the jury’s perceptions. This Court should reverse his convictions.

d. This Court should reach the issue even if defense counsel failed to sufficiently object to the in-court restraint.

The State may argue that the electric shackling issue was not sufficiently preserved below but this Court should reach the substantive issue nonetheless. Mr. Stoddard's lawyer did not explicitly object to the DOC plan when the trial court first suggested that in-court restraints may come into play if Mr. Stoddard's behavior were to deteriorate.³ 10/27/14 RP 6-7. Once the case was sent out for trial, the judge had already made up his mind on the issue. 10/30/14 RP 20-22. ("I believe that the security measures I have ordered today are appropriate... [Defense counsel] anything further?"). At that point, defense counsel complained of the trial going forward with her client "being surrounded by the personnel in the courtroom." 10/30/14 RP 22. Because of the attendant Sixth and Fourteenth Amendment implications, the shackling procedure used below must be addressed on appeal.

To demonstrate ineffective assistance of counsel, a defendant must make two showings: (1) defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced the defendant, i.e., there is a reasonable

³ "I expect that you will conduct yourself appropriately... If you do not, then we will take appropriate steps to make sure that the courtroom is secure." 10/27/14 RP 8 (emphasis added).

probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different. *State v. Thomas*, 109 Wn.2d 222, 225–26, 743 P.2d 816 (1987) (applying the two–prong test in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984)). U.S. Cons. Amend. VI. To prevail on a claim of ineffective assistance of counsel based on a failure to object, the defendant must show: (1) the absence of a legitimate strategic or tactical reason for not objecting; (2) that the trial court would have sustained the objection if made; and (3) the result of the trial would have differed if the evidence had not been admitted. *State v. Saunders*, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

The Washington Supreme Court already applied the traditional *Strickland* test to a defense counsel failure to object to shackling. *In re Davis*, 152 Wn. 2d 647 at 698. Davis was shackled when tried for capital murder. In his post-conviction personal restraint petition, Davis argued that “he had ineffective assistance of counsel during both the *guilt phase* and *penalty phase* of his trial because his counsel did not object to [him] being shackled and then did not prevent the jury from seeing the ankle shackles. *Id.* at 698. The Supreme Court agreed that “it is the responsibility of defense counsel to raise an objection to physical restraints,” that “[i]n not timely objecting to the shackling of Petitioner

during the new trial, defense counsel may have waived any objection,” and this would have been deficient performance. *Id.* at 699-700.

Because “there was overwhelming evidence of his guilt,” Davis was unable to show that “there was a reasonable probability that, *but for* his counsel's deficient performance by not objecting, the outcome of his trial would have been different.” *Id.* at 700. The Court, however, reached the opposite conclusion with respect to the penalty phase of the proceeding. There, like Mr. Stoddard below, Davis contested the State’s assertions against him with evidence of his own. Even though the jurors’ “opportunity to observe Davis in shackles was partial and fleeting,” the Court remanded, because “the balance must tip in Davis' favor in the penalty phase given the difference in the nature of the inquiry.” *Id.* at 705.

As discussed above, given the competing nature of eyewitness testimony in the case, Mr. Stoddard’s in-court demeanor when exercising his constitutional right to testify in his own defense, was of critical import. In closing argument, the prosecuting attorney specifically asked the jurors to consider “the manner in which they testify” when choosing who to believe. RP 121-22.

Like in *Davis*, the Court should find that Mr. Stoddard’s right to a fair trial was prejudiced by the in-court restraint, whether the objection was sufficient or not.

2. The State failed to prove that Mr. Stoddard committed a custodial assault against Officer Daniels.

a. The State is required to prove every essential element of the crime beyond a reasonable doubt.

In a criminal prosecution, the State bears the burden to prove every element of the charged offense beyond a reasonable doubt. *Apprendi v. New Jersey*, 530 U.S. 466, 477, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000); *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970); U.S. Const. amend. XIV; Const. art. I, § 3.

In reviewing the sufficiency of the evidence, the question is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *State v. Green*, 94 Wn.2d 216, 221, 616 P.2d 628 (1980). To find a defendant guilty beyond a reasonable doubt, the trier of fact must “reach a subjective state of near certitude of the guilt of the accused.” *Jackson*, 443 U.S. at 315.

The absence of proof beyond a reasonable doubt of an element of the crime requires reversal and dismissal. *Jackson*, 443 U.S. at 319; *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969), *reversed on other grounds by Alabama v. Smith*, 490 U.S. 794,

109 S. Ct. 2201, 104 L. Ed. 2d 865 (1989); *Green*, 94 Wn.2d at 221.

Reversal and dismissal of Count III is required here.

b. The State failed to produce sufficient evidence to prove that Mr. Stoddard intended to assault Officer Daniels, when he ran into him while running away from others who had blinded him with pepper spray

A person is guilty of custodial assault where the person assaults a staff member at any adult corrections institution who was performing official duties at the time of the assault. RCW 9A.36.100(1)(b).

Instruction No. 8 correctly specified for the jury that Mr. Stoddard could be convicted of custodial assault against Officer Daniels if, and only if, he assaulted him. CP 21. Instruction No. 9 correctly specified that Mr. Stoddard could be guilty of such a crime only if he acted intentionally. CP 21. With respect to this *mens rea* element of this particular charge, the State's proof failed.

Exhibit 1, the video of the incident, shows how Mr. Stoddard ran wildly after being pepper sprayed in the eyes by Officer Casey. When this happened, Officer Daniels was outside the dining hall. RP 54. Mr. Stoddard testified that getting sprayed in the eyes made him scared, panicked, and anxious, so he ran. RP 95. He was trying to flee, to "get away." RP 96. He could not see anybody on the other side of the door. RP 96, 102.

Under RCW 9A.08.010(1)(a), “[a] person acts with intent or intentionally when he acts with the objective or purpose to accomplish a result which constitutes a crime.” That is not what Mr. Stoddard was doing. Even Officer Daniels’ testimony supported Mr. Stoddard’s account of the effects of the pepper spray. RP 54, 61 (discussing the substance as painful: “the fluid flows down to the eyes causing a blindness to a person temporarily so they cannot see”).

The prosecuting attorney argued to the jury: “If you believe he did it on purpose, he is guilty.” RP 134. The prosecuting attorney also noted that Mr. Stoddard “may have been trying to get out of there, but he was willing to take down whoever got in his way.” RP 123-24 (emphasis added). But proof of willfulness is less than proof of intent and in a sense, this word choice reveals why the State’s proof was insufficient. “A requirement that an offense be committed willfully is satisfied if a person acts knowingly with respect to the material elements of the offense, unless a purpose to impose further requirements plainly appears.” RCW 9A.08.010(4). The State may have established that Mr. Stoddard was willing to go through the door – and ultimately through Officer Daniels – to escape the corrections officers who had pepper sprayed him, but that is not sufficient to prove beyond a reasonable doubt that he committed an

intentional assault. ⁴ “Wilfully equates with knowingly...Knowingly is a less serious form of mental culpability than intent.” *City of Spokane v. White*, 102 Wn. App. 955, 961, 10 P.3d 1095 (2000).

c. Count III should be reversed and dismissed for insufficient evidence.

The State’s proof regarding Mr. Stoddard’s intent was insufficient. The conviction on count III cannot stand; it must be reversed and dismissed with prejudice. *Jackson* 443 U.S. at 319; *Green*, 94 Wn.2d at 221.

E. CONCLUSION

For the reasons above, this Court should reverse all three of Mr. Stoddard’s convictions for a new trial, or in the alternative, reverse and dismiss count III.

Respectfully submitted this 14th day of September, 2015.

/s Mick Woynarowski

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⁴ In rebuttal, the prosecuting attorney re-acknowledged that “a lot of this comes down to absence of mistake, did he mean to do all of this?” RP 132.

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO**

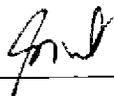
STATE OF WASHINGTON,)	
)	
RESPONDENT,)	
)	
v.)	NO. 46938-3-II
)	
KYLE STODDARD,)	
)	
APPELLANT.)	

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