

NO. 48072-7-II

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

STATE OF WASHINGTON,

Respondent,

v.

THOMAS LOMAX,

Appellant.

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

The Honorable David Edwards, Judge

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

Page

A. ARGUMENT 1

1. The trial court failed to consider all the reasons it should not take the extraordinary measure of shackling Lomax during trial.. 1

2. The trial court abused its discretion in excluding evidence of the juvenile crimes of dishonesty..... 4

3. The prosecutor vouching for witness credibility in closing argument denied Lomax a fair trial..... 4

4. Cumulative error denied Lomax his right to a fair trial..... 4

5. and 6. The court erred in imposing a mandatory DNA collection fee. 4

7. It is error to require Lomax to provide yet another DNA sample..... 5

8. Remand is necessary to correct a scrivener’s error..... 5

9. Appellate costs are properly raised in Lomax’s opening brief.. 5

B. CONCLUSION 6

CERTIFICATE OF SERVICE 7

TABLE OF AUTHORITIES

Page

Cases

<i>State v. Damon</i> , 144 Wn.2d 686, 25 P.3d 418, 33 P.3d 735 (2001)	2, 4
<i>State v. Finch</i> , 137 Wn.2d 792, 975 P.2d 967 (1999).....	1, 2
<i>State v. Mathers</i> , 193 Wn. App. 913, 376 P.3d 1163, <i>review denied</i> , 380 P.3d 482 (2016).....	5
<i>State v. Shelton</i> , 194 Wn. App. 660, 378 P.3d 230 (2016) (petition for review pending, No. 93392-8)	5
<i>State v. Sinclair</i> , 192 Wn. App. 380, 367 P.3d 612 (2016).....	5
<i>State v. Stoddard</i> , 192 Wn. App. 222, 366 P.3d 474 (2016).....	5

Other Authorities

Article I, Section 3 and Article I, Section 22 (Amendment 10) of the Washington State Constitution	1
Sixth and Fourteenth Amendments of the United States Constitution	1

A. ARGUMENT

1. The trial court failed to consider all the reasons it should not have taken the extraordinary measure of shackling Lomax during trial.

“[A] defendant in a criminal case is entitled to appear at trial free from all bonds or shackles except in extraordinary circumstances.” *State v. Finch*, 137 Wn.2d 792, 842, 975 P.2d 967 (1999). “This is to ensure that the defendant receives a fair and impartial trial as guaranteed by the Sixth and Fourteenth Amendments of the United States Constitution and Article I, Section 3 and Article I, Section 22 (Amendment 10) of the Washington State Constitution.” *Finch*, 137 Wn.2d at 843. “[R]estraining a defendant during trial infringes upon this right to a fair trial for several reasons[:] ... it violates a defendant's presumption of innocence[,],... it restricts the defendant's ability to assist his counsel during trial, it interferes with the right to testify in one's own behalf, and it offends the dignity of the judicial process.” *Finch*, 137 Wn.2d at 844–45. Given the constitutional implications of using restraints in a criminal trial, “shackles or other restraining devices should ‘be used only when necessary to prevent injury to those in the courtroom, to prevent disorderly conduct at trial, or to prevent an escape.’” *State v. Damon*, 144 Wn.2d 686, 691, 25 P.3d 418, 33 P.3d 735 (2001). Subject to this limitation, a trial court has broad discretion to

determine which security measures are necessary to maintain decorum in the courtroom and to protect the safety of its occupants. *Id.* at 691.

A trial court must consider numerous factors prior to ordering a defendant restrained during trial. The trial court failed to weigh and balance all of the requisite considerations (as below) before shackling Lomax.

[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.

Damon, 144 Wn.2d at 691 (*quoting Finch*, 137 Wn.2d at 848 “[T]he trial court should allow the use of restraints only after conducting a hearing and entering findings into the record that are sufficient to justify the use of the restraints.” *Damon*, 144 Wn.2d at 691–92.

Lomax was facing a persistent offender life sentence if convicted. A serious sentence alone does not justify shackling. If so, any accused facing more than just a few years in prison, or who would be subject to great personal repercussions if incarcerated, would be shackled.

Nothing about Lomax’s temperament caused the court concern. The court made no record of aggressive behavior during prior court appearances.

Similarly, there was nothing remarkable about Lomax's age or physical attributes.

Although Lomax has 13 prior felony convictions, none are for escape, or threatening or intimidating a judge, or assault or intimidating a corrections officer or police officer, or in any way menacing court staff or other criminal justice participants.

There was no evidence of an escape plan. Rather, the court only heard through a court administrator that a corrections officer suspected Lomax planned to escape.

Nothing suggested Lomax had self-destructive tendencies.

Nothing in the record reported a concern for mob violence, attempted revenge by others, the possibility of rescue by other offenders still at large, or a large menacing trial audience.

Finally, the court did not take issue with the nature and physical security of the courtroom. RP III 411-12.

“[A] trial court is required to exercise discretion in determining whether use of restraints is necessary to maintain decorum in the courtroom.” *Damon*, 144 Wn.2d at 692. The trial court failed to do so.

Lomax's conviction should be reversed.

2. The trial court abused its discretion in excluding evidence of the juvenile crimes of dishonesty.

There is not additional authority Lomax would like to present to the court.

3. The prosecutor vouching for witness credibility in closing argument denied Lomax a fair trial.

There is not additional authority Lomax would like to present to the court.

4. Cumulative error denied Lomax his right to a fair trial

There is not additional authority Lomax would like to present to the court.

5. and 6. The court erred in imposing a mandatory DNA collection fee.

There are published opinions from each Court of Appeals division.

Each resolves the issue contrary to the position taken by Lomax:

Division I - *State v. Shelton*, 194 Wn. App. 660, 378 P.3d 230 (2016)
(petition for review pending, No. 93392-8)

Division II – *State v. Mathers*, 193 Wn. App. 913, 376 P.3d 1163,
review denied, 380 P.3d 482 (2016)

Division III – *State v. Stoddard*, 192 Wn. App. 222, 366 P.3d 474
(2016)

7. It is error to require Lomax to provide yet another DNA sample.

There is not additional authority Lomax would like to present to the court.

8. Remand is necessary to correct a scrivener's error.

The state concedes error. Brief of Respondent at 20.

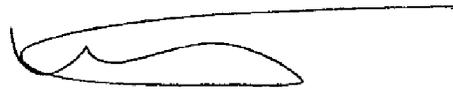
9. Appellate costs are properly raised in Lomax's opening brief.

The state maintains that appellate costs are not ripe. To the contrary, an objection to appellate costs in appellant's opening brief is appropriate. *State v. Sinclair*, 192 Wn. App. 380, 389, 367 P.3d 612 (2016). However, "where the State knows at the time of receiving the notice of appeal that no cost bill will be filed, a letter so advising defense counsel would be courteous." *Id.* at 390. To date, I have received no notice from the State.

B. CONCLUSION

Lomax rests on the brief filed, the additional argument and authorities in this reply brief, and any argument which may occur during oral argument.

Respectfully submitted October 28, 2016.

A handwritten signature in black ink, appearing to read "Lisa E. Tabbut". The signature is written in a cursive style with a long horizontal stroke extending to the right.

LISA E. TABBUT/WSBA 21344,
Attorney for Thomas Lomax

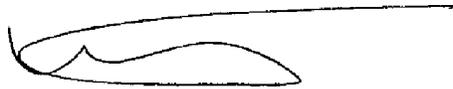
CERTIFICATE OF SERVICE

Lisa E. Tabbut declares as follows:

On today's date, I efiled the Reply Brief to (1) Grays Harbor County Prosecutor's Office, at appeals@co.grays-harbor.wa.us; (2) the Court of Appeals, Division II; and (3) I mailed it to Thomas Lomax/DOC#897441, Clallam Bay Corrections Center, 1830 Eagle Crest Way, Clallam Bay, WA 98326.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed October 28, 2016, in Winthrop, Washington.

A handwritten signature in black ink, appearing to read 'Lisa E. Tabbut', with a long horizontal line extending to the right.

Lisa E. Tabbut, WSBA No. 21344
Attorney for Thomas Lomax, Appellant

LISA E TABBUT LAW OFFICE

October 28, 2016 - 1:41 PM

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