

No. 49218-1-II

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

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STATE OF WASHINGTON,

Respondent,

v.

JEFFREY ALLEN BOATRIGHT

Appellant.

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ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Anne Hirsch  
Cause No. 16-1-00706-34

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BRIEF OF RESPONDENT

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## **A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. There is no indication that the jury was aware of Boatright's leg restraints, and the State presented substantial evidence that Boatright was guilty of vehicle prowling. Do these facts render any alleged error harmless beyond a reasonable doubt?
2. Should this court decline to impose appellate costs, or should it impose costs at this time, and leave the determination of Boatright's indigency for when the judgment actually comes due?

## **B. STATEMENT OF THE CASE**

In the early morning hours of Jan, 17, 2015, Philip Kelley awoke to find an individual in his driveway, dressed in a white and blue jacket and baseball-cap, rummaging through his vehicle. RP 176-79. Armed with a baseball bat in one hand and cell phone in the other, Kelley walked outside, keeping a close watch on the prowler for several minutes while he spoke to operators at 911.<sup>1</sup> RP 180-84. Once Officer Jeffrey Davis of the Olympia Police Department and Deputy Shenkel of the Thurston County Sheriff's Office arrived at the scene, the prowler took off running. RP 51-55. Officer Davis gave chase, and began searching the area. RP 54-55. With help from Kelley, who directed the officers to a nearby driveway, they discovered Jeffrey Boatright hiding behind a car, wearing a white and blue jacket and two-tone baseball cap, and with a small black bag within

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<sup>1</sup> Surveillance video of the events show that the prowler spent significant time sorting through several vehicles, and that Kelley was outside and watching the prowler for several minutes, followed by the arrival of law enforcement, and the suspect running off. RP 145-55, Exhibit 15.

arm's reach. RP 54-56, 185-86. As he was being arrested, Boatright told Kelley "I got to go to rehab anyways." RP 187.

The bag next to Boatright was found to contain a number of items taken from vehicles belonging to Kelley and several of his neighbors. RP 64-66. One of those neighbors, Gregory Hilchey, had a video surveillance system at his home which recorded an individual wearing a light and dark jacket and two-tone baseball cap entering several vehicles; Kelley walking outside to observe the prowler; and the individual running away upon the arrival of law enforcement at the scene. RP 145-55, Exhibit 15.

At trial, the State presented the surveillance video, along with testimony from Officer Davis, Hilchey and Kelley. Kelley stated that while he had been unable to make out the prowler's features, he had closely observed the individual, and based upon the clothing, he was a "hundred percent" certain that Boatright was the person he had seen entering the vehicles. RP 198. Boatright was subsequently convicted of vehicle prowling in the second degree, and sentenced to sixty months. RP 291.

### **C. ARGUMENT**

- 1. The Evidence Against Boatright is Damning. It Is Clear Beyond A Reasonable Doubt The He Would Have Been Convicted Regardless Of Whether Or Not He Had Been Placed In Restraints.***

In his only point of error, Boatright claims that the trial court violated his due process rights when it ordered that he be restrained with a leg brace. App Brief at 3. Nevertheless, even presuming that the court erred in imposing the restraints,<sup>2</sup> this claim would clearly fall within the realm of harmless error, as the State presented overwhelming evidence of Boatright's guilt, and there is no indication that the jury was ever aware of the leg brace. *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967) (holding that certain constitutional errors may be deemed harmless); *Delaware v. Van Arsdall*, 475 U.S. 673, 106 S. Ct. 1431, 89 L. Ed. 2d 674 (1986) ("The harmless error rule preserves an accused's right to a fair trial without sacrificing judicial economy in the inevitable presence of immaterial error."); *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002) (quoting *Neder v. United States*, 527 U.S. 1, 9, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999)) ("the ... test for determining whether a constitutional error is harmless: Whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'").

a. *The strength of evidence against Boatright establishes beyond a reasonable doubt that the leg restraints did not contribute to the guilty verdict.*

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<sup>2</sup> Based upon the facts, the State does not believe that the court erred by placing Boatright in shackles, but for the sake of expediency, is only focusing upon harmless error analysis.

Under the harmless error doctrine, unless there is a reasonable belief that “but for” the restraint, Boatright may have been found innocent, any alleged error must be found harmless and subsequently dismissed. *State v. Finch*, 137 Wn.2d 792, 862, 975 P.2d 967 (1999) (affirming the guilty verdict due to overwhelming evidence of guilt, despite the fact that the jury had seen the defendant in restraints). However, simply put, the evidence against Boatright is overwhelming. He was found hiding at the scene of the crime with a bag of stolen property within arm’s reach. RP 64-66. Surveillance footage showed that he was wearing the same outfit as the individual who committed the thefts, Exhibit 15, and an eyewitness who watched the prowler for an extended period of time directed law enforcement to where Boatright was hiding, RP 185-86, then identified him as the prowler based upon his outfit. RP 188. Finally, the jury was informed that upon his apprehension, Boatright told Kelley that “I got to go to rehab anyway.” RP 187.

As his only defense, Boatright’s defense counsel argued that there was reasonable doubt as to whether Boatright actually committed the vehicle prowls, but this claim is not believable. Is it somehow possible that at 3:30 in the morning, Boatright just happened to be innocently hiding behind a car in a random residential driveway, when a man wearing the same outfit handed him a bag of stolen goods, and ran off into the night?

Maybe. Is it probable or reasonable? Absolutely not. Clearly, the jury justifiably rejected Boatright's unsupported defense, instead relying on the overwhelming evidence to find him guilty.

In light of these facts, it is clear beyond a reasonable doubt that no reasonable jury would have found Boatright innocent, regardless of the presence of the restraint. *State v. Kidd*, 57 Wn.App. 95, 101, 786 P.2d 847 (1990). Accordingly, the conviction must be upheld on the grounds that the alleged error did not affect the outcome at trial, and was therefore harmless. *Brown*, 147 Wn.2d at 341.

b. *Every indication is that the jury was unaware of Boatright's leg restraint, therefore, without a suggestion of prejudice, the alleged error must be held harmless.*

There is nothing in the record suggesting that the jury was aware of the leg restraint, and under Washington law, it is well established that there can be no prejudice from the imposition of restraints if the jury is unaware of their presence. *State v. Hutchinson*, 135 Wn.2d 863, 888, 959 P.2d 1061 (1998) ("A claim of unconstitutional shackling is subject to harmless error analysis. In order to succeed on his claim, the Defendant must show the shackling had a substantial or injurious effect or influence on the jury's verdict. Because the jury never saw the Defendant in shackles, he cannot show prejudice."); *Rhoden v. Rowland*, 10 F.3d 1457, 1459-60 (9th Cir. 1993) ("Of course, if the jurors never saw [defendant's]

shackles, then he cannot show prejudice”); *State v. Jaime*, 168 Wn.2d 857, 873, 233 P.3d 554 (2010) (“In cases where such restraints were used, Washington courts have found that there was no prejudice to the defendant because a jury must be aware of a restraint to be prejudiced by it.”); *State v. Finch*, 137 Wn.2d 792, 861, 975 P.2d 967 (1999); *United States v. Collins*, 109 F.3d 1413, 1418 (9th Cir. 1997). Contrary to this established line of authority, Boatright’s brief claims that prejudice may attach even if jurors did not have an opportunity to see the restraints, however, to make this argument, he misrepresents the law.<sup>3</sup> App. Brief at 8. In fact, in the case Boatright relies upon, *In re Davis*, the court actually affirmed a guilty verdict, despite the fact that a member of the jury saw the defendant in restraints (although the court did reverse the death penalty sentence), thus the holding does not support Boatright’s claim. *In re Pers. Restraint of*

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<sup>3</sup> To support his claim that prejudice may attach even when jurors do not see the restraints, Boatright cites to *In re Davis*, stating “(reversing death penalty even though “No jurors saw [the defendant] in shackles during the penalty phase.”).” App. Brief at 8. However, the full quote states:

“[O]nly one juror saw [the defendant] in shackles for brief glimpses on two occasions during the guilt phase. *No jurors saw [the defendant] in shackles during the penalty phase.* Although there is no evidence that any juror saw Petitioner in shackles during the penalty phase, we cannot be assured that any negative inference as to Petitioner’s character was cured.” *In re Davis*, 152 Wn.2d at 704 (emphasis on portion quoted by Boatright).

In its full context, it is clear that the quotation does not hold that prejudice may exist even if the jury is unaware of restraints.

*Davis*, 152 Wn.2d 647, 662, 101 P.3d 1 (2004) (“We affirm the Court of Appeals in the guilt phase.”).

In the present case, both the trial court judge and the prosecutor noted that the leg brace was not visible,<sup>4</sup> and Boatright’s trial counsel did not dispute these findings. RP 15, 17-18. Thus, any suggestion that the jury could, in fact, see the restraint is purely speculative. *Bishop v. Miche*, 88 Wn. App. 77, 86, 943 P.2d 706 (1997) (“Mere speculation is not sufficient to support a claim.”).

Finally, Boatright argues that the imposition of restraints can restrict an accused person’s ability to assist in the defense, and can interfere with the right to testify. App. Brief at 9. However, there is no indication that Boatright sought to testify, and he fails to explain how the brace impaired his ability to assist in his defense.<sup>5</sup> *In re Det. of Pettis*, 188 Wn. App. 198, 211, 352 P.3d 841 (2015) (noting that courts will not consider unsupported allegations).

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<sup>4</sup> The prosecutor stated “I can look at the defendant here as the court can and can see that there is no way that the jury’s going to be able to see that.” RP 15.

<sup>5</sup> Regarding the restraints, the court acknowledged that Boatright needed to be in good communication with his attorney, and the court instructed him that if there was an issue, to notify the court so a recess could be taken. RP 18. At no point throughout the trial did Boatright or his attorney notify the court of any issues.

Consequently, absent any indication that Boatright was actually prejudiced by the imposition of the restraints, the alleged error is harmless, and the conviction must be upheld.

***2. This Court Has the Discretion to Impose Appellate Costs on Boatright, Despite the Fact That He Was Found Indigent at Trial. If Boatright Is Unable to Pay When Judgment is Due, He May At That Time Seek a Waiver of Costs.***

In the event that Boatright's appeal is unsuccessful, he requests that the court exercise its discretion to deny any appellate costs requested. App. Brief at 9. It is well established that RCW 10.73.160(1) gives this court discretion as to the award of costs. *State v. Sinclair*, 192 Wn. App. 380, 367 P.3d 612 (2016); see *State v. Nolan*, 141 Wn.2d 620, 8 P.3d 300 (2000). Boatright argues that because the trial court found him to be indigent, costs should presumptively be waived, App. Brief at 10, however, this argument ignores both the language and the history of RCW 10.73.160.

To begin with, while the ability to pay is a controlling factor at the trial court level, *Sinclair* notes that 10.73.160 does not set forth parameters for the exercise of an appellate court's discretion. *Sinclair*, 192 Wn. App. at 389. That decision goes on to hold that "ability to pay is certainly an important factor that may be considered under 10.73.160, but it is not

necessarily the only relevant factor, nor is it necessarily an indispensable factor. *Id.*

Next, in *Blank*, the Supreme Court held that an inquiry into the defendant's ability to pay is not constitutionally required before appellate costs are imposed under 10.73.160, although such an inquiry is required "before enforced collection or any sanction" for nonpayment. *State v. Blank*, 131 Wn.2d 230, 239-42, 930 P.2d 1213 (1997). The court pointed out that the statute contemplates an inquiry into ability to pay at the time the defendant requests remission of costs. *Id.* at 242. "[C]ommon sense dictates that a determination of ability to pay and an inquiry into defendant's finances is not required before a recoupment order may be entered against an indigent defendant as it is nearly impossible to predict ability to pay over a period of 10 years or longer." *Id.*

Finally, Boatright cites *Blazina* as support for his argument that he should not be subject to appellate costs. App. Brief at 10. Reliance on *Blazina* is misplaced though, as that case concerned a trial court's imposition of discretionary legal financial obligations, such as DNA testing, extradition costs, and public defender recoupment. *State v. Blazina*, 182 Wn.2d 827, 831, 344 P.3d 680 (Wash. 2015). As discussed above, the imposition of appellate costs is subject to a different standard

than the imposition of costs at the trial court level. *Sinclair*, 192 Wn. App. at 389.

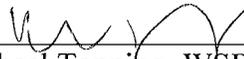
It is not unfair to ask the appellant to shoulder the cost of proceedings resulting from his commission of a crime. Those costs have to be paid by someone; they do not simply evaporate. If Boatright does not pay them, that burden falls upon the taxpayers. At such future time as the State seeks to collect the costs of appeal, Boatright has the statutory right to seek remission if he truly cannot pay. He may, however, become a productive citizen who can afford to pay those costs.

The State respectfully asks this court to impose the costs as requested by the State in the cost bill.

#### **D. CONCLUSION**

For these reasons, the State asks that Boatright's conviction be upheld, and the court exercise its discretion to impose appellate costs.

Respectfully submitted this 15<sup>th</sup> day of February, 2017.

  
\_\_\_\_\_  
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CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent on the date below as follows:

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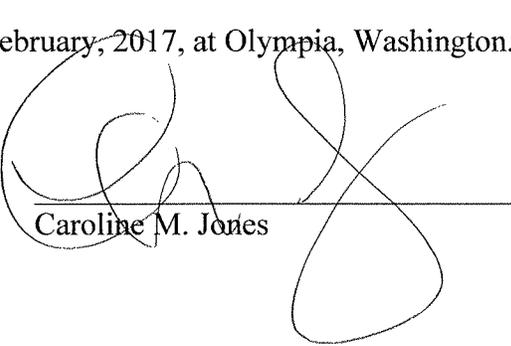
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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 15 day of February, 2017, at Olympia, Washington.

  
\_\_\_\_\_  
Caroline M. Jones

# THURSTON COUNTY PROSECUTOR

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