

No. 49777-8-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent,

v.

XAVIER FLORES, Appellant.

Appeal from the Superior Court of Skamania County
The Honorable Mary Sue Wilson
No. 16-1-01186-5

**BRIEF OF APPELLANT
XAVIER FLORES**

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I. ASSIGNMENTS OF ERROR

1. The Trial Court's Order, Requiring Mr. Flores to be Shackled With Leg Restraints During Trial, Was Error.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Does a trial court abuse its discretion when it orders that a defendant be in leg restraints during trial based on the defendant being charged with assault in the second degree of a police officer, prior convictions, including attempted elude, and where the defendant is seated in close proximity to the jury, even though there is no reason to believe that the defendant is an imminent risk of escape, injury to anyone in the courtroom, or disrupting the proceedings?
2. May a trial court order leg restraints without considering other, less restrictive options, such as an additional corrections officer?
3. May a trial court defer to the recommendations or requests of corrections officers in deciding whether or not to use leg restraints during trial?
4. May a trial court order leg restraints as a routine security measure?
5. Is a defendant prejudiced by the use of leg restraints when

the restraints are not visible to the jury, but the defendant is required to take the stand and be removed from the stand outside the presence of the jury, unlike any other witnesses? Is it possible that the jury would infer that there were restraints or other security issues based on the defendant being treated differently than all the other witnesses?

III. STATEMENT OF THE CASE

1. Leg Restraints.

The State made a motion to restrain the defendant during trial. (RP 9). Defense counsel objected. (RP 9-10).

The State argued that Mr. Flores should be restrained during trial because it was security issue, he was dangerous, and he was looking at prison time if convicted. Unless the court ordered leg restraints, the Thurston County Sheriff's office would require two deputies in the courtroom for security purposes. (RP 11-12). The use of leg restraints in Thurston County appears to be common practice as defense counsel noted that he had 50 or more trial days, with different defendants, where they were in leg restraints. (RP 10). The State also argued that Mr. Flores was dangerous because he was charged with assaulting an officer in this case and his criminal history included other felonies, obstruction, resisting

arrest, assault in the fourth degree when he was a juvenile, and attempting to elude. (RP 12). The State also argued that Mr. Flores was looking at 22-29 months if convicted, with a possible exceptional sentence. (RP 12).

Defense counsel noted that Mr. Flores had not posed any security issues while in jail and had moved up in classification while in the jail. (RP 13-14). Defense counsel also argued that Mr. Flores did not have any violent criminal history. (RP 13-14).

The court ordered that Mr. Flores be restrained with a leg brace during trial. (RP 17). The court held that restraints were appropriate in this case due to the seriousness of the charge and Mr. Flores' criminal history:

[T]he factors that support it in this specific case are the seriousness of the charge, in particular Assault 2, the nature of the allegations that are set forth in the Affidavit of Probable Cause, including the conduct at the time interacting with law enforcement officers; and also, the criminal history that is not objected to that does include obstructing and attempting to elude a police vehicle and Assault 4.

(RP 17). The court also noted that the courtroom was not large and Mr. Flores would be seated in close proximity to the jury. (RP 17).

The court also found that the leg brace was the most minimal restraint possible:

[H]ere the proposed restraint is a leg brace, which it has been stipulated that the leg brace is not visible to the jury

and would not be mentioned if it was worn. And that among restraint options, it's the most minimal, but it does provide a measure of security, because it will lock under sudden movement to prevent quick movement or running.

(RP 16).

The court did note that the jury may be able to tell that Mr. Flores is restrained if they saw him walking, so the court would make efforts to ensure that the jury does not see the defendant walking around the courtroom. (RP 17). Mr. Flores did testify. (RP 327). To avoid the jury seeing Mr. Flores walking in restraints, he took the witness stand while the jury was out and returned to counsel table while the jury was out. (RP 325, 380). All other witnesses took the stand and were excused in front of the jury.

2. Facts.

On July 7, 2016, Mr. Flores was with his girlfriend. (RP 328). Her cousin called and said she needed help moving. (RP 328). So, Mr. Flores and his girlfriend went to help. (RP 328). While they were at the house, Mr. Flores was concerned that there were dangerous people at the house. (RP 329). He called his girlfriend, who was sitting in their car, and told her to leave, that he would go out the back and leave on foot, and they would meet up later. (RP 329).

Mr. Flores left on foot and believed he was being followed and

was in danger. (RP 330). He ran and ended up in the parking lot of the Extended Stay and slid under a van to hide. (RP 332). Around that time he was on the phone with his girlfriend, telling her he needed help. (RP 333).

Ms. Tarvis worked as the night laundry person at Extended Stay. (RP 91). She heard someone say help me and then saw someone running on the security camera. (RP 92). When she went outside, she saw the defendant under a car. (RP 95). She asked what he was doing, Mr. Flores didn't answer, got up, and ran. (RP 95). Mr. Flores testified that he ran because he didn't want to put her in harm's way. (RP 332-33). Ms. Tarvis called the police because she was working alone and didn't feel comfortable. (RP 95).

Mr. Flores saw a car coming, so he ran and ducked down by a tree. (RP 333, 336). Ms. Gardner was staying at the Extended Stay and she testified that she woke up at 2:30 a.m. to yelling and screaming, she looked out her window and saw a man on a hill reciting prayers. (RP 272-73).

Officer Clark was dispatched to the Extended Stay regarding a suspicious person yelling. (RP 148). He was the first officer to arrive. (RP 149). At first he didn't see or hear anything, so he drove around the parking lot. (RP 149-50). Then he saw someone running out of the

bushes towards his car. (RP 150).

Mr. Flores testified that he saw another car, realized it was a police car, so he thought everything would be okay. (RP 336). He stood up, made eye contact, and raised his hands to get the officer's attention. (RP 336, 365). Mr. Flores walked up to the patrol car and opened the passenger door to talk to the officer. (RP 340). Mr. Flores testified that the officer got out of the car, said get the fuck away from my car, that Mr. Flores put his hands up and told the officer people were chasing him, he closed the car door, and the officer grabbed his arm and slammed his face on the ground. (RP 341).

Mr. Flores testified that the officer landed on top of him and he couldn't breathe. (RP 342). He testified that the officer kept telling him to stop resisting, then tased him repeatedly, without warning. (RP 344). Mr. Flores testified that he kept asking the officer why he was doing this and he tried to get up and get the officer off of him, but he never grabbed the officer or his gun. (RP 345). The officer then started punching or elbowing Mr. Flores. (RP 347). At that point, Mr. Flores started yelling obscenities at the officer. (RP 347). Another officer arrived and began punching Mr. Flores in the face. (RP 348).

Officer Clark testified that when he stopped and got out of his car Mr. Flores was at his car, with the passenger door open. (RP 151). He

testified that he asked Mr. Flores if he was okay, if he needed help, and told him to close the car door. (RP 151). He testified that Mr. Flores did not respond. (RP 151). Officer Clark testified that he walked over to Mr. Flores, grabbed his shoulder, pulled him away from the car, and shut the door. (RP 152). Then, Mr. Flores lunged at him, put his arms around the officer's neck, and was squeezing. (RP 153). Officer Clark testified that he tried to push Mr. Flores off, but he couldn't, he thought Mr. Flores was trying to bite him, so he did a leg sweep and took Mr. Flores to the ground. (RP 154).

Officer Clark testified that he told Mr. Flores to let go or he'd use his taser. (RP 157). He tased Mr. Flores two or three times, for a total of 10-15 seconds. (RP 211). Officer Clark testified that Mr. Flores grabbed his taser and his gun during the struggle. (RP 159-60). The officer then used elbow strikes and knee strikes on Mr. Flores. (RP 160-1).

Officer Rafael was also dispatched to the Extended Stay regarding a suspicious person, possibly with mental health issues. (RP 228). When he arrived he saw Officer Clark and Mr. Flores wrestling on the ground behind the patrol car. (RP 230-31). Officer Rafael testified that he tried to pull Mr. Flores' arms off Officer Clark, but was unable to. (RP 232). So, he punched Mr. Flores in the face three times. (RP 232). Then, they were able to detain and handcuff Mr. Flores. (RP 162). After Mr. Flores was

detained, no other force was used by Mr. Flores or the officers. (RP 251).

The altercation lasted about 30 seconds. (RP 223).

Several people who were staying at the Extended Stay witnessed this incident. Ms. Tuff saw some kind of chase or altercation and then Mr. Flores handcuffed. (RP 111). Mr. Eyring saw Mr. Flores in an angry, fighting mode, saw the officer approach Mr. Flores, tackle him, and then continue fighting on the ground. (RP 125). He testified that Mr. Flores never walked toward the officer. (RP 133). He testified that it looked like a wrestling match; he did not see any hitting. (RP 140). Mr. Eyring testified that after Mr. Flores was in handcuffs “one of the officers felt the need – I don’t know why – but to punch the Defendant. It looked like it was in the kidney area.” (RP 141). He testified that the officer punched the defendant 7 to 10 times. (RP 141-42).

The jury did not reach a verdict on the assault in the second degree charge; Mr. Flores was convicted of the lesser charge of assault in the third degree. (RP 466).

I. ARGUMENT

1. The Trial Court Erred By Ordering That Mr. Flores Be Restrained During Trial.
 - a. *The Trial Court Abused Its Discretion By Ordering Restraints When There Was No Imminent Risk of Escape, Injury, or Disruption.*

“[R]estraints 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. Finch*, 137 Wash. 2d 792, 846–48, 975 P.2d 967, 997–1000 (1999), quoting *State v. Hartzog*, 96 Wash.2d 383, 398, 635 P.2d 694 (1981). Shackling a defendant violates the 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.” *Id.* at 844-45.

A trial judge must exercise discretion in determining the extent to which courtroom security measures are necessary to maintain order and prevent injury. That discretion must be founded upon a factual basis set forth in the record. A broad general policy of imposing physical restraints upon prison inmates charged with new offenses because they may be ‘potentially dangerous’ is a failure to exercise discretion.

Id. at 847, quoting *Harzog*, 96 Wash.2d at 400.

Factors the court may consider in deciding whether to use restraints are:

[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.

Id. at 848, quoting *Hartzog*, 96 Wash.2d at 400. However, the presence of one or more of these factors does not necessarily mean a defendant should be restrained. *Id.* at 850. “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 while in the courtroom.” *Id.* Even when the court finds that a defendant poses a risk that would justify restraints, restraints should only be used as a last resort, when no other less restrictive measures are available. *Id.* Our Supreme Court superficially noted that the court should consider less restrictive security measures, including the use of additional security personnel. *Hartzog*, 96 Wash.2d at 401. When a court orders restraints under any other circumstances, the court abuses its discretion. *Finch*, 137 Wash. 2d at 850.

Additionally, the court should not give deference to correctional officers. *Id.* at 853. “Courts have specifically found reversible error where the trial court based its decision solely on the judgment of correctional officers who believed that using restraints during trial was necessary to maintain security, while no other justifiable basis existed on the record.” *Id.*, citing *See People v. Vigliotti*, 203 A.D.2d 898, 611 N.Y.S.2d 413

(1994); *People v. Thomas*, 125 A.D.2d 873, 510 N.Y.S.2d 460 (1986).

In *Finch*, the defendant was on trial for two counts of murder, including shooting a police officer responding to the original murder, and was facing the death penalty. *Finch*, 137 Wash. 2d at 803. Nonetheless, the court held that “[t]he trial court's decision to shackle Mr. Finch during the trial and sentencing was clearly an abuse of discretion. Mr. Finch was never disruptive in court, he was not an escape risk and he posed no threat to anyone other than, possibly, Thelma. The trial court's decision was error.” *Id.* at 853.

In this case, it appears that Thurston County has a broad, general policy of using restraints. Defense counsel stated that he had been in trial over fifty days in this court, with different defendants, all in restraints. The court discussed its normal procedures when a defendant is restrained. And, it appears it is the preference of the sheriff's office to use restraints in order to have fewer deputies in court. It is improper for the court to fail to exercise its discretion and order the use of restraints for security, without specific findings that they are necessary in a particular case.

Furthermore, there was no evidence that Mr. Flores was an imminent risk of escape, harming anyone, or being disruptive in court. The court found that restraints were necessary given the seriousness of the charge and Mr. Flores' criminal history. However, if a person charged

with assault in the second degree for assaulting an officer and who has some prior convictions warrants restraints, restraints would be ordered in an alarming number of trials. Even in *Finch*, where the defendant was charged with killing a police officer and was facing the death penalty, the use of restraints was found to be error. There must be some specific reasons to be concerned that this defendant will try to escape, harm someone in the courtroom, or be disruptive. Because the trial court did not make any such finding and based its decision to order restraints solely on the nature of the charge and an innocuous criminal history, the court abused its discretion. The trial court also noted the small size of the courtroom and the jury's proximity to Mr. Flores. However, there is nothing in the record to indicate that Mr. Flores posed a risk to the jurors or that the court considered other security measures, such as moving counsel's table further from the jury.

Even if the court properly found that Mr. Flores posed a security risk, it is clear from the record that the court had a less restrictive alternative. The court could have ordered two deputies to be present during the trial, rather than restrain Mr. Flores. The court's deference to the sheriff's department's request or preference in this case, was error.

b. *The Error Was Not Harmless Beyond a Reasonable Doubt.*

Unconstitutional shackling is subject to constitutional harmless

error analysis. *Finch*, 137 Wash. 2d at 859, 861. When there is a constitutional error, it is presumed to be prejudicial unless the State can prove that the error is harmless beyond a reasonable doubt. *Id.* at 859. Unconstitutional shackling is only harmless when there is overwhelming evidence of guilt or when the evidence shows that the shackles were not visible and there was no prejudice to the defendant. *Id.* at 861.

In *Finch*, the defendant had Velcro leg restraints that were under his pants, made no noise, and were not visible to the jury. *Id.* at 856. But, the defendant's movement was noticeable restricted, the restraints shorted his stride, and he entered the courtroom after the jury. *Id.* Thus, the jury may have inferred that he was restrained. *Id.*¹ The court in *Finch* held that the use of restraints was clearly an abuse of discretion. *Id.* at 853. While the court found that the error was harmless regarding the guilt phase, due to the overwhelming evidence of guilt, the court reversed regarding the penalty phase. *Id.* at 862-63. The court did not find that the error was harmless due to the restraints not being visible.

In this case, there was not overwhelming evidence of guilt. Mr. Flores did not confess. He testified that the officer attacked him first. A civilian witness that the officer approached and tackled Mr. Flores and that the other officer punched Mr. Flores for no reason, after he was in

¹ There were other restraints that were visible to the jury and were discussed in *Finch*.

handcuffs. Furthermore, the jury did not reach of a verdict on assault in the second degree, and convicted Mr. Flores of the lesser charge of assault in the third degree. Therefore, there is no way to know if the use of the restraints effected the jury's verdict, thus the error cannot be harmless beyond a reasonable doubt.

And, while the restraints themselves were not visible to the jury, Mr. Flores was the only witness who took the stand and left the stand outside of the jury's presence. It is possible that the jury noticed that Mr. Flores was treated differently than every other witness and speculated as to the reasons he was treated differently, just as the jury in *Finch* may have speculated as to the reasons he was walking in noticeably short strides. It is certainly possibly that the jury inferred the difference was due to restraints or security precautions. Therefore, the error is not harmless.

2. This Court Should Not Impose Appellate Costs Because Mr. Flores is Indigent and Unable to Pay.

The amended RAP 14.2 states that costs will be awarded unless this court directs otherwise in its decision, or the commissioner or clerk finds that "an adult offender does not have the current or likely future ability to pay such costs." RAP 14.2. Furthermore, a trial court's "finding of indigency remains in effect . . . unless the commissioner or clerk determines by a preponderance of the evidence that the offender's financial

circumstances have significantly improved since the last determination of indigency.” RAP 14.2.

This Court should direct that costs not be imposed in this case.

As a general matter, the imposition of costs against indigent defendants raises problems that are well documented in *Blazina*—e.g., “increased difficulty in reentering society, the doubtful recoupment of money by the government, and inequities in administration.” *Blazina*, 182 Wash.2d at 835, 344 P.3d 680. It is entirely appropriate for an appellate court to be mindful of these concerns. Carrying an obligation to pay [appellate costs] plus accumulated interest can be quite a millstone around the neck of an indigent offender.

State v. Sinclair, 192 Wash. App. 380, 391-92, 367 P.3d 612, 616 (2016, quoting *State v. Blazina*, 182 Wn.2d 827, 301 P.3d 492 344 P.3d 680, 686 (2015). Although *Blazina* is not binding for appellate costs, some of the same policy considerations apply. *Id.*

Under *Blazina*, a trial court must consider “important factors, such as incarceration and a defendant's other debts, including restitution, when determining a defendant's ability to pay.” *Blazina*, 182 Wn.2d at 838. In addition, if a person is considered indigent, “courts should seriously question that person's ability to pay” *Id.*

In this case, Mr. Flores was found indigent and counsel was appointed for his trial, as well as this appeal. (CP 6, 104-05, RP Sentencing (Sent.) 23). The trial court only imposed the mandatory costs

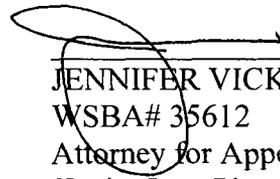
and fees. (CP 96-97, RP Sent. 23). In addition, Mr. Flores was sentenced to 20 months at the department of corrections (DOC). (CP 94). It is unlikely that Mr. Flores will be able to pay appellate costs after his release from prison. Therefore, this Court should exercise its discretion and not award appellate costs in this matter, if Mr. Flores does not substantially prevail.

I. CONCLUSION

In conclusion, the trial court abused its discretion by ordering that Mr. Flores be restrained and the error was not harmless beyond a reasonable doubt. Therefore, this matter should be reversed and remanded for a new trial.

Dated this 13th day of February, 2017.

Respectfully Submitted,



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COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON,)
)
 Respondent,) NO. 49777-8-II
 vs.)
) CERTIFICATE OF SERVICE
 XAVIER FLORES,)
)
 Appellant.)

The undersigned certifies that on this day correct copies of this appellant's brief were delivered electronically via the Court of Appeals web portal to the following:

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The undersigned certifies that on this day correct copies of this appellant's brief were delivered by U.S. mail to the following:

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This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington.


Signed February 13, 2017 at Tacoma, Washington.

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