

No. 49777-8-II

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

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STATE OF WASHINGTON,

Respondent,

v.

Xavier Joaquin Flores  
Appellant.

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

The Honorable Mary Sue Wilson  
Cause No. 16-1-01186-5

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BRIEF OF RESPONDENT

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

1. Did the trial court abuse its discretion when it imposed restraints on Flores, and if so, was Flores prejudiced?
2. Flores argues that because he was found indigent at trial, appellate costs should not be imposed. The State does not object.

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

At two in the morning on September, 7, 2016, the Tumwater Police Department received several calls regarding an erratically behaving man in the parking lot of an Extended Stay America hotel. RP Vol. I at 92, 148. One witness described the man, later identified as the Appellant, Xavier Flores, standing atop a hill, screaming prayers, RP Vol. II at 281-82, whereas another witness testified that she heard a voice repeatedly calling out “help me,” and upon investigating, found Flores hiding part-way underneath a van. RP Vol. I. at 95. According to the witness, when she approached Flores, he ran off in the opposite direction. RP Vol. I at 95.

Shortly thereafter, Officer Kelly Clark of the Tumwater PD arrived at the scene, and began circling the parking lot in his vehicle. RP Vol. I at 150. As he drove by, Flores jumped out of some nearby bushes, and opened Clark’s passenger door. RP Vol. I at 151. Although it is disputed

as to what happened next,<sup>1</sup> all parties agree that Clark and Flores began wrestling on the ground. RP Vol. I at 110, 125, 134-38, 151-53; Vol. II at 281-82, 341-53. It is also undisputed that Clark used his Taser on Flores to no effect, RP Vol. I at 157-58, and that Clark sustained a cut to his forehead during the altercation. RP Vol. I at 171.

While the parties struggled on the ground, Officer Jason Raphael of the Tumwater PD arrived, and entered the fray. RP Vol. II at 229-31. Raphael testified that Flores had Clark in a headlock, and in an effort to free Clark, he began punching Flores in the head. RP Vol. II at 231-34. Because the fight occurred off to the side of the parking lot, the police dash cams did not capture incident on video, but they did contain audio of a man, identified as Flores, unintelligibly screaming throughout. RP Vol. I at 167. Together, Clark and Raphael were able to effectively subdue Flores, and place him in handcuffs, though he continued to violently struggle and yell unintelligibly for a considerable length of time. RP Vol. II at 234-39.

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<sup>1</sup> Eyewitnesses testified that Flores took a combative stance towards Clark, raising his hands in preparation to fight, but they were unable to say who actually started the fight, while both Flores and Clark claimed that the other party was the aggressor. RP Vol. I at 110, 125, 134-38, 151-53; Vol. II at 281-82, 341-53.

After Flores had been effectively restrained,<sup>2</sup> additional law enforcement agents and medical personnel arrived. RP Vol. I at 162. Sergeant Steven Bardiff of the Tumwater PD noted that Flores was not only continuing to growl and yell, but he was also visibly biting his own tongue to the point that it was bleeding. RP Vol. II at 261. Flores' continued nonsensical screaming and violent struggling prevented him from receiving treatment at the scene, and instead, he was transported to a local hospital where he was placed in full restraints. RP Vol. II at 237, 263. Clark on the other hand received attention for his cut forehead, and was advised he may have a concussion. RP Vol. II at 264.

At trial, several residents of the hotel testified as to Flores' erratic behavior, and his confrontational attitude towards Clark. RP Vol. I. at 95, 110, 125, 134-38; Vol. II at 281-82. Additionally, a number of law enforcement officers offered their version of events, which painted Flores as the aggressor. RP Vol. I at 151-61. For his part, Flores testified that he attempted to enter Clark's vehicle in an effort to escape dangerous men, and was subsequently assaulted by law enforcement. RP Vol. II at 330-353. Ultimately, Flores was convicted of Assault in the Third Degree, and sentenced to twenty months confinement. CP 92, 94.

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<sup>2</sup> Although Flores was in handcuffs, testimony from hotel residents indicated that it still required five officers to hold Flores down as he struggled and screamed. RP Vol. I at 111-12.

### C. ARGUMENT

#### 1. The Trial Court Did Not Abuse Its Discretion When It Imposed Leg Restraints, Because the Trial Court Meaningfully Considered Relevant Factors, and Flores' Past Behavior Justifiably Warranted Increased Caution.

In his only point of error, Flores argues that the trial court abused its discretion when it imposed leg restraints. *See State v. Finch*, 137 Wn.2d 792, 845, 975 P.2d 967 (1999) (noting that the decision to impose restraints is reviewed for the abuse of discretion); App. Brief at 9. To the contrary, the record shows that the trial court meaningfully considered relevant factors, such as Flores' past violent behavior towards law enforcement, before ordering the least restrictive form of restraints available, noting that steps would be taken to ensure the restraints would not be visible to the jury. *State v. Hartzog*, 96 Wn.2d 383, 400, 635 P.2d 694 (Wash. 1981) (citing *State v. Tolley*, 290 N.C. 349, 368, 226 S.E.2d 353 (1976)) (listing factors for a court to consider before ordering shackling);<sup>3</sup> RP Vol. I. at 15-18.

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<sup>3</sup> The factors listed in *Hartzog* are “the 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 mood of the audience; the nature and physical security of the courtroom; and the adequacy and availability of alternative remedies.” *Hartzog*, 96 Wn.2d at 400. Of particular importance in the present case are the seriousness of the second degree assault charges; Flores' temperament and character as evidenced by witness testimony at trial; Flores' past record which included past charges of resisting

Certainly, at the very least, Flores' behavior on the night of his arrest would appear to justify the least restrictive form of restraints available. After all, witnesses testified that Flores took a combative stance towards law enforcement; he tried to choke a police officer; multiple officers were required to restrain him; a Taser was unable to subdue him; even once restrained, he remained too violent to receive medical attention; and overall, witness statements did not paint Flores as an overly calm and collected individual. RP Vol. I at 95, 150-65, Vol. II at 222-39, 281-82. In addition, Flores has past instances of criminal conduct and resisting arrest. RP Vol. I at 17. Objectively viewing those facts, a reasonable judge could find that in a small courtroom, minimal restraints were a necessary precaution.

The trial judge did not simply order that Flores be placed in restraints however. Rather, the record shows that the court heard arguments from both sides, listed the relevant standards, and after meaningfully considering the factors, held that restraints were needed, in large part due to Flores' violent history with law enforcement. RP Vol. I at 15-18. The trial court also took special notice of the nature of the

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arrest; self-destructive tendencies, again evidenced by his behavior the night of his arrest; and the nature and physical security of the courtroom, which was noted to be a small space. All of these factors weigh in favor of placing Flores in minimal restraints.

restraints,<sup>4</sup> stating that they would not be apparent to the jury, which distinguishes the present circumstances from cases where the imposition of restraints were found to be an abuse of discretion. *See Finch*, 137 Wn.2d at 854-55 (where the defendant’s shackles were in plain view of the jury, and the Supreme Court specifically questioned whether it would have been possible to bring the defendant into the courtroom outside the presence of the jury).

Taken together, these facts show that the trial court validly exercised its discretion based upon a factual basis set forth in the record. *Hartzog*, 96 Wn.2d at 400-01 (“[T]he standard for appellate review will be whether the trial court has abused its broad discretion to provide for order and security in the courtroom.”). Accordingly, it was not error for the court to impose restraints, and Flores’ claim must be denied.

**2. Because the Restraints Were Not Apparent to the Jury, Flores Was Not Prejudiced by Their Imposition, Therefore Any Error Is Harmless.**

Even if Flores can establish that he was unconstitutionally shackled, absent some indication that the jury was aware of the leg

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<sup>4</sup> Flores argues that the trial court did not sufficiently consider alternatives to restraints, such as placing additional deputies in the courtroom. App. Brief at 12. However, considering that witnesses testified that five law enforcement officers struggled to restrain Flores, even once he was in handcuffs, and attempts to use a Tazer on him were unsuccessful, an additional deputy in the courtroom is not necessarily a perfect solution. RP Vol. I at 157-58, 111-12.

restraints,<sup>5</sup> any alleged error must be deemed harmless. *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 (Wash. 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.”); *Finch*, 137 Wn.2d at 861; *United States v. Collins*, 109 F.3d 1413, 1418 (9th Cir.).

Rather than claim that the shackles were visible, Flores instead speculates that the jury may have inferred the presence of leg restraints because when testifying, Flores was seated prior to the juror’s arrival, and remained seated until after the jury was excused. App. Brief at 14. Perhaps a seasoned trial attorney would find it noteworthy when a witness is seated before the jury enters, but twelve laypeople likely would not. Even if the

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<sup>5</sup> Notably, the court stated that it would take steps to ensure there isn’t a “likelihood or possibility of [the restraints] being noted.” RP Vol. I at 17.

jurors did take note of the procedural deviation, it is unlikely they would jump to the conclusion that Flores was shackled and unable to walk. Accordingly, his argument is nothing more than mere speculation, and not particularly persuasive speculation at that. Unfounded speculation alone is insufficient to require a reversal. *Bishop v. Miche*, 88 Wn. App. 77, 86, 943 P.2d 706 (Wash. Ct. App. 1997) (“Mere speculation is not sufficient to support a claim.”); *Nelson v. W. Coast Dairy Co.*, 5 Wn.2d 284, 296, 105 P.2d 76 (Wash. 1940) (“It is true that a finding or verdict cannot be made to rest upon mere speculation or conjecture.”). In light of these facts, Flores’ claim must be denied.

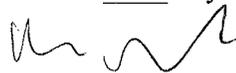
**3. Flores Requests That the Court Not Impose Appellate Costs, and the State Does Not Contest.**

Finally, because Flores was found to be indigent at the trial court level, he argues that appellate costs should not be imposed. App. Brief at 14. The State does not contest.

**D. CONCLUSION**

For these reasons, the State asks that the court affirm Flores’ conviction.

Respectfully submitted this 24<sup>th</sup> day of March, 2017.



Michael Topping, WSBA# 50995      Attorney for  
Respondent

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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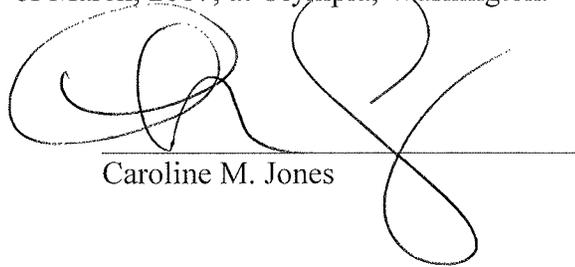
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AND TO: Jennifer Vickers Freeman  
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I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 24 day of March, 2017, at Olympia, Washington.



Caroline M. Jones

**THURSTON COUNTY PROSECUTOR**  
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