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NO. 58072-8-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

STATE OF WASHINGTON,

Respondent,

v.

DEMAR RHOME,

Appellant.

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COURT OF APPEALS
STATE OF WASHINGTON
FILED
DIVISION I

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE GREGORY P. CANOVA
THE HONORABLE RONALD KESSLER
THE HONORABLE NICOLE MACINNES

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. A defendant is competent to stand trial if he is able to understand the nature of the proceedings and assist in his defense. The trial court chose to accept the conclusion of a psychologist from Western State Hospital, who observed Rhome multiple times over a 12-day stay, that Rhome was competent, over the opinion of Rhome's expert, who spoke with Rhome for an hour and concluded that he was not. Has Rhome failed to show an abuse of discretion?

2. Objections at trial must be timely and specific, to allow the court to correct any error. Rhome did not object to testimony about a rape allegation, but instead cross-examined the State's witness. By the time the court itself raised the issue, there had been considerable testimony on the allegation. Did the trial court act within its discretion by requiring the State to cast doubt on the allegation through additional questioning, rather than trying to instruct the jury to disregard numerous questions and answers?

3. To maintain a diminished capacity defense, a defendant must produce expert testimony demonstrating that a mental disorder, not amounting to insanity, impaired his ability to form the mental state necessary for the crime charged. Rhome repeatedly affirmed that he was asserting a diminished capacity defense. The only expert testimony

available on the issue was that of Dr. Ward, a psychologist from Western State Hospital, who had rejected a conclusion of diminished capacity. The trial court allowed the State to present Dr. Ward's testimony in its case-in-chief, so that Rhome could follow his plan to bring out his history of mental health issues through Dr. Ward, and thus attempt to cast doubt on Dr. Ward's conclusion. Rhome did not object to this procedure. Has Rhome failed to show that the trial court abused its discretion?

4. Prior bad acts, while not admissible to prove character in order to show action in conformity therewith, may be admissible to show preparation and plan, or as "res gestae" to complete the picture of the crime for the jury. The State's theory was that Rhome so controlled Kialani Brown that he was able to convince her to murder Lashonda Flynn. Brown alleged that Rhome had raped her in the days leading up to the murder. The trial court did not allow Brown to use the word "rape," but limited her to saying that Rhome "forced himself" on her. Did the trial court properly exercise its discretion in admitting this relevant evidence and limiting any prejudice to Rhome? Was any error harmless where Rhome told the jury in his opening statement that Brown claimed that he had raped her?

5. While a defendant generally has the right to appear before the jury free of shackles or other physical restraints, trial courts have

discretion to address this on a case-by-case basis based on facts in the record. Jail personnel told the trial court that Rhome had threatened jail staff and attempted to assault them. The record indicates that Rhome's leg brace, which was worn under his trousers, was not visible to the jury. Did the trial court properly exercise its discretion in requiring Rhome to wear the brace?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS

Defendant Demar Rhome was charged by amended information with Murder in the First Degree, with a deadly weapon allegation. The charge was based on the State's belief that Rhome had participated, along with Kialani Brown, in the November 2003 stabbing murder of Lashonda Flynn. CP 1-6, 37-39.

Both Rhome and Brown were initially charged with Murder in the Second Degree. CP 1-6. Brown pled guilty to Manslaughter in the First Degree, having told police that Rhome stabbed Flynn. 5RP¹ 18; 12RP 57-58. Brown withdrew this plea on the heels of her admission that it was she who wielded the knife, albeit at Rhome's urging and direction, and she

¹ The system for referring to the verbatim report of proceedings is set out in Appendix A.

ultimately pled guilty to Murder in the Second Degree with a deadly weapon. 5RP 18; 12RP 60.

Rhome's case took a long time to get to trial, due in part to his commitments to Western State Hospital ("WSH") for evaluations of his competency to proceed and his capacity to commit the charged crime, and to wrangling over his representation. Rhome's first motion to proceed pro se was denied, as the trial court found that his request was equivocal. CP 16. Rhome's motion to discharge his appointed counsel and represent himself was eventually granted, and Michael Danko was appointed to serve as standby counsel. CP 18, 19.

A jury found Rhome guilty as charged. CP 62-63. The trial court imposed a high-end sentence of 371 months. CP 65, 67.

2. SUBSTANTIVE FACTS

On November 17, 2003, 17-year-old Kialani Brown left her parents' home in Vancouver, Washington with her two-year-old son Kai in tow; Brown was headed for Seattle to visit Demar Rhome, a seemingly charming man whom she had met on a telephone chat line. 11RP 107-16. On November 23rd, a scant week later, Beverly Brown received a phone call from Rhome informing her that her daughter Kialani had been involved in a murder -- that Kialani was a "cold-blooded killer" who had stabbed another girl in the neck. 9RP 35-37. During the short time

intervening between Brown's arrival in Seattle and the murder of Lashonda Flynn, Rhome had managed to completely dominate Kialani Brown.

Upon Brown's arrival in Seattle, Rhome introduced her to Flynn, whom Rhome had described as his step-sister.² 11RP 112-13, 117-18. Over the next few days, Rhome saw to it that the three were always together, and the dynamic began to feel strange to Brown. 11RP 118-19; 12RP 32-33. Rhome started to foment distrust between Brown and Flynn. 11RP 120-21. He also began to suggest that the two women have sex together. 11RP 123-24. Once, Rhome forced Brown into anal sex over her protests. 11RP 125.

A few days into the week, Rhome escalated his threatening behavior. He told Brown that Flynn planned to kill her; he described how it would happen, and told Brown that two-year-old Kai would be abandoned on a doorstep. 11RP 126-28. Rhome urged Brown to kill Flynn first, and gave Brown tips on how best to accomplish the job. 11RP 129-30. Rhome never left Brown alone; she began to feel isolated from her family and guilty for having lied to them,³ and she was scared to the

² Flynn was actually a 17-year-old who had been kicked out of her grandmother's house; she had been living with Rhome since June 2003. 12RP 223-24.

³ Brown had told her parents that she was visiting a girlfriend in Seattle. 11RP 115.

point where she felt unable to make good decisions. 11RP 130-31;
12RP 34.

On the night of the murder, Rhome directed Brown to feign a desire for sex with Flynn, tie her up and blindfold her, and stab her. 12RP 39-40. He gave Brown a rope. 12RP 41. Fearing for her life and for her son, Brown did as Rhome directed. 12RP 41. She told Flynn that Rhome had a surprise for her, and Flynn complied. 12RP 42. Rhome gave Brown a knife, and showed her how to use all her force; he was right there with Brown when she stabbed Flynn. 12RP 43. As the women struggled, Rhome told Brown to stab Flynn again and kill her; Brown stabbed Flynn three or four times. 12RP 44-45. Flynn said, "Devante,⁴ why are you doing this to me?" 12RP 45.

Rhome told Brown to start cleaning up, and she did. 12RP 46-48. Brown then helped Rhome put Flynn's body in a trash bag. 12RP 49. Rhome decided to take the body to Discovery Park, and told Brown to call a cab. 12RP 49-50. When the cab arrived, they carried the body to the trunk. 10RP 114; 12RP 50. Once at the park, they dragged Flynn's body into the woods, and left. 12RP 52-53.

⁴ Rhome went by the name of Devante Carlton. 13RP 8-9.

Rhome told Brown that he did not intend to go to jail. He told her that if she ever revealed what had happened, he would kill her and her family. He said that if she tried to leave him, he would "put the whole thing on [her]." 12RP 51.

At the time of his arrest, Rhome described the murder as a lesbian encounter between Brown and Flynn that turned into a physical struggle fueled by drugs and alcohol,⁵ and ended with Brown stabbing Flynn. Ex. 2 at 3-7, 16, 29-30. Rhome said that he helped Brown clean up and dispose of the body because he felt threatened by her. Ex. 2 at 9-10, 13-15, 18-19, 21.

At trial, Rhome embellished his story. He claimed that Brown wanted him to kill Kai's father, Alex Dupre, who had allegedly mistreated her. 13RP 10-16. To convince Rhome to do this, Brown offered to kill Flynn, whose sexual jealousy had become a problem for Rhome. 13RP 33-36. Rhome again described large quantities of alcohol and drugs, and a lesbian encounter between the two women. 13RP 47-52. His description of Flynn's death was especially graphic. 13RP 53-55. In this version, however, Rhome experienced "mental problems" and symptoms of post-traumatic stress disorder when Brown stabbed Flynn. 13RP 49,

⁵ There was no indication of alcohol or any drugs in Flynn's blood or urine. 10RP 179.

52-54, 56, 65, 68, 79, 122-24. He urged the jury not to hold him accountable. 13RP 153.

C. ARGUMENT

1. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN FINDING RHOME COMPETENT.

Rhome claims that the trial court abused its discretion in finding that he was competent to stand trial. To the contrary, the trial court held a hearing at which it heard testimony from an expert retained by Rhome, who opined that Rhome was not competent, as well as from a psychologist from WSH, who concluded that he was. Based on the number and quality of observations by the psychologist from WSH, the trial court accepted that expert's conclusion. This was not an abuse of discretion.

a. Relevant Facts.

On January 7, 2005, the trial court signed an Order of Commitment for Observation, directing that Rhome be committed to the Department of Social and Health Services for evaluation of his competency to stand trial, as well as his capacity to commit the crime charged. Rhome was transported to WSH for this purpose. CP 7-9.

In a Forensic Psychological Report dated March 25, 2005, Dr. Jason Dunham, a forensic psychologist at WSH, detailed interactions that he and the hospital staff had with Rhome over the course of the

12-day stay. Ex. 3. Dr. Dunham conducted a clinical interview with Rhome at the beginning of the evaluation. Ex. 3 at 5, 6, 11-12. While Rhome refused to participate in any additional clinical interviews, he was under 24-hour clinical observation by WSH staff, and extensive notes from these observations were included in the report. Ex. 3 at 5, 6, 6-11. Staff particularly noted that Rhome was manipulative, disruptive, defensive and narcissistic. Ex. 3 at 6-11.

Dr. Waiblinger, the ward psychiatrist, described Rhome as "self-serving, antisocial and unpleasant," and "inappropriate with authority," but saw no symptoms of mental illness. Ex. 3 at 11.

Dr. Dunham added that "[l]iterally every member of [Rhome's] treatment team and every staff person on ward F2 that I consulted with provided essentially the same information – that Mr. Rhome is an extremely antisocial person with no signs of a mental disorder." Ex. 3 at 6.

Dr. Dunham concluded that Rhome did not suffer from a mental illness, but rather "a dangerous combination of antisocial and narcissistic personality disorders." Ex. 3 at 12. Dr. Dunham found no basis to conclude that Rhome was not competent to stand trial:

He does not suffer from any mental disorder that would inhibit his trial competency. I recognize that his attorneys will most likely have difficulty working with him. However, his uncooperative and argumentative attitude is based upon his severe personality disorder rather than on

any mental illness, and a personality disorder alone is not a basis for incompetency.

Ex. 3 at 13.

Rhome's attorneys obtained an independent evaluation from Dr. David White, a clinical psychologist and neuropsychologist. Dr. White submitted a report on May 25, 2005, in which he described the meeting he had with Rhome at the King County Jail. Ex. 1. Dr. White reported that Rhome "would not undergo a psychological evaluation," but "spoke in an agitated manner for about one hour." Ex. 1 at 1. Dr. White "did not attempt to engage in a typical clinical interview," but essentially listened to Rhome talk. Ex. 1 at 12. Dr. White noted Rhome's intense distrust of and anger toward his attorneys. Ex. 1 at 12. Dr. White also detailed Rhome's psychiatric records, dating from 1998. Ex. 1 at 2-12. Dr. White agreed with several previous evaluators that Rhome suffered from a "[p]sychotic disorder not otherwise specified." Ex. 1 at 2, 7, 9, 16.

Dr. White concluded that Rhome was not competent to stand trial. He focused on Rhome's ability to assist counsel:

At the present time, I do not believe that Mr. Rhome has the basic and fundamental capacity to rationally participate in his own defense. I believe that his paranoia severely interferes with his ability to work with his attorneys, and that an ability to assist his attorneys will be critical to any chance that he has at a successful defense. . . . Rather than cooperating with his attorneys, my sense is that he will interact with them in a hostile manner and, in a courtroom,

might use this as a forum to argue with and condemn his attorneys. Such actions will prevent him from assisting in his defense.⁶

Ex. 1 at 15-16.

The trial court held a hearing to determine competency on June 8, 2005. Dr. White emphasized Rhome's distrust of his attorneys, and Rhome's expressed desire to somehow counteract their courtroom strategy. 1RP 29-30. Dr. White expressed the opinion that Rhome was not capable of rationally assisting his attorneys in his defense, and thus was not competent to stand trial. 1RP 16.

Dr. Dunham, whose training in forensic psychology was far more extensive and specific than Dr. White's, did not agree with Dr. White's conclusion. 1RP 44-45, 68-69, 112. Dr. Dunham said that a person could have a severe personality disorder, or even a severe mental illness, yet still be competent to stand trial. 1RP 83. He stressed the importance of looking at "functional behavior" in assessing whether a person has the *ability* to work with his attorney and assist in his own defense. 1RP 83-84. The time to observe genuine behavior is when a person does not know he is being observed, and Rhome's time at WSH afforded an opportunity for this type of observation. 1RP 106-07. Dr. Dunham concluded that, while

⁶ Rhome ultimately represented himself at trial, thus obviating any need to get along with his attorneys.

Rhome would undoubtedly prove difficult to work with, he was capable of assisting his attorneys. 1RP 89-90. Dr. Dunham saw no reason to doubt Rhome's competency to stand trial. 1RP 90.

The court heard argument from the parties. Defense counsel argued that, because Rhome thought so highly of himself, he was simply unable to receive information or advice from his attorneys, evaluate it rationally, and react accordingly. 1RP 130-31. Rhome did not seem to appreciate how counsel could be of benefit to him, given his situation. 1RP 132. Rhome believed that any suggestion that was inconsistent with his own innocence was a result of defense counsel colluding with the prosecutor. 1RP 135. Counsel urged the court to find that mental illness prevented Rhome from assisting in his own defense, and to return Rhome to WSH for medication to restore competency.⁷ 1RP 133, 137-38.

The State urged the court to place greater weight on Dr. Dunham's opinion, because his training and education were more focused on the evaluation of a criminal defendant's competency, and because Dr. Dunham had the advantage of more time to observe Rhome, as well as the input of staff. 1RP 140-41, 143. The State recognized that Rhome's determination to control his situation would likely make it difficult for his attorneys to

⁷ Dr. Dunham testified that Rhome was not medicated during his stay at WSH because "[h]e didn't need any." 1RP 74.

work with him. 1RP 141-42. The State nevertheless urged the court to accept Dr. Dunham's unequivocal conclusion that Rhome was competent to stand trial. 1RP 143.

The trial court clearly articulated the issue:

So the question does come down to an analysis of the available evidence to establish whether or not the defense has met its burden of establishing by a preponderance that the defendant is not able to effectively assist counsel in the preparation and presentation of his own defense.

1RP 145. In carrying out its analysis, the court found a "distinct difference in the quality of data that was available and utilized." 1RP 147-48. Dr. White based his conclusion on a one-hour meeting with Rhome during which Rhome "basically ranted," and on a review of prior reports. 1RP 148. Dr. Dunham, on the other hand, had the advantage of a one-hour intake interview attended by three other mental health professionals that went very well. 1RP 148. In addition, Dr. Dunham had a series of observations by mental health staff over a period of 12 days. 1RP 148-49.

Pointing out that "[h]is ability to assist counsel is different than his willingness to assist counsel," the trial court found that Rhome had not established by a preponderance of the evidence that he was incompetent to stand trial. 1RP 149. The court signed a written order finding Rhome competent to stand trial. CP 14-15.

b. Rhome Was Properly Found Competent.

A defendant is competent to stand trial if he is able to understand the nature of the proceedings against him and to assist in his own defense. State v. Benn, 120 Wn.2d 631, 662, 845 P.2d 289 (1993); RCW 10.77.010(14). A defendant claiming to be incompetent must convince the court by a preponderance of the evidence that this is so. RCW 10.77.090(3); see State v. Harris, 114 Wn.2d 419, 431, 789 P.2d 60 (1990) (defendant claiming incompetency to be executed has burden of proof on that issue). A trial court has wide discretion in determining the competency of a defendant to stand trial, and the court's decision will not be reversed on appeal absent an abuse of that discretion. State v. Ortiz, 104 Wn.2d 479, 482, 706 P.2d 1069 (1985).

The trial court carefully exercised its discretion in this case. The court held a hearing, at which it heard the testimony of both experts and the argument of counsel. In reaching its decision that Rhome was able (if not necessarily willing) to assist counsel in his defense, the court took into account the data available to both experts. Based on the facts set out above, the court concluded that Dr. Dunham had data that were superior in both quality and quantity to the data available to Dr. White. Based on a preponderance of the evidence standard, the court did not abuse its

discretion in assigning more weight to Dr. Dunham's conclusions, and finding Rhome competent.

Rhome nevertheless contends that the trial court gave insufficient weight to the opinion of one of his attorneys, who believed that Rhome was unable to assist in his own defense. In making the competency determination, a trial court must give considerable weight to a lawyer's opinion as to his client's competency. State v. Hicks, 41 Wn. App. 303, 307, 704 P.2d 1206 (1985). However, there is no reason to think that the trial court did not do so in this case. Rhome's attorney expressed his frustration in dealing with his client. While Rhome's attorney believed that Rhome *could not* rationally assist him, the evidence showed more likely than not that Rhome simply *would not* assist counsel. Simple recalcitrance does not support a finding of incompetence.

2. THE TRIAL COURT PROPERLY MITIGATED THE PREJUDICIAL EFFECT OF TESTIMONY ABOUT RHOME'S VIOLENT BEHAVIOR TOWARD HIS FORMER GIRLFRIEND.

Rhome contends that the trial court failed to mitigate the prejudice when a detective related an allegation made by a prior girlfriend that Rhome had raped and assaulted her. He argues that nothing short of an instruction to disregard the testimony was sufficient. This is not correct. Rhome failed to timely object to the testimony, and instead cross-

examined the detective on the allegation. Under these circumstances, the trial court reasonably concluded that an instruction to disregard was not practicable, and instead mitigated the prejudice by requiring the State to cast doubt on the truth of the allegation. This was not an abuse of discretion.

a. Relevant Facts.

The State called Detective Rolf Norton, who had responded to the scene of the murder. 10RP 46-47, 50. On direct examination, the State questioned Norton about montages he had shown to Ahmed Ali, the cab driver who drove Rhome and Brown to Discovery Park, and to Hye Lee, who worked in the "Dollar Store" where Rhome had purchased a knife. 10RP 51-59. The State also questioned Norton about recordings of voicemail messages left for Flynn's grandmother, Olla Pinder, by Rhome and Flynn. 10RP 60-63.

Rhome himself brought up the subject of his ex-girlfriend, Audrey Rose Anderson, during his cross-examination of Detective Norton. Rhome asked Norton whether he and Norton had spoken of Anderson, and whether Norton had told Rhome that Anderson seemed angry at Rhome. 10RP 65. Norton responded, "Yes, I definitely felt that she had some issues with you." 10RP 66. Rhome asked Norton about the content of his conversation with Anderson; he implied by his questions that Anderson

had some information about Flynn's murder that she had failed to disclose to police. 10RP 66-69.

On re-direct, the prosecutor asked Norton why he had contacted Anderson. 10RP 77. Norton said that Anderson had left a voicemail for Rhome indicating that she wanted no further contact with him, and Norton had sought out additional information from her. 10RP 77-79.

On re-cross, Rhome asked for further detail about what Anderson had told Norton. 10RP 79-83. Rhome then returned to why Anderson was angry at him, and suggested that Anderson had not been truthful with Norton due to her anger. 10RP 84-85.

On re-direct, the prosecutor asked whether Anderson had explained why she was angry at Rhome. 10RP 85. Norton responded, "She said that Demar Rhome had choked her, hit her with a frying pan, and raped her."⁸ 10RP 86. The prosecutor then asked, "[D]id she describe that he had tried to make her work as a prostitute?"; Norton responded in the affirmative. 10RP 86.

On re-cross, Rhome questioned Norton at some length on the allegation that he hit Anderson with a frying pan, raped her, and choked her. He challenged the allegation, claiming that Anderson had a history of

⁸ Rhome did not object to this response. 10RP 86.

telling lies, and pointing out that there was no evidence of any report by Anderson alleging violence. 10RP 87-90.

The trial court stopped the questioning, sent the jury out, and asked, "What are we doing here?" 10RP 90. The prosecutor took responsibility for Norton's answer as to why Anderson might have been angry at Rhome, explaining that he had expected Norton to recount Anderson's claim that Rhome had forced her to work as a prostitute.⁹ 10RP 91. The prosecutor admitted that he had neglected to warn Detective Norton not to go into "the other things," adding, "I should have. It is my fault." 10RP 91.

The trial court responded, "I don't even know what role Audrey Rose Anderson plays in this case." 10RP 91. The prosecutor was also at a loss, assuring the court that "I would have never uttered the word or ask[ed] anybody to utter the words Audrey Rose Anderson until [Rhome] brought it up." 10RP 92.

The prosecutor offered to bring out the fact that there was nothing to suggest that Anderson had ever filed a police report alleging violence, and that Detective Norton had no basis to believe or disbelieve the

⁹ The State believed that this answer would have been a fair response, given the State's theory that Rhome tried to control the women in his life. 10RP 94. The trial court agreed. 10RP 95.

allegation. 10RP 93. The court considered instructing the jury to disregard Norton's answer, but was concerned because "we have now had multiple questions from Mr. Rhome about it. [T]he whole thing has snowballed. So I just don't think that's going to be an effective way of dealing with it." 10RP 93-94.

Rhome suggested that they simply move on:

Your Honor, I only brought up Audrey Rose Anderson for one purpose. And that was just so it could be clear about the girlfriend thing. And I agree that we should have talked about this,¹⁰ and he admitted himself that he knew about there was no – no charge or any reports made against me from Snohomish County, but **I think we should just leave it alone. I think if we just move on it'll be just fine.** I just brought it up so people can know who was the real girlfriend and ex-girlfriend. That was my only intention.

10RP 96 (emphasis added).

The court pointed out that there were three alternative ways to deal with Norton's answer: 1) ignore it and move on, as Rhome had suggested; 2) clarify on re-direct that this was simply an unsupported allegation; or 3) instruct the jury to disregard it. 10RP 97-98. The court rejected the last alternative:

[I]t really isn't a simple question and an answer[.] I can just instruct the jury to ignore the last question and answer, but we have had kind of a whole series. I should have cut it off right away. But we have now had a series of questions now

¹⁰ The court had pointed out that the State should have brought its proposed question before the court for discussion and a ruling. 10RP 95.

from Mr. Rhome. I don't know how I can instruct the jury to disregard it without telling them what it is they are supposed to disregard, and that just emphasizes itself.

10RP 99. The court decided to have Detective Norton testify that there was no verification of Anderson's allegations. 10RP 99-100.

The following colloquy ensued:

Mr. Rhome: Your Honor, if I may add, what I think you should tell the jurors to disregard is the part about the prostitution. Just simply because she's not really a witness in this case. Not for me. Not for him. And you may not even find admissible to use any of her statements. You could also influence the jurors to disregard to think about rape and frying pan just simply because it was really no reports.

The Court: I don't want to say again what the testimony was because I think that just emphasizes. That's the problem that I'm having is that there's been too much kind of drawn out testimony. You asked questions about those statements. I could tell them just to disregard everything that the detective has said about Audrey Rose Anderson but I don't – that's going to encompass too much information.

Mr. Rhome: I just wanted to try to help you see how they disregard certain things that don't pertain to me, and the victim alone that was killed. That's all I was trying to do. Just trying to make it easier.

10RP 100-01.

The court suggested that Rhome first finish with his questions about Anderson; the prosecutor could then establish with Detective Norton that there was no corroboration of the allegations, that the conversation was limited, and that Norton had seen no need for further investigation.

10RP 102. Rhome did not disagree:

The Court: So that's what I would suggest we do when we call the jury back out.

Mr. Rhome: I have no problem with it, your Honor. I just know that – I just know that they should disregard other things just because she never made any statements before the time that I got locked up.

The Court: Well, that's a whole different issue. You can argue that to the jury. I'm concerned about having anything in this trial of Audrey Rose Anderson. I fail to see the significance.

10RP 103 (emphasis added).

On re-direct examination of Detective Norton, the prosecutor did as directed by the court:

Q: Detective, I just want to be clear for the jury. You had one conversation with Audrey Rose Anderson; is that right?

A: That's correct.

Q: And it was not face-to-face, it was over the telephone?

A: Yes.

Q: And how much did it take up of your follow-up report?

A: One small paragraph. About twelve typed lines.

Q: Now, you mentioned that she made some allegation of violence. Was there anything that you were aware of that corroborated that specific allegation?

A: No.

Q: To your knowledge, were there any police reports that she ever filed about that particular allegation?

A: Not to my knowledge.

Q: And did you ever even feel the need to follow-up and investigate those particular allegations of violence?

A: I did not.

10RP 105-06.

b. Rhome Waived This Issue By Failing To Object.

An appellate court will not generally review issues raised for the first time on appeal. RAP 2.5(a); State v. Scott, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). By failing to object at a point that will give the trial court an opportunity to correct an alleged error, a defendant waives the right to predicate an appeal on that error. State v. Kendrick, 47 Wn. App. 620, 636, 736 P.2d 1079, rev. denied, 108 Wn.2d 1024 (1987); see Wagner v. Wagner, 1 Wn. App. 328, 333, 461 P.2d 577 (1969) (any error waived where no objection was made until well into cross-examination); see generally 5 Karl B. Tegland, Washington Practice: Evidence Law and Practice § 103.8 (4th ed. 1999) (objection must be made as soon as the basis for the objection becomes apparent).

Courts make an exception for manifest error affecting a constitutional right. State v. McFarland, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). To qualify for this exception, a defendant must identify a constitutional error and show how, in the context of the trial, the alleged error actually affected the defendant's rights. Id. Evidentiary errors under ER 404¹¹ are not of constitutional magnitude. State v. Jackson, 102 Wn.2d 689, 695, 689 P.2d 76 (1984).

¹¹ Although no basis for any objection was ever mentioned in the record, the admission of evidence of other crimes, wrongs or acts is governed by ER 404(b).

Rhome never objected to Detective Norton's mention of Anderson's allegations of rape and other violence. While the trial court ultimately raised the issue itself, this came only after Rhome had explored the allegations on cross-examination. By that time, the court reasonably decided that the effective remedies available were limited.

Moreover, Rhome did not clearly indicate to the court that he wanted the jury to be instructed to disregard Detective Norton's answer relating Anderson's allegations. He first suggested that "we should just leave it alone," assuring the court that "if we just move on it'll be just fine." 10RP 96. When the court persisted in considering possible remedies, Rhome focused not on the rape and violence, but on the "part about the prostitution" (which was arguably relevant). 10RP 100. He added that the court "could also influence the jurors to disregard to think about rape and frying pan just simply because it was really no reports." 10RP 100. The lack of reports was the centerpiece of the remedy that the court ultimately settled on. Finally, when the court outlined the sequence of questions that the prosecutor ultimately followed, Rhome said that he "ha[d] no problem with it." 10RP 103.

Whether by failing to timely object to mention of Anderson's allegations, by cross-examining Detective Norton on the allegations, or by

acquiescing in the court's suggested remedy, Rhome waived this issue.

This Court should not consider this claim on appeal.

c. The Trial Court's Remedy Was Sufficient.

An appellate court will review a trial court's evidentiary rulings for an abuse of discretion. State v. Williams, 137 Wn. App. 736, 743, 154 P.3d 322 (2007). The trial court generally has some discretion with respect to the remedy for improperly admitted evidence. See, e.g., State v. Lewis, 130 Wn.2d 700, 707, 927 P.2d 235 (1996) (trial court's denial of motion for mistrial based on improper testimony of detective reviewed for abuse of discretion).

The trial court, faced with a pro se defendant who did not object when arguably inadmissible evidence came in through a State's witness, crafted the best remedy possible under the circumstances. Because Rhome had questioned Detective Norton on cross-examination about Anderson's allegations, it was no longer a simple matter of instructing the jury to disregard Norton's answer. By directing the prosecutor to ask Norton questions that cast doubt on the credibility of the allegations, the court minimized the possibility that the jury would place any significant weight on the allegations in deciding whether Rhome was an accomplice to the murder of Lashonda Flynn. This was not an abuse of discretion.

d. Any Error Was Harmless.

Erroneous admission of evidence under ER 404(b) is reviewed under the nonconstitutional harmless error standard. State v. Ray, 116 Wn.2d 531, 546, 806 P.2d 1220 (1991). Reversal is not required unless there is a reasonable probability that the outcome of the trial was materially affected by the error. Id.

Any error here was harmless. First of all, Rhome himself raised the specter of rape in his opening statement, telling the jury that Kialani Brown had "told lies on me like rape." 2/28/06 RP 20. Moreover, in his cross-examination of Detective Norton, Brown vigorously attacked Anderson's credibility. 10RP 81-84, 87-90. Finally, the trial court lessened the impact of the allegations by requiring the prosecutor to ask Norton questions to show that Norton's contact with Anderson was limited to a brief telephone conversation, and that Norton knew of no support for the allegations. 10RP 105-06.

Under these circumstances, neither the brief reference to Anderson's allegations, nor the trial court's chosen remedy, were likely to have affected the outcome of this case.

3. THE TRIAL COURT PROPERLY ALLOWED THE STATE TO INTRODUCE EXPERT TESTIMONY ON DIMINISHED CAPACITY IN ITS CASE-IN-CHIEF.

Rhome maintains that his right to present a defense was violated when the trial court allowed the State to present expert testimony in its case-in-chief that Rhome did not suffer from diminished capacity at the time of Flynn's murder. He claims that he had abandoned his plan to present a diminished capacity defense, and in any event had no way to properly present such a defense. This is inaccurate. Rhome maintained his defense of diminished capacity from opening statement through closing argument. He told the court he planned to use the expert testimony presented by the State to inform the jury about his extensive history of mental health problems, and thus to cast doubt on the expert's conclusion. The trial court did not abuse its discretion in allowing the expert testimony.

a. Relevant Facts.

Right from the start, Rhome made clear his determination to raise a diminished capacity defense at trial. He raised the issue several times during early pretrial hearings: "I also wanted to try to see if I could get an order for Western State for – to pursue a diminished capacity" (2RP 17); "I wanted to ask you . . . about the Western State Hospital thing, not as a

competency issue, but I am entitled to be able to use diminished capacity as a defense on my behalf" (3RP 17).

The trial court acquiesced, and on September 15, 2005 signed an order committing Rhome to WSH for a psychiatric evaluation to determine whether he suffered from diminished capacity at the time of Flynn's murder. CP 25-27. In a forensic psychological report dated December 20, 2005, Dr. Barry Ward, a psychologist at WSH, rejected a conclusion of diminished capacity. CP 85-101.

As the parties moved closer to trial, the prosecutor asked that Rhome clarify what defense he intended to proffer. 7RP 152-53. Rhome responded that he intended to raise both diminished capacity and "regular defense." 7RP 153. The court explained that Rhome would have to articulate a basis for a diminished capacity defense. 7RP 155. The prosecutor pointed out that Dr. Ward had evaluated Rhome and had concluded that he did not suffer from diminished capacity at the time of the crime. 7RP 155.

The court and the parties discussed whether Rhome wanted to present testimony from Dr. Ward at trial:

Prosecutor: But that [Dr. Ward's conclusion] doesn't preclude Mr. Rhome from presenting the testimony and arguing to the contrary. So that – that's his choice.

I would be happy, if that's the way that Mr. Rhome wants to go, to inform Barry Ward, who has already been

subpoenaed by the State, that that subpoena also applies to the defense because he wants him to testify, and also would be happy to even allow the Defendant to conduct the direct examination of Barry Ward, if we call him in our case. My point is, if that's part of the defense that Mr. Rhome wants to pursue I will facilitate it in any way that we can.

The Court: You can't do a diminished capacity defense unless you have some evidence, other than your own testimony. So Barry Ward, who did your evaluation at Western State, if you were going to present a defense of some mental issue, mental disease or defect for diminished capacity, then he would be the likely witness. But you can't just get on the stand and say I had diminished capacity. There has to be some evidentiary basis for it, which usually comes in the form of an expert witness like Barry Ward. . . . Now, I have indicated to you the diminished capacity issue, the fact that the prosecutor would make Mr. Ward or Dr. Ward available. The question is whether or not you would be – whether you want the prosecutor to do that, since you have a – would have a more difficult time getting Mr. Ward up here than the prosecutor would.

Rhome: Well, I most definitely tell you, if the prosecutor is willing to bring him down here, I have no problem doing a live open examination. I have no problem with it.

My basis for diminished capacity is one, I do have a longest – well, a long enough extent of mental health records that I'm able to use. There is also, you know – there's a – he – the prosecutor has a statement, a copy statement from doctor, I forget his name, but it was a doctor that Northwest Public Defender sent up to see me. He found me with some psychosis, but not actual mental illness. But I do have some mental health records that I'm able to use that could help Barry Ward be under the influence that I could have been suffering from disorganized thinking.

7RP 155-58.

Rhome noted that Dr. Ward "didn't believe that I suffered from any psychosis or whatever." 7RP 160. Rhome nevertheless expressed his hope that Dr. Ward might yet be helpful in establishing a diminished capacity defense: "But if I'm able to work with angles by showing them certain things from my mental health records that should be in Walter Peale['s] file he may reconsider, and think about how I would probably qualify for a better chance to use diminished capacity as a defense." 7RP 160.

Prior to opening statements, the issue of Dr. Ward's testimony arose once more. The State had originally planned to put Dr. Ward on the stand in its case-in-chief to testify about statements that Rhome had made. However, in light of Rhome's endorsement of a diminished capacity defense, the State suggested addressing that issue with Dr. Ward at the same time. 9RP 4-5. The court agreed that it would be best to address diminished capacity with Dr. Ward when he was in court, rather than make him come back twice; Rhome could examine Dr. Ward for his own purposes at that time. 9RP 4-5, 9, 11-12. Rhome did not object to this proposed procedure.

Consistent with his plan for his defense, Rhome told the jury in his opening statement about his history of mental problems: "I think I have been suffering from some mental problems because I do have a history of,

you know, short history of mental health records." 2/28/06 RP 8. Rhome followed this up with a claim that he was mentally impaired at the time of the murder: "I just was like not all the way there." 2/28/06 RP 8. He later reiterated: "I was so just out of it." 2/28/06 RP 9. He returned repeatedly to this theme: "I will truthfully say there was a great possibility that mental problems could have contribute[d] along with me being nervous." 2/28/06 RP 18.

The State called Dr. Ward in its case-in-chief. Dr. Ward explained that he had evaluated Rhome with respect to diminished capacity at Rhome's request. 12RP 118. Dr. Ward concluded that the available data did not suggest that Rhome lacked the capacity to commit the murder. 12RP 120. Even assuming that Rhome's version of events was true, there was nothing in what Rhome told Dr. Ward that suggested that Rhome was unable to form intent, or that he was unable to premeditate. 12RP 129. Every version of events, including Rhome's own, described purposeful and goal-directed conduct. 12RP 134-36. Dr. Ward acknowledged, however, that Rhome met the criteria for at least two personality disorders, and that some data suggested major mental illness. 12RP 131.

Rhome's cross-examination of Dr. Ward was designed to further his diminished capacity defense. He got Dr. Ward to agree that he had a long trail of mental health records documenting signs of mental illness.

12RP 139. Dr. Ward also acknowledged that Rhome had as a juvenile been found incompetent. 12RP 141.

Rhome never objected at trial to Dr. Ward's testimony on diminished capacity. At one point, in response to the prosecutor's suggestion that Rhome had opened the door to his adult criminal history, Rhome said: "I'm using diminished capacity. There is no question about it. He can do that."¹² 12RP 171.

Rhome focused much of his own testimony on diminished capacity. He repeatedly insisted that he suffered from symptoms of post-traumatic stress disorder, describing the flashbacks that he experienced at the time of Flynn's murder. 13RP 52, 54, 56, 65, 68, 79, 91, 122-23. Rhome also claimed that he experienced "confused" and "psychotic" thinking at the time of the crime. 13RP 49, 63, 122-23. He told the jury that he was "just not there." 13RP 54. He mentioned "issues with the brain," and referred to the effect that his mental health problems had on his actions. 13RP 76, 154. He asked the jury to find him "not guilty by certain mental health issues," urging that he "should not be held accountable for it." 13RP 124, 153.

¹² The trial court ultimately did not allow testimony about Rhome's adult criminal history. 12RP 173-76.

Both the State and the court questioned whether the jury should be instructed on diminished capacity, and whether argument on that defense would be allowed. 13RP 163-65. Rhome said that this was not an issue for him – his concern had been that the jury hear from both the prosecutor and Dr. Ward that he had a history of mental health issues ("The jurors are entitled to know about that which they do."). 13RP 169. With the agreement of both parties, the court gave a diminished capacity instruction. 14RP 2-5; CP 55.

In his closing argument, Rhome again emphasized his mental defense. He told the jury that his post-traumatic stress disorder set in as he watched Brown stab Flynn. 14RP 39-40. He spoke of his mental illness, and the "psychotic thinking" that affected his actions. 14RP 39-40. Rhome argued that mentally ill people should not be held accountable for their crimes. 14RP 39-40. He told the jury that, if they believed he was suffering from mental illness, they should believe that the illness made him unable to assist in Flynn's murder. 14RP 40.

b. Rhome Waived Any Error By Failing To Object.

An appellate court will not generally review issues raised for the first time on appeal. RAP 2.5(a); Scott, 110 Wn.2d at 685. Not only did Rhome fail to object to Dr. Ward's testimony on diminished capacity, he affirmatively agreed that it was properly before the jury. 13RP 169.

Moreover, Rhome used his cross-examination of Dr. Ward to further his own theories. 12RP 139, 141. Any error was waived.

c. The Trial Court Properly Allowed The Testimony.

To maintain a diminished capacity defense, a defendant must produce expert testimony demonstrating that a mental disorder, not amounting to insanity, impaired his ability to form the culpable mental state to commit the crime charged. State v. Atsbeha, 142 Wn.2d 904, 914, 16 P.3d 626 (2001). The trial court's admission or rejection of expert testimony is reviewed for an abuse of discretion. State v. Stenson, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997).

The trial court here properly allowed Dr. Ward to testify about diminished capacity. To support his mental defense, Rhome had to use Dr. Ward's testimony to convince the jury that he was unable to form the intent necessary for murder. On cross-examination, Rhome got Dr. Ward to affirm his long history of mental health problems, and the signs of mental illness contained therein. Rhome used this to argue that, notwithstanding Dr. Ward's conclusion, he did indeed suffer from incapacitating mental illness at the time of the murder.

Contrary to his claim on appeal that he altered his strategy and abandoned his diminished capacity defense, the record is clear that

nothing would have dissuaded Rhome from arguing that his mental issues precluded a finding of guilt, and he made such argument repeatedly.

Unfortunately for Rhome, his attempt to persuade the jury that he could not form the intent to murder Flynn was doomed on this record. As the State pointed out in closing argument, the jury did not need Dr. Ward's testimony to conclude that Rhome had the capacity to intend Flynn's murder. 14RP 17. Even under Rhome's version of events, his actions before, during and after the crime were purposeful and goal-oriented, and thus intentional.

4. THE TRIAL COURT PROPERLY PERMITTED LIMITED REFERENCE TO RHOME'S SEXUAL AGGRESSIVENESS TOWARD KIALANI BROWN.

Rhome complains that the trial court allowed Brown to testify that he had raped her in the days leading up to the murder. He describes this testimony as irrelevant and prejudicial. Rhome is mistaken. The evidence was properly admitted because it was relevant to the level of control that Rhome exerted over Brown in convincing her to stab Flynn. In addition, due to its close temporal proximity to the murder, the rape was part of the res gestae under the State's theory of the case. Finally, the trial court effectively mitigated any prejudice to Rhome by preventing Brown from using the word "rape," limiting Brown to saying that Rhome "forced himself" on her.

a. **Relevant Facts.**

Prior to putting Brown on the witness stand, the State sought a ruling on whether she would be allowed to testify that Rhome had raped her. The prosecutor explained that this would show the extent of Rhome's control over Brown, and thus help to explain why Brown felt compelled to stab Flynn at Rhome's behest. 11RP 14. Because Brown's stay in Seattle was brief, the rape would have occurred within the week prior to Flynn's murder. 11RP 15.

Rhome objected, arguing that Brown was lying about the rape, and that any rape had no relevance to the murder. 11RP 16. Rhome said that Brown had made several different statements, and had denied any rape in at least one of them. 11RP 16-18. The court responded: "Well, whether or not it happened, **whether or not she said it did or it didn't on different occasions** is somewhat a different issue than whether the State would be allowed to bring it out in direct examination." 11RP 18 (emphasis added).¹³

The court ruled that the State would be allowed to elicit the testimony, given the temporal proximity to the murder and the State's theory that Brown stabbed Flynn because of the control and power exerted

¹³ The phrase in bold was omitted from the discussion of this issue in the Brief of Appellant. BOA at 22.

by Rhome. 11RP 18-19. The court would not allow Brown to use the word "rape," however, because "that word is too much of a red flag and a buzz word and is too prejudicial"; instead, Brown was to use "descriptive terms." 11RP 81.

Brown adhered to the court's ruling. She testified that, once when she was in Rhome's room and things "had already kind of gotten to an intimate point," she asked him to stop and he "forced himself on me." 11RP 125.

b. The Trial Court Properly Limited The Evidence.

Prior bad acts, while not admissible to prove character in order to show action in conformity therewith, may be admissible for other purposes, among them motive, opportunity, intent, preparation and plan. ER 404(b). Such acts may also be admitted if they are part and parcel of the crime charged, i.e., the "res gestae," and are necessary to complete the picture for the jury. State v. Tharp, 96 Wn.2d 591, 594, 637 P.2d 961 (1981); State v. Lane, 125 Wn.2d 825, 831-35, 889 P.2d 929 (1995).

Admission of evidence under ER 404(b) requires a two-part analysis: 1) the evidence must be relevant to a material issue; and 2) the probative value of the evidence must outweigh its potential for prejudice. Lane, 125 Wn.2d at 831. While the trial court must find by a preponderance that the act occurred, a separate evidentiary hearing is not

necessary because the defendant will have the opportunity to confront the witness when she testifies at trial. State v. Kilgore, 147 Wn.2d 288, 292, 294-95, 53 P.3d 974 (2002). The admission of such evidence is reviewed for abuse of discretion. Lane, 125 Wn.2d at 831.

Given the State's theory of the case, Rhome's rape of Brown was relevant as evidence of his preparation and plan to eliminate Flynn, by attaining such a level of control over Brown that he could convince her to stab Flynn. The rape was also part of the complete picture of Rhome's role as an accomplice to the murder, in light of its relationship to the crime and its close temporal proximity.

Contrary to Rhome's claim on appeal, the trial court did not admit the evidence with no regard for whether the rape actually occurred. The court's verbal stutter-step on which Rhome relies ("whether or not it happened") does not disguise the nature of the court's ruling, encapsulated in the phrase that follows, and which Rhome ignores: "whether or not she said it did or it didn't on different occasions." 11RP 18. When the entire sentence is read, it is clear that the trial court was informing Rhome that Brown's inconsistency on the rape was not itself sufficient to preclude the State from offering the evidence in its case-in-chief.

Brown's testimony on direct examination, in which she detailed what happened when Rhome "forced himself" on her, was sufficient to

show by a preponderance that the act occurred. No separate evidentiary hearing was needed, and Rhome was free to confront Brown on this issue. See Kilgore, 147 Wn.2d at 294-95. The trial court was clearly aware of the potential prejudice, and properly mitigated it by precluding use of the word "rape." There was no error.

c. Any Error Was Harmless.¹⁴

Even if the trial court erred in allowing testimony about Rhome's sexual aggressiveness toward Brown, any error was harmless. Rhome himself told the jury in his opening statement that Brown had claimed that he raped her. 2/28/06 RP 20. There was thus no reasonable probability that Brown's testimony had a material effect on the outcome of the trial.

5. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN REQUIRING RHOME TO WEAR A LEG BRACE UNDERNEATH HIS PANTS IN COURT.

Rhome contends that the trial court abused its discretion in allowing him to be "shackled" in court. He argues that this was a violation of his constitutional right to due process, and he asks this Court to reverse his conviction on this basis. This claim should be rejected. The record indicates that the leg brace, which Rhome wore underneath his pants, was necessary due to Rhome's threatening and assaultive behavior toward jail

¹⁴ The standard of review for harmless error under ER 404(b) is set out in § C.2.d, supra.

staff. The record further indicates that the brace was not visible to the jurors. Rhome's due process rights were not violated, and reversal is not warranted.

a. Relevant Facts.

The prosecutor raised the issue of Rhome's leg restraint during voir dire:

Before we begin with individual jurors, I don't know if this is something that needs to be addressed. Mr. Rhome has apparently the braces that are on the knees that are not visibly apparent to me right now. I don't know if they are to the jurors when he's seated, but certainly if they are something that are visible we need to address it.

8RP 16.

Rhome immediately asked that the leg restraint be removed:

Well, I need to have this took off because I'm not running nowhere. I'm really trying to fight for my freedom back, and the sergeant made recommendations to the CO's that I have it on. So it'll give me a funny walk as if my right leg is crippled. So when I sit down or walk they are going to notice. There is this metal thing. [Indicating.] I have a clip here that I have to bend, and if I don't this is how I walk. You know. But the showing, you know.

8RP 16.

The trial court tried to ascertain whether the restraint could be seen, and the following discussion ensued:

The Court: Well, I can't see because I have the bar in front. Go back by the bench on the other side of Mr. Danko.

Mr. Danko: Move this way.

The Court: Walk over there, would you?

Mr. Rhome: This is – it sticks out right here. [Indicating.]

The Court: Sit down on the bench behind you so I can see what happens when you sit down.

Mr. Rhome: Oh, this?

The Court: Well, I mean, of course it's not going to occur to the jurors that that has something to do with his custody status.

Mr. Barber: I would agree, and just so that the record reflects that Mr. Rhome has been designated ultra security. So this – and I would ask for the officers to sort of, agreement or not with the proposition, that this is a security measure they have deemed necessary and appropriate during the course of this trial.

Mr. Rhome: I'm only ultra security because one of the CO tries to set me up to fight him and that's a given story.

The Court: Well I have nothing to do with your classification in the jail. That's up to them.

Mr. Rhome: You have control what happens within your jurisdiction of this courtroom.

The Court: Sir, actually, I know what I have control of and what I don't. I don't really need you to tell me. I don't see any reason why he can't wear that. I don't want him walking around the courtroom much anyway.

Mr. Rhome, you can certainly stand up there, and take a couple of steps, but I don't want you walking all over the courtroom. So it's not visible from where I am. Even if it were I'm assuming that people would think it had something to do with Mr. Rhome's physical condition. Never – I mean, I work in the system, and it wouldn't even occur to me that it was a security issue. So I know that I have had them. Because I have had previous defendants with them on their legs. So at least for purposes of voir dire let's keep it on.

8RP 16-18.

During presentation of the State's case-in-chief, Rhome appeared in court one day in his white, ultra-security jail uniform, having refused to

put on the clothes that his standby counsel had provided. 12RP 4-5.

When the court cautioned him that it was not in his best interest to appear before the jury in jail clothing, Rhome refused to change, insisting that the jail guards were trying to provoke him. 12RP 5-6. Rhome added, "They like the fact to kind of watch me, and get me to get physical against them, and I don't want to have to use my combat skills unless I have to."

12RP 6. The court continued to try to persuade Rhome to change, urging him to "go back upstairs, put on the leg cuff that the jury can't see –".¹⁵

12RP 8. Rhome refused: "I'm staying just like this." 12RP 8.

Moments later, Rhome's standby counsel raised the issue of shackling, and asked whether "that part of his attire could be removed while he's in open court."¹⁶ The court responded:

Well, I'm not willing to either request or order the officers to remove the chain. I thought what was a perfectly acceptable, from everybody's perspective, solution was to have the boot, which I would say the jurors didn't even notice. It was very well concealed. The problem is I think that the boot can't be put – would have to be put on over this attire, which is – makes it – renders it ineffective.

My understanding is that if you – there is some issue about putting the boot on with this particular outfit.

¹⁵ It appears from the record that Rhome may have had a chain connecting his legs when he was dressed in the ultra-security jail uniform. 12RP 6, 7. Apparently referring to the chains, Rhome noted that the guards were "thinking that I was going to get violent with them." 12RP 6. All of this occurred outside the presence of the jury. See 12RP 4, 28.

¹⁶ Again, the "attire" referred to appears to be the leg chain.

I do not want Mr. Rhome to be in shackles, but I'm also not going to order that he not have anything on his legs. So I don't know where we are with that but . . .

12RP 10-11.

At the court's request, several jail guards present in court offered an explanation for the shackles:

Officer Barber: The reason he doesn't have his boot on is he has threatened officers yesterday he would swing on anybody that tried to put the boot on him, and sergeant ordered it and chains on and it –

Officer Cook: Also our policy too, your Honor, that when someone is an ultra security inmate the shackles stay on.

The Court: Well, of course if he were in his civilian clothes he wouldn't have the shackles on.

Officer Cook: Correct.

12RP 12.

Again at the court's request, Sergeant Owens appeared in court to clarify the situation:

The Court: Apparently Mr. Rhome is not going to change his clothes, but we have the issue of the shackles, and I would like to know what the jail's position is on that, and whether or not we can replace those with the boot, and what the issue is around that.

Sergeant Owens: Well, apparently Mr. Rhome will not put the boot on, and he's not cooperative with that. And by our policy, based on his status, and the charge status that he has we are not going to remove the shackles. It's a security issue for us, and we are not comfortable, and it's our practice and policy not to do so.

12RP 21-22. Not fully satisfied with this explanation, the court insisted on knowing exactly why Rhome was classified as an ultra-security inmate.

12RP 22. After a brief break, Sergeant Owens returned, and explained that Rhome was classified as an ultra-security inmate because he had threatened jail staff and attempted to assault them, and had committed property destruction. 12RP 23-24.

As to the choice of restraint, Owens said that, because of its more complicated mechanism, putting the "boot" on an inmate's leg was "almost impossible" to do if force was required. 12RP 24. The court again asked Rhome if he would be willing to allow the officers to replace the shackles with the "boot." 12RP 25. Rhome agreed, saying it really made no difference to him, and the court took a recess to facilitate a change of clothing and restraint before the jury was brought in. 12RP 25-26, 28.

b. The Trial Court Properly Exercised Its Discretion In Requiring Rhome To Wear A Leg Brace.

A defendant generally has the right to appear before the jury free of shackles or other physical restraints. State v. Hutchinson, 135 Wn.2d 863, 887, 959 P.2d 1061 (1998), cert. denied, 525 U.S. 1157 (1999). A defendant's appearance in such restraints may cause the jury to be prejudiced against him, contravening the presumption of innocence and violating the defendant's right to due process. Id.

Trial courts have discretion, however, to address on a case-by-case basis whether a particular defendant should be restrained during trial.

State v. Elmore, 139 Wn.2d 250, 273, 985 P.2d 289 (1999), cert. denied, 531 U.S. 837 (2000). Reliance on a general policy of imposing physical restraints on inmates merely because they are potentially dangerous is not sufficient; the exercise of discretion must be based on facts in the record. State v. Clark, 143 Wn.2d 731, 773, 24 P.3d 1006 (citing State v. Finch, 137 Wn.2d 792, 846, 975 P.2d 967, cert. denied, 528 U.S. 922 (1999)), cert. denied, 534 U.S. 1000 (2001). The court must weigh on the record the reasons for restraining the defendant. Elmore, 139 Wn.2d at 273.

There are a number of factors for the trial court to consider in making this determination, including: the seriousness of the present charge; defendant's temperament and character; defendant's age and physical attributes; defendant's 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. Hutchinson, 135 Wn.2d at 887-88 (citing State v. Hartzog, 96 Wn.2d 383, 400, 635 P.2d 694 (1981)).

While the trial court did not address all of the listed factors, the court correctly declined to rely on the general security concerns expressed

by the jail officers, and insisted on learning exactly why the jail considered Rhome dangerous. The court learned that Rhome had threatened jail staff, attempted to assault jail staff, and committed property destruction. The court knew that Rhome was charged with Murder in the First Degree with a deadly weapon, an extremely violent crime. The crime charged obviously cast Rhome's temperament and character in a disturbing light. Rhome was 22 years old at the time of trial, and strong enough to carry the body of the murder victim in a duffle bag. CP 79; 10RP 113; 13RP 70.

After learning facts sufficient to support some sort of restraint, the court ascertained what the problem was with putting the leg brace ("boot") on an uncooperative inmate. The court tried to convince Rhome to allow the brace to be placed on his leg underneath his clothing, rather than appearing before the jury in visible shackles. The court ultimately succeeded, and there was no further mention of the brace throughout the trial. The trial court properly declined to exercise its discretion based only on generalized security concerns, but rather based its decision that Rhome should wear a leg brace under his clothes on specific facts in the record. This decision should not be revisited on appeal.

c. Any Error Was Harmless.

A claim of unconstitutional physical restraint is subject to harmless error analysis. Elmore, 139 Wn.2d at 274; Clark, 143 Wn.2d at 775. The State must generally overcome the presumption of prejudice, and show that any error was harmless beyond a reasonable doubt. Clark, 143 Wn.2d at 775; Hutchinson, 135 Wn.2d at 887.

However, where the jury's view of the restraint is brief or inadvertent, the defendant must make an affirmative showing of prejudice. Elmore, 139 Wn.2d at 273, 274. This requires a showing that the restraint had a substantial or injurious effect or influence on the jury's verdict. Hutchinson, 135 Wn.2d at 888.

Even if this Court concludes that the trial court abused its discretion here, any error was harmless. The court repeatedly stated that the leg brace was not visible to the jury. 8RP 18 ("it's not visible from where I am"); 12RP 8 ("go back upstairs, put on the leg cuff that the jury can't see"), 10 ("solution was to have the boot, which I would say the jurors didn't even notice. It was very well concealed."). The trial record contains no evidence that the jurors saw Rhome's leg brace. Under these

circumstances, Rhome cannot have been prejudiced. See Hutchinson, 135 Wn.2d at 888 ("Because the jury never saw the Defendant in shackles, he cannot show prejudice.").

Even if Rhome's belief that the brace gave him a "funny walk as if my right leg is crippled" is credited (8RP 16), there nevertheless was no constitutional violation. "When the jury's view of a defendant or witness in shackles is brief . . . or inadvertent, the defendant must make an affirmative showing of prejudice." Elmore, 139 Wn.2d at 273 (quoting Wilson v. McCarthy, 770 F.2d 1482, 1485-86 (9th Cir. 1985)). After observing Rhome walk with the brace, the court concluded: "Even if it were [visible] I'm assuming that people would think it had something to do with Mr. Rhome's physical condition. . . . I work in the system, and it wouldn't even occur to me that it was a security issue." 8RP 18. Based on the small chance that jurors could even see the brace or its effect on Rhome's walk, and the even smaller likelihood that they would associate what they saw with a physical restraint related to security concerns, any error was harmless.

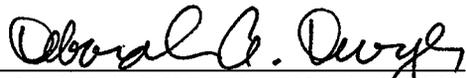
D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Rhome's conviction.

DATED this 9th day of July, 2007.

Respectfully submitted,

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APPENDIX A

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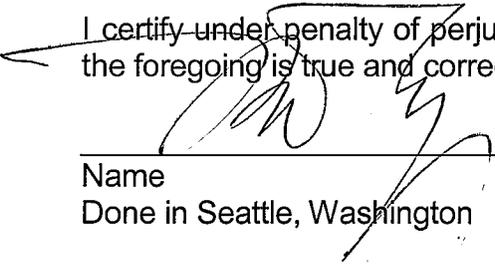
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15RP	April 14, 2006

[The volume containing Rhome's opening statement is dated February 28, 2006, and is referred to in the brief by that date.]

Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to **Gregory C. Link**, the attorney for the appellant, at Washington Appellate Project, 1511 Third Avenue, Suite 701, Seattle, WA 98101, containing a copy of the **Brief of Respondent**, in **STATE V. DEMAR RHOME**, Cause No. **58072-8-1**, in the Court of Appeals for the State of Washington, Division I.

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



Name
Done in Seattle, Washington

07-09-07

Date

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