No. 47351-8-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

SHAWN D. OLLISON,

Appellant.

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

The Honorable Carol Murphy, Judge
Cause No. 14-1-01309-8

AMENDED BRIEF OF RESPONDENT

Carol La Verne
Attorney for Respondent

2000 Lakeridge Drive S.W.
Olympia, Washington 98502
(360) 786-5540

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

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2. Whether the court miscalculated Ollison's offender score in light of its ruling finding that counts one and three constituted the same criminal conduct.

3. Whether Ollison suffered prejudice as a result of his counsel's agreement with the offender score.

B. STATEMENT OF THE CASE.

The State accepts the appellant's statement of the substantive and procedural facts of the case.

C. ARGUMENT.

1. The trial court did not abuse its discretion by ordering Ollison to wear a leg brace restraint under his clothing. Even if it had been error, it would be harmless error.

a. The court did not abuse its discretion.

Ollison maintains that the record does not support the trial court's order that he wear a leg brace restraint during trial. He argues that there was no showing that he was an escape risk, had been disorderly, or that he was a physical danger to anyone in the courtroom. He further faults the court for failing to consider less restrictive alternatives. Appellant's Opening Brief at 8.

The trial court held a hearing at the beginning of the trial regarding restraints on the defendant. It took testimony from Corrections Officer Trevor Davis. Trial TP 26-35.[1] He testified that the leg brace was the least restrictive restraint available other than no restraint, but in that case there would be three officers in the courtroom during trial rather than two. Trial RP 27, 33-34. The court considered the high bail placed on Ollison, which resulted from the serious allegations of the case and that the defendant was in maximum custody in the jail. Trial RP 40. It also determined that the leg brace was not painful, would not be visible to the jury, and that for normal movement could be controlled by the defendant. Trial RP 40-41. The court further ruled that if Ollison needed to move around the courtroom, the jury would be excused for a break while he did so. Trial RP 41.

A defendant has the right to appear at trial without shackles or restraints, except in extraordinary circumstances. He or she may be physically restrained only when necessary to prevent escape, injury, or disorder in the courtroom. State v. Jennings, 111 Wn. App. 54, 61, 44 P.3d 1 (2002), *review denied*, 145 Wn.2d 1016, 41

1 References to the Verbatim Report of Proceedings of the trial will be designated "Trial RP" and references to the transcript of the sentencing hearing will be designated "Sentencing RP."

P.3d 482 (2002). "It is fundamental that a trial court is vested with the discretion to provide for courtroom security, in order to ensure the safety of court officers, parties, and the public." State v. Hartzog, 96 Wn.2d 383, 396, 635 P.2d 694 (1981).

Restraints are disfavored because they may impact the constitutional right to the presumption of innocence, State v. Elmore, 139 Wn.2d 250, 273, 985 P.2d 289 (1999), as well as the right to testify in one's own behalf and the right to confer with counsel during a trial. State v. Damon, 144 Wn.2d 686, 691, 25 P.3d 418 (2001). The trial court must weigh on the record the reasons for using restraints on the defendant in the courtroom. Elmore, 139 Wn.2d at 305. The court should consider a long list of factors addressing the dangerousness of the defendant, the risk of his escape, his threat to other persons, the nature of courtroom security, and alternative methods of ensuring safety and order in the courtroom. State v. Hutchinson, 135 Wn.2d 863, 887-88, 959 P.2d 1061 (1998) (citing to Hartzog, 96 Wn.2d at 400). A lesser showing of necessity is required when there is no jury present. State v. Walker, 185 Wn. App. 790, 799, 344 P.3d 227 (2015).

The right to appear in court without restraints is not unlimited. State v. Finch, 137 Wn.2d 792, 846, 975 P.2d 967

(1999). A trial court has broad discretion to provide security and ensure decorum in the courtroom. Restraints, even visible ones, may be permitted after the court conducts a hearing and enters findings justifying the restraints. State v. Damon, 144 Wn.2d at 691-92. Regardless of the type of proceeding, and whether or not a jury is present, it is for the court, not jail or prison administrators, to determine whether and how restraints will be used. Walker, 185 Wn. App. at 797. The standard of review is abuse of discretion, recognizing that the trial court has broad discretion. Hartzog, 96 Wn.2d at 401.

In State v. Flieger, 91 Wn. App. 236, 955 P.2d 872 (1998), the court found a legitimate distinction between a shock box which does not restrain physical movement and cannot be seen by jurors from other restraint methods which are visible. In that case it did not matter because the shock box worn by the defendant had been noticed by the jurors. Id., at 242. *See also* State v. Afeworki, 189 Wn. App. 327, 353, 358 P.3d 1186 (2015) ("Because it is not visible to observers, [the Band-It shock device] does not implicate the presumption of innocence.")

The mere fact that a jury sees a defendant wearing restraints does not automatically require reversal. *See* State v. Rodriguez,

146 Wn.2d 260, 270, 45 P.3d 541 (2002). When a jury's view of a defendant or witness in shackles is brief or inadvertent, the defendant must affirmatively show prejudice. State v. Elmore, 138 Wn.2d 250, 273, 985 P.2d 289 (1999).[2] In some situations, an appropriate jury instruction may cure any prejudice. Rodriguez, 146 Wn.2d at 270.

There is no authority for the argument that the trial court must consider every possible alternative, or even any particular alternative, before ordering the defendant to wear restraints. Nor is a crowd of uniformed officers surrounding the defendant necessarily less prejudicial than restraints invisible to the jury. State v. Thompson, 169 Wn. App. 436, 472, 290 P.3d 996 (2012).

Here the court relied primarily on the seriousness of the allegations on which Ollison was being tried. Ollison used a stick to force Aleta (Penny) Miller to hand over her car keys and some cash, after entering her home. Trial RP 111-12, 122-23. He threatened to kill her if she called anyone, causing her to throw her phone into a garden area, from which he retrieved it. Trial RP 123-25. While being held at gunpoint by Miller's neighbor, he

2 In general, the law is unclear which party bears the burden of proving either prejudice or lack of prejudice. Jennings, 111 Wn. App. at 61.

repeatedly yelled "Shoot me, shoot me. It's a matter of life and death. Just shoot me." Trial RP 135. "Go ahead and shoot me; if you don't, they will." Trial RP 382-83. "Just kill me. I can't go back. Let me go." 03/09/15 Trial RP 46. "Go ahead, Bob, just shoot me because if you don't they will." 03/09/15 RP 72.

The neighbor declined to shoot him. Ollison got into Miller's car, revved the engine, made a sharp turn, and drove through a chain link fence, barely missing three witnesses, and then only because one of them jumped out of the way and another grabbed the third and threw her out of the path of the car. Trial RP 136-39, 385, 391, 03/09/15 Trial RP 49-50, 53-56, 58. Ollison then led a number of officers on a high speed chase, characterized by erratic and reckless driving, beginning in Olympia and ending in Centralia. Trial RP 193-233, 237-45, 247-58, 312-16. The chase ended because a deputy sheriff used his own vehicle to pin the stolen car Ollison was driving against a jersey barrier, slowing it to a stop. Trial RP 224, 258, 316. During the chase Ollison ran over a spike strip, deflating both front tires, but he continued for several miles, still at high speeds, running on the rims of the front wheels. Trial RP 217-18, 222-23, 239-40, 251, 253-54, 315. During the time he

was driving on the front rims, he hit another vehicle driven by Karen Brown. He failed to stop. Trial RP 224, 256, 350-53.

Once Ollison was forced to a stop he sat in the stolen car, hands up and staring at the arresting officer, ignoring orders to exit the vehicle. It was not until a deputy broke out the passenger window that he began to crawl out of the car. Trial RP 258-59, 317.

Ollison declined to give a statement to the police. 03/02/15 RP 30. He did not testify at trial. 03/09/15 Trial RP 128-29. No explanation was ever offered for Ollison's actions. Sentencing RP 30. While it is true that a defendant is presumed innocent, the court is entitled to consider the facts of the case when deciding upon courtroom security. Hutchinson, 135 Wn.2d at 887-88. Here the court was faced with a man who was 34 or 35 years old, in good physical shape, wearing civilian clothes so that if he escaped he would blend in with other people in the courthouse and be more difficult to follow. Trial RP 30, 32. He had demonstrated irrational behavior and a willingness to endanger other people in an effort to escape. His efforts to escape from whatever he perceived he was running from were extreme. No judge would count on him behaving rationally in court, or expose the people in the courtroom, or the general public, to the risk that Ollison would escape and

repeat his previous behavior. Had he not been wearing the leg brace, an additional corrections officer would have been required in the courtroom, Trial RP 33-34, resulting in more expense to the public and not necessarily reducing any potential prejudice to Ollison. The leg brace was painless and undetectable under clothing, and the only clue that the jury would have would occur if Ollison walked in their presence. Trial RP 27-28, 32. The judge observed that the brace was undetectable, and ruled that if Ollison needed to move around the courtroom, that would take place outside the presence of the jury. Trial RP 40-41.

> "Judicial discretion is a composite of many things, among which are conclusions drawn from objective criteria; it means a sound judgment exercised with regard to what is right under the circumstances and without doing so arbitrarily or capriciously. Where the decision or order of the trial court is a matter of discretion, it will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons."

State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971) (internal citations omitted).

The trial court did not abuse its discretion.

b. Even if there was error, it was harmless.

Errors which infringe on a defendant's constitutional rights are presumed prejudicial. Flieger, 91 Wn. App. at 243. Like other constitutional errors, a claim of unconstitutional shackling is subject to a harmless error analysis. Jennings, 111 Wn. App. at 61. The State bears the burden of showing that the shackling did not influence the jury's verdict. Damon, 144 Wn.2d at 692. "A constitutional error is harmless if the appellate court is convinced beyond a reasonable doubt that any reasonable jury would have reached the same result in the absence of the error." State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985).

The court in Hutchinson found that because the jury never saw the defendant in shackles he could not show prejudice and therefore the error was harmless. Hutchinson, 135 Wn.2d at 888.[3] Similarly, the court in Jennings held that the stun gun the defendant was wearing was not visible to the jury and the error was harmless. Jennings, 111 Wn. App. at 61. The court in Damon found that the jury must have observed the restraint chair in which the defendant was seated, and therefore the error was not harmless. Damon, 144 Wn.2d at 693.

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3 In Hutchinson, the court put the burden on the defendant to show that the shackling had a substantial prejudicial effect of the verdict. Hutchinson, 135 Wn.2d at 888.

The only prejudice to which Ollison points is the possibility that the jury saw the brace. "[T]he jury *may* have perceived Ollison as a dangerous person . . . since there is no way to prove the jury didn't observe the restraint sometime during the trial." Appellant's Opening Brief at 9, emphasis added. However, there is not even a hint in the record that the jury saw anything suspicious. An appellate court will not speculate that events which do not appear in the record may have occurred. State v. Blight, 89 Wn.2d 38, 46, 569 P.2d 1129 (1977). "It is a well established principle that

> '[o]n a partial or incomplete record the appellate court will presume any conceivable state of facts within the scope of the pleadings and not inconsistent with the record which will sustain and support the ruling or decision complained of; but it will not, for the purpose of finding reversible error, presume the existence of facts as to which the record is silent.'"

State v. Jasper, 174 Wn.2d 96, 123-24, 271 P.3d 876 (2012).

The record in this case contains nothing that indicates the jury saw that Ollison was wearing a leg brace. He suffered no prejudice. Even if the court had erred in ordering him to wear the brace, which it did not, any error would be harmless.

> 2. Ollison's offender scores for Counts 2 and 7 were miscalculated. While it makes no difference in the total sentence he will serve, his case should be remanded for resentencing.

Ollison is correct that his offender score was miscalculated for Counts 2 and 7, first degree burglary and attempting to elude. The court found that Counts 1 and 3, first degree robbery and theft of a motor vehicle, constituted the same criminal conduct. CP 186; Sentencing RP 23. They count only as one offense, the one carrying the highest offender score. RCW 0.94A.525(5)(a)(i). The scores for the burglary and attempting to elude included a point for both the robbery and the theft of a motor vehicle. CP 169, 171, 186. His offender score for Count 2, first degree burglary, and Count 7, attempting to elude, should have been three rather than four for each one. CP 169, 171. The standard ranges should have been 31 to 41 months for the burglary and two to six months for the attempt to elude. His sentences for those two offenses were above the correct standard range. CP 189.

However, the most serious offense of which Ollison was convicted, and which carried the highest sentence, was first degree robbery. His offender score for that was correctly calculated at three, with a standard range of 46 to 61 months. CP 168. The first degree burglary and attempting to elude charges carried smaller standard ranges, and thus even at the higher, incorrect score, less time was imposed on those than the 60 months, plus a 24-month

deadly weapon enhancement, that he received on the first degree robbery conviction.

The remedy for an erroneous sentence is remand for resentencing. State v. Ford, 137 Wn.2d 472, 485, 973 P.2d 452 (1999). The State concedes that this matter should be remanded to the Superior Court to correct his offender scores for the two contested counts, and to be resentenced on them. As noted, however, the offender score for the first degree robbery was correctly calculated, and his sentence of 60 months, plus a 24-month deadly weapon enhancement, will stand.

3. Even though defense counsel incorrectly calculated Ollison's offender score for Counts 2 and 7, Ollison suffered no prejudice and therefore there is no ineffective assistance of counsel.

Defense counsel did not merely agree to an incorrect offender score. It appears from the record that the State correctly calculated at least the scores for the burglary charge, but defense counsel convincingly argued that they should be one point higher. Sentencing RP 27-28. The score sheet for the burglary count shows that the correct score was altered and the correct range crossed off; a score of four was written over a score of three, and

the higher range circled while the lower was crossed off. CP 169. Ollison argues that he received ineffective assistance of counsel.

Claims of ineffective assistance of counsel are reviewed de novo. State v. White, 80 Wn. App. 406, 410, 907 P.2d 310 (1995). To prevail on a claim of ineffective assistance of counsel, an appellant must show that (1) counsel's performance was deficient; and (2) the deficient performance prejudiced him. State v. Thomas, 109 Wn.2d 222, 225-26, 743 P.2d 816 (1987). Deficient performance occurs when counsel's performance falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008 (1998). An appellant cannot rely on matters of legitimate trial strategy or tactics to establish deficient performance. State v. Hendrickson, 129 Wn.2d 61, 77-78, 917 P.2d 563 (1996). Prejudice occurs when, but for the deficient performance, the outcome would have been different. In re Pers. Restraint of Pirtle, 136 Wn.2d 467, 487, 965 P.2d 593 (1996). There is great judicial deference to counsel's performance and the analysis begins with a strong presumption that counsel was effective. Strickland v. Washington, 466 U.S. 668, 689, 104 S.Ct. 2052, 80 L. Ed. 2d 674 (1984); State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251

(1995). A reviewing court need not address both prongs of the test if the defendant makes an insufficient showing on one prong. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, that course should be followed. Strickland, 104 S. Ct. at 1069-70.

The test for whether a criminal defendant was denied effective assistance of counsel is if, after considering the entire record, it can be said that the accused was afforded effective representation and a fair and impartial trial. State v. Thomas, 71 Wn.2d 470, 471, 429 P.2d 231 (1967); State v. Bradbury, 38 Wn. App. 367, 370, 685 P.2d 623 (1984). Prejudice occurs when but for the deficient performance, the outcome would have been different. Pirtle, 136 Wn.2d at 487.

Under the deferential standard used when reviewing counsel's performance, it is difficult to say that a one-point error in calculating the scores for two of the less serious offenses of which Ollison was convicted is ineffective assistance of counsel. If his argument is correct, virtually any mistake an attorney makes is going to be considered ineffective assistance of counsel. While it was indeed a mistake, it did not deprive Ollison of a fair trial.

Further, Ollison suffered no prejudice from the error. The first degree robbery conviction carries the greatest sentence. The other sentences are served concurrently with it. CP 189. The first degree burglary conviction carried a 24-month deadly weapon enhancement, and that is not affected by the miscalculation of the score. Even when he is resentenced, his total sentence is going to remain the same—108 months. Without prejudice there is no ineffective assistance of counsel.

D. CONCLUSION.

The court did not abuse its discretion by ordering Ollison to wear a leg brace restraint during trial. His offender score was miscalculated for two of his felony convictions, and the matter should be remanded for resentencing. Because he will serve the same amount of time even after resentencing, he has not suffered any prejudice and therefore counsel was not ineffective.

Respectfully submitted this ____ day of January, 2016.

Carol La Verne, WSBA #19229
Attorney for Respondent

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Respectfully submitted this 13th day of January, 2016.

Carol Laverne

Carol La Verne, WSBA #19229
Attorney for Respondent

CERTIFICATE OF SERVICE

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

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COURTS OF APPEALS DIVISION II
950 BROADWAY, SUITE 300
TACOMA, WA 98402-4454

--AND TO--

THOMAS EDWARD DOYLE
ATTORNEY AT LAW
PO BOX 510
HANSVILLE, WA 98340-0510
EMAIL: TED9@ME.COM

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

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Nancy Jones-Hegg

THURSTON COUNTY PROSECUTOR

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