

NO. 47725-4-II

IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION II

---

STATE OF WASHINGTON,

Respondent,

v.

KYLE LIPINSKI,

Appellant.

---

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

The Honorable Erik Price, Judge

OPENING BRIEF OF APPELLANT

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**A. ASSIGNMENTS OF ERROR**

1. The trial court erred when it allowed the State to present text messages without adequate authentication in order to establish the crime of violation of a no contact order.

2. The trial court erred in making the appellant wear a leg brace during trial.

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Reversal is required when the State fails to sufficiently authenticate a text message and it is reasonably probable that its admission materially affects the outcome of a hearing. Did trial court err when it found that text messages sent to the complaining witness were properly authenticated, where there was no evidence that appellant Kyle Lipinski owned or had access to the account used to send the messages or that three phrases identified by the complaining witness were sufficiently unique to indicate that the messages were composed and sent by Mr. Lipinski rather than another? Assignment of Error 1.

2. Did the trial court violate Mr. Lipinski's constitutional right to a fair and impartial trial by requiring him to wear a leg brace? Assignment of Error 2.

## C. STATEMENT OF THE CASE

### 1. Procedural facts:

Kyle Lipinski was charged in Thurston County Superior Court with two counts of felony violation of a post conviction no-contact court order, pursuant to RCW 10.99.050 and RCW 26.50.110(5). Clerk's Papers (CP) 4-5. The State alleged on December 1, 2014, and December 6, 2014, Mr. Lipinski had contact with Aubrey Boyes or went to her residence with knowledge of the existence of a valid no-contact order issued pursuant to Chapter 10.99 RCW on June 5, 2014, preventing him from contacting her or going to her residence, and that he had at least two prior convictions for violation of a no-contact order. CP 4-5. The State also alleged that both offenses were committed against a family member pursuant to RCW 10.99.020. CP 4-5.

The matter came on for jury trial on June 8, 2015, the Honorable Erik Price presiding. Report of Proceedings (RP) (6/8/15) at 5-92, RP (6/9/15) at 93-141.<sup>1</sup>

Mr. Lipinski was in custody at the time of trial. He was classified as

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<sup>1</sup>The record of proceedings is designated as follows: RP – December 18, 2014, December 22, 2014, December 30, 2014, January 28, 2015, January 29, 2015, February 4, 2015, March 12, 2015, May 13, 2015, June 3, 2015, June 8, 2015, (jury trial), June 9, 2015 (jury trial), and June 25, 2015 (sentencing).

an inmate worker in minimum custody. RP (6/8/15) at 12. He was also being held by the Thurston County District Court because the current felony charges constituted a probation violation in that court. RP (6/8/15) at 14. At the beginning of trial the State moved to have Mr. Lipinski in a leg brace restraint. RP (6/8/15) at 7. Defense counsel objected to use of the device. RP (6/8/15) at 7. A deputy sheriff testified that a mechanical leg brace is not visible the jury and has a hinge that remains unlocked when the defendant is “walking normally,” but locks in a restraining position if the person tries to run or kick. RP (6/8/15) at 9. The deputy stated that Mr. Lipinski had received two bail revocations and that he failed to provide a urinalysis test in December, 2014. RP (6/8/15) at 13. After hearing testimony, the court ordered use of the leg brace restraint. RP (6/8/15) at 17.

Neither exceptions nor objections were taken to the jury instructions. RP (6/9/15) at 94.

The jury found Mr. Lipinski guilty of both counts of violation of a no-contact order as charged. RP (6/9/15) at 138; CP 87, 89. The jury also found by special verdict in each count that the appellant and Ms. Boyes are members of the same family or household. CP 88, 90.

The trial court denied Mr. Lipinski’s motion to sentence him under the Drug Offender Sentencing Alternative and imposed concurrent standard

range sentences, with a total term of incarceration of 27 months. RP (6/25/15) at 19, 20; CP 100. The court found that Mr. Lipinski has the ability to work when released. RP (6/25/15) at 20.

Timely notice of appeal was filed on June 25, 2015. CP 93. This appeal follows.

**2. Trial testimony:**

Aubrey Boyes dated Kyle Lipinski for five years and had a daughter with him. RP (6/8/15) at 51. Their relationship ended and Ms. Boyes obtained a no-contact order in Thurston County District Court Cause No. 14DV-0506 TCP on June 4, 2014, with an expiration date of June 5, 2016, prohibiting Mr. Lipinski from having contact with her. RP (6/8/15) at 52. Exhibit 1.

Beginning in late 2014, Ryan Waslawski lived with Ms. Boyes and her two children in her residence in Rochester, Washington. RP (6/8/15) at 43. At approximately 9:30 p.m. on December 1, 2014, Mr. Waslawski was sleeping in Ms. Boyes' house when he heard someone knocking at the door and ringing the doorbell. RP (6/8/15) at 44. Ms. Boyes and her children were out of the state at the time. RP (6/8/15) at 46.

Mr. Waslawski got up and saw Mr. Lipinski through the window next to the front door RP (6/8/15) at 45. Mr. Waslawski had known Mr. Lipinski



for many years and stated that he recognized him as being the person standing outside Ms. Boyes' house. RP (6/8/15) at 43, 45. He stated that Mr. Lipinski was leaning with his face against the window glass, smoking a cigarette. RP (6/8/15) at 45. He decided not to answer the door and sat in the living room. RP (6/8/15) at 45. Mr. Waslawski did not report the incident until the police contacted him on December 6, 2014 regarding text messages received by Ms. Boyes that she alleged were from Mr. Lipinski. RP (6/8/15) at 47.

The State sought to introduce two text messages that Ms. Boyes stated she had received on December 6, 2014 when she was at her parents' house. RP (6/8/15) at 53, 54. Ms. Boyes asserted that the texts were sent to her by Mr. Lipinski. Defense counsel objected, arguing that that the texts be excluded because they could not be authenticated. RP (6/8/15) at 55, 56. The texts represented the evidence introduced at trial to prove that Mr. Lipinski violated the no-contact order as alleged in Count 2.

Although the messages came from a telephone number that she did not recognize and did not have the sender's name attached to it, the State argued that the messages were from Mr. Lipinski. The State asserted:

- The texts contained a reference to "Snowflake," a pet name that Mr. Lipinski used for Ms. Boyes. RP (6/8/15) at 55, 58.

- The message says that the sender loves her more than the sugar in a baby jar, and Ms. Boyes stated that when they were together, Mr. Lipinski gave her a baby jar full of sugar. RP(6/8/15) at 58.
- The message is ends with the letters “PS,” and she said the Mr. Lipinski signed notes to her “PS.” RP(6/8/15) at 58.

After hearing argument regarding admissibility of the texts, the court overruled the defense’s objection and admitted the text messages into evidence. RP (6/8/15) at 66. *See* Exhibits 6 and 7.

After the texts were admitted, Ms. Boyes testified that she believed that the texts were sent by Mr. Lipinski because no one else called her “Snowflake” and that it was signed “PS,” which is how he signed other notes and texts to her. RP (6/8/15) at 67-69.

After receiving the text messages, Ms. Boyes returned to her house and called law enforcement. RP (6/8/15) at 69.

Deputy Lester Klene of the Thurston County Sheriff’s Office was dispatched to Ms. Boyes’ residence in response to a report of a violation of a no-contact order on December 6, 2014. RP (6/8/15) at 76. Deputy Klene took photos of texts on Ms. Boyes’ cell phone. He also confirmed that a domestic violence no-contact order issued June 5, 2014, prohibited Kyle

Lipinski from contacting Ms. Boyes. RP (6/8/15) at 79, 80. The order expires June 5, 2016. RP (6/8/15) at 81. Exhibit 1.

The parties agreed to the following stipulation, which was read to the jury by the court:

The parties have agreed that certain facts are true. You must accept as true that person before the Court who has been identified in the charging document as defendant Kyle Lipinski, was convicted on June 5, 2014, of two separate counts of violation of a no-contact, protection or restraining order, domestic violence, in *State of Washington v. Kyle David Lipinski* in Thurston County District Court Cause Number 14 DV-0506 TCP.

RP (6/8/15) at 41.

The court also read an instruction limiting consideration of the two prior convictions for violation of a court order for the purpose of deciding whether the defendant has two prior convictions for violation of a court order.

RP at 41.

The defense rested without calling witnesses. RP (6/8/15) at 88.

D. ARGUMENT

1. THE TRIAL COURT ERRONEOUSLY ADMITTED EVIDENCE OF TEXT MESSAGES SENT TO MS. BOYES' CELLULAR TELEPHONE BECAUSE THE MESSAGES WERE NOT SUFFICIENTLY IDENTIFIED OR AUTHENTICATED, AS REQUIRED BY ER 901(A).

The trial court permitted the prosecution to present the content of

two text messages received by Ms. Boyes on December 6, 2014, despite defense objection to their admission. RP (6/8/15) at 62-66; Exhibits 6 and 7. The State asserted that the texts were sent by Mr. Lipinski, in violation of the no contact order. RP (6/8/15) at 57-58. Defense counsel unsuccessfully argued that the State had not presented sufficient proof of authenticity of the texts or the identity of the sender. RP (6/8/15) at 60-62.

**a. Standard of proof**

A trial court's admission of evidence is reviewed for abuse of discretion. *State v. Magers*, 164 Wn.2d 174, 181, 189 P.3d 126 (2008). Abuse of discretion occurs when a trial court's decision is manifestly unreasonable or based on untenable grounds. *Magers*, 164 Wn.2d at 181.

**b. Text or other forms of electronic communication may be created through subterfuge or fraud, requiring careful scrutiny by the trial court.**

The purpose of authentication is to establish that the identification or object to be authenticated is what it purports to be. *State v. Monson*, 113 Wn.2d 833, 837, 784 P.2d 485 (1989); *State v. Payne*, 117 Wn. App. 99, 106, 69 P.3d 889 (2003). In order to satisfy the requirements for authentication under ER 901, the State must introduce sufficient proof to permit a reasonable factfinder to find in favor of authenticity or identification. *Id.* Pursuant to ER

901(a), "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." This requirement is met "if sufficient proof is introduced to permit a reasonable trier of fact to find in favor of authentication or identification." *State v. Bradford*, 175 Wn. App. 912, 928, 308 P.3d 736 (2013), review denied, 179 Wn.2d 1010, 316 P.3d 494 (2014) (citing *State v. Danielson*, 37 Wn. App. 469, 471, 681 P.2d 260 (1984)).

Text messages, emails, Twitter messages, Instagram, screenshots, Snapchat, and Facebook posts, and similar forms of social media are relatively new methods of communication and which are constantly being refined or modified by the architects of social media. Consequently, courts struggle to determine the proper method by which to examine testimony offered through a text message or other forms of electronic communication and how such testimony should be authenticated. *See, e.g. In re Detention of H.N.* 188 Wn.App. 744 P.3d (2015).

If text messages are considered to be documents and subject to the same requirements for authenticity as non-electronic documents, said communication may be authenticated by direct proof, such as the testimony of a witness who saw the author sign the document, acknowledgment of execution by the signer,

admission of authenticity by an adverse party, or proof that the document or its signature is in the purported author's handwriting. *See Com. v. Koch*, 2011 PA Super 201, 39 A.3d 996, 1004 (2011) (*citing* McCormick on Evidence, §§ 219-221 (E. Cleary 2d Ed.1972)). However, the advent of texts, emails, Twitter, Snapchat, and a myriad of social media creates significant difficulty in establishing authorship. *Koch*, 39 A.3d at 1004. For instance, multiple persons may use a text account, and accounts can be accessed without permission. The majority of courts across the country which have considered this question have determined the mere fact that an e-mail bears a particular address is inadequate to authenticate the identity of the author; typically, courts demand additional evidence. *Id.* A strict standard should be applied to text messages, Snapchat, Twitter, and Facebook messages, and other electronic communication due to the significant dangers of “spoofing” accounts and fraudulent use by persons other than the account holder.

Washington courts have made steps toward adopting heightened requirements for authentication of text messages. *See, State v. Bradford*, 175 Wn. App. 912, 929-30, 308 P.3d 736 (2013). In *Bradford*, Division 1 found that the State introduced sufficient evidence to support a finding that text messages read to the jury and contained in an examination report had been authenticated and were what the State purported them to be text messages

written and sent to a stalking victim's friend by the defendant. *Bradford*, 175 Wn. App. at 928. The evidence also included testimony that for a substantial period of time, Bradford telephoned the victim and appeared at her place of employment on a frequent basis; Bradford also regularly appeared outside of the victim's house; and the content of the text messages themselves indicated that Bradford was the individual who sent them. *Bradford*, 175 Wn. App. at 928-29.

In *H.N.*, the court acknowledged the significance of the sender's admission that the text messages had been sent by her, the identifying information in the text message, the content of the text messages and that the text messages were consistent with the time line of certain events in H.N.'s life. *H.N.*, 188 Wn.App. at 753.

**c. The State failed to establish Mr. Lipinski sent the texts.**

The State offered little of the corroboration necessary to authenticate that Mr. Lipinski sent the text messages offered against him at trial. Unlike *Bradford*, the only witness to testify as to the authenticity of these text messages was the recipient of the text herself, who did not testify as to any other personal contact with the defendant. The only identifying information on the text message was her assertion that three cryptic references in the texts

denoted that Mr. Lipinski was the sender of the texts. The State presented no corroborating testimony regarding the use of the word "Snowflake," "PS.," or text the reference to a baby jar and sugar were phrases used by Mr. Lipinski. The contact information did not include unique identifiers, such as a phone number that was assigned to the appellant.

There was never an acknowledgement by Mr. Lipinski that he had sent the messages. The only corroboration which connected Mr. Lipinski to the text messages was the obscure references that Ms. Boyes, without additional corroboration, claimed uniquely used by Mr. Lipinski. Looking at the appearance and the content of the message, it is impossible to authenticate the text messages in this manner.

There was also no forensic evidence used to establish Mr. Lipinski sent the text messages. In *Bradford*, the police performed a "phone dump" of the receiver's cell phone generating a report that itemized each text message sent or received to the phone over the period of several months, including the text messages at issue. *Bradford*, 175 Wn. App. at 919.

In this case, there was no reason why the State did verify messages were sent from Mr. Lipinski to Ms. Boyes on the date when the messages were purported to have been sent by him. The State did not determine whether the telephone number from which the text was sent was used by Mr. Lipinski. RP



(6/8/15) at 82. Nor did the State determine if Mr. Lipinski had an account at textnow.com, which is the service that the sender used to send the text. RP (6/8/15) at 83, Exhibits 6 and 7. Law enforcement did not investigate the owner of the textnow.com account used to send the message, or not did any member of law enforcement examine any cell phone or other device belonging to Mr. Lipinski to determine if it was used to send the texts. Despite the relative ease by which an electric trail could have followed to determine who sent the texts, the State based its case on Ms. Boyes' assumption that the texts must be from the appellant because of phrases—which could have easily been “spoofed” by a person familiar with their relationship. Because the phrases are not unique identifiers that could be traced to an account used by Mr. Lipinski, it is insufficient for authentication of the text messages.

**d. Because the court committed error that affected the outcome of the trial, reversal is required.**

The failure of the State to sufficiently authenticate the messages resulted in error which materially affected the outcome of the trial. When it is reasonably probable that the trial court's error materially affected the outcome of a hearing, reversal is required. *State v. Neal*, 144 Wn.2d 600, 611, 30 P.3d 1255 (2001). Improper admission of evidence constitutes harmless error only if the evidence is of minor significance in reference to the evidence as a

whole. *Id.*

The only evidence offered against Mr. Lipinski in Count 2 was the text messages. The improper admission of the text messages was not harmless, and this Court should reverse.

2. **THE TRIAL COURT ERRED BY ORDERING MR. LIPINSKI TO WEAR A LEG BRACE RESTRAINT DURING TRIAL.**

While due process does not guarantee every person a perfect trial, both our state and federal constitutions do guarantee all defendants a fair trial. *State v. Swenson*, 62 Wn.2d 259, 382 P.2d 614 (1963); *Bruton v. United States*, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968). Included in this due process right to a fair trial is the right "to appear at trial free from all bonds or shackles except in extraordinary circumstances." *In re the Personal Restraint of Davis*, 152 Wn.2d 647, 693, 101 P.3d 1 (2004); *Illinois v. Allen*, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970).

In this case, despite being designated as a prison worker and being classified by the jail staff to be under minimum security, trial court ruled, over defense objection, that Mr. Lipinski would be required to wear a leg brace restraint during trial. The court stated:

I should add there is also a factor regarding the age and

physical attributes of the defendant. The defendant appears to the Court to be of relatively young age and able-bodied, certainly not infirmed or aged. Coupling those two considerations together with the physical layout of [the] courtroom—we have a relatively small courtroom. The defendant's table is probably nine feet or so from the jury box. The defendant is sitting on the opposite side of defendant's counsel from the jury, thereby making it more difficult for the jury to see the leg brace, if it indeed is visible. I do note that the bottom cuff appears to be visible under the pant leg and the sock is not over the top of it, which is often the case.

RP (6/8/15) at 16.

After noting that the leg brace was partially visible, the court concluded:

Nevertheless, with the physical characteristics and the ages and attributes of the defendant and nature of the charges, I will order the use of the leg brace. I'll note it is the least restrictive. Should the State be requesting any more serious type of restraint, I would of course, look carefully at that request under the circumstances.

RP (6/8/15) at 16-17.

As noted *supra*, except in extraordinary situations, a defendant in a criminal trial is entitled to appear in open court free of physical restraint, the purpose for which is to safeguard his or her right to a fair and impartial trial under the Sixth and Fourteenth Amendments of the United States Constitution and article I, sections 3 and 22 of the Washington Constitution. Shackling or handcuffing impinges upon the right to a fair trial in a number of ways, the

most important of which is that it violates the right to the presumption of innocence. *Finch*, 137 Wn.2d 792, 842-43, 975 P.2d 967 (1999), *cert. denied*, 528 U.S. 922 (1999). Restraints may only be ordered for three purposes: "to prevent injury to those in the courtroom, to prevent disorderly conduct at trial, or to prevent an escape." *Finch*, 137 Wn.2d at 866. In addition, the court's decision to use restraints may only be justified if based upon "specific facts relating to the individual" that are "founded upon a factual basis set forth in the record." *Finch*, 137 Wn.2d at 866 (quoting *State v. Hartzog*, 96 Wn.2d at 399-400). Finally, since the right to appear free from restraints derives from both the federal and state constitutions, its violation mandates reversal of conviction and remand for a new trial unless the State proves the error harmless beyond a reasonable doubt. *State v. Damon*, 144 Wn.2d 686, 692, 25 P.3d 418 (2001). Courts must consider less restrictive alternatives before imposing physical restraints, which should be used only as a "last resort." *Finch*, 137 Wn.2d at 850.

As noted, restraints may be justified "to prevent injury to those in the courtroom, to prevent disorderly conduct at trial, or to prevent an escape." *Finch*, 137 Wn.2d at 846. Even in such limited circumstances, however, justification for the restraint will be found only if based upon "specific facts relating to the individual" that are founded upon a factual basis set forth in the

record." *Id.*

Here, the record does not support the court's ruling requiring Mr. Lipinski to wear a leg restraint during trial. There was no showing that he was an escape risk, that he had a history of being disorderly or that he posed a risk of physical injury. The court relies on the "nature of the charges," but fails to explain why the allegations that he appeared at Ms. Boyes' house and sent her text messages would create a risk of harm. Nor does the court address the fact that Mr. Lipinski was trusted by jail staff to the extent that he was permitted to be an inmate worker and was in a minimum custody classification or why that would constitute a risk of violence in the courtroom. RP (6/8/15) at 12.

The use of physical restraint was not justified in this case. This Court must consider whether the error was harmless. *State v. Damon*, 144 Wn.2d 686, 693, 25 P.3d 418 (2001). As this court noted in *State v. Jennings*, 111 Wn. App. 54, 61, 44 P.3d 1 (2002), case law is not clear regarding whether unconstitutional shackling creates a presumption of prejudice that the State must overcome or whether the defendant must demonstrate that the restraint was prejudicial.

The Supreme Court has held that "[t]he error will not be considered harmless unless the State demonstrates that the shackling did not influence the jury's verdict." *State v. Damon*, 144 Wn.2d at 692.

As a result of the shackling, the jury may have perceived Mr. Lipinski as a dangerous individual, especially since there is no way to prove the jury didn't observe the restraint sometime during the trial. Citing *State v. Finch*, 137 Wn.2d at 862, the court in *Damon* considered whether unconstitutional shackling was harmless based on the overwhelming evidence test to determine whether "the untainted evidence is so overwhelming that it necessarily leads to a finding of guilt." *Damon*, 144 Wn.2d at 421 (quoting *State v. Guloy*, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985)).

#### **E. CONCLUSION**

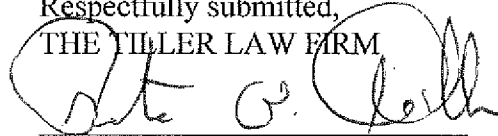
The State failed to present sufficient evidence that the texts sent to Ms. Boyes' cellular telephone on December 6, 2014 were actually sent by Mr. Lipinski. Therefore, there was insufficient proof to authenticate the text messages and admit them into evidence at trial, and insufficient proof to convict Mr. Lipinski of the crime violation of no contact order as alleged in Count 2. Mr. Lipinski's conviction on this count must therefore be reversed and dismissed.

The trial court violated Mr. Lipinski's constitutional rights to appear and defend free from physical restraints when it granted the State's motion to put him in a leg brace. As a result this Court should reverse Mr. Lipinski's convictions and remand for a new trial.

DATED: December 17, 2015.

Respectfully submitted,

THE TILLER LAW FIRM



PETER B. TILLER-WSBA 20835

Of Attorneys for Kyle Lipinski

CERTIFICATE OF SERVICE

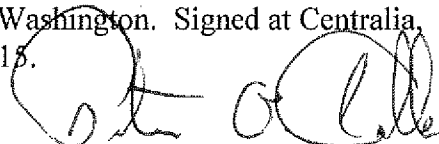
The undersigned certifies that on December 17, 2015, that this Appellant's Opening Brief was sent by the JIS link to Mr. David Ponzoha, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, and copies were mailed by U.S. mail, postage prepaid, to the following:

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This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on December 17, 2015.



PETER B. TILLER

**TILLER LAW OFFICE**

**December 17, 2015 - 4:55 PM**

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