No. 47725-4-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

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
Cause No. 14-1-01901-1

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether the court properly admitted evidence of text messages sent to Ms. Aubrey Boyes' cellular telephone.

2. Whether the court abused its discretion when it ordered that Lipinski wear a leg brace restraint, under his clothing and invisible to the jury.

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 properly admitted evidence of text messages sent to Ms. Aubrey Boyes' cellular telephone.

Lipinski claims that the trial court erroneously admitted evidence of text messages sent to the victim because they were not sufficiently authenticated under Evidence Rule (ER) 901(a). A 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.

The trial court excused the jury from the courtroom to hear the objection to the admission of the text messages in greater

detail. The trial court took testimony from Aubrey Boyes as to how she identified that the text messages were from Lipinski. Trial PR 58-59.

Washington courts have yet to directly develop special rules for the admissibility of text messages. KARL TEGLAND, WASHINGTON PRACTICE: EVIDENCE § 901.17, at 466 (5d ed. 2015). Therefore, the courts have been relying on ER 901(a), which is the general provision of authentication or identification. "The requirements 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." ER 901(a). This standard has been met "if sufficient proof is introduced to permit a reasonable trier of fact to find in favor of authentication or identification." State v. Danielson, 37 Wn. App. 469, 471, 681 P.2d 260 (1984). It has also been held that "[a] trial court is not bound by the rules of evidence when making a determination as to authenticity". State v. Williams, 136 Wn. App. 486, 500, 150 P.3d 111 (2007) (citing ER 104(a); ER 1101(c)(1); Danielson, 37 Wn. App. at 471). State v. Bradford, 175 Wn. App. 912, 308 P.3d 736 (2013). It is then the job of the jury to weigh the evidence and decide the credibility of the witness and the admitted

text messages. State v. Andrews, 172 Wn. App. 703, 293 P.3d 1203 (2013).

The Andrews Court was persuaded by the reasoning of the North Dakota Supreme Court that decided a victim's testimony as to the defendant's phone number and signature sufficiently authenticated pictures of received text messages. Id. "The proponent of offered evidence need not rule out all possibilities inconsistent with authenticity or conclusively prove that evidence is what it purports to be; rather, the proponent must provide proof sufficient for a reasonable juror to find the evidence is what it purports to be." State v. Thompson, 2010 ND 10, 777 N.W.2d 617, 624. Andrews, 172 Wn. App. at 705 (citing FED. R. EVID. 901(a); United States v. Hyles, 479 F.3d 958, 968-69 (8th Cir. 2007)). The Andrews' Court goes on to also include "[..], an Illinois appellate court, citing *Thompson*, decided no error occurred in admitting a transcript of received text messages as read by the victim." People v. Chromik, 408 Ill. App. 3d 1028, 946 N.E.2d 1039, 1056, 349 Ill. Dec. 543 (2011). Andrews, 172 Wn. App. at 709. After adopting the above case law the Andrews court held that the trial court had tenable grounds to allow the text messages to be enter as evidence. Id.

The trial court, following the Thompson rationale, used the content of the text messages to conclude that Lipinski was indeed the sender. Boyes testified that the text messages referred to her as "Snowflake". Trial RP 58 [1]. Snowflake is a pet name given to her by Lipinski. Id. Boyes also explained that a text message said "someone who loved me more than sugar in a baby jar". Id. This sugar jar referenced the time Lipinski gave her a baby food jar full of sugar and told her that he loved her more than that. Id. The contexts of these messages are unique and contain references to prior interactions. Boyes goes on further to explain the text messages were signed "PS". Id. This is a reference to when the couple was living together and they used to have "PS, I love you" on the wall. Id. Lipinski would also sign everything with "PS" throughout their relationship. Id. The court also heard testimony regarding how the nature of the text messages addressed the current events happening between the parties. Boyes testified that a text message said "I may be scared, and it doesn't mean I'm in danger. Everything is going to work out, and that I may hate him, but he will love me." Id. Boyes explained that this statement related

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."

to prior conversation about Boyes being scared that the two had conducted through text messages. Id at 59.

The trial court determined that the uniqueness of the details contained within the text messages, and the context to current events placed the statements in the same category as the cases represented by the Thompson case from North Dakota. Trial RP 65. Therefore, the trial court properly exercised its discretion and allowed the text messages to be admitted. The trial court also found that the text messages were an admission by the defendant and admissible under a hearsay exception. Id at 66.

The trial court did not abuse its discretion.

2. The trial court did not abuse its discretion by ordering Lipinski 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.

Lipinski maintains that the record does not justify 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 a history of being disorderly or that he posed a risk of physical injury. Appellant's Opening Brief at 17.

The trial court held a hearing at the beginning of the trial regarding restraints on the defendant. It took testimony from Corrections Officer Jason Lawson. Trial RP 8-13. Lawson testified that the leg brace was the least restrictive restraint available other than no restraint, but in that case there would be two officers in the courtroom during trial rather than one. Trial RP 9. The court considered the bail placed on Lipinski, which resulted from the allegations of the case, and that the defendant was on a no-bail hold in district court. Trial RP 10. 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 9.

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 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.

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

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.

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 allegations on which Lipinski was being tried. Lipinski had allegedly violated his post-conviction no contact order. The court looked at the underlying violation, noting that there was a disregard of an order issued by the courts. Trial RP 16. The court also took note of other instances where Lipinski failed to adhere to the requirements of the courts. These instances resulted in revocation of bail on two separate occasions. Trial RP 13,16.

The court also considered the age and physical attributes of the defendant. Trial RP 16. The court stated the defendant appeared to be relatively young in age and able-bodied. Trial RP 16. This along with the fact the physical layout of the courtroom

was relatively small, the court ordered the use of the leg brace. Trial RP 17.

Had he not been wearing the leg brace, an additional corrections officer would have been required in the courtroom, Trial RP 10, resulting in more expense to the public and not necessarily reducing any potential prejudice to Lipinski. The leg brace was painless and undetectable under clothing, and the only clue that the jury would have would occur if Lipinski walked in their presence. Trial RP 10-11.

> "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 court did note that the bottom of Lipinski's brace was showing. Trial RP 17. This was easily remedied by corrections pulling up his sock up and over the brace prior to the jury coming in. Id.

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

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.

was seated, and therefore the error was not harmless. Damon, 144 Wn.2d at 693.

The only prejudice to which Lipinski points to is the possibility that the jury saw the brace. "[T]he jury *may* have perceived Lipinski as a dangerous individual, especially since there is no way to prove the jury didn't observe the restraint sometime during the trial." Appellant's Opening Brief at 18, 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.'"

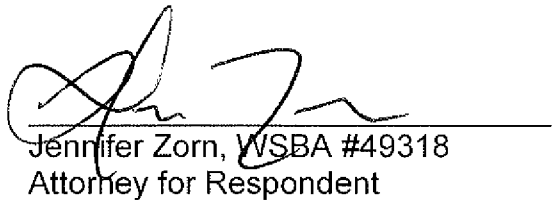
State v. Jasper, 174 Wn.2d 96, 123-24, 271 P.3d 876 (2012).

The record in this case contains nothing that indicates the jury saw that Lipinski 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.

D. CONCLUSION.

The court did not abuse its discretion by allowing the admission of the text messages or in ordering Lipinski to wear a leg brace restraint during trial. The State respectfully asks this court to affirm his convictions.

Respectfully submitted this 10th day of February, 2016.



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CERTIFICATE OF SERVICE

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

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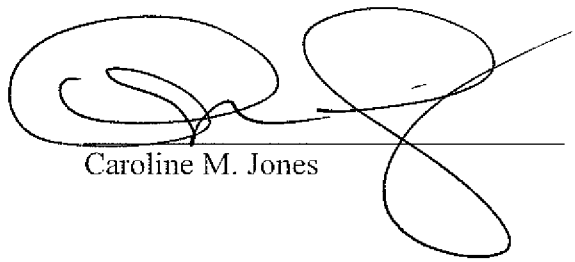

Caroline M. Jones

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