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STATE OF WASHINGTON
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**COURT OF APPEALS
OF THE STATE OF WASHINGTON,
DIVISION TWO**

STATE OF WASHINGTON, Respondent,

v.

DAVID SIMANOVSKI, Appellant.

STATE OF WASHINGTON, Respondent,

v.

ROBERT L. INMAN, Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR JEFFERSON COUNTY
05-1-00102-5
#05-1-00103-3

BRIEF OF RESPONDENT

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INTRODUCTION

Twenty years ago, the United States Supreme Court noted that jurors can handle seeing guards near a defendant in a courtroom.

While shackling and prison clothes are unmistakable indications of the need to separate a defendant from the community at large, the presence of guards at a defendant's trial need not be interpreted as a sign that he is particularly dangerous or culpable. Jurors may just as easily believe that the officers are there to guard against disruptions emanating from outside the courtroom or to ensure that tense courtroom exchanges do not erupt into violence. Indeed, it is entirely possible that jurors will not infer anything at all from the presence of the guards. If they are placed at some distance from the accused, security officers may well be perceived more as elements of an impressive drama than as reminders of the defendant's special status. Our society has become inured to the presence of armed guards in most public places; they are doubtless taken for granted so long as their numbers or weaponry do not suggest particular official concern or alarm.

Holbrook v. Flynn, 475 U.S. 560, 569, 106 S.Ct. 1340, 89 L.Ed.2d 525 (1986). The heightened security in all public buildings after September 11th makes the presence of armed guards commonplace.

Defendants David Simanovski and Robert Inman argue in their consolidated appeal that the trial court erred by allowing three uniformed guards to remain in the courtroom. Yet neither

defendant cites Holbrook or addresses its holding – that jurors expect to see guards in a courtroom. Defendants also challenge the trial court’s use of two pattern jury instructions. Because none of defendants’ arguments undermine the jury’s verdicts, the State of Washington respectfully request this Court to affirm defendants’ convictions and dismiss this consolidated appeal.

I. RESTATEMENT OF ISSUES PRESENTED

Defendants’ appeal presents 5 issues:

A. Additional courtroom security violates due process only if “the presence of...uniformed and armed officers was so inherently prejudicial that [defendant] was thereby denied his constitutional right to a fair trial.” Holbrook, 475 U.S. at 570. Here, the trial judge allowed three uniformed guards to remain in the courtroom near, but not next to, defendants. (1 VRP 11-12). Was the presence of these guards so inherently prejudicial that it deprived defendants a fair trial?

B. When defendant must wear physical restraints in the courtroom, “the judge must conduct a hearing weighing the reasons for physical restraint on the record and determine that the prejudice to the defendant is outweighed by the necessity for physical restraint.” State v. Rodriguez, 146 Wn.2d 260, 266, 45 P.3d 541

(2002). On the other hand, “when a courtroom arrangement is challenged as inherently prejudicial, the question to be answered is whether an unacceptable risk is presented of impermissible factors coming into play.” In re Woods, 154 Wn.2d 400, 417, 114 P.3d 607 (2005). Must the court stop trial and hold a fact-finding hearing when defendant objects to the presence of uniformed guards in the courtroom?

C. In State v. Goble, 131 Wn. App. 194, 126 P.3d 821 (2005), this Court invalidated an inference that defendant Goble’s intentional assault implied Goble’s knowledge that the assault victim was a police officer. Here, the trial court permitted the jury to infer defendants’ knowledge that a gun was in their car from the fact they intended to go out shooting. Was this a reasonable inference?

D. The trial court instructed the jury on reasonable doubt using a pattern instruction this Court approved in State v. Bennett, 131 Wash.App. 319, 328, 126 P.3d 836 (2006). Defendants argue that the instruction, based on a pattern instruction from the Federal Judicial Center, misstates the law on reasonable doubt. Was this Court mistaken in Bennett when it upheld use of the instruction?

E. A trial court may calculate an offender score based on “information [that] is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing.” RCW 9.94A.530(2). At the sentencing hearing, defendant Simanovski’s counsel stated “I didn’t review the criminal history indicated by the counsel, *but I’m sure that it’s accurate.*” (10/7/05 VRP 35) (emphasis added). Defendant Simanovski also did not object at the sentencing hearing to the accuracy of his criminal history. Did defendant acknowledge the information under RCW 9.94A.530(2)?

II. STATEMENT OF FACTS

This case involves three men – Cary Gallauher, defendant Inman and defendant Simanovski – who were driving a stolen van with a rifle lying between the driver and passenger seats. (I VRP 121). Defendants Inman and Simanovski both had felony convictions and their judgments forbade them from possessing firearms. The State granted Gallauher transactional immunity, and he testified at trial about the events on June 22, 2005 that led to the three mens’ arrests.

A. Inman and Simanovski Intended To Go Shooting

On the 22nd, defendants Inman and Simanovski drove to Gallauher's house to visit his father.

Q. Now, does Mr. Inman come to the house occasionally?

A. Just occasionally.

Q. All right. Did he come to your house on June 22, 2005?

A. Yes.

Q. And what did he come in?

A. A van.

Q. ...Was anybody else with him?

A. Another guy, yep. Mr. Simanovski.

(II VRP 18-19).

Gallauher and his father were preparing to leave to buy a car. Gallauher's father suggested that Inman take him. At some point, the conversation turned to the father's new rifle.

A. ...I was getting to leave [and] he says, I don't remember what happened or who suggested it or what, but somebody was talking to my dad about his new gun.

Q. Okay.

A. And it was suggested that we take it to go shoot it.

Q. Okay. So the suggestion was you go shoot the gun?

A. Yeah.

* * * *

Q. Now, after you, um, had the suggestion, what did you guys do?

A. I asked my dad if it was okay. He said it was all right with him. So I got it and I was kind of in a rush to leave so I ran in my bedroom, grabbed a few bullets that was in there.

(II VRP 20). Inman, Simanovski and Gallauher left together in the van, first to go buy a used car and then to go shooting. (II VRP 21).

B. The Three Mens' Arrests

The job of buying the car was more complicated than first thought, and the three men stopped for gas, went to Inman's house and then returned to the Snug Harbor Café. (II VRP 22-25). Throughout the trip, Gallauher held the rifle in his lap or placed it on the seat when he left the van. When the men returned to the Snug Harbor Café for the second time, Jefferson County Sheriffs officers pulled over stolen van and arrested the men.

Deputy Sheriff Scott Boyd was first on the scene. He identified the van and license plat as matching the description of a

stolen vehicle. (I VRP 116). The van turned down a driveway, and Deputy Sheriff Boyd, with lights on, followed.

[T]he vehicle traveled further down the driveway, probably a hundred feet and then the driver of the vehicle immediately exited the vehicle, the back seat passenger immediately exited the vehicle, and both took a quick glance at me and then looked away from me in kind of a motion as if they were going to try to flee. And at that time I noticed a third person coming out of the vehicle. I had already drawn my weapon as I was attempting to conduct a felony stop, and ordered them all to lie on the ground. Then they immediately stopped what they were doing and laid on the ground.

(I VRP 117).

Deputy Boyd called for backup, and two deputies arrived shortly. Deputy Boyd then searched the van and found two guns – a rifle and a handgun.

There was a rifle lying in between the front driver and passenger seats. Uh, and behind – there was a single row back seat in the van and behind that seat was a, uh, blue windbreaker type jacket. And wrapped in that was a holster which contained a pistol.

(I VRP 121). The Deputies arrested Inman, Simanovski and Gallauher and took them into custody.

C. Defendants' Convictions.

The Jefferson County Prosecuting Attorney charged defendant Inman with one count of second degree taking a motor

vehicle without permission and two counts of first degree unlawful possession of a firearm. (Amended Information; CP 20). The Prosecutor charged defendant Simanovski with one count of second degree taking a motor vehicle without permission; one count of possession of 40 grams or less of marijuana; and two counts of first degree of possession of a firearm. (Amended Information; CP 1).

After a two day trial, the Jefferson County jury found defendant Inman guilty on all counts and defendant Simanovski guilty of possession of the .270 single shot rifle. (Inman Verdict Forms; CP 57 - 63; Simanovski Verdict Form; CP 29). Defendants now appeal.

ARGUMENT

III. STANDARD OF REVIEW

This Court reviews the trial court's decision on additional courthouse security for an abuse of discretion.

[A]llowing the presence of an armed, uniformed deputy sheriff during trial of a criminal matter is a discretionary matter for the trial court. We will not grant a new trial on that basis unless we can hold that the trial court manifestly abused that discretion.

State v. Olsen, 44 Wn. App. 671, 672, 722 P.2d 887 (1986).

The Court reviews challenges to jury instructions *de novo*. State v. Bennett, 131 Wn. App. 319, 324, 126 P.3d 836 (2006). “We review a challenged jury instruction *de novo*, examining the effect of a particular phrase in an instruction by considering the instructions as a whole and reading the challenged portion in the context of all the instructions given.” The Court reviews allegations of prosecutorial misconduct for an abuse of discretion. State v. Stenson, 132 Wn.2d 668, 718, 940 P.2d 1239 (1997) (“trial court rulings based on allegations of prosecutorial misconduct are reviewed under an abuse of discretion standard”).

Finally, the court reviews defendant Simanovski’s challenges to the information used at sentencing for an abuse of discretion. State v. Grayson, 154 Wn.2d 333, 341-42, 111 P.3d 1183 (2005).

IV. ALLOWING THREE GUARDS TO REMAIN IN THE COURTROOM WAS NOT AN ABUSE OF DISCRETION.

A. Enhanced Security Was Not Inherently Prejudicial

Trial courts have inherent authority to secure their courtrooms for trial. “Under the inherent powers of the courts, the judiciary has authority to administer justice and to ensure the safety of court personnel, litigants and the public.” State v. Wadsworth, 139 Wn.2d 724, 741, 991 P.2d 80 (2000). Defendants argue that

the trial court abused this discretion by allowing three uniformed guards to remain in the courtroom at the beginning of trial.

Defendants' assertion is unpersuasive for three reasons. First, defendant Simanovski's counsel made only a passing reference to "a more than usual showing of the jail staff" and had no reason why the guards' presence was inherently prejudicial.

MR. CRITCHLOW: My concern is that there's three uniformed officers here. All of whom may or may not be very present to the counsel table in an implication that there's dangerous defendants. And I don't want that, I think that's prejudicial for jurors, uh, to think that. And I would ask that, uh, they be as discreet as possible in terms of their security supervision.

* * * *

COURT: Well, I'm not going to remove anybody from the courtroom. I mean, they can come in and be as they will. I don't see the issue, Mr. Critchlow, I really don't. I mean we've got courthouse security and we've got officers, there's one for each defendant because both defendants are in custody, I assume. I mean, that's kind of what they do. I don't suppose you'll be standing up there the whole time will you? The officers, you know, do you intend to stand there?

OFFICER: Yes, sir.

COURT: You do?

OFFICER: I'll be over there.

COURT: Oh, yeah, standing over there is fine.

(I VRP 11-12).

Second, as illustrated in the dialogue above, the trial judge arranged the guards to minimize any potential interference with defendants and counsel. This was all that was required.

Recognizing that jurors are quite aware that the defendant appearing before them did not arrive there by choice or happenstance, we have never tried, and could never hope, to eliminate from trial procedures every reminder that the State has chosen to marshal its resources against a defendant to punish him for allegedly criminal conduct. To guarantee a defendant's due process rights under ordinary circumstances, our legal system has instead placed primary reliance on the adversary system and the presumption of innocence. When defense counsel vigorously represents his client's interests and the trial judge assiduously works to impress jurors with the need to presume the defendant's innocence, we have trusted that a fair result can be obtained.

Holbrook v. Flynn 475 U.S. 560, 567-568, 106 S.Ct. 1340, 89 L.Ed.2d 525 (1986).

Third, defendants fail to prove on appeal that the presence of three guards was inherently prejudicial. As the United States Supreme Court ruled, a defendant must prove that enhanced security was prejudicial *in his specific case*.

The first issue to be considered here is thus whether the conspicuous, or at least noticeable, deployment of security personnel in a courtroom during trial is the sort of inherently prejudicial practice that, like shackling, should be permitted only where justified by

an essential state interest specific to each trial. We do not believe that it is.

The chief feature that distinguishes the use of identifiable security officers from courtroom practices we might find inherently prejudicial is the wider range of inferences that a juror might reasonably draw from the officers' presence.

Holbrook, 475 U.S. at 568-569. The Washington Supreme Court confirmed this test for non-physical restraints in In re Woods, 154 Wn.2d 400, 417, 114 P.3d 607 (2005).

When a courtroom arrangement is challenged as inherently prejudicial, the question to be answered is whether an unacceptable risk is presented of impermissible factors coming into play. Holbrook v. Flynn, 475 U.S. 560, 570, 106 S.Ct. 1340, 89 L.Ed.2d 525 (1986). In other words, all a court may do in such a situation is to look at the courtroom scene presented to the jury and determine whether what they saw was so inherently prejudicial as to pose an unacceptable threat to the defendant's right to a fair trial. Id. at 572, 106 S.Ct. 1340.

In re Woods 154 Wn.2d at 417.

Nothing in the record or in defendants' briefs suggests that Inman or Simanovski failed to receive a fair trial with three guards present at trial. Because the trial court's ruling did not pose an unacceptable threat to defendant's right to a fair trial, defendants' fail to prove an abuse of discretion.

B. A Hartzog Hearing Is Unnecessary For Non-Physical Restraints

Defendants fault the trial court for not holding a hearing under State v. Hartzog, 96 Wn.2d 383, 635 P.2d 694 (1981). Under Hartzog, “if the court determines the need for security measures that cannot be concealed from the jury, the judge must make a record of a compelling individualized threat of injury to people in the courtroom, disorderly conduct, or escape.” State v. Gonzalez, 129 Wn. App. 895, 902, 120 P.3d 645 (2005). A Hartzog hearing in this case was unnecessary, however, because the trial court did not order defendants shackled or placed in any physical restraints.

First, as described above, non-physical restraints -- unlike shackles -- do not pose an inherent threat to defendants’ right to a fair trial. Holbrook, 475 U.S. at 568-89; Woods, 154 Wn.2d at 417. Hartzog hearings are required when the jury might be able to see defendant in physical restraints. State v. Rodriguez, 146 Wn.2d 260, 264, 45 P.3d 541 (2002) (“it is a well settled rule that absent some compelling reason for physical restraint, defendants may appear in court free of prison garb and shackles”). Because defendants’ Inman and Simanovski were never in physical

restraints, their objection was to the arrangement of guards in the courtroom. The “inherent prejudice” test of Holbrook and Wood therefore applied.

Second, the case defendants cite in support of their argument – State v. Gonzales – had an unusual and distinguishable set of facts. In Gonzales, the trial judge gave a preemptive instruction to the jury that defendant could not afford bail and was therefore in custody and handcuffed during transport. Gonzales, 129 Wn. App. at 898. The Court of Appeals criticized the trial court for drawing the jury’s attention to the security measures without compelling reasons to do so.

Here, the court did not order Mr. Gonzalez restrained in court, and the jury never saw him, even fleetingly, outside the courtroom. Nevertheless, Mr. Gonzalez was tried before a jury that had been instructed by the trial judge that (1) he was poor, or at least too poor to post bail; (2) he was being held in jail; (3) he was being transported in restraints; and (4) he would remain under uniformed guard throughout the trial. This strikes at the very heart of the presumption of innocence. There was simply no need to caution this jury to cure a problem that did not arise.

Gonzales, 129 Wn. App. at 903.

In this case, the trial court did nothing to call the jury’s attention to the guards in the courtroom. There was no need for a Hartzog hearing and certainly, no need for a cautionary instruction.

V. THE COURT'S JURY INSTRUCTION ON KNOWLEDGE WAS PROPER

Defendants next argue that the pattern instruction on knowledge was erroneous, citing State v. Goble, 131 Wn. App. 194, 126 P.3d 821 (2005). At issue is the optional last sentence to the instruction: "Acting knowingly or with knowledge also is established if a person acts intentionally." (WPIC 10.02; Instruction 20; CP 55).

Unlike Goble, the instruction was appropriate here. The optional language addresses a common defense to unlawful possession of a firearm: defendant did not know there was a gun in the car. The jury could reasonably infer that defendants Inman and Simanovski knew the rifle was in the car *because they intended to go shooting with Gallauher*. Defendants may disagree with jury's decision to believe Gallauher's testimony on that point, but they do not assign error to the verdict on those grounds.

Instead, defendants contend the instruction is inherently misleading. But this court in Goble did not reach such a broad result. The court ruled that the knowledge instruction was inappropriate when the jury could confuse the intentional act of hitting someone, with the knowledge that the victim was a police officer.

We agree that the instruction is confusing and that the italicized portion of the instruction allowed the jury to presume Goble knew Riordan's status at the time of the incident if it found Goble had intentionally assaulted Riordan. This conflated the intent and knowledge elements required under the to-convict instruction into a single element and relieved the State of its burden of proving that Goble knew Riordan's status if it found the assault was intentional.

Goble, 131 Wn. App. at 203.

Because the elements of unlawful possession of a firearm have a more straightforward knowledge element – whether defendants knowingly possessed the rifle in the car – the instruction was proper. In addition, defendants' trial counsel were not ineffective by not objecting to the instruction.

VI. THE COURT'S REASONABLE DOUBT INSTRUCTION WAS PROPER.

At the close of trial, the court instructed the jury on reasonable doubt, using a pattern instruction first proposed by the Federal Judicial Center. State v. Castle, 86 Wn. App. 48, 55-56, 935 P.2d 656 (1997). This court has approved use of the pattern instruction.

Looking at the whole language of [the reasonable doubt] Instruction here, we hold that it clearly instructed the jury that it was the State's burden to establish guilt beyond a reasonable doubt and that the defendant is presumed innocent unless that burden is overcome. Merely stating the standard in the negative did not shift the burden of proof to the

defense. Additionally, we conclude that the “possible doubt” language merely emphasized that a reasonable doubt is one based on a real possibility of innocence founded on reason and evidence, as opposed to any possibility of innocence, however far fetched...

Accordingly, we adopt Castle, and we hold that the reasonable doubt instruction did not relieve the State of its burden of proof.

State v. Bennett 131 Wn. App. 319, 328, 126 P.3d 836 (2006).

Defendants’ arguments in this appeal amount to a disagreement with Bennett’s holding. Because the Court correctly upheld use of the pattern instruction, defendants’ arguments for overruling the precedent are unpersuasive.

VII. THE PROSECUTOR ARGUED APPROPRIATELY IN CLOSING

Defendant Simanovski argues that the deputy prosecutor’s closing argument contained misconduct “so flagrant and ill-intentioned that a curative instruction would not have corrected the error”. (Opening Brief at 19). Yet the excerpts defendant quotes show a legitimate argument regarding constructive possession. Defendant Simanovski is guilty of possession because he got in a van containing a rifle *to go shooting*. (II VRP 101) (Gallauer “testified that when they were at his house the suggestion was

made by one of the two defendants that 'we all go shooting at the gravel pit.'").

The Deputy Prosecutor quoted the jury instruction on constructive possession and explained to the jury how the evidence satisfied the instruction. (II VRP 100-103). It is difficult to imagine this was misconduct, let alone misconduct so flagrant and ill-intentioned that a curative instruction would not have corrected the error.

VIII. THE TRIAL COURT CORRECTLY SENTENCED DEFENDANT SIMANOVSKI

The trial court sentenced defendant Simanovski to the midpoint of the standard sentencing range. (10/7/05 VRP 33) ("I'll sentence you then to the midpoint of the standard range"). Because of this, the case does not present a Blakely issue, and under RCW 9.94A.585, the sentence itself is not appealable. State v. Grayson, 154 Wn.2d 333, 338, 111 P.3d 1183 (2005). The court also granted defendant's request for a Drug Offender Sentencing Alternative. (10/7/05 VRP 33).

Despite this, defendant challenges his sentence on two grounds: (1) there was insufficient evidence of his criminal history; and (2) the prior convictions might have been the same criminal

conduct. One principle answers both challenges. Defendant has the obligation to object to any criminal history, and here, defendant did not object.

Under RCW 9.94A.530(2), the trial court may rely on “acknowledged” information. This includes a criminal history to which defendant makes no objection.

In determining any sentence other than a sentence above the standard range, the trial court may rely on no more information than is admitted by the plea agreement, or admitted, acknowledged, or proved in a trial or at the time of sentencing, or proven pursuant to RCW 9.94A.537. Acknowledgement includes not objecting to information stated in the presentence reports.

RCW 9.94.530(2). Here, neither defendant nor his counsel objected to the criminal history at the sentencing hearing. In fact, defendant’s counsel noted “I’m sure that it’s accurate.” (10/7/05 VRP 35). Defendant and his counsel admitted and acknowledged the criminal history.

Because the trial court sentenced defendant to the midpoint of the standard range, defendant has failed to raise a valid challenge to his sentence.

CONCLUSION

The presence of additional guards at defendants' trial did not deprive them of a fair trial. Furthermore, the trial court correctly instructed the jury and no reasonable challenge exists to the jury's verdicts. The State of Washington respectfully requests this court to affirm defendants' convictions and sentences and dismiss this appeal.

DATED this 9th day of August, 2006.

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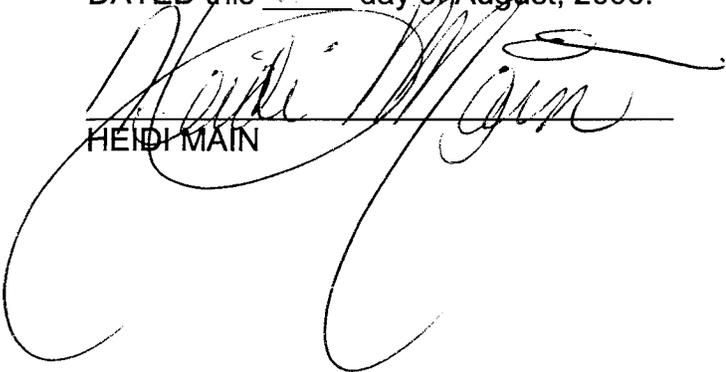
DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington, that on the date stated below, I mailed or caused delivery of **Brief of Respondent** to:

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