

NO. 36101-9-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

RONNIE ARCHIBALD,

Appellant.

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

The Honorable John R. Hickman, Judge

BRIEF OF APPELLANT

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STATE OF WASHINGTON
COURT OF APPEALS
DIVISION TWO
APPELLANT'S BRIEF
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A. ASSIGNMENTS OF ERROR

1. Improper reference to appellant's incarceration infringed on the presumption of innocence and denied appellant a fair trial.

2. The prejudicial display of courtroom security measures denied appellant a fair trial.

Issue pertaining to assignments of error

Despite efforts to prevent the jury from learning appellant was incarcerated, the state's key witness testified appellant had mailed her a letter from jail. The court denied appellant's motion for a mistrial. Appellant's custodial status was further emphasized when the court permitted the courtroom security officer to reposition himself during appellant's testimony, implying that appellant was dangerous, although there was no indication that appellant posed any threat. Did these repeated references to appellant's incarceration compromise the presumption of innocence and deny appellant a fair trial?

B. STATEMENT OF THE CASE

1. Procedural History

On January 30, 2006, the Pierce County Prosecuting Attorney charged appellant Ronnie Archibald with three counts of first degree rape and one count of second degree assault. CP 1-4, 6-8; RCW

9A.44.040(1)(c); RCW 9A.36.021(1)(a). The case proceeded to jury trial before the Honorable John R. Hickman.

The jury found Archibald not guilty on all three counts of first degree rape. CP 188-90. It found him not guilty of the lesser offense of second degree rape on one count and convicted him of second degree rape on the other two counts. CP 191-93. The jury also found Archibald not guilty of second degree assault but entered a guilty verdict to the lesser offense of third degree assault. CP 194-95.

The court imposed standard range sentences of 200 months to life on the rape convictions and 12 months and one day on the assault conviction. CP 226. Archibald filed this timely appeal. CP 240.

2. Substantive Facts

Archibald and S.W. began dating in October 2005, and their relationship quickly became sexual. 5RP¹ 210. Although they broke up briefly in November 2005, they continued to have sex during that time. 5RP 211. Archibald and S.W. were back together by New Year's Eve, and in January 2006, Archibald moved some of his belongings into S.W.'s duplex. 4RP 140; 5RP 211.

¹ The Verbatim Report of Proceedings is contained in 11 volumes, designated as follows: 1RP—1/4/07; 2RP—1/8/07; 3RP—1/9/07; 4RP—1/16/07; 5RP—1/17/07; 6RP—1/18/07; 7RP—1/22/07; 8RP—1/23/07; 9RP—1/24/07; 10RP—2/23/07; 11RP—3/23/07.

On January 28, 2006, S.W. and Archibald went to a club. They stayed until closing, then returned home around 2:30 a.m. 4RP 140-41. S.W. claims that Archibald raped and assaulted her over the course of the next few hours. 4RP 147. Archibald admitted assaulting S.W., but he denied the rape allegations. 7RP 460.

At trial, the state presented a letter S.W. said she received from Archibald after his arrest. 4RP 178-79. At defense counsel's request, the state established the foundation for admitting the letter outside the jury's presence, so that the jury would not learn and draw any negative inference from the fact that the letter was mailed from the jail. 4RP 180. While the court ruled the letter admissible, defense counsel objected to admission of the envelope identifying the jail as the return address. 4RP 191; 5RP 199. The state indicated it was not moving to admit the envelope and would not in any way reference Archibald's incarceration. 5RP 199-200. The court granted defense counsel's requested limitation and ruled that the envelope would not be discussed. 5RP 200.

The jury then returned to the courtroom, and the prosecutor asked S.W. why she believed Archibald sent the letter. She responded, "Because it came from the prison or jail – whatever it's called..." 5RP 202.

Defense counsel immediately requested a sidebar and moved for a mistrial. 5RP 202, 238. The prosecutor suggested that the error could be

cured by striking the testimony and instructing the jury to disregard it, but defense counsel disagreed, arguing such a ruling would only highlight the harmful testimony. 5RP 238-39.

The court agreed that testimony that the letter came from the jail could be prejudicial. Moreover, the court said it understood why defense counsel would decline an instruction which drew further attention to that testimony. Nonetheless, the court denied the motion for a mistrial, ruling S.W.'s testimony was not a fatal flaw. 5RP 241.

Defense counsel's efforts to avoid drawing attention to Archibald's incarceration were again thwarted when the court permitted the security officer in the courtroom to reposition himself when Archibald testified. Upon learning that Archibald would likely testify, the security officer indicated that he wanted to move near the jury box during Archibald's testimony. 6RP 330. The officer said he would also feel comfortable moving to the area by the swinging gate next to Juror No. 1. The officer proposed moving when Archibald moved to the witness stand. 6RP 330.

Defense counsel objected. He pointed out that there was no indication Archibald posed a security risk and thus no need for the extra precautions. Moreover, although the jury was clearly aware that the security guard was in the courtroom, the jury likely just believed that was normal trial procedure. But having the officer move at the same time

Archibald moved would convey to the jury not only that Archibald was in custody but that he was considered a threat. 6RP 331-32.

The court overruled the defense objection and deferred to the security officer's determination that he needed to move while Archibald testified. At defense counsel's suggestion, the court ruled that Archibald would be moved on and off the stand, and the officer would take his position by the swinging gate, outside the jury's presence. 6RP 332. In accordance with the court's ruling, the security guard repositioned himself before the jury was brought into the courtroom for Archibald's testimony. 7RP 457.

C. ARGUMENT

REPEATED REFERENCES TO ARCHIBALD'S
INCARCERATION COMPROMISED THE PRESUMPTION OF
INNOCENCE AND DENIED ARCHIBALD A FAIR TRIAL.

A criminal defendant is guaranteed a fair and impartial trial by the Sixth and Fourteenth Amendments of the United States Constitution and article I, § 3 and article I, § 22 (amendment 10) of the Washington State Constitution. State v. Finch, 137 Wn.2d 792, 843, 975 P.2d 967, cert. denied, 528 U.S. 922 (1999). The presumption of innocence is a basic component of a fair trial. Finch, 137 Wn.2d at 844.

It is well settled that a criminal defendant is generally entitled to appear at trial free of physical restraints, because such restraints infringe

on the presumption of innocence. Finch, 137 Wn.2d at 842, 844. The defendant is entitled to be brought before the court “with the appearance, dignity, and self-respect of a free and innocent man.” Finch, 137 Wn.2d at 844. The appearance of the defendant in prison garb, handcuffs, or shackles creates a substantial danger of destroying in the jury’s minds the presumption of innocence. Finch, 137 Wn.2d at 845².

Washington law clearly recognizes that “[m]easures which single out a defendant as a particularly dangerous or guilty person threaten his or her constitutional right to a fair trial.” Finch, 137 Wn.2d at 845. Verbal references to a defendant’s custody status could have the same prejudicial effect as bringing the defendant into the courtroom wearing handcuffs or prison garb. While a defendant is entitled to indicia of innocence, reminding the jury he is in jail raises an inference of guilt. Haywood v. State, 107 Nev. 285, 288, 809 P.2d 1272, 1273 (1991) (prosecutor’s references to defendant’s in-custody status were improper, but error was harmless due to overwhelming evidence of defendant’s guilt); see also

² But see State v. Boggs, 57 Wn.2d 484, 489, 358 P.2d 124 (1961), holding that the presumption of innocence was not destroyed when a juror, visiting an inmate at the jail, inadvertently saw the defendant behind bars while trial was in progress. Boggs is clearly inconsistent with later decisions recognizing the prejudicial effect of physical indicia that the defendant is in custody. See, e.g., Estelle v. Williams, 425 U.S. 501, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976); Illinois v. Allen, 397 U.S. 337, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970); State v. Finch, *supra*; State v. Hartzog, 96 Wn.2d 383, 635 P.2d 694 (1981).

State v. Harrison, 136 Idaho 504, 506-07, 37 P.3d 1 (2001); State v. Martinez, 624 A.2d 291, 294 (R.I., 1993).

As with physical restraints, verbal references to the defendant's custody status are "unmistakable indications of the need to separate a defendant from the community at large." See Finch, 137 Wn.2d at 845 (quoting Holbrook v. Flynn, 475 U.S. 560, 568-69, 106 S. Ct. 1340, 89 L. Ed. 2d 525 (1986)). Such references can destroy the presumption of innocence and deny the defendant a fair trial.

Here, when the state indicated it would offer a letter Archibald purportedly wrote to S.W. after his arrest, the parties went to great pains to prevent the jury from learning that the letter had been mailed from the Pierce County Jail. 4RP 180. Both the prosecution and the defense recognized that reference to Archibald's incarceration would be unfairly prejudicial. Moreover, while it ruled the letter admissible, the court granted the defense motion to exclude the envelope, which included the jail as the return address. 5RP 200. Unfortunately, S.W. was not instructed regarding this limitation, and she testified she knew the letter was from Archibald because "it came from the prison or jail – whatever it's called..." 5RP 202.

This reference to Archibald's incarceration was not only inherently prejudicial but also completely unnecessary to the state's case. Cf. State

v. Mullin-Coston, 115 Wn. App. 679, 64 P.3d 40 (2003)³ (probative value of defendant's custody status outweighed potential for unfair prejudice). In Mullin-Coston, testimony that a witness was a close enough friend to have visited the defendant in jail was relevant because the defendant disputed her testimony that he confessed to her. Mullin-Coston, 115 Wn. App. at 694.

Here, on the other hand, while S.W.'s credibility was called into question by inconsistencies between her testimony and that of other witnesses⁴, there was no issue as to the nature of her relationship with Archibald. See 5RP 210; 7RP 459. The fact of his incarceration had no relevance to the state's case, and no legitimate purpose was served by evidence that he was in jail. S.W.'s testimony served only to raise an unfair inference of guilt, compromising the presumption of innocence. See Gholston v. State, 620 So.2d 715, 716 (Ala. Cr. App. 1992) (when defendant's incarceration is brought to jury's attention, "there is a danger that the jury will convict on general principles" and the "presumption of innocence is in danger of 'going out the window'"), aff'd, 620 So.2d 719 (1993).

³ Affirmed, 152 Wn.2d 107, 95 P.3d 321 (2004).

⁴ For example, S.W. testified that she did not tell anyone she was drunk that morning, while the officer she spoke to testified she said she was pretty drunk. 5RP 215-16, 296. She also testified that she was so distraught her friend had to provide directions to her home as they talked on the telephone, while her friend testified that S.W. just showed up at her house. 5RP 231, 265.

While the court recognized the potential for unfair prejudice from S.W.'s reference to Archibald's incarceration, it found that S.W.'s testimony was not a fatal flaw. 5RP 241. That testimony was not the only demonstration of Archibald's custodial status, however.

In addition, the court permitted the courtroom security officer to draw attention to his presence by repositioning himself during Archibald's testimony. 6RP 332; 7RP 457. The presence of uniformed security guards in the courtroom, by itself, is not inherently prejudicial, and a case by case analysis is appropriate. Holbrook, 475 U.S. at 567, 569. The presence of guards could be interpreted by the jury in many ways which do not indicate the need to separate the defendant from the community at large:

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.

Id. at 567.

But here, the officer was not a mere passive presence which could be subject to many interpretations. By repositioning himself for Archibald's testimony, the security officer demonstrated that his presence

was an active security measure focused on Archibald, implying that Archibald was dangerous and not to be trusted. See Holbrook, 475 U.S. at 569.

A trial court has the duty to shield the jury from routine security measures. See State v. Hutchinson, 135 Wn.2d 863, 887-88, 959 P.2d 1061 (1998), cert. denied, 525 U.S. 1157 (1999). Moreover, due process requires the trial judge to be "ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." State v. Gonzalez, 129 Wn. App. 895, 901, 120 P.3d 645 (2005) (quoting Smith v. Phillips, 455 U.S. 209, 217, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982)).

In Gonzalez, the trial court instructed the jury at the beginning of trial that because the defendant could not post bail, he was being held in jail, was transported to court in handcuffs, and remained under guard while in the courtroom. The court further instructed the jury not to draw any negative inferences from these security measures. Gonzalez, 129 Wn. App. 898. Defense counsel did not request this instruction and moved for a mistrial after it was given. Id. at 898. On appeal, the court held that, while the jurors never saw the defendant in handcuffs, their awareness of the transportation protocols, as well as the presence of uniformed guards

throughout trial, was a continuing reminder that the state found he merited the trappings of guilt. *Id.* at 901-02.

Likewise, in this case, the security officer was present in the courtroom throughout the trial. While the jurors were likely aware of the guard's presence, they probably drew no negative inferences from the mere fact that he was in attendance. By allowing the guard to reposition himself during Archibald's testimony, however, the court created a clear implication that the guard was needed in the courtroom because Archibald had been deemed dangerous and was not to be trusted.

Contrary to this implication, the security officer admitted Archibald was not posing a threat, and there was no indication he had posed any security problems in the jail which would warrant the guard's action. 6RP 330-31. S.W.'s testimony had already improperly and unnecessarily exposed the jury to information that Archibald was incarcerated. By allowing this further unwarranted display of Archibald's custodial status, the court failed to protect Archibald's due process right to a fair trial.

Just as shackles and prison attire are inherently prejudicial, so are repeated reminders of a defendant's incarceration. In both situations the jury is made aware of the need to separate the defendant from the community at large. The danger of unfair prejudice is especially high in

cases such as Archibald's where violent offenses are being alleged, because the incarceration could lead the jury to infer that the defendant is dangerous and predisposed to commit violent crimes.

The testimony that Archibald was incarcerated, together with the demonstration of courtroom security measures focused on Archibald, likely impacted the jury's verdict, and Archibald's convictions should be reversed.

D. CONCLUSION

Repeated references to Archibald's incarceration compromised the presumption of innocence and denied Archibald a fair trial. This Court should reverse Archibald's convictions and remand for a new trial.

DATED this 20th day of August, 2007.

Respectfully submitted,



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Certification of Service by Mail

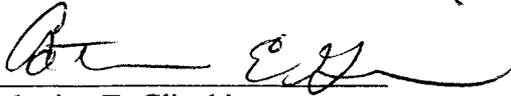
Today I deposited in the mails of the United States of America, postage prepaid,
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State v. Ronnie J. Archibald, Cause No. 36101-9-II, directed to:

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



Catherine E. Glinski
Done in Port Orchard, WA
August 20, 2007

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STATE OF WASHINGTON
BY _____ DEPUTY
COUNTY OF PIERCE