

82008-2

No. 25821-1-III

COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

JAMES FRANK JAIME,

Appellant.

On Appeal from the Yakima County Superior Court
Cause No. 05-1-03114-5
The Honorable Blaine Gibson, Judge

OPENING BRIEF OF APPELLANT

STEPHANIE C. CUNNINGHAM
Attorney for Appellant
WSBA No. 26436

4616 25th Avenue NE, No. 552
Seattle, Washington 98105
Phone (206) 526-5001

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I. ASSIGNMENTS OF ERROR

A. Assignments of Error

1. The trial court erred when it ordered, over defense objection, that the trial be held in a courtroom inside the jail building.
2. Forcing Appellant to stand trial in a jail courtroom violated his State and Federal rights to due process and the presumption of innocence.
3. The trial court erred when it denied the defense request to call an expert witness to testify about the reliability of eyewitness identifications.

B. Issues Pertaining to the Assignments of Error

1. Were Appellant's rights to due process and the presumption of innocence violated when he was forced to stand trial in a courtroom located inside the jail building, where the trial court failed to find that trial in that location was necessary due to safety concerns, and where the trial court failed to balance any security needs against potential prejudice to Appellant? (Assignments of Error 1 & 2)
2. Did the trial court abuse its discretion when it excluded the proposed expert testimony explaining various factors that can undermine the reliability of eyewitness testimony, where

the testimony was directly relevant to the facts of this case, and where the State's case rested entirely on positive eyewitness identifications of the shooter? (Assignment of Error 3)

II. STATEMENT OF THE CASE

A. Procedural History

The State charged James Frank Jaime by Information with one count of second degree murder (RCW 9A.32.050) while armed with a firearm (RCW 9.94A.533), and one count of first degree unlawful possession of a firearm (RCW 9.41.040). (CP 103-04)

Prior to trial, Jaime sought permission to call an expert witness to testify regarding factors that can affect reliability of eyewitness identifications. (07/14/06 RP 3-4; 09/11/06 2-6; 09/18/06 RP 2-29)¹ The trial court denied the request, and entered written findings stating its reasons. (I RP 16; CP 18-22) Jaime also objected to the trial being held in a courtroom inside the Yakima County Jail, and asked that the proceedings be moved to a

¹ Citations to the transcripts in this case will be as follows. References to the pretrial hearings dated June 30, 2007 through September 18, 2007 will be to the date of the proceeding followed by the page number (DATE RP ##). References to the trial proceedings labeled Volumes I through X will be to the volume number followed by the page number (## RP ##). References to the sentencing hearing on January 18, 2007 will be to "S RP" followed by the page number (S RP ##). References to the supplemental Verbatim Excerpt of Proceedings from October 2, 2006 will be as "VEP" followed by the page number (VEP ##).

courtroom in the courthouse. (I RP 7-12, 35-39) The trial court also denied this request. (I RP 40-43)

In order to limit potential prejudice to Jaime, the parties agreed to bifurcate trial on the second degree murder count from trial on the unlawful possession of a firearm count. (III RP 87, 90-91, 95) A jury convicted Jaime of second degree murder while armed with a firearm following the first part of trial, and after additional evidence and deliberation, convicted Jaime of first degree unlawful possession of a firearm. (X RP 967; 975-76, 991; CP 70, 71, 74) The trial court sentenced Jaime within his standard range to a total of 417 months of confinement. (S RP 1034, 1037; 7-8) This appeal follows. (CP 5)

B. Substantive Facts

Ignacio Ornales was shot and killed on December 27, 2005 after a drug deal soured. (IV RP 124; V RP 312) Ornales and his girlfriend, Linda Gange, had driven to the Yakima home of their friend, Rachel McClaskey, in the hopes of securing drugs. (IV RP 124-25; VI RP 452-53) McClaskey earlier contacted her friend, Deann Moore, in an attempt to find a supplier. (VI RP 453) Moore's boyfriend (now husband), Shawn Stahlman, decided to scam Ornales by mixing real drugs with another substance and

selling it as pure. (V RP 311-12, 349; VI RP 377, 425) Stahlman called a friend to assist, then the friend, Stahlman, and Moore drove to McClaskey's house. (V RP 313; VI RP 425, 426). Stahlman called his friend by the nickname "Apache." (V RP 312-13)

After some initial conversations at the car, Moore, Stahlman and Apache all went inside McClaskey's house to talk. (IV RP 127; V RP 313, 314; VI RP 428-30, 454, 455, 456) Apache and Ornales went alone into a bathroom while the others stayed in the living room. (IV RP 127; V RP 314; VI RP 456) Ornales and Apache had a heated argument, mostly in Spanish, then returned to the living room. (IV RP 130; V RP 315; VI RP 430-31, 457)

The witnesses' accounts of what happened next vary, but at some point Apache took off his jacket, pulled out a gun, threatened Ornales, and pulled the trigger. (IV RP 136-39; V RP 319; VI 436, 460-61, 464-65) The first shot missed and Ornales ran outside, followed by the others. (IV RP 142, 148; V RP 322-24; VI RP 466) Apache pulled the trigger again, this time hitting Ornales in the back. (V RP 324, VI 440; VII RP 615) Ornales fell to the ground in the street, and Stahlman took his wallet and ran. (V RP 324) He and Apache fled the scene. (V RP 325) Law enforcement and

emergency personnel arrived soon after, but were unable to save Ornales. (VI RP 511; VII 543, 551)

Stahlman is a self-described career criminal, and avoided a 59 month minimum sentence by entering into an immunity agreement with the State in exchange for his testimony. (V RP 307-09, 310; VI RP 375, 376) Stahlman testified that the man he called Apache is James Frank Jaime, and they have known each other for about 10 years. (V RP 312-13, 319, 321, 325) Stahlman thought that Jaime did not shoot directly at Ornales, but that he was trying to intimidate or show dominance over Ornales. (V RP 319, 321, 356)

The morning after the shooting, Stahlman took the money he stole from Ornales and bought food from Dairy Queen. (V RP 327) He claimed he talked to Jaime a few days later and told him that he should "keep his head down" because the "dude" was dead, and that Jaime responded "oh fuck." (V RP 334) Stahlman initially told law enforcement that a man named "Javier" was the shooter, then confessed to the shooting himself, before finally pointing the finger at Jaime. (V RP 336; Exh. 10, 11)

Gange and McClaskey positively identified Jaime in court. (IV RP 132, VI RP 455) Moore was unable to make an in-court

identification. (VI RP 441, 448) Moore, who drove with Stahlman and his friend to McClaskey's house, testified that Jaime did not look like the friend she met that night. (VIII RP 816-17)

Police investigators received a lead that a man named "Javier" was the shooter. (VII RP 590) Investigators created a photomontage containing pictures of various "Javiers" known to law enforcement, but none of the witnesses made positive identifications. (IVV RP 590-91) Investigators later received information that the suspect might be known as "Apache." (VII RP 591) They created another montage containing Jaime's photo, and all the witnesses positively identified him as the shooter. (VII RP 591-92, 671) Investigators also searched the vehicle belonging to Jaime's girlfriend, which matched the description of the shooter's vehicle. (VII RP 675) Investigators found a traffic citation written out to James Jaime and several handwritten notes containing the word "Apache" inside the vehicle. (VII RP 677, 678-79) The State presented no other physical evidence connecting Jaime to a weapon or to McClaskey's home.

Jamie called several witnesses on his own behalf. His brother, Johnny Jaime, testified that he and James Jaime and their cousin, Jaime Olguin, drove to Tacoma together on the evening of

December 27, 2005. (VIII RP 739-40) They ate dinner at the Tacoma Azteca, and saw family and friends. (VIII RP 741-42, 765) Jaime Olguin also testified that he and James Jaime and Johnnie Jaime traveled to Tacoma together just after Christmas, but he could not remember the exact date. (VIII 788, 790) Both men testified that James Jaime does not speak Spanish. (VIII RP 745, 794) Jaime's mother and guardian also both testified that Jaime does not speak Spanish. (VIII RP 802, 821)

Jaime testified on his own behalf. He confirmed Johnny Jaime's and Jaime Olguin's testimony that they were in Tacoma on the night of December 27th. (VIII RP 828-29) He denied being with Stahlman or at McClaskey's home on December 27th. (VIII RP 828, 832) He can only say a few basic phrases in Spanish. (VIII RP 833) He also testified that he received the numerous, large tattoos on his arms many years ago, when he was about 15 or 16 years old. (VIII RP 867-68)

III. ARGUMENT & AUTHORITIES

A. Forcing Jaime to Stand Trial in a Courtroom Inside the Jail Violated His State and Federal Constitutional Rights to Due Process and the Presumption of Innocence.

Every criminal defendant is entitled to a fair trial by an impartial jury. U.S. CONST. amends. VI, XIV § 1; WASH. CONST. art. I, §§ 3, 21, 22. The right to a fair trial includes the right to the presumption of innocence. *Estelle v. Williams*, 425 U.S. 501, 503, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976); *State v. Crediford*, 130 Wn.2d 747, 759, 927 P.2d 1129 (1996). This constitutionally guaranteed presumption is the bedrock foundation in every criminal trial. *Morissette v. United States*, 342 U.S. 246, 275, 72 S. Ct. 240, 96 L. Ed. 288 (1952). It is the duty of the court to give effect to the presumption by being alert to any factor that could "undermine the fairness of the fact-finding process." *Estelle*, 425 U.S. at 503.

The presumption of innocence guarantees every criminal defendant all "the physical indicia of innocence," including that of being "brought before the court with the appearance, dignity, and self-respect of a free and innocent man." *State v. Finch*, 137 Wn.2d 792, 844, 975 P.2d 967 (1999). Courtroom security measures such as shackling, gagging, or handcuffing can

unnecessarily mark the defendant as guilty or dangerous. *Holbrook v. Flynn*, 475 U.S. 560, 567-68, 106 S. Ct. 1340, 89 L. Ed. 2d 525 (1986). Thus, the appearance of prison garb, shackles or other restraints "may reverse the presumption of innocence by causing jury prejudice," thereby denying due process. *State v. Hutchinson*, 135 Wn.2d 863, 887, 959 P.2d 1061 (1998) (quoting *Jones v. Meyer*, 899 F.2d 883, 885 (9th Cir. 1990)).

When a defendant wears prison garb during trial it creates a "continuing influence" that could very well "affect a juror's judgment" by allowing "impermissible factors [to come] into play." *Estelle*, 425 U.S. at 505. "When the court allows a defendant to be brought before the jury in restraints the jury must necessarily conceive a prejudice against the accused, as being in the opinion of the judge a dangerous man, and one not to be trusted, even under the surveillance of officers." *Finch* 137 Wn.2d at 845 (quoting *State v. Williams*, 18 Wash. 47, 51, 50 P. 580 (1897)). The use of shackles and prison clothes are "inherently prejudicial" because they are "unmistakable indications of the need to separate a defendant from the community at large." *Holbrook*, 475 U.S. at 568-69.

Being forced to stand trial in a courtroom located inside the walls of the jail is no less prejudicial than being forced to stand trial

while shackled, handcuffed, or wearing jail clothing. It sends a message to the jury that a defendant is not a free person, and that a defendant is either guilty or too dangerous to be released into the community. Because of this, the rules governing when and how a trial court can order the defendant restrained should also apply when the trial judge is deciding whether to hold trial in a jail courtroom.

The trial court is vested with the duty and discretion to provide courtroom security. *State v. Hartzog*, 96 Wn.2d 383, 396, 635 P.2d 694 (1981). As a result of the inherent prejudice of such measures, close judicial scrutiny is required to ensure that they are necessary to further an essential state interest, such as preventing injury to those in the courtroom, disorderly conduct at trial, or escape. *Finch*, 137 Wn.2d at 846. Before a court may properly impose such potentially prejudicial measures, it must make a factual determination of necessity, on the record, taking into consideration various factors that include the seriousness of the charge, the degree of risk that a particular defendant might pose, the defendant's own safety and that of others in the courtroom, and the adequacy of alternative remedies. *Finch*, 137 Wn.2d at 848.

"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, 901-02, 120 P.3d 645 (2005) (citing *Hartzog*, 96 Wn.2d at 397-98). The court must then balance the need for such measures against the risk of undermining the right of the accused to a fair trial. *Finch*, 137 Wn.2d. at 849-50.

In this case, Jaime strenuously objected to conducting trial inside the jail courtroom. (I RP 7-12, 35-39) In response, the prosecutor expressed concern for the safety of witnesses and the attorneys if trial occurred at the courthouse. (I RP 9) He claimed that witnesses had been threatened, and that Jaime had been behaving badly while in the jail. (I RP 9) The prosecutor also noted that Jaime would have to be transported from the jail to the courthouse in shackles; so trial inside the jail would reduce the risk of inadvertent viewing by the jurors. (I RP 38-39)

Jaime’s counsel responded that any threats against witnesses were not necessarily related to Jaime’s case because several witnesses were known gang members; that Jaime’s behavior had drastically improved since being put on medications; that the courthouse has security measures in place; and that

additional safety measures could be used at the courthouse if necessary (I RP 9-10, 12)

The court ruled that trial would be held in the jail courtroom because of the “allegations of threats made against the witnesses by Mr. Jaime or through his cohorts who are outside[;]” because of Jaime’s “history of violent behavior in the jail” and an escape attempt; and because of concerns for the safety of court staff and attorneys. (I RP 40) The court also noted that it was easier to maneuver the jurors around at the jail than at the courthouse, and agreed that it reduced the risk that the jurors would see Jaime during transport. (I RP 40) The court agreed to make apologies to the jury for the location, telling them:

Let me just explain to you one other thing. You might wonder why we’re in the jail courtroom here. Although we have six courtrooms in the courthouse, we only have three jury rooms for deliberations. And so with a longer trial like this, the court administrator will frequently assign that trial over here where we have a jury room right across the hallway. And that way she has a lot more flexibility in scheduling the shorter trials among the three jury rooms across the street. That’s why we’re here.

(VEP 2)

The court based its decision to remain in the jail courtroom not on facts, but on allegations. The prosecutor’s assertions did not

sufficiently establish that trial in the jail was a necessity. The prosecutor did not show, and the trial court did not find, that security measures at the courthouse would be inadequate. The court did not consider any other security measures that could be used at the courthouse. There was no evidence that Jaime posed a current or future risk to his or others' safety. And every in-custody defendant is transported from the jail to the courthouse in the same manner, so the risk of Jaime being spotted is no greater than in any other case.² There simply was no "compelling individualized threat" requiring trial in the jail. *Gonzalez*, 129 Wn. App. at 902.

The court did not find that trial in the jail was necessary, just that it was more convenient. The court did not weigh Jaime's right to a fair trial against any perceived need to hold trial at the jail. And although the court told the jury that the location was coincidental, that instruction does not overcome the inherent prejudicial effect of conducting the trial in the jail.

The jail environment is vastly different from that of a

² This is not an acceptable reason for holding trial in the jail in any event. As noted by this Court in *Gonzalez*: "If juror views of restrained defendants are inevitable in this county . . . then it is the transport procedures which must change, not the constitutional presumption of innocence." 129 Wn. App. at 905.

courthouse. People go to the courthouse for all sorts of non-criminal purposes: to apply for a fishing license, to file real estate paperwork, even to get married. But the jail has only one purpose: to keep criminals off the street and away from law-abiding citizens. This, coupled with heightened security measures present in the jail, creates an ominous atmosphere that would be nearly impossible for a reasonable juror to ignore during trial and deliberations, and could therefore affect a juror's ability to remain impartial.

Being in the jail every day of trial is a "continuing reminder that the State perceived [Jaime] as meriting the trappings--if not the presumption--of guilt." *Gonzalez*, 129 Wn. App. at 901-02. It is an "unmistakable indication. . . of the need to separate a defendant from the community at large." *Finch*, 137 Wn.2d at 845.

If safety concerns do not make it absolutely necessary to hold trial in a jail courtroom, and if the trial court does not find that that need outweighs the overwhelming prejudice to the defendant, then the trial should not be held in the jail. In this case, there was no finding of necessity, and no balance of need versus prejudicial impact. Accordingly, Jaime's right to a fair trial and to the presumption of innocence was violated.

Where an error infringes on a defendant's constitutional

rights, the error is presumed prejudicial and the State bears the burden of proving the error is harmless. *Finch*, 137 Wn.2d at 859. The error is harmless if the evidence against the defendant is so overwhelming that no rational conclusion other than guilt can be reached. *Finch*, 137 Wn.2d at 859 (citing *State v. Guloy*, 104 Wn.2d 412, 705 P.2d 1182 (1985)). The State must demonstrate that the security measures did not influence the jury's verdict. *State v. Clark*, 143 Wn.2d 731, 775, 24 P.3d 1006 (2001) (citing *State v. Belmarez*, 101 Wn.2d 212, 216, 676 P.2d 492 (1984)).

In this case, the evidence of guilt was not overwhelming. There was no physical evidence tying Jaime to the crime. The State's evidence rested entirely on the eyewitness identifications of several admitted drug users, and a man who had previously admitted to the crime but recanted and agreed to name Jaime in order to obtain immunity.³ It cannot be said that trial inside the jail and the inferences that flow naturally from Jaime's presence in this location did not affect the jury and influence their determination of guilt.

Trial inside the jail placed upon Jaime a presumption of guilt,

³ See VI RP 426, 453 473-74; V RP 226-27, 310.

not a presumption of innocence, and denied him the right to stand before the jurors with the “appearance, dignity, and self-respect of a free and innocent man.” *Finch*, 137 Wn.2d at 844. “When a trial right as fundamental as the presumption of innocence is abridged . . . reversal is required.” *Gonzalez*, 129 Wn. App. at 905. Accordingly, Jamie’s convictions should be reversed, and his case remanded for a new trial in the courthouse.

B. The Trial Court Erred When it Excluded Jaime’s Proposed Expert Testimony Regarding the Reliability of Eyewitness Identifications.

The question of admissibility of expert testimony on the reliability of eyewitness identification is within the discretion of the trial court, reviewed under an abuse of discretion standard. *State v. Cheatam*, 150 Wn.2d 626, 646, 81 P.3d 830 (2003) (citing *State v. Coe*, 109 Wn.2d 832, 844, 750 P.2d 208 (1988); *State v. Guloy*, 104 Wn.2d 412, 430, 705 P.2d 1182 (1985)). A criminal defendant has the right to offer the testimony of his or her witnesses in order to establish a defense. *Cheatam*, 150 Wn.2d at 648.

[W]here eyewitness identification of the defendant is a key element of the State’s case, the trial court must carefully consider whether expert testimony on the reliability of eyewitness identification would assist the jury in assessing the reliability of eyewitness testimony. In making this determination the court should consider the proposed testimony and the

specific subjects involved in the identification to which the testimony relates, such as whether the victim and the defendant are of the same race, whether the defendant displayed a weapon, the effect of stress, etc.

Cheatam, 150 Wn.2d at 649.

Here, the State's entire case against Jaime rested on positive eyewitness identifications. The identification testimony was as follows. Jaime took off his jacket, and had a tank top underneath, so his arms were clearly visible. (IV RP 137; VI RP 477) None of the witnesses described seeing tattoos on the shooter. (V RP 213; VI RP 449)

Stahlman, who initially confessed to the murder but later identified Jaime in exchange for a generous immunity agreement, was the only person who claimed to have known Jaime before that night. (V RP 310, 312-13, 325, 336; VI RP 375-76)

Gange described the shooter simply as a short, Mexican man. (IV RP 128; V RP 212-14) She admitted that the lighting inside McClaskey's house was quite dim. (IV RP 141) But she was able to describe the gun in great detail--a .22 semiautomatic Ruger made of gray, polished metal with a black metal clip. (IV RP 146-48) She admitted she was very focused on the weapon. (V RP 222)

McClaskey also gave a non-detailed description of the shooter: five-foot-eight or five-foot-nine, Hispanic with “squinty” eyes. (VI RP 480) Moore could not identify Jaime with any certainty at trial. (VI RP 441, 448) She testified that Jaime’s complexion, nose and face are different from those of the shooter. (VIII RP 816-17)

Jamie’s proposed expert testimony would have explored the effects of stress, violence, weapon focus, lighting, and cross-racial identification. (09/18/06 RP 8, 10-11) In denying Jaime’s request, the trial court relied on the *Cheatam* case. (09/18/06 RP 10, 22; I RP 16) But the facts of that case are entirely distinguishable.

In *Cheatam*, the Court held that exclusion of the expert testimony was proper. The court found that testimony explaining how stress and violence can render memory less accurate would not be helpful because the victim specifically testified that she “realized that she would need to memorize the face of her attacker in order to identify him later, and that she carefully examined his face in order to do so.” 150 Wn.2d at 649. The court also noted that the expert’s testimony explaining how victims tend to focus on a weapon would also be of marginal relevance because the attacker held the knife to the victim’s throat, where she would have

been unable to see it. 150 Wn.2d at 650. The court found that testimony summarizing studies showing the greater difficulty in recognizing individuals from a different race than that of the observer would be of minimal relevance because the victim described the attacker to a sketch artist the next day, resulting in a sketch that was “photo perfect.” 150 Wn.2d at 649-50. Ultimately, the Court found that the relevance of the expert testimony was “debatable and, therefore . . . the trial court’s decision not to admit [the] testimony under the facts of this case was a tenable exercise of discretion. 150 Wn.2d at 652.

Unlike *Cheatam*, the witnesses here did not focus on “memorizing” the shooter’s face. They all gave vague descriptions of the shooter, and Gange admitted she was more focused on the weapon. (V RP 222) The witnesses also testified that the lighting inside the home was dim. (IV RP 141) They described the shooter as Mexican or Hispanic, which the witnesses were not. (IV RP 128; VI RP 480; CP 20) The expert testimony would be relevant under the facts of this case, and should have been admitted.

The trial court concluded that the photo-identifications were “adequately reliable, so expert testimony on the subject of eye-witness identification would be [a] collateral issue[.]” (CP 21) But

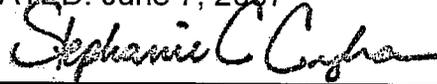
what the court failed to see is that the entire point of the expert testimony is to question the reliability of the photo and in-court identifications, and because these identifications were so critical to the State's case, the testimony is not remotely "collateral." The trial court abused its discretion when it excluded the expert testimony, and the exclusion was clearly prejudicial considering the importance of the eyewitness identifications to the State's case. Jaime's conviction should therefore be reversed.

IV. CONCLUSION

The trial court's decision to conduct the trial inside the jail when it was not absolutely necessary was clear error. The court's explanation to the jury did not remove the prejudice to Jaime because the jurors' judgment was surely influenced by the discomfort and negative associations caused by being in the jail environment—a far from impartial location with no other purpose than to hold those suspected and guilty of crimes. Because of this, Jamie was denied a fair trial and his constitutional rights to due process and the presumption of innocence. In addition, the trial court abused its discretion when it denied Jaime's request to call an expert to discuss the reliability of eyewitness identifications, especially because the State's entire case rested on positive

eyewitness identifications. Either of these reasons justifies reversal of Jaime's conviction and a new trial.

DATED: June 7, 2007



STEPHANIE C. CUNNINGHAM

WSBA No. 26436

Attorney for James Frank Jaime

CERTIFICATE OF MAILING

I certify that on 06/07/2007, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to:

Kevin Eilmes, DPA
Prosecuting Attorney's Office
128 N. Second St., Rm. 211
Yakima, WA 98901

James Frank Jaime, DOC#814201
Washington State Penitentiary
1313 N 13th Ave.
Walla Walla, WA 99362



STEPHANIE C. CUNNINGHAM

WSBA No. 26436