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No. 97681-3

NO. 51177-1-II

THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

JOHN JACKSON, SR.,

Appellant.

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

APPELLANT'S REPLY BRIEF

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A. ARGUMENT.

1. Using irons and chains to restrain Mr. Jackson in court without cause is clearly erroneous and likely affected the contested credibility issues at the heart of the case, and this Court should order a new trial.

a. The State's mootness analysis is irrelevant because Mr. Jackson is entitled to relief in his direct appeal.

The prosecution tries to dodge this Court's critique of the court's shackling policies by claiming Mr. Jackson's shackling is moot. Resp. Brief at 7. But mootness analysis only arises when this Court cannot give relief. *Robbins v. Legacy Health Sys., Inc.*, 177 Wn. App. 299, 308, 311 P.3d 96 (2013). Mr. Jackson's case is on direct appeal and he remains incarcerated, serving the sentence imposed. This Court may remedy trial court improprieties by ordering a new trial. This remedy applies to trial and pretrial errors when they are either structural or had a likely effect on the outcome of the trial. Because there is a remedy available for errors that occurred in this trial, the issues raised in this direct appeal from a jury trial are not moot.

b. Visible chains and shackles during pretrial proceedings are impermissible without an individual justification.

i. The prosecution concedes the court set a blanket policy adopting the jail's security measures without any individual assessment.

The response brief does not deny, but rather endorses, the court's blanket policy mandating "waist chain, cuffs, and leg irons" for accused persons when they appear in court, without an individual inquiry, detailed in the State's brief, App. C-2. The trial court adopted the Clallam County jail's internal regulations for how all accused and detained people will appear in court, which is:

First appearance	"waist chain, cuffs, and leg irons"
All superior court hearings, other than trials	"full restraints (waist chain, cuffs, and leg irons)" if "maximum classification" OR "waist chain and cuffs" if "Minimum or medium custody"
Trials	"Officer will secure either right or left leg brace on the inmate"; Wear jail uniform
"Jury trial only"	Leg brace; May wear personal clothing rather than jail uniform

Resp. Brief, App. C at 2-4. The "classification" that determines whether leg irons are mandated is not based on some sophisticated metric, as the prosecution implies, but simply the charged offense, person's age, weapons used in charged crime, prior criminal history, and officer's other information from past contacts. App. C-1 (15.106-1(1)).

This policy requires "waist chain, cuffs, and leg irons" for all first appearances and "restraint devices" for every court hearing, without exception. App. C-3. Even people deemed low risk must wear waist chains and cuffs for court hearings. *Id.* Every person unable to post bail must court with chains, cuffs, and possibly leg irons, with the only exception being the trial itself, but then a person must wear a leg brace.

The prosecution offers a blanket jail policy as a substitute for the court individually determining whether a person needs to be held in chains and shackles in court.

ii. This blanket policy is unconstitutional.

Chaining, cuffing and otherwise physically restraining to every detained person brought into court does not constitute an individualized determination of the necessity of shackling,

contrary to established law. *State v. Hartzog*, 96 Wn.2d 383, 400-01, 635 P.2d 694 (1981). *Hartzog* rejected a court policy mandating shackles during all proceedings, not just jury trials as the prosecution's brief incorrectly claims. Resp. Brief at 14.

Hartzog is far from alone in finding constitutional error from requiring leg restraints or other shackling without in individual determination of necessity. *See, e.g*, *State v. Jaquez*, 105 Wn. App. 699, 709, 20 P.3d 1035 (2001) (relying on case law to conclude that "a decision to allow the use of leg restraints based solely on jail policy is clearly erroneous" and presumptively prejudicial).

Yet the prosecution encourages this Court to endorse its blanket policy and claims "no Washington law prohibits" such a blanket policy for any non-jury proceeding. Resp. Brief at 11. This contention is incorrect. In *State v. Walker*, 185 Wn. App. 790, 880, 344 P.3d 227 (2015), this Court ruled an individualized determination of the need for shackles necessary for non-jury proceedings. A defendant has the "right to appear in court free from restraints," and this applies to any court proceeding. *Id.* This right "may yield" to courtroom security requirements but

any "decision to restraint a defendant [in any proceeding] must be founded upon a factual basis set forth in the record." *Id.*, citing inter alia, *Hartzog*, 96 Wn.2d at 400.

In *State v. Finch*, 137 Wn.2d 797, 853, 975 P.2d 967 (1999), the Supreme Court likewise rejected the idea that the court may rely on the judgment of correctional officers who believe restraints are necessary for courtroom security. The record must show further justification for restraints. Furthermore, here Mr. Jackson was not only chained, cuffed and otherwise shackled for court hearings, he was restrained during the trial.

iii. The prosecution offers no individualized need to shackle, chain, or restrain Mr. Jackson.

The prosecution gives no reason for the court to physically restrain Mr. Jackson at any court proceeding. It does not try to explain that the court exercised its discretion on a case-by-case basis because the record unequivocally shows the court had no individualized basis for shackling and restraining him.

Mr. Jackson objected to the full restraints imposed pretrial and the leg brace used at trial for no reason. RP 6, 74.

Mr. Jackson never acted out in court or otherwise presented an apparent risk to the courtroom staff, judge, or lawyers. The court did not ask for an individualized reason to shackle Mr. Jackson and the prosecution never offered one. Instead, the prosecution simply asserts the court's blanket policy is harmless.

c. The court's reliance on a blanket shackling policy created by the jail should be treated as structural error.

The court's pattern and practice of fully restraining everyone at first appearances and maintaining all or most restraints on every detained person without reference to their in-court behavior should not be condoned or swept under the rug by deeming the error harmless or illusory.

The systemic restraint of all detained accused persons means that people who are not able to post bail are restrained while wealthier people are not. It puts poor people at a distinct disadvantage during pretrial court appearances, making it harder for them to concentrate, meaningfully confer with counsel, and be treated with the presumption of innocence. *See Finch*, 137 Wn.2d at 844 (explaining effects of shackling in

person's courtroom participation and perceptions of innocence). This Court should treat the blanket policy as structural error, otherwise the prosecution will continue endorsing this approach and disadvantaging those people who are too poor to post bail in an unequal and unfair manner. *See Estelle v. Williams*, 425 U.S. 501, 505-06, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976) (noting "troubling" practice of having jail inmates wear jail clothes in court operates against only poor people, unable to post bail, and risks violating fundamental fairness and equal protection).

d. The improper blanket shackling requires reversal because it impacted the judge and jury's assessment of Mr. Jackson's credibility, dangerousness, and ability to interact with others in the courtroom.

At the least, physically restraining a person during trial or other substantive court hearings "without first enumerating the reasons for this extraordinary measure is '*inherently prejudicial*' error." *Jaquez*, 105 Wn. App. at 710 (emphasis in original, citing *Finch*, 137 Wn.2d at 845). The prosecution bears the burden of proving this error is harmless beyond a reasonable doubt. *Id.* at 708.

When a practice is "inherently prejudicial," courts place "little stock" in a fact-finder's claim that it did not affect them. *Holbrook v. Flynn*, 475 U.S. 560, 570, 106 S. Ct. 1340, 89 L. Ed.2d 525 (1986). No one need actually articulate a consciousness of prejudicial effect, but rather the court asks "whether 'an unacceptable risk is presented of impermissible factors coming into play.'" *Id.*; citing Estelle v. Williams, 425 U.S. at 505.

Applying the presumption of prejudice here, this Court presumes the jury realized Mr. Jackson was physically restrained during trial and the prosecution must prove otherwise. Jurors had the opportunity to notice Mr. Jackson's restraints. *See, e.g.*, *Jaquez*, 105 Wn. App. at 708 n.6 (reasonable to infer jury saw defendant shackled at some point and no evidence disproves this).

When he testified, his brace was in a position to be actually visible through his clothes, and could have been detected as well as when he struggled to stand during the trial proceedings. RP 448. The record shows it was "hard" for Mr. Jackson to move. RP 272-73. It shows he struggled to stand in

front of the jury. RP 75, 448. The brace affected his freedom of movement unlike any other participant in the trial. He could not take his oath standing as the other witnesses had done, walk to the stand to testify, or stand for the jury to show respect unlike every other participant in the trial proceeding.

The prosecution claims Mr. Jackson would have worn loose pants, but this is solely based on the written jail policy that asks defendants to wear clothes "loose enough to fit comfortably over a leg brace." App C-4; Resp. Brief at 18. This policy in no way requires that the brace is hidden by the pants, just that the pants accommodate a brace to fit underneath.

Even if not overtly visible, the purpose of the restraints is to limit Mr. Jackson's freedom of movement. It necessarily impaired his freedom of movement, affecting his ability to move naturally and instilling a fear he could trigger the brace's lock on his leg by mistake. Jurors would notice stilted movement during trial of a restrained person. Restraints inherently impair his ability to move while in the courtroom, when talking to counsel, as he was testifying, or while listening to testimony.

Mr. Jackson explained the difficulty he had moving, such as standing up in the courtroom.

Furthermore, Mr. Jackson was shackled in five point restraints when the trial court set a bail that was too high for him to post. Shackling signals a person as "particularly dangerous or guilty," which is a critical component of the bail a court sets. *See Finch*, 137 Wn.2d at 845. Because Mr. Jackson could not meet the bail the court set, he remained in jail through trial. And while in jail, he could not participate in the investigation, such as obtaining his cell phone and giving the text messages to his lawyer that formed a key part of the case against him. RP 98-100, 117-18.

The case against Mr. Jackson was a credibility contest. He presented sufficient evidence to trigger the court's obligation to present self-defense instructions. CP 41-43. Thus the evidence was not overwhelming, as the prosecution asserts. Rather, it was for the jury to assess whether they believed his explanation of events. This Court cannot sit as the 13th juror and decide whether their perception of events was colored by seeing that

Mr. Jackson was the lone person in the courtroom deprived of regular freedom of movement even while testifying.

Mr. Jackson's unnecessary physical restraints undermined the fairness of the proceedings against him and requires a new trial.

2. The court improperly imposed legal financial obligations despite Mr. Jackson's indigence.

A sentencing court should "seriously question" an indigent defendant's ability to pay legal financial obligations. *State v. Blazina,* 182 Wn.2d 827, 839, 344 P.3d 680 (2015). Here, the sentencing court knew Mr. Jackson was being sentenced to prison and had been unable to post bail since his arrest. RP 14, 565. The court learned nothing of his assets. RP 565-68. His income was unreliable and unpredictable, relying on what he could earn while fishing which he had to share with others. RP 566. The court knew he had child support but Mr. Jackson did not know how much. RP 567. And Mr. Jackson objected to the imposition of LFOS because he lacked the resources to pay. RP 563.

Yet the court found Mr. Jackson indigent for purposes of appeal, just as he had been during the trial. His on-going indigency is presumed. RAP 15.2(f); *see also* RCW 10.01.180(3)(b) ("defendant who is indigent . . . is presumed to lack the current ability to pay"). The prosecution does not contest Mr. Jackson's indigency but still demands he pay discretionary LFOs despite it.

Furthermore, the Legislature attempted to remedy the entrenched problem of court that have continued to impose costs on indigent defendants by enacting new laws to render LFOs more discretionary and to insist that a person who is indigent should not be otherwise punished financially. Although the new law went into effect after Mr. Jackson's sentencing, he should be entitled to its curative and remedial effect as his appeal is on-going.

The savings statute cited by the prosecution does not apply. RCW 10.01.040 speaks to the repeal of a "criminal or penal statute" and "penalties or forfeitures incurred while it was in force." But RCW 10.01.060 addresses and defines "costs" that a court may impose on a criminal defendant. "Costs" are a

specific type of financial obligation a court may impose. *See, e.g.*, RCW 10.01.170 (addressing installment payment schedules for "fines, penalties, fees, restitution, or costs"). Costs are limited to the expenses actually incurred. RCW 10.01.160(2). The omission of any reference to "costs" in RCW 10.01.040 indicates this statute does not apply to save them in the event of a statutory change. *See State v. Roggenkamp*, 153 Wn.2d 614, 625, 106 P.3d 196 (2005) ("fundamental rule of statutory construction is that the legislature is deemed to intend a different meaning when it uses different terms").

The court's inquiry into Mr. Jackson's ability to pay was inadequate under *Blazina*. The revision of the LFO statutes to limit the court from imposing costs upon an indigent person further demonstrates the impropriety of imposing costs upon Mr. Jackson when his indigency is not disputed. The filing fee, DNA fee, attorney fee, and other costs imposed should be stricken or the case remanded for a further hearing on Mr. Jackson's current financial status.

B. CONCLUSION.

This Court should order a new trial and sentencing hearing, and any further relief merited in the interest of justice.

DATED this 28th day of August 2018.

Respectfully submitted,

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

STATE OF WASHINGTON,	)	
	)	
Respondent,	)	
	)	
v.	)	NO. 51177-1-II
	)	
JOHN JACKSON, SR.,	)	
	)	
Appellant.	)	

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