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Washington State
Court of Appeals
Division Two

December 1, 2015

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. FAUZI BIN ZAIN, Appellant.	No. 47368-2-II UNPUBLISHED OPINION

SUTTON, J. – Fauzi Bin Zain appeals his bench trial conviction for failure to register as a sex offender.[1] He argues that (1) the evidence was insufficient to support his conviction because it failed to prove that he lacked a fixed residence or knew that he lacked a fixed residence, (2) the trial court failed to hold a proper hearing before allowing him to remain partially handcuffed during the bench trial, (3) defense counsel provided ineffective assistance by failing to object or request a hearing on the restraint issue, (4) the sex offender registration statute, RCW 9A.44.130,[2] is unconstitutional on its face because it imposes an undue burden on the right to travel and freedom of movement, and (5) the trial court imposed legal financial obligations (LFOs) without making findings on his current or future ability to pay. We hold that (1) the evidence was sufficient to support the conviction, (2) the trial court's failure to hold a hearing before allowing Zain to remain partially handcuffed was harmless, (3) Zain fails to establish that any alleged deficient

[1] This was his third conviction, having had at least two prior convictions for failing to register.

[2] The legislature amended RCW 9A.44.130 in 2015. Laws of Washington 2015, ch. 261, § 3. These changes are not relevant here. Accordingly, we cite to the current version of the statute.

performance by defense counsel was prejudicial, (4) the sex offender statute is not an unconstitutional restriction on the right to travel or freedom of movement, and (5) Zain cannot challenge his LFOs on appeal because he failed to raise the issue below. Accordingly, we affirm.

FACTS

Because of a previous adjudication of guilt for a sex offense, Zain was required to register as a sex offender. On January 16, 2014, upon his release from a correctional facility, Zain registered at a residential hotel, the Hudson Hotel Annex, using a housing voucher from the Department of Corrections (DOC). This voucher was good for three months. Zain registered this address with the Cowlitz County Sheriff's Office on January 16.

When Zain's rent became due on April 16, the hotel manager was unable to locate Zain to contact him about the rent in person or by phone. On April 21, the manager removed Zain's belongings[3] from the apartment, changed the lock, and "checked him out" of the hotel. Verbatim Report of Proceedings (VRP) at 17. The manager discarded Zain's belongings when no one claimed them after 30 days.

Zain's community corrections officer (CCO) and an investigator hired by the sheriff's office were also unable to locate Zain at the hotel or contact him directly by phone between April 17 and 28. On April 28, the CCO learned that Zain was in the Lewis County jail. Zain did not notify the sheriff's office of any address change or that he no longer had a fixed address.

[3] Zain's belongings consisted of "a couple bags and . . . one blue Tupperware tub." Verbatim Report of Proceedings at 18.

The State charged Zain with failing to register between April 10 and April 28, 2014. Zain waived his right to a jury trial and stipulated to his prior sex offenses and to two prior failure to register convictions.

Before the bench trial started, defense counsel advised the trial court that Zain was in handcuffs and asked that the handcuffs be removed or one hand released so Zain could take notes. The trial court asked the corrections officer present in the courtroom if Zain could "have one hand," and the corrections officer responded that he "was told no." VRP at 5-6. When the trial court told the officer that if this was a security issue, the court would "need to know more," the corrections officer conferred with someone on his radio and told the trial court that he could release one hand. VRP at 6. After determining that Zain was right handed, the officer released that hand. There was no further discussion of any restraints.

The State presented testimony from a sheriff's office clerk responsible for sex offender registration address changes, the hotel manager, Zain's CCO, and the investigator. Their testimony was consistent with the facts described above. In addition, the hotel manager testified that Zain did not move back into the room after the lock was changed on April 21 and that he (the manager) was not required to formally evict a resident because this was a hotel.

Zain was the sole defense witness. He testified that he started living at the hotel on January 16, but that he believed the voucher paid his rent through the end of April. But Zain also testified that the voucher was good for three months' rent.

When defense counsel asked Zain if he had been to the hotel between April 10 and 28, he responded, "I'd been by there." VRP at 52. Zain denied having moved to another residence or

having become homeless during this time, and he testified that he was never told that he had been "evicted" from the hotel. VRP at 53.

In an oral ruling,[4] the trial court found Zain guilty of failure to register as a sex offender. Specifically, the trial court found that Zain had "knowingly fail[ed] to send his change of address to the Cowlitz County Sheriff within three business days of ceasing to have a fixed residence and having last registered with the Cowlitz County Sheriff, did knowingly fail to report weekly to the Cowlitz County Sheriff." VRP at 66. The trial court's oral ruling focused on the fact that the housing voucher was good for only three months, so Zain had to pay rent starting April 16. The trial court also noted that it was Zain's responsibility to ensure he had a fixed residence and that the registration form had advised him that he was responsible for reporting within three days once he lacked a fixed residence.

The trial court sentenced Zain on July 31, 2014. Although there was no discussion during the sentencing hearing about the LFOs or Zain's current or future ability to pay LFOs, the judgment and sentence included $1,775 in mandatory and discretionary LFOs. The judgment and sentence contained a boilerplate finding on Zain's ability to pay LFOs, stating,

> The court has considered the total amount owing, the defendant's past, present, and future ability to pay [LFOs], including the defendant's financial resources and the likelihood that the defendant's status will change. The court finds that the defendant has the ability or likely future ability to pay the [LFOs] imposed herein.

CP at 10.

[4] There are no written findings of fact and conclusions of law in the record before us. Although a trial court is required to enter written findings of fact and conclusions of law following a bench trial, we may decide issues raised on appeal in the absence of written findings and conclusions if, as is the case here, the record is sufficient to facilitate review. CrR 6.1(d); *State v. Otis*, 151 Wn. App. 572, 577, 213 P.3d 613 (2009).

Zain appeals his conviction and LFOs.

ANALYSIS

I. SUFFICIENCY

The trial court found that Zain did not have a fixed residence after April 21. Zain argues that the State failed to present evidence sufficient to prove that he (1) lacked a fixed residence, or (2) knew he lacked a fixed residence. Br. of Appellant at 18. We disagree.

When reviewing a sufficiency of the evidence claim, we ask whether, after viewing the evidence in a light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt. *State v. Witherspoon*, 180 Wn.2d 875, 883, 329 P.3d 888 (2014). Because credibility determinations are for the trier of fact and are not subject to review, *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990), we defer to the trier of fact's resolution of conflicting testimony, evaluation of witness credibility, and decisions regarding the persuasiveness of the evidence. *State v. Walton*, 64 Wn. App. 410, 415-16, 824 P.2d 533 (1992), *abrogated on other grounds by In re Pers. Restraint of Cross*, 180 Wn.2d 664, 681 n. 8, 327 P.3d 660 (2014).

Under RCW 9A.44.130(5)(a) and (b), any person who is required to register under the sex offender registration statute must notify the county sheriff of his address change within three business days of moving. Similarly, under RCW 9A.44.130(6)(a), a person lacking a fixed residence must provide written notice to the county sheriff within three business days after ceasing to have a fixed residence.

The evidence showed that (1) when Zain registered at the hotel on January 16, he used a housing voucher that was good for three months, (2) Zain knew the voucher was good for three

months of rent, (3) the housing voucher expired April 16, (4) the hotel manager removed Zain's property from his room and changed the lock on April 21, (5) Zain did not claim his property or move back into the room after April 21, and (6) Zain did not notify the sheriff's office of any change in address or residential status. Viewed in the light most favorable to the State, this evidence established that Zain could not have resided at the hotel as of April 21. This coupled with the fact that there was no evidence that Zain had moved to another location and Zain's testimony denying having moved to another residence in April, was sufficient to allow the trial court to find that Zain did not have a fixed residence after April 21. Thus, Zain's argument that the evidence was insufficient to show that he lacked a fixed residence fails.

Furthermore, viewed in the light most favorable to the State, this evidence was sufficient to establish that Zain knew he no longer had a fixed residence. Zain admitted that he was aware the housing voucher was good for only three months and the manager testified that Zain did not move back into the hotel after the locks were changed on April 21.[5] Thus, Zain's argument that the evidence was insufficient to show that he did not know he lacked a fixed residence also fails.

II. RESTRAINTS

Zain next argues that the trial court violated his federal[6] and state[7] due process rights because the trial court did not conduct a hearing to determine whether the restraint of one of his

[5] Because we view the evidence in the light most favorable to the State, the fact that Zain testified that he believed the voucher was good through April, despite knowing that the housing voucher was good for only three months, is irrelevant here.

[6] U.S. Const. amend. XIV.

[7] Wash. Const. art. I, § 3.

hands during the bench trial was necessary nor did the trial court consider a less restrictive alternative. This argument fails.

A criminal defendant is entitled to be free from restraints at trial except under extraordinary circumstances. *State v. E.J.Y.*, 113 Wn. App. 940, 951, 55 P.3d 673 (2002). "'Restraints are viewed with disfavor because they may abridge important constitutional rights, including the presumption of innocence, privilege of testifying in one's own behalf, and right to consult with counsel during trial.'" *State v. Turner*, 143 Wn.2d 715, 725, 23 P.3d 499 (2001) (quoting *State v. Hartzog*, 96 Wn.2d 383, 398, 635 P.2d 694 (1981)). But "'[i]t is [also] 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.'" *Turner*, 143 Wn.2d at 725 (quoting *Hartzog*, 96 Wn.2d at 396). In cases involving potential, but not actual, misconduct by the defendant, the trial court "'must exercise discretion in determining the extent to which courtroom security measures are necessary to maintain order and prevent injury. That discretion must be founded upon a factual basis set forth in the record.'" *State v. E.J.Y.*, 113 Wn. App. 940, 951, 55 P.3d 673 (2002) (quoting *Hartzog*, 96 Wn.2d at 400).

However, "[a] claim of unconstitutional shackling is subject to harmless error analysis." *State v. Hutchinson*, 135 Wn.2d 863, 888, 959 P.2d 1061 (1998). "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). Thus, such "error does not require reversal unless it is shown that the use of restraints substantially affected the trial court's fact finding." *E.J.Y.*, 113 Wn. App. at 952 (citing *Hutchinson*, 135 Wn.2d at 888).

The State appears to concede that the trial court did not make an adequate record of why it allowed Zain to remain partially handcuffed during the trial, and we agree.[8] But Zain does not offer any argument that having his one hand partially handcuffed affected the trial court's fact finding ability, and no such issue is apparent in the record. Nor does he assert that it affected his ability to consult with counsel, testify, or otherwise participate in his bench trial, and the record does not reflect any such impairment.[9] Further, the likelihood of prejudice was greatly reduced because there was no jury. *See E.J.Y.*, 113 Wn. App. at 952. Thus, we hold that Zain does not establish that his being partially handcuffed substantially affected the trial court's fact finding and this argument fails.

Zain also argues that defense counsel provided ineffective assistance because he failed to object to the use of restraints and failed to request a hearing on the restraints. But because, as discussed above, Zain does not establish prejudice, this argument also fails.[10] *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995) (to establish ineffective assistance of counsel, appellant must show both deficient representation and that this deficient performance was prejudicial).

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[8] We note that although in situations like this, which involve bench trials and accommodations to allow the defendant to participate in his defense, the use of certain restraints will frequently be harmless. But the trial court should still conduct the proper inquiry and analysis before allowing a defendant to remain restrained.

[9] Instead, Zain asserts that prejudice is presumed. But even if prejudice is presumed, the State may overcome this presumption if the error was harmless beyond a reasonable doubt. *State v. Clark*, 143 Wn.2d 731, 775, 24 P.3d 1006 (2001).

[10] We also note that the record does not contain the facts that would be necessary for us to determine whether the trial court would have ordered that Zain not be restrained if defense counsel had made such an objection.

III. RIGHT TO TRAVEL

Zain next argues that the sex offender registration statute is facially unconstitutional because it imposes an undue burden on the right to travel and freedom of movement and is not narrowly tailored. We rejected this identical claim in *State v. Smith*, 185 Wn. App. 945, 952-56, 344 P.3d 1244, *review denied*, 183 Wn.2d 1011 (2015). Although Zain filed his opening appellate brief on January 7, 2015, and we did not file *Smith* until February 18, 2015, Zain has not presented argument in a reply or any supplemental briefing demonstrating that we should not follow *Smith*. Accordingly, under *Smith*, this argument fails.

IV. LFOs

Finally, Zain challenges his LFOs, arguing that the trial court failed to make the necessary findings on his ability to pay and invites us to exercise our discretion and address this issue despite his failure to object to the LFOs at sentencing. We decline this invitation.

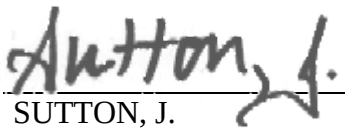
When an appellant fails to raise an issue below, we may refuse to review it. RAP 2.5(a). In *State v. Blazina*, our Supreme Court reaffirmed that appellate courts in this state may decline to review the imposition of discretionary LFOs where the defendant failed to object to the imposition of LFOs at sentencing. 182 Wn.2d 827, 832-33, 344 P.3d 680 (2015).

In May 2013, we issued *State v. Blazina*, wherein we declined to review the trial court's imposition of discretionary LFOs because the defendant did not object at sentencing. *State v. Blazina*, 174 Wn. App. 906, 911, 301 P.3d 492 (2013), *remanded by* 182 Wn.2d 827 (2015). Thus, by May 2013, defendants were on notice that they must object to the imposition of LFOs in order to preserve the error for appellate review. Because Zain was sentenced in July 2014, well after May 2013, and he did not object to the trial court's imposition of LFOs at sentencing, we decline

his invitation to review this issue for the first time on appeal. *See State v. Lyle*, 188 Wn. App. 848, 852, 355 P.3d 327 (2015).

We affirm Zain's conviction and LFOs.

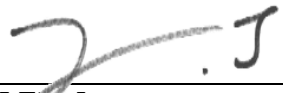
A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.



SUTTON, J.

We concur:

WORSWICK, P.J.



LEE, J.