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Washington State
Court of Appeals
Division Two

March 8, 2016

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. ROBERT WADE NAILLON, Appellant.	No. 46754-2-II Consolidated with:
In re the Personal Restraint Petition of: ROBERT WADE NAILLON, Petitioner.	No. 46810-7-II UNPUBLISHED OPINION

LEE, J. — Robert Wade Naillon appeals his convictions for unlawful possession of a controlled substance (methamphetamine) and vehicle prowling in the second degree, arguing that the trial court (1) violated his right to present a defense by denying his motion for a second test of a glass pipe, (2) violated his right to a fair trial by requiring a court officer to stand by an exit door while he testified, and (3) erred in imposing discretionary legal financial obligations (LFOs) without determining his ability to pay. In a consolidated personal restraint petition (PRP), Naillon adds that the field testing procedure for the glass pipe was improper, that his speedy trial rights were violated, and that he received ineffective assistance of counsel.

We hold that (1) a retesting of the pipe was not necessary to Naillon's unwitting possession defense, (2) the trial court did not abuse its discretion by adhering to standard procedure and posting an officer near the exit door during Naillon's testimony, and (3) Naillon waived his LFO challenge by not objecting to the imposition of LFOs during sentencing. We further hold that a

proper chain of custody for the pipe was established, that Naillon was tried within the speedy trial period, and his counsel's performance was neither deficient nor prejudicial. We affirm Naillon's judgment and sentence, and deny the PRP.

FACTS

After Alissa Shipley and her daughter saw Naillon enter a Cadillac parked in a church parking lot on June 17, 2014, Shipley called the police. She then contacted Naillon, who told her that the Cadillac belonged to his brother. Shipley saw that Naillon had a watch in his hand. When she told him to put anything that did not belong to him back in the car, Naillon put the watch inside the car and walked across the street.

Longview Police Officer Shawn Close arrived and contacted Naillon. Naillon initially denied being inside the Cadillac but then said he thought the car was his mother's and that he was looking inside to find a watch to check the time. After Shipley's daughter identified Naillon as the man she saw inside the Cadillac, and after the Cadillac's owner said that Naillon did not have permission to be in his car, Officer Close arrested Naillon for vehicle prowling in the second degree.

Officer Close searched Naillon incident to his arrest and found a glass pipe in his back pocket. Officer Close recognized the pipe as an item commonly used to smoke methamphetamine. The pipe contained the residue of a crystalline substance that Officer Close believed was methamphetamine. A field test of the pipe conducted at the police station showed the pipe contained methamphetamine, which was later confirmed by testing at the Washington State Patrol Crime Lab.

The State charged Naillon with unlawful possession of a controlled substance (methamphetamine) and vehicle prowling in the second degree.[1] During his arraignment on July 1, Naillon requested the pipe be sent to the state crime lab as soon as possible for testing. At a July 25 hearing, Naillon stated that he wanted his own test done after the state lab returned the pipe. The trial court suggested that he speak with his attorney about a possible defense expert.

On August 5, Naillon's attorney moved to withdraw, and Naillon complained that his attorney was refusing to obtain a second test for the pipe. Defense counsel confirmed that he would not request a second test for strategic reasons. Naillon did not object to his attorney's withdrawal.

On August 7, the trial court granted the motion to withdraw, and Naillon again requested a second test of the pipe. The trial court deferred all motions to an August 19 hearing. On August 19, Naillon's new attorney stated that he would be requesting funds for a second test of the pipe after contacting several labs to determine the cost.

After the trial court denied the defense motion to suppress the glass pipe on September 2, defense counsel moved for a second testing of the pipe. In making the motion, counsel stated that the defense at trial would be one of unwitting possession, and he explained to Naillon that "[u]nwitting possession means you didn't know what it was." 1 Report of Proceedings (RP) at 146. Naillon agreed that this would be his defense.

[1] An additional charge of possession of stolen property, based on items in Naillon's possession, was dismissed before trial.

Defense counsel then informed the court that he did not know of any statutory right to an independent test but that Naillon insisted he was entitled to a second test. The trial court denied the motion after concluding that there was no legal basis for a second test.

At trial, Shipley, three police officers, and the Cadillac's owner testified to the facts cited above. During his testimony, Officer Close described how he tested the pipe at the police station and logged it into evidence before it was sent to the state crime lab. He explained that there was no requirement that the field testing be done in Naillon's presence. The forensic scientist who tested the pipe at the state crime lab testified that its residue contained methamphetamine.

After the State rested, defense counsel stated that Naillon would testify. The following exchange then occurred between a court officer, the trial court, and Naillon:

> COURT OFFICER: Your Honor, if he's going to testify, one of us is going to—
> [TRIAL COURT]: We need to have him seated. Well, I'll take the jury out and have you take him up, seat him—
> COURT OFFICER: Well, one of us will be standing up there.
> [TRIAL COURT]: Yeah. Yeah.
> . . . .
> DEFENDANT: I have to have somebody near me while I'm up there?
> [DEFENSE COUNSEL]: That would be up to the judge, not me.
> DEFENDANT: Ma'am, I feel that that's going to—
> [TRIAL COURT]: Mr. Naillon, stop. I'm not talking to you at the moment.
> DEFENDANT: Well—
> [TRIAL COURT]: So what I would do is—when he is called—actually when it's planned for him to be called--are you going to put him on next?
> [DEFENSE COUNSEL]: Yes. You want to go first, don't you?
> DEFENDANT: It's up to you but I—I don't see how I should have a guard up there by me, I mean it's just--
> COURT OFFICER: Because there's an exit door there.
> [TRIAL COURT]: Okay. The guard is going to be there.
> DEFENDANT: I've never been a flight risk. I've never been a flight risk.
> . . . .
> COURT OFFICER: It's—it's just our procedure, Rob.

2A RP at 263-64.

Naillon then testified that he did not know that anything containing methamphetamine was in his pocket and that the pipe was an incense burner. He denied that anyone else put the pipe in his pocket, stating instead that "it magically appeared." 2A RP at 292.

The defense investigator, who was a retired police captain, testified that while glass pipes may be sold as incense burners, they frequently contain drugs. When shown the pipe recovered from Naillon's pocket, he testified that he would have assumed it was a methamphetamine pipe.

The trial court instructed the jury on unwitting possession, but the jury found Naillon guilty as charged. The trial court imposed 18 months' confinement on the drug charge and 364 days' confinement on the prowling charge. Pursuant to a preprinted provision finding that Naillon had the ability to pay, the trial court imposed mandatory and discretionary LFOs totaling $4,125. Naillon appeals his convictions and the discretionary LFOs imposed.

ANALYSIS

A. REQUEST FOR SECOND TEST

Naillon argues that the trial court violated his right to present a defense by denying his motion to have the glass pipe retested. We disagree.

In Washington, CrR 3.1 authorizes payment for expert services when necessary to an adequate defense. CrR 3.1(f)(1); *State v. Young*, 125 Wn.2d 688, 691, 888 P.2d 142 (1995). "'CrR 3.1(f) incorporates the constitutional right of an indigent defendant to the assistance of expert witnesses.'" *State v. Cuthbert*, 154 Wn. App. 318, 330, 225 P.3d 407 (2010) (quoting *State v. Poulsen*, 45 Wn. App. 706, 709, 726 P.2d 1036 (1986)), *review denied*, 169 Wn.2d 1006 (2010).

Whether expert services are necessary for an indigent defendant's adequate defense lies within the sound discretion of the trial court, and the trial court's exercise of discretion will not be overturned absent a clear showing of substantial prejudice. *Young*, 125 Wn.2d at 691; *see also City of Mt. Vernon v. Cochran*, 70 Wn. App. 517, 524, 855 P.2d 1180 (1993) (appointment of expert for indigent defendant is discretionary, and there is no "black letter" rule to apply in determining whether expert must be appointed), *review denied*, 123 Wn.2d 1003 (1994).

In requesting a second test of the glass pipe at public expense, defense counsel stated that Naillon intended to pursue a defense of unwitting possession at trial. An unwitting possession instruction is appropriate when the defendant admits possessing contraband but argues that he was ignorant of that possession or of its illegal nature. *State v. Staley*, 123 Wn.2d 794, 799, 872 P.2d 502 (1994). By employing such a defense, Naillon admitted possessing a pipe containing methamphetamine, but he argued that he did not know he had the pipe nor did he know that the pipe contained methamphetamine. A second test of the pipe would not have advanced either argument. *See State v. Heffner*, 126 Wn. App. 803, 810, 110 P.3d 219 (2005) (denial of expert's services upheld where facts did not show expert would have materially assisted defense counsel). The trial court did not abuse its discretion in concluding that an independent test of the glass pipe was not necessary to Naillon's defense.[2]

[2] Naillon also contends that the trial court violated his due process rights and deprived him of effective counsel when it denied his request for an independent test of the glass pipe. But Naillon does not present any argument in support of these contentions. Therefore, we do not consider these contentions. *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962).

B. PRESENCE OF COURT OFFICER

Naillon contends that the trial court violated his due process right to a fair trial by placing a court officer near an exit door when he testified without finding that the officer's placement was necessary. We disagree.

The presumption of innocence is a basic component of a fair trial under our criminal justice system. *State v. Jaime*, 168 Wn.2d 857, 861, 233 P.3d 554 (2010). To preserve the presumption of innocence, the defendant is "'entitled to the physical indicia of innocence which includes the right of the defendant to be brought before the court with the appearance, dignity, and self-respect of a free and innocent man.'" *Id.* at 861-62 (quoting *State v. Finch*, 137 Wn.2d 792, 844, 975 P.2d 967 (1999)).

We review trial management decisions for abuse of discretion. *Jaime*, 168 Wn.2d at 865. "'A trial judge must exercise discretion in determining the extent to which courtroom security measures are necessary to maintain order and prevent injury.'" *Id.* (quoting *State v. Hartzog*, 96 Wn.2d 383, 401, 635 P.2d 694 (1981)). But "'close judicial scrutiny' is required to ensure that inherently prejudicial measures are necessary to further an essential state interest," such as preventing injury to those in the courtroom, disorderly conduct, or escape. *Finch*, 137 Wn.2d at 846 (quoting *Estelle v. Williams*, 425 U.S. 501, 504, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976)).

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); *Finch*, 137 Wn.2d at 845. Before a trial court may properly impose such potentially prejudicial measures, it must make a factual determination of necessity, on the

record, taking into consideration factors that include the seriousness of the charge, the defendant's own safety and that of others in the courtroom, and the adequacy of alternative remedies. *Finch*, 137 Wn.2d at 848. The trial court must balance the need for such measures against the risk of undermining the right of the accused to a fair trial. *Id.* at 849-50.

But when security measures are not inherently prejudicial, the trial court is not required to make a record of a compelling safety or security threat. *See Holbrook*, 475 U.S. at 566-67 (reversing circuit court's conclusion that trial court had to identify safety threats to justify presence of troopers in courtroom).

In *Holbrook*, the United States Supreme Court ruled that, unlike physical restraints, uniformed security guards in a courtroom do not inherently prejudice a defendant's right to a fair trial. 475 U.S. at 569. "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." *Id.* The Court added that "'reason, principle, and common human experience' counsel against a presumption that any use of identifiable security guards in the courtroom is inherently prejudicial." *Id.* (quoting *Estelle*, 425 U.S. at 504).

We decline to hold that the trial court was obligated to make a factual determination of necessity to justify the presence of a single court officer by an exit door, and we see no abuse of discretion in this trial management decision. Furthermore, we observe that the record shows only that a court officer stood near an exit door while Naillon testified. The record does not show where the officer stood before Naillon testified, whether the jury could see the officer while Naillon testified, or the extent to which the officer was armed. Thus, even if error occurred in assessing

the need for the court officer to stand near the door, that error was harmless, as the record does not show that the officer's presence affected the jury or resulted in actual prejudice. *See State v. Hutchinson*, 135 Wn.2d 863, 888, 959 P.2d 1061 (1998) (any error in shackling defendant was harmless where he did not show prejudice from the unseen restraints), *cert. denied*, 525 U.S. 1157 (1999).

C. LFOs

Naillon argues further that the trial court erred by imposing discretionary LFOs based on an unsupported finding that he had the ability to pay.[3] Naillon asserts that he may challenge the assessment of these obligations for the first time on appeal.

Naillon's judgment and sentence states that the trial court considered his ability to pay the LFOs imposed. Naillon did not challenge this language or his LFOs during sentencing. Our decision in *State v. Blazina*, 174 Wn. App. 906, 301 P.3d 492 (2013), *remanded*, 182 Wn.2d 827 (2015), issued before Naillon's sentencing, provided notice that the failure to object to LFOs during sentencing waives a claim of error on appeal. 174 Wn. App. at 911. As our Supreme Court noted, an appellate court may use its discretion to reach unpreserved claims of error. *State v. Blazina*, 182 Wn.2d 827, 832-33, 344 P.3d 680 (2015). We decline to exercise such discretion here.

[3] Naillon does not challenge his mandatory LFOs, which included a $500 victim assessment, a $200 filing fee, and a $100 deoxyribonucleic acid (DNA) fee. *See State v. Lundy*, 176 Wn. App. 96, 102, 308 P.3d 755 (2013) (legislature has divested courts of discretion to consider defendant's ability to pay when imposing mandatory LFOs).

D. PRP

Naillon argues in his PRP that the trial court erred by denying his request for a second test of the glass pipe, the chain of custody for the pipe was not established because he did not observe the officer's field test of the pipe, his speedy trial rights were violated, and he received ineffective assistance of counsel. We have already addressed Naillon's request for a second test of the pipe and turn to his other issues.

To be entitled to relief, a petitioner must show constitutional error that resulted in actual and substantial prejudice or nonconstitutional error that resulted in a complete miscarriage of justice. *See In re Pers. Restraint of Cook*, 114 Wn.2d 802, 813, 792 P.2d 506 (1990). The petitioner must state the facts on which his claim of unlawful restraint is based as well as the evidence reasonably available to support the factual allegations. *In re Pers. Restraint of Williams*, 111 Wn.2d 353, 364, 759 P.2d 436 (1988). When the petition rests on conclusory allegations, we must decline to determine its validity. *Cook*, 114 Wn.2d at 813-14.

1. Chain of Custody

Naillon contends that the chain of custody for the glass pipe was not properly established because the officer did not conduct the field test or bag and seal it afterward in his presence. In support of this contention Naillon points out that he was deprived of access to the prison law library because his kiosk blew up and rendered him unconscious.[4] Naillon's contention fails.

[4] During a pretrial hearing, defense counsel stated that Naillon wanted the court to know that he had been electrocuted while doing legal research at the jail. Counsel investigated but could not confirm this claim.

Officer Close testified at trial that there is no authority requiring a field test to be conducted in the defendant's presence, and Naillon cites no such authority here. Officer Close also testified about the manner in which he tested the pipe and packaged it for delivery to the state crime lab for additional testing. He further testified that both the packaging and the pipe were in substantially the same condition at trial as they were when he entered them into evidence. The record establishes an unbroken chain of custody for the pipe. *See State v. Picard*, 90 Wn. App. 890, 897, 954 P.2d 336 (1998) (before object connected with crime may be admitted into evidence, it must be identified and shown to be in substantially the same condition as when the crime was committed), *review denied*, 136 Wn.2d 1021 (1998). Naillon's allegation regarding the law library is supported only by his own assertions, and he does not explain why that allegation entitles him to relief. Naillon's chain of custody challenge fails.

2. Speedy Trial

Naillon also asserts that his speedy trial rights were violated, but the record demonstrates otherwise.[5] Naillon's original trial date was August 11, 2014, which was within 60 days of his July 1 arraignment and therefore within the speedy trial period. *See* CrR 3.3(b)(1)(i), (c)(1). When the trial court granted his attorney's motion to withdraw on August 7, the 60-day period began anew. CrR 3.3(c)(2)(vii). Naillon's trial began on September 2, which was well within the new speedy trial period. There was no violation of Naillon's speedy trial rights, and his challenge fails.

[5] In support of his speedy trial challenge, Naillon again points out that he was denied access to the jail law library because the kiosk blew up and electrocuted him. But Naillon does not explain how his lack of access to the law library supports his speedy trial challenge.

3. Ineffective Assistance of Counsel

Finally, Naillon maintains that he received ineffective assistance of counsel because his attorney did not (1) provide him with discovery until two days before trial, (2) visit him for sufficient periods of time or adequately prepare for trial, or (3) give effective arguments or cross examinations, including an argument supporting the retesting of the glass pipe. We disagree.

To prove a claim of ineffective assistance of counsel, a petitioner must show that his counsel's performance was deficient and that the deficiency was prejudicial. *In re Pers. Restraint of Crace*, 174 Wn.2d 835, 840, 280 P.3d 1102 (2012). Prejudice results when it is reasonably probable that but for counsel's errors, the result of the proceeding would have been different. *Id.* We strongly presume that defense counsel's performance was effective. *State v. McFarland*, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995). We need not address both prongs of the ineffective assistance of counsel test if the defendant makes an insufficient showing on one prong. *State v. Garcia*, 57 Wn. App. 927, 932, 791 P.2d 244, *review denied*, 115 Wn.2d 1010 (1990). Because claims of ineffective assistance of counsel present mixed questions of law and fact, we review them de novo. *In re Pers. Restraint of Brett*, 142 Wn.2d 868, 873, 16 P.3d 601 (2001).

Naillon does not cite any authority to support his argument that he is entitled to all discovery materials. And, Naillon fails to identify what discovery he claims defense counsel failed to provide him until a couple of days before trial. Therefore, Naillon's argument is not sufficient for us to address his claim that defense counsel was ineffective because defense counsel "never gave [Naillon] *a* discovery until 2 days before trial." PRP at 5 (emphasis added); RAP 16.7(a)(2). Nevertheless, Naillon fails to show prejudice.

Also, the record does not support Naillon's general assertions that his attorney was unprepared and gave inadequate arguments or cross examinations. His attorney correctly asserted that a second test of the pipe was not required, and we see no deficiency in this regard. While Naillon points to the fact that he was deprived of access to the law library to support his ineffective assistance of counsel challenge, Naillon does not explain how his lack of access to the law library supports his claim of ineffective assistance of counsel. We reject Naillon's assertion that he received ineffective assistance of counsel.

We affirm the judgment and sentence, and deny the personal restraint petition.

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.

LEE, J.

We concur:

WORSWICK, P.J.

MELNICK, J.