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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. KARLO ALONSO MONTAÑO-AROCHI, Appellant.	2 CA-CR 2008-0255 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20072192

Honorable Frank Dawley, Judge Pro Tempore

AFFIRMED

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B R A M M E R, Judge.

¶1 Appellant Karlo Alonso Montaño-Arochi (Montaño-Arochi) appeals from his convictions and sentences for aggravated assault. He argues the trial court compelled

him to wear jail attire for the final three days of his four-day bench trial in violation of the Fourteenth Amendment and Arizona Constitution. We affirm.

Factual and Procedural Background

¶2 We view the evidence in the light most favorable to sustaining Montaño-Arochi's convictions and sentences. *See State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). On June 5, 2007, D. had a heated argument with his neighbor's occasional guest, Montaño-Arochi, during which Montaño-Arochi told D. "he was going to get [him]." The following morning, as D. was in his vehicle about to leave for work, Montaño-Arochi approached D. and fired three shots, striking D. in both arms. When police arrived, D. told an officer that his "neighbor's friend," whose name he did not know, had shot him. While at the hospital, D. reiterated to police officers that his neighbor's guest had shot him.

¶3 Around the same time, D.'s live-in fiancée, C., was asked to identify a suspect police officers had detained. C., who had not witnessed the shooting, initially misidentified another person as her neighbor's occasional guest. C. realized her mistake the following day when Montaño-Arochi visited D.'s neighbor and police detained him. As Montaño-Arochi was sitting in the police cruiser, the detaining officer asked C. to identify him. C. then identified Montaño-Arochi as her neighbor's occasional guest. Three weeks after the shooting, D. identified Montaño-Arochi in a six-picture photographic lineup as the man who had shot him.

¶4 On June 12, 2007, a grand jury indicted Montaño-Arochi for attempted first-degree murder and two counts of aggravated assault. He waived his constitutional right to a trial by jury on all of the charges. *See* Ariz. Const. art. II, § 23. On the first day of trial, Montaño-Arochi, who was in custody, was permitted to change out of his orange jail attire and into a suit. D. testified and identified Montaño-Arochi as the man that had shot him. C. was expected to testify and was sworn in that day but did not testify until the next day.

¶5 On the second day of trial, the jail did not permit Montaño-Arochi to change out of his jail attire, so he appeared in court wearing the orange jail clothing. Montaño-Arochi objected to "continuing trial . . . in his orange garb" because "there is a psychological effect in people seeing him in orange." The trial court denied Montaño-Arochi's objection, noting that, although defendants are entitled to wear civilian clothing during jury trials, this rule is inapplicable in the context of bench trials. The court stated it was aware that Montaño-Arochi was in custody, as it had seen him numerous times during pretrial hearings. It also noted that Montaño-Arochi's clothing would not "make a difference at all [to the court]." The state does not dispute that Montaño-Arochi appeared for the remaining three days of the bench trial, clothed in jail attire. During that time, seventeen witnesses testified, including C.

¶6 C. identified Montaño-Arochi as her neighbor's occasional guest and the man she had overheard threaten D. the day before the shooting. She explained that she

initially had misidentified a different suspect as Montaño-Arochi because she had "never looked at [Montaño-Arochi] in his face . . . [and had] never made eye contact with [him]." She "only knew his profile" and "only knew what he wore." Moreover, at the time she misidentified the other suspect, she had been crying, was not wearing her glasses, and had identified the suspect from forty feet away. C. had identified Montaño-Arochi both the day after the shooting and again at trial as her neighbor's occasional guest.

¶7 The trial court found Montaño-Arochi guilty of both counts of aggravated assault but not guilty of attempted first-degree murder. It sentenced him to concurrent, presumptive, 7.5-year terms of imprisonment. This appeal followed.

Discussion

¶8 Relying on *Estelle v. Williams*, 425 U.S. 501 (1976), Montaño-Arochi argues the trial court erred by compelling him to be clothed in jail attire during his bench trial in violation of the Fourteenth Amendment's due process and equal protection clauses. *See also State v. Jeffers*, 135 Ariz. 404, 416, 661 P.2d 1105, 1117 (1983) ("A state cannot compel an accused to stand trial before a jury in identifiable prison clothes."), *citing Williams*, 425 U.S. at 512. Montaño-Arochi had raised these federal constitutional claims adequately in the trial court by objecting to "continuing trial . . . in his orange garb." *See Williams*, 425 U.S. at 512. We therefore review these constitutional claims de novo, *see Emmett McLoughlin Realty, Inc. v. Pima County*, 212

Ariz. 351, ¶ 16, 132 P.3d 290, 294 (2006), and apply a harmless-error analysis. *See Williams*, 425 U.S. at 506-08 (approving application of harmless-error doctrine to prison-clothes cases); *State v. Reid*, 114 Ariz. 16, 23, 559 P.2d 136, 143 (1976) (applying *Williams*'s harmless-error standard for jail attire to shackling of defendant during trial). Error is harmless "if we can say, beyond a reasonable doubt, that the error did not contribute to or affect the verdict." *State v. Bible*, 175 Ariz. 549, 588, 858 P.2d 1152, 1191 (1993). It is the state's burden to show that any error is harmless. *Id.*

¶9 *Williams* addressed the Fourteenth Amendment implications of requiring a defendant to wear prison clothing during a *jury* trial. 425 U.S. at 502-03. In determining that "the State cannot, consistently with the Fourteenth Amendment, compel an accused to stand trial before a jury while dressed in identifiable prison clothes," the Court reasoned that such attire may impair the presumption of innocence—a basic component of the adversary system and the right to a fair trial—embodied within the due process clause. *Id.* at 503-06, 512. This possible impairment, it explained, is a product of the effect that attire may have on the jury's judgment. *Id.* at 504-05. Addressing equal protection, the Court also noted "[the] troubling . . . fact that compelling the accused to stand trial in jail garb operates usually against only those who cannot post bail prior to trial." *Id.* at 505.

¶10 Although Montaño-Arochi does not argue the trial court was influenced by his jail attire, he relies on *People v. Zapata*, 34 Cal. Rptr. 171 (Cal. Ct. App. 1963), a

California appellate decision the Supreme Court cited in *Williams*, to support his contention that "the [*Williams*] rule applies equally for a bench trial as it does for a jury trial." *See Williams*, 425 U.S. at 504 (citing *Zapata* for proposition jail attire may influence jury and impair presumption of innocence, violating due process). In reviewing a trial court's decision to compel a criminal defendant to wear jail attire during his bench trial, the *Zapata* court stated that equality before the law is impaired when a defendant who cannot afford, or is otherwise unable to make, bail is required to wear jail clothing at trial. 34 Cal. Rptr. at 176. It further noted a psychological consideration: "Some defendants may be callous; others confused and embarrassed by prison garb to the point where they may be handicapped in presenting or assisting their defense."[1] *Id.* at 177. Despite finding the trial court had erred, however, the *Zapata* court ultimately declined to reverse because "the error did not cause a miscarriage of justice." *Id.*

¶11 Montaño-Arochi argues the due process principles *Williams* articulated apply equally to witnesses as to juries. He contends the witnesses at his trial were influenced improperly by his jail attire and he thereby was deprived of a fair trial. He also urges us to find *Zapata* persuasive and apply the equal protection principles noted in

[1]We need not address whether any such psychological impairment manifested itself here. Even were we persuaded to follow *Zapata*, it did not characterize this consideration as a per se bar against requiring a defendant to wear jail attire. *See Zapata*, 34 Cal. Rptr. at 177 (finding error did not require reversal). Moreover, Montaño-Arochi does not argue his defense was handicapped in any way because he felt confused or embarrassed by his jail attire.

Williams in the context of a bench trial. He emphasizes he was denied bail pursuant to article II, § 22(a) of the Arizona Constitution and thus "was ultimately forced to stand trial in jail clothing because he was suspected of being an illegal alien." *See* Ariz. Const. art. II, § 22(a)(4).

¶12 We need not address whether being required to wear jail attire violated Montaño-Arochi's constitutional rights, however, because we conclude that, even if the trial court erred by declining his request to wear civilian clothing, any such error was harmless. *See Williams*, 425 U.S. at 506-07; *Bible*, 175 Ariz. at 588, 858 P.2d at 1191; *Zapata*, 34 Cal. Rptr. at 177. On the first day of trial, D. testified that shortly after the shooting he had identified Montaño-Arochi in a photographic lineup as the man who had shot him. D. also identified Montaño-Arochi at trial as his assailant. But, as we noted above, Montaño-Arochi was wearing a suit on the first day of trial. Thus, D.'s testimony could not have been influenced by Montaño-Arochi's jail attire. On the second day of trial, when Montaño-Arochi was wearing jail attire, C. identified him as her neighbor's occasional guest. Although she initially had misidentified another person as the neighbor's guest on the day of the shooting, on the following day she positively identified Montaño-Arochi while seated in a police cruiser as the guest, a circumstance at least as suggestive as that presented at trial.[2] Thus, we see no possibility that Montaño-Arochi's

[2]Montaño-Arochi does not challenge this identification on appeal. He does argue, however, that the witnesses at trial were influenced improperly by his jail attire. He asserts "the numerous witnesses . . . can only have been . . . influenced, consciously or

jail clothing after the first day of trial influenced these witnesses' testimony in any meaningful fashion. Accordingly, we can say beyond a reasonable doubt that, even if it were error for the court to require Montaño-Arochi to wear jail attire during the last three days of his trial, such error did not contribute to or affect the court's ruling. *See Bible*, 175 Ariz. at 588, 858 P.2d at 1191.[3]

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not, by the impression created by the trial court that a guilty man was on trial." Seventeen witnesses testified during the three days Montaño-Arochi was clothed in jail attire. Other than C., however, Montaño-Arochi fails to direct us to specific instances in the record suggesting any of those witnesses were influenced negatively. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi) (argument on appeal must contain citations to "parts of the record relied on"). Accordingly, Montaño-Arochi has waived this argument as to the remaining witnesses. *See State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (insufficient argument on appeal constitutes waiver of claim).

[3]Because we find any error was harmless, we need not address Montaño-Arochi's passing argument that requiring him to wear jail attire violated the equal privileges and immunities clause of the Arizona Constitution. *See* Ariz. Const. art. II, § 13. Unlike his federal constitutional claims, Montaño-Arochi's state constitutional claim was not raised adequately below. *See State v. Calabrese*, 157 Ariz. 189, 191, 755 P.2d 1177, 1179 (App. 1988) (finding waiver of Arizona constitutional claim where appellant moved to suppress evidence solely on federal constitutional grounds). And, even if the argument had been raised adequately, Montaño-Arochi fails to argue here that the equal privileges and immunities clause of the Arizona Constitution provides broader rights than its federal counterpart. *See In re Leopoldo L.*, 209 Ariz. 249, n.1, 99 P.3d 578, 581 n.1 (App. 2004).

Disposition

¶13 For the foregoing reasons, we affirm Montaño-Arochi's convictions and sentences.

J. WILLIAM BRAMMER, JR, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

GARYE L. VÁSQUEZ, Judge