In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana

No. 06-10-00162-CR

VAUGHN RAY BELL, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 336th Judicial District Court
Fannin County, Texas
Trial Court No. CR-09-23218

Before Morriss, C.J., Carter and Moseley, JJ.
Opinion by Chief Justice Morriss

OPINION

At some point during Vaughn Ray Bell's Fannin County jury trial for possessing the drug Ecstasy[1]—and without the record reflecting any action or threat by Bell that warranted such action—some form of physical restraint was placed on his person for the remainder of his trial.[2]

On appeal, Bell asserts that the evidence is insufficient to link him to the contraband and that the trial court reversibly erred in shackling Bell during trial. We conclude (1) sufficient evidence links Bell to the Ecstasy, (2) shackling Bell during trial, without individualized evidence of danger from Bell, was error, and (3) the shackling error was reversible.

(1) Sufficient Evidence Links Bell to the Ecstasy

Bell argues the evidence is legally insufficient to link him to the contraband. The State responds that the evidence is sufficient to tend to connect Bell to the contraband.

In evaluating legal sufficiency, we review all the evidence in the light most favorable to the trial court's judgment to determine whether any rational jury could have found the essential elements of the offense beyond a reasonable doubt. *Brooks v. State*, 323 S.W.3d 893, 912 (Tex. Crim. App. 2010) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)); *Hartsfield v. State*, 305 S.W.3d 859, 863 (Tex. App.—Texarkana 2010, pet. ref'd). Our rigorous legal sufficiency review

[1]Specifically, Bell was charged with possessing one gram or more, but less than four grams, of a controlled substance in penalty group 2, to-wit, Ecstasy. The controlled substance known as Ecstasy is 3-4 methylenedioxymethamphetamine. The State provided notice of intent to enhance Bell's punishment, alleging two prior felony convictions. *See* TEX. HEALTH & SAFETY CODE ANN. § 481.116 (West 2010); TEX. PENAL CODE ANN. § 12.41(a)(3) (West 2011).

[2]The jury found Bell guilty, found both enhancements to be true, and assessed punishment at twenty years' imprisonment. The trial court sentenced Bell accordingly.

focuses on the quality of the evidence presented. *Brooks*, 323 S.W.3d at 917 (Cochran, J., concurring). We examine legal sufficiency under the direction of the *Brooks* opinion, while giving deference to the responsibility of the jury "to fairly resolve conflicts in testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Hooper v. State*, 214 S.W.3d 9, 13 (Tex. Crim. App. 2007) (citing *Jackson*, 443 U.S. at 318–19); *Clayton v. State*, 235 S.W.3d 772, 778 (Tex. Crim. App. 2007).

At trial, the State was required to prove that Bell exercised control, custody, management, or care over the Ecstasy and that he knew the matter possessed was contraband. *See Evans v. State*, 202 S.W.3d 158, 161 (Tex. Crim. App. 2006); *see also* TEX. PENAL CODE ANN. § 1.07(a)(39) (West 2011). Mere presence at the location where drugs are found is insufficient, by itself, to establish actual care, custody, or control of those drugs. *Evans*, 202 S.W.3d at 162. Presence or proximity to drugs, however, when combined with other direct or circumstantial evidence, may be sufficient to establish control, management, custody, or care if the proof amounts to more than a strong suspicion or probability. *Id*. "The 'affirmative links rule' is designed to protect the innocent bystander from conviction based solely upon his fortuitous proximity to someone else's drugs." *Poindexter v. State*, 153 S.W.3d 402, 406 (Tex. Crim. App. 2005).

> When the accused is not in exclusive possession of the place where the substance is found, it cannot be concluded that the accused had knowledge of and control over the contraband unless there are additional independent facts and circumstances which affirmatively link the accused to the contraband.

Deshong v. State, 625 S.W.2d 327, 329 (Tex. Crim. App. [Panel Op.] 1981).

One or more of the factors from the following nonexclusive list have been used to establish a person's possession of contraband:

> (1) the contraband was in plain view or recovered from an enclosed place; (2) the accused was the owner of the premises or the place where the contraband was found; (3) the accused was found with a large amount of cash; (4) the contraband was conveniently accessible to the accused; (5) the contraband was found in close proximity to the accused; (6) a strong residual odor of the contraband was present; (7) the accused possessed other contraband when arrested; (8) paraphernalia to use the contraband was in view, or found on the accused; (9) the physical condition of the accused indicated recent consumption of the contraband in question; (10) conduct by the accused indicated a consciousness of guilt; (11) the accused attempted to flee; (12) the accused made furtive gestures; (13) the accused had a special connection to the contraband; (14) the occupants of the premises gave conflicting statements about relevant matters; (15) the accused made incriminating statements connecting himself or herself to the contraband; (16) the quantity of the contraband; and (17) the accused was observed in a suspicious area under suspicious circumstances.

Muckleroy v. State, 206 S.W.3d 746, 748 n.4 (Tex. App.—Texarkana 2006, pet. ref'd); *see Evans*, 202 S.W.3d at 162 n.12. The number of links present is not as important as the degree to which they tend to link the defendant to the controlled substance. *Taylor v. State*, 106 S.W.3d 827, 831 (Tex. App.—Dallas 2003, no pet.).

While on patrol, Kevin Sanmann, a trooper with the Texas Department of Public Safety, noticed the vehicle driving immediately behind him lacked a front license plate and conducted a

traffic stop. After initiating contact with the driver, Sanmann detected a moderate odor of marihuana in the vehicle. The driver of the vehicle informed Sanmann that he did not have a driver's license. After questioning the driver outside the vehicle, Sanmann approached Bell, who was still sitting in the passenger seat. Sanmann observed marihuana residue "on both sides of [Bell's] legs and a little bit right in the center, between his legs." Sanmann then requested Bell to step out of the vehicle and conducted a warrant check using Bell's name and date of birth. The warrant check discovered the existence of a warrant for Bell's arrest. Sanmann conducted a search of the vehicle and discovered marihuana residue on the passenger seat and passenger floorboard, as well as a pill bottle located between the console and the passenger seat. The pill bottles contained pills with a stamp resembling a fish. Sanmann testified pills containing stamps that resemble "objects or images" are "usually Ecstasy." Neither Bell nor the driver "accept[ed] responsibility" for the pill bottle. Due to the position of the pill bottle, Sanmann arrested Bell.

In addition to Bell's presence at the scene, there are multiple factors linking Bell to the Esctasy. Bell was closer to the contraband and the contraband was more accessible to Bell. The pill bottle was "shoved down" between the console and the passenger seat. The pill bottle was in plain view. Sanmann testified that the top quarter of the pill bottle was exposed and that it could be seen outside the vehicle. Bell possessed other contraband, marihuana, in the same vicinity as

the Esctasy. Besides the small amount of marihuana residue observed on the passenger seat,[3] Sanmann testified "[j]ust very little" residue was on Bell's clothes. Sanmann testified he did not discover any marihuana residue on the driver's side of the vehicle. The jury could have reasonably concluded Bell made furtive gestures. While questioning the driver, Sanmann observed Bell, who was a passenger in the vehicle, "inside the car, moving around." Although the record does not conclusively establish these gestures were furtive, a rational juror could have concluded they were.[4] Bell owned or had a greater right of possession of the vehicle where the contraband was located. Sanmann testified that the car belonged to Bell's wife, Tanya.[5]

Viewing these factors in the light most favorable to the verdict and since it was within the purview of the jury to weigh credibility and conflicts in the evidence, we conclude that a rational juror could find the essential elements of the offense beyond a reasonable doubt. The evidence supporting Bell's conviction was sufficient to show Bell had control, management, custody, or care over the Esctasy.

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[3]We note the record contains a dismissal which states that the quantity was not a useable quantity. At oral argument, Bell argued we should not consider the presence of marihuana because it was not a useable quantity. We disagree; the presence of contraband is an affirmative link even if not a useable quantity.

[4]On cross-examination, Sanmann testified that he had asked Bell to look for the proof of insurance and conceded that Bell could have been following his instructions and that the movements did not factor into his "decisionmaking of whether or not [Bell] possessed something." On direct examination, Sanmann testified, based on his experience as a police officer, when "someone's moving around a lot in the vehicle," that "they're hiding stuff."

[5]On cross-examination, Sanmann testified that, on one occasion, Bell said "wife" and on another, Bell said "girlfriend." The record at guilt/innocence does not clearly establish the specific relationship of the parties. Regardless of whether Tanya was Bell's wife or girlfriend, the jury could reasonably deduce that Bell had a greater right of possession of the vehicle than the driver. We note that, during the punishment phase, Tanya testified she had been married to Bell for four years.

(2) Shackling Bell During Trial, Without Individualized Evidence of Danger from Bell, Was Error

Bell also argues that his rights to due process and presumption of innocence were violated by his being restrained during trial. Bell asserts that the trial court has a routine practice of shackling all criminal defendants who are in custody.

After the trial on the merits began, but before the conclusion of the guilt/innocence phase, the trial court ordered Bell shackled. The trial court's statements on the record strongly suggest its routine practice is to restrain all criminal defendants who have not been released on bond. The trial court stated, "Everybody who is in custody has the same necessity of restraint."[6] With

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[6]During the guilt/innocence phase of trial, the following exchange occurred outside the presence of the jury:

> [Defense Counsel]: . . . . I understand that we took a break because my client didn't have any leg irons on him and, currently, for the record, he has a chain that is linked between his two ankles, if I've described that correctly. We would object to that being used as a device in front of the jury. I think he has the right to a presumption of innocence and this chain, even though we will do the best to keep the jury from seeing it, if they do see it, that's going to destroy this presumption of innocence and deny him his right to a fair trial.
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> We already have a sheriff's deputy standing within arm's reach of him, which should be sufficient amount of security. We have a bailiff that's been present. I believe we have two bailiffs now and -- in addition to -- two or three highway patrolmen right outside. I don't think the chain is necessary. I think it's going to deprive him of a fair trial and his rights under the United States and Texas Constitution. So, we're going to object to that.
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> THE COURT: Any response from the State?
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> [The State]: Yes, Your Honor. I would just ask the Court to have the bailiff provide a report as -- sitting in the various seats of the jurors' seats -- as to whether he can see the defendant's seat as the -- as he's currently configured and if he can see that the defendant is chained, making an obvious attempt to see that.
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> THE BAILIFF: No, ma'am, you can't. You can see the pants leg and the pants leg covers the cuffs up, so you cannot see the chains.

admirable candor,[7] the State conceded at oral argument that the trial court routinely restrains all criminal defendants who have not been released on bond.[8]

In its brief, the State concedes the trial court erred "by requiring Appellant to be shackled without finding a particularized reason for shackling that was specific to Appellant." There is a good reason for this concession—the law is well established that routine shackling of criminal defendants is prohibited. "The law has long forbidden routine use of visible shackles during the guilt phase." *Deck v. Missouri*, 544 U.S. 622, 626 (2005).

> [Defense Counsel]: But that presupposes he's not allowed to move and, if he moves any, they're going to hear a chain rattle and they're going to look over here and go, who's rattling a chain, who's chained up, and it can only be my client that's chained up. I've been getting up, walking around; the bailiff has; everybody's been getting up except Ray. They hear that chain going, they're going to think he must have been doing something that got him chained up. There's really no need to have him chained up, Judge.
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> I don't think any of his offenses are escapes or failure to appears. I'm not swearing to that, but, as I remember off of his criminal history, he doesn't have anything like that, Judge. I don't think there's any evidence of any intent to flee.
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> THE COURT: [Defense Counsel], your objection is noted. It will otherwise be overruled. The bailiff's obligation is to the jury, not to an inmate. There is a person here to handle that. *Everybody who is in custody has the same necessity of restraint.* The difficulty is, the sheriff's office has one discreet and, therefore, we only have the one that's been available. We have allowed for y'all to position briefcases, and somebody went down and got an extra one so you have two. The State also has one under there. So, it's the Court's opinion that there is no impact on the presumption, and the defendant will just be mindful about movement of his legs, and we will be sure to give breaks for everybody to use the restroom and he can move his legs at that time.

(Emphasis added.)

[7]We appreciate the State's professionalism and integrity in making this concession and commend the State for clarifying the record in this regard.

[8]The State represented to this Court that a more discreet restraint is normally used than the restraint in this case. However, as this Court stated in *Austin v. State*, No. 06-07-00161-CR, 2008 Tex. App. LEXIS 8630 (Tex. App.—Texarkana Nov. 18, 2008, no pet.) (mem. op., not designated for publication), whether a restraint such as a "leg brace" was visible is not the correct question. While a restraint which is not visible may result in less harm, a trial court errs if it restrains a criminal defendant without specific reasons for the restraints in the record.

Almost ninety years ago, the Texas Court of Criminal Appeals stated:

> [I]f the record discloses no good reason for having the prisoner manacled during the trial the same will be cause for reversal; on the other hand, if, in the sound discretion of the court, it appears necessary to retain his shackles to prevent the escape or self-destruction of the prisoner, or to prevent him from injuring bystanders or officers of the court, or if necessary to maintain a quiet and peaceable trial, the court may try the prisoner without having the shackles removed; his action being subject to the closest scrutiny and review by the appellate court.
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> . . . .
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> We desire to make it perfectly plain that we regard a trial with the prisoner in irons as obnoxious to the spirit of our laws and all ideas of justice, and it is only when the record brings the case clearly within one of the rare exceptions that we would consent for a conviction to stand. Before a judge should permit a case to proceed under such circumstances, he should be very sure of his ground.

Gray v. State, 268 S.W. 941, 949–50 (Tex. Crim. 1924) (op. on reh'g). This general rule has been reaffirmed repeatedly.

The Fourteenth Amendment to the United States Constitution and Article I, Section 19 of the Texas Constitution guarantee criminal defendants the right to a fair trial. U.S. CONST. amend. XIV; TEX. CONST. art. I, § 19; *Wynn v. State*, 219 S.W.3d 54, 59 (Tex. App.—Houston [1st Dist.] 2006, no pet.). The use of restraints, such as shackles, cannot be justified based on a general appeal to the need for courtroom security or simple reference to the severity of the charged offense. *Long v. State*, 823 S.W.2d 259, 283 (Tex. Crim. App. 1991). The appearance of a defendant in

shackles before a jury during the guilt/innocence portion of trial, as well as the punishment phase,[9] can violate the defendant's Fifth and Fourteenth Amendment rights to due process. *Deck*, 544 U.S. at 629–34 (2005). "Visible shackling undermines the presumption of innocence and the related fairness of the factfinding process." *Id*. at 630. In addition to undermining the presumption of innocence, visible[10] shackling "can interfere with the accused's 'ability to communicate' with his lawyer," ability to "participate in his own defense[,]" and "'affront[s]' the 'dignity and decorum of judicial proceedings that the judge is seeking to uphold.'" *Id*. at 630–31. For these reasons, shackling is called for only in rare circumstances, and the record must detail the grounds for such action. *Cooks v. State*, 844 S.W.2d 697, 722 (Tex. Crim. App. 1992); *Gray*, 268 S.W. at 950.

Before restraining a defendant at trial, a trial court must set forth with specificity the reasons supporting its decision to restrain the defendant. *Cooks*, 844 S.W.2d 722; *Long*, 823 S.W.2d at 282 ("the record must clearly and affirmatively reflect the trial judge's reasons

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[9]In *Deck*, the United States Supreme Court announced that a trial court errs in shackling a defendant during the punishment phase of a trial when there is no evidence that the defendant was violent, likely to flee, or had otherwise disrupted the trial. *Deck*, 544 U.S. at 630–31.

[10]*Deck* concerned restraints that were only visible. *See id.* at 628. The law, though, is well-established that any form of restraints requires the record to reflect reasons specific to the criminal defendant. *See Austin*, 2008 Tex. App. LEXIS 8630. This case presents an additional issue not discussed by the United States Supreme Court in *Deck*. The record contains some evidence the restraints may have been audible. In this case, Bell's trial counsel stated the chains would be audible. The trial court did not take exception to this statement and instructed the defendant to be "mindful about movement of his legs . . . ." On appeal, Bell directs our attention to numerous references to the record where the jury entered and exited the courtroom. Bell argues he was required to rise for the jury, which resulted in the "rattling of the chains." The record does not reflect the defendant rose and does not reflect the chains rattled, but the record also does not reflect that the defendant did not rise and does not reflect that the chains did not rattle. In *Wiseman v. State*, the First District Court of Appeals considered, among other factors, the defense counsel's statement on the record that the chains were audible. *Wiseman v. State*, 223 S.W.3d 45 (Tex. App.—Houston [1st Dist.] 2006, no pet.).

therefor"); *Marquez v. State*, 725 S.W.2d 217, 227 (Tex. Crim. App. 1987). Only in rare circumstances is shackling called for, and in such event, the record must detail the grounds for such action. *Long*, 823 S.W.2d at 282; *Jacobs v. State*, 787 S.W.2d 397, 407 (Tex. Crim. App. 1990); *Marquez*, 725 S.W.2d at 227. Even if a trial court does not err in ordering shackles, all efforts must be made to ensure the jury does not view the defendant in shackles. *Long*, 823 S.W.2d at 282; *Ziolkowski v. State*, 223 S.W.3d 640, 643 (Tex. App.—Texarkana 2007, pet. ref'd).

On appeal, the role of an appellate court is to determine whether the trial court erred in ordering the restraints. *Long*, 823 S.W.2d at 282. Even in the face of error, reversal may not be called for if such was harmless. *Cooks*, 844 S.W.2d at 723; *Long*, 823 S.W.2d at 283. In this case, the record fails to reveal any reasons, other than a general concern for courtroom safety and general concern that a criminal defendant might flee, to justify the use of restraints. The trial court did not base its decision on any evidence that Bell had previously committed violent acts, that Bell was likely to flee, or that Bell had otherwise disrupted the trial.[11]

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[11]The State directs our attention to its notice of intent to introduce evidence of extraneous offenses and bad acts. We note that, at punishment, the State introduced evidence of Bell's extensive criminal history. Although the vast majority of the offenses were for possession of controlled substances, the State did introduce evidence of misdemeanor convictions for evading arrest, resisting arrest, and terroristic threat. At the time Bell was ordered restrained, the record did not contain evidence of these prior offenses, and the trial court did not reference these prior offenses when deciding to restrain Bell.

Certainly courtrooms are places where violence can occur.[12] Our role is not to second guess the trial court's discretion in controlling the courtroom and ensuring the safety of the litigants, participants, and witnesses in attendance. If a criminal defendant has acted in a manner providing justification for restraints, it is well within the trial court's sound discretion to order such defendant restrained during trial. A trial court, though, abuses its discretion when the court restrains a criminal defendant without reasons, on the record, specific to that defendant. Because the record in this case fails to contain any justification for the shackling beyond a general concern for courtroom safety, the shackling of Bell was error.

(3) The Shackling Error Was Reversible

Bell argues, citing *Deck*, 544 U.S. at 629–34, that the State has the burden to establish beyond a reasonable doubt that the error was harmless. Because there is no evidence the error did not result in harm, Bell argues the error was reversible. In *Deck*, the United States Supreme Court concluded that the lack of evidence showing no harm mandated a reversal. *Id.* at 634. As noted above, *Deck* concerned visible restraints. The United States Supreme Court did not address whether the same standards for harmless error would apply if the restraints are not seen by the jury. We conclude *Deck* is distinguishable from this case due to the fact that there is no evidence, in this case, that the restraints were observed by the jury. To the extent the tests may differ, we will

[12]On July 1, 1992, a gunman opened fire in the courtroom of the Fort Worth Court of Appeals killing two attorneys and wounding at least two others, including a former law clerk to this Court. *See Davis v. State*, 890 S.W.2d 489, 491 n.1 (Tex. App.—Eastland 1994, no pet.).

evaluate the effect of the error in this case under the *Chapman* test,[13] as codified by Rule 44.2(a) of the Texas Rules of Appellate Procedure as interpreted by Texas caselaw.

The Texas Court of Criminal Appeals has developed several factors to consider when conducting a harm analysis under Rule 44.2(a). *Harris v. State*, 790 S.W.2d 568 (Tex. Crim. App. 1989);[14] *see also Wilson v. State*, 938 S.W.2d 57 (Tex. Crim. App. 1996); *Orona v. State*, 791 S.W.2d 125 (Tex. Crim. App. 1990). These factors include (1) the nature of the error, (2) the extent the error was emphasized by the State, (3) the weight a juror would probably place on the error, (4) the error's probable collateral consequences, and (5) whether declaring it harmless would encourage its repetition with impunity. *Harris*, 790 S.W.2d at 587. Since *Harris*, the Texas Court of Criminal Appeals has clarified that overwhelming evidence of guilt, while not determinative, is a factor that can also be considered. *See Motilla v. State*, 78 S.W.3d 352, 356–57 (Tex. Crim. App. 2002) (explaining discussion in *Harris* concerning weight a juror would probably place on the error factor). No single factor is dispositive. *Ex parte Werne*, 118 S.W.3d 833, 837 (Tex. App.—Texarkana 2003, no pet.).

[13]"The Chapman test is codified in Texas Rule of Appellate Procedure 44.2(a), which provides that constitutional error requires reversal of the judgment 'unless the court determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment.'" *Clay v. State*, 240 S.W.3d 895, 904 (Tex. Crim. App. 2007) (quoting TEX. R. APP. P. 44.2(a)).

[14]*Harris* concerned former Rule 81(b)(2). *Harris*, 790 S.W.2d at 587. We note the Texas Court of Criminal Appeals has held the factors announced in *Harris* are not automatically applicable in a harm analysis under Rule 44.2(b). *See Mason v. State*, 322 S.W.3d 251, 257 n.10 (Tex. Crim. App. 2010) (noting they have "invoked select factors from *Harris* in our 44.2(b) harm analyses"). The court, though, noted that "the *Harris* factors might still be applicable in Rule 44.2(a) analyses." *Id.*

The first factor is the nature of the error. The error in this case violates well established constitutional rights. Conducting a trial where the defendant is in shackles is "obnoxious to the spirit of our laws and all ideas of justice." *Ziolkowski*, 223 S.W.3d at 643 (quoting *Gray v. State*, 268 S.W. 941, 950 (Tex. 1924)). *Harris* mandates that we concern ourselves with "the integrity of the process" leading to a conviction. *See Harris*, 790 S.W.2d at 587. The violation of a well established constitutional right adversely affects the integrity of the process leading to a conviction. This factor strongly favors a finding of reversible error.

The second factor is the extent the error was emphasized by the State. We have not been directed to anywhere in the record that the State emphasized the error in any manner. Bell argues the State moved one of the briefcases shielding the shackles from the jury's view when it used it as a demonstrative aid. The record does reflect that the State used a briefcase as a demonstrative aid, but the record does not reflect that this briefcase was one of the briefcases blocking the shackles from the jury's view.[15] We have not been directed to anywhere in the record the State made a reference to or otherwise drew attention to the defendant's restraints. Our own review of the record has not revealed any such reference. Clearly, the State did not emphasize the error or seek in any way to benefit from the error. This factor weighs strongly in favor of a finding that the error is not reversible.

[15]The State represented at oral argument that the briefcase used as a demonstrative aid was not the same briefcase used to block the shackles from the jury's view. This representation, though, is not part of the record. Regardless, as noted above, the record does not demonstrate the briefcase used as a demonstrative aid was one of the briefcases shielding the shackles from the jury's view.

The third factor is the weight a juror would probably place on the error, assuming it was aware of the error. In this connection, we should also consider whether the evidence was overwhelming as well as the character of the error and how it might be considered in connection with other evidence in the case. *Motilla*, 78 S.W.3d at 359.

The timing of the shackling increases our concern about jurors possibly forming such an impression. Bell was not shackled at the beginning of the guilt/innocence phase. Rather, the shackling occurred after approximately half of the guilt/innocence phase had been completed. There is a substantial likelihood a juror, if he or she noticed a change in the defendant's mobility or noticed the shackles themselves, would suspect the defendant committed some violent act or posed some new threat of which the juror was unaware. Although the evidence of guilt was sufficient, the evidence linking Bell to the contraband was not overwhelming. Given the less than overwhelming links between Bell and the contraband, the impression that might have been created by shackling Bell in the middle of the guilt/innocence phase has a reasonable probability of affecting the jury's verdict, if it were perceived. Because the record is silent on whether the jury perceived the shackles, we count this factor neither for, nor against, a finding of reversible error.

The fourth factor is the error's probable collateral consequences. This factor requires us to "contemplate such things as the disparaging of a sole defense," as well as "a probable affect on the harshness of the punishment." *Higginbotham v. State*, 807 S.W.2d 732, 737 (Tex. Crim. App. 1991). As noted above, the affirmative links, although sufficient, were not overwhelming.

Bell's main defense was that the contraband did not belong to him. There is a reasonable probability the restraints, if perceived, may have alleviated some lingering doubts the jury had concerning whether Bell possessed the contraband. More important, there is a reasonable likelihood that shackling, if perceived, could have resulted in a harsher punishment.[16] While Bell had an extensive criminal history, here he received the maximum sentence available. Bell's extensive history would prevent this factor from weighing strongly in favor of a finding of reversible error. Again, though, because the record is silent on whether the jury perceived the shackles, we weigh this factor neither for, nor against, a finding of reversible error.

The last factor requires us to consider whether the likelihood of declaring the error harmless would encourage its repetition with impunity. As noted above, this case presents a rare circumstance in Texas jurisprudence—routine shackling of in-custody criminal defendants. The fact that the practice in this case was routine makes this case distinguishable from the vast majority of cases on this issue. We are not aware of any cases which have found error to be harmless when shackling was routine. In fact, Texas appellate courts have consistently found routine shackling to be reversible error. *See, e.g.*, *Davis v. State*, 195 S.W.3d 311, 315 (Tex. App.—Houston [14th Dist.] 2006, no pet.) (reversing routine shackling); *Wiseman*, 223 S.W.3d at 50 (reversing routine shackling). This Court's opinion in *Hawkins* is distinguishable because, in *Hawkins*, this Court

[16]Trying a criminal defendant in restraints perceived by the jury "suggests to the jury that the justice system itself sees a 'need to separate a defendant from the community at large.'" *Deck*, 544 U.S. at 630 (quoting *Holbrook v. Flynn*, 475 U.S. 560 (1986)).

merely suspected the practice had become routine.[17] *See Hawkins*, 2009 Tex. App. LEXIS 16, at *7–8. Because we only suspected the practice may have become routine in *Hawkins*, this factor was of less importance. The fact that the practice in this case was routine[18] makes a significant difference in our analysis.

A routine practice indicates a substantial likelihood the error will continue to be repeated. Under the circumstances presented here, there is a substantial risk of repetition of the error. When declaring an error harmless would encourage it to be repeated with impunity, Texas courts have found the error to be reversible. *See, e.g.*, *Davis*, 195 S.W.3d at 319; *Daniels v. State*, 25 S.W.3d 893, 899 (Tex. App.—Houston [14th Dist.] 2000, no pet.). The last factor strongly favors a finding that the error is reversible.

After careful and deliberate consideration of the above factors, we are compelled to conclude the error in this case is reversible. The only factor weighing against such a conclusion is the extent the error was emphasized by the State. This factor, standing alone, fails to counterbalance the factors that favor a finding of reversible error. Due to the rare circumstances

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[17]At oral argument, the State assured this Court that this practice would cease "if [he] could bear upon the judge." The State argued, similarly in *Hawkins v. State*, No. 06-08-00087-CR, 2009 Tex. App. LEXIS 16, at *7–8 (Tex. App.—Texarkana Jan. 7, 2009, pet. ref'd) (mem. op., not designated for publication), we should find the error to be harmless. In *Hawkins*, this Court expressed concern that the practice may have become routine, but ultimately found the error to be harmless because "[i]t is now represented to us that the procedures in that court have been formally changed in order to comply with the constitutional requirements on this issue." *Id*. *Hawkins* is distinguishable both because the assurances provided by the State in *Hawkins* were more comprehensive than in this case and because the factor was of less importance in *Hawkins* where there was only a suspicion the practice had become routine.

[18]"'[T]he routine use of shackles in the presence of juries' compromises '[t]he courtroom's formal dignity, which includes the respectful treatment of defendants, reflects the importance of the matter at issue, guilt or innocence, and the gravity with which Americans consider any deprivation of an individual's liberty through criminal punishment.'" *Wiseman*, 223 S.W.3d at 50 (quoting *Deck*, 544 U.S. at 630).

of this case—a routine procedure to restrain all criminal defendants not released on bond—we are obligated to find the error reversible.

For the reasons stated, we reverse the judgment of the trial court and remand to the trial court for further proceedings consistent with this opinion.

Josh R. Morriss, III
Chief Justice

Date Submitted: July 27, 2011
Date Decided: September 14, 2011

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