# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>February 7, 2013 |
| v | No. 306461<br>Wayne Circuit Court |
| SANFORD DAVIS,<br><br>Defendant-Appellant. | LC No. 11-005385-FC |

Before: TALBOT, P.J., and WILDER and STEPHENS, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of assault with intent to do great bodily harm less than murder, MCL 750.84, and felonious assault, MCL 750.82(1). Defendant was sentenced as an habitual offender, fourth offense, MCL 769.12, to 76 months to 25 years' imprisonment for assault with intent to do great bodily harm less than murder, and to 60 months to 15 years' imprisonment for felonious assault. For the reasons set forth below, we affirm.

This case arises out of an incident that occurred in the Detroit residence of Samuel Sloan and Tiffany Davis, defendant's sister. On May 19, 2011, Leslie Davis, defendant's mother, was at the residence with Berry Butler, Sloan's 33-year-old cousin who suffered from paranoid schizophrenia. Tiffany was Butler's care-taker and would ensure he took his medications, which caused him to sleep a lot. Leslie testified that on the day of the incident, Butler touched her "private part." Leslie instructed Butler not to do that. Butler hit Leslie in the face. Sloan then physically walked Butler out the door and told him to go for a walk. Tiffany and Butler walked to the pharmacy to obtain Butler's mediation, and when they returned, Butler took the medication and became drowsy. Sloan testified that Butler fell asleep on the couch then went to an upstairs bedroom and fell asleep on a bed. About ten minutes later, Sloan went to check on Butler and saw him sleeping on the bed.

Shortly after Sloan saw Butler sleeping on the bed, defendant knocked on the front door of the residence and Sloan let defendant inside. Sloan did not notice defendant holding anything. Earlier that day, defendant had learned that Butler hit Leslie in the face. Sloan testified that defendant went upstairs for five or six minutes where Butler was sleeping when he heard "something got threw [sic], and then seconds after that [defendant] fell down the stairs." Specifically, Sloan testified that he saw defendant fall down the stairs and then run outside and away from the house without saying anything.

About five to ten minutes later, one of Sloan's children arrived home from the park and went upstairs to where Butler was sleeping. The child immediately came downstairs and informed Sloan that Butler was "bleeding." Sloan went upstairs and found Butler in the same position lying on the bed; however, the back of Butler's head was "gashed all the way across" and was bleeding. Sloan saw the pole to a car-jack that he normally kept in his garage lying on the floor near the bed. Sloan thought that Butler was sleeping because he was still snoring, however, when emergency personnel arrived, Butler was unconscious. Following the injury, Butler was placed in a nursing home and could not walk or talk and required a feeding tube.

Immediately after discovering Butler in an injured state, Sloan called defendant on a cellular telephone. Sloan testified as follows regarding the telephone conversation he had with defendant:

> I put the phone on speaker phone like and said, "I know you going to hit my cousin in his sleep." This cat going to say, "Yeah, I split it to the pink."
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> * * *
>
> I asked him why would he hit my cousin in the head . . . I asked him why did he hit my cousin in his sleep, why would you hit my cousin while he sleep. He said, "Yes I did. I split it to the pink meat."
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> * * *
>
> He say, um, "You think I'm going to let someone touch my mom?" . . . And I was like, "But in his sleep?" And he said, "You going to call the police?"

Sloan explained that to him, "split it to the pink" meant that defendant "bust my cousin head."

A responding police officer testified that he found Butler unconscious lying on a bed. Police found a four-foot metal pole on the floor near the bed. The pole had blood on it and there was blood spatter on the floor and a large amount of blood on the bed near the pillow. The responding officer and an evidence technician testified that they did not observe any signs that a struggle occurred in the room.

On August 17, 2011, defendant's jury trial commenced. Before jury selection, defense counsel requested that the trial court allow defendant, who was wearing a jail uniform, to change into civilian clothes that defense counsel had brought with him to court. Defense counsel explained that defendant's girlfriend attempted to bring civilian clothing to defendant at the Wayne County Jail the day before trial per instructions from the jail. However, when the girlfriend arrived with the clothing, the jail refused to accept the clothing because it was too close to defendant's trial date. The trial court denied defense counsel's request. The court explained that defendant's preliminary examination was held on June 1, 2011, giving defendant's family over two months to arrange for defendant to have civilian clothing at the jail where he was being held. The court explained that defendant could not change clothing in the courthouse because it was against court policy and because of "security reasons." The court explained that the security policy was necessary because deputies had previously been "stuck by needles hidden in clothing." In addition, the court stated that defendant could have worn the clothing he was

arrested in that was already at the jail. Defense counsel did not contest that defendant had access to the clothing he wore when he turned himself in to police. The court stated that it would have defendant turn his jail uniform inside-out to conceal the "Wayne County Jail" markings so that "there are absolutely no markings indicating that he is in custody."

At trial, defendant testified that Butler charged at him after he confronted Butler about touching Leslie. Specifically, defendant testified that the altercation occurred in the upstairs bedroom. According to defendant, Butler hit him in the face, and defendant pushed Butler away from him. Defendant testified that when Butler lunged at him a second time, defendant hit Butler in the head with a metal pole that was lying on the floor. Defendant explained that Butler stopped attacking him after defendant hit him one time in the head. Defendant testified that Butler was conscious and looking for cigarettes when he left the room. Defendant denied telling Sloan that he "split it to the pink."

Defendant was convicted and sentenced as set forth above. On appeal, defendant contends that the trial court denied him his state and federal constitutional right to due process when it denied his request to change into civilian clothing.

Whether a defendant was denied his right to due process involves a constitutional issue that we review de novo. *People v Sadows*, 283 Mich App 65, 67; 768 NW2d 93 (2009). A preserved, nonstructural constitutional error is reviewed to determine whether the error was "harmless beyond a reasonable doubt." *People v Anderson (After Remand)*, 446 Mich 392, 405-406; 521 NW2d 538 (1994) (citations and quotation omitted). Such errors are harmless, "if [it is] clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *People v Hyde*, 285 Mich App 428, 447; 775 NW2d 833 (2009) (quotation and citations omitted). There must be no "reasonable possibility that the [error] complained of might have contributed to the conviction." *Anderson*, 446 Mich at 406 (quotation omitted).

Incorporated within a criminal defendant's right to a fair trial is the right to appear before a jury without any indicia of incarceration including physical restraints or jail clothing. *People v Banks*, 249 Mich App 247, 256; 642 NW2d 351 (2002); *People v Lee*, 133 Mich App 299, 301; 349 NW2d 164 (1984), citing *Estelle v Williams*, 425 US 501; 96 S Ct 1691; 48 L Ed 2d 126 (1976). Accordingly, a trial court must grant a criminal defendant's timely request to wear civilian clothing during trial. *People v Harris*, 201 Mich App 147, 151; 505 NW2d 889 (1993). In instances where a trial court denies a defendant's request to wear civilian clothing, "[o]nly if a defendant's clothing can be said to impair the presumption of innocence will there be a denial of due process." *People v Lewis*, 160 Mich App 20, 31; 408 NW2d 94 (1987).

In this case, the trial court did not deny defendant his due process right to a fair trial. The trial court noted that defendant could have worn the civilian clothing he had on at the time of his arrest. The clothing remained in the jail where defendant was lodged. Defense counsel did not dispute that defendant had access to this clothing and there is nothing in the record to suggest that defendant did not have access to the clothing. Thus, the trial court had reason to deny

defendant's request to change on the first day of trial given the court's concern for security and safety of the sheriff deputies.[1]

More importantly, defendant cannot show that the attire he wore at trial deprived him of the presumption of innocence. *Lewis*, 160 Mich App at 31. Here, the trial court observed on the record that defendant was wearing "greens" issued by the Wayne County Jail. The court proposed that "[w]e'll turn his greens inside out so that . . . there are absolutely no markings indicating that he is in custody." In doing so, the trial court took measures to assure that defendant was not prejudiced by his jail uniform. See *Harris*, 201 Mich App at 151-152 (holding that jail-issued blue pants and a blue shirt did not deny the defendant his due process rights after the trial court determined that the clothing looked like work clothes).[2] Furthermore, the trial court instructed the jury that defendant was presumed innocent and that it was not to infer guilt simply because defendant was accused of a crime. See *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008) ("jurors are presumed to follow their instructions").

Moreover, even if defendant were able to show constitutional error occurred in this case, any error was harmless beyond a reasonable doubt where a rational juror would have convicted defendant regardless of whether he was wearing jail clothing. *Anderson*, 446 Mich at 406. In this case, there was substantial evidence of defendant's guilt. Although defendant testified that he acted in self-defense and did not throw the first punch, a rational juror could have easily concluded that defendant lacked credibility. Indeed, there was substantial evidence to allow a rational juror to conclude that defendant purposefully sought-out Butler in order to inflict a physical beating on him in retaliation for Butler touching defendant's mother. In particular, evidence showed that Sloan checked on Butler a little over an hour before defendant entered the home and went upstairs. At that time, Butler was sleeping and uninjured. After defendant entered the home, he proceeded directly upstairs for five or six minutes. Sloan heard a noise and defendant then ran from the home. Minutes later, other occupants of the home found Butler lying in the same position on the bed with a bloody head wound and a metal pole with blood on it lying nearby. Sloan testified that defendant admitted that he "split" the victim's head "to the pink" and when Sloan asked him why he hit Butler in his sleep defendant asked Sloan, "[y]ou think I'm going to let someone touch my mom?" In addition, a jury could have rejected

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[1] We do not encourage trial courts to deny a criminal defendant's request to wear civilian clothing; a trial court should make reasonable efforts to accommodate such requests and where accommodation is not feasible or untimely, a court should create a detailed record explaining the reasons for the denial. A trial court's cursory dismissal of a defendant's request to wear civilian clothing simply invites error for appellate review and potentially jeopardizes a defendant's constitutional rights.

[2] The dissent acknowledges that "a defendant may be compelled to stand trial in prison clothing without a violation of his due process rights" where a trial court finds that the "prison clothing appears similar enough to civilian clothing that it would not affect the presumption of innocence." *Post* at 3. Here, the trial court found that there were no markings indicating that defendant was in custody. This finding is not significantly different from finding that defendant "does not appear to be in jail clothes."

defendant's testimony that defendant happened to find Sloan's car-jack pole lying on the bedroom floor during his alleged altercation with Butler where Sloan testified that he kept the pole in his garage. Rather, evidence would allow the jury to infer that defendant obtained the pole from the garage then entered the residence and hit Butler over the head with the pole.

In sum, we conclude that any error in this case was harmless where it is clear beyond a reasonable doubt that a rational jury would have convicted defendant regardless of his attire. *Hyde*, 285 Mich App at 447; *Anderson*, 446 Mich at 406.

Next, defendant contends that his convictions of assault with intent to commit great bodily harm and felonious assault violate the state and federal protections against double jeopardy. Defendant's argument is devoid of legal merit. See *People v Strawther*, 480 Mich 900; 739 NW2d 82 (2007) (convictions of both assault with intent to commit great bodily harm, MCL 750.84, and felonious assault, MCL 750.82, do not violate double jeopardy); *People v Beasley*, 239 Mich App 548, 556; 609 NW2d 581 (2000) (this Court is bound by our Supreme Court's precedent).

Affirmed.

/s/ Michael J. Talbot
/s/ Kurtis T. Wilder

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STEPHENS, J. (*dissenting*)

I respectfully dissent. Our courts have held for decades that a defendant's timely request to wear civilian clothing *must* be granted unless a defendant's request is untimely, or when the trial court makes a finding that the jail clothing in a particular case does not infringe on the presumption of innocence. This defendant's request was timely and, unlike the majority, my review of the transcript does not yield evidence of the necessary fact finding by the trial court. Therefore, unlike the majority, I conclude that the trial court erred. Moreover, unlike the majority, I do not believe that the prosecution has met its burden to show beyond a reasonable doubt that the error was harmless. I would therefore reverse defendant's conviction and remand for a new trial.

## I. FACTS

I adopt the majority's statement of facts in this case with the exception of the interpretation of the colloquy regarding the jail clothing. I believe that it is useful to acknowledge the exact words used, because the majority and I come to different conclusions regarding what the trial court actually found. Prior to any jurors entering the courtroom, the trial court asked whether there were any additional pretrial matters. Defendant's counsel responded as follows:

> *Defendant's Counsel:* Yes, there is, Your Honor. My—my client's family attempted to take some civilian clothing over to him earlier this week, and Ms. Ashley Coppin, who is his girlfriend, went on the day of the appointment they gave her, which actually wasn't until yesterday. And I know the time from the preliminary exam to the trial is kind of—kind of compressed here. We were just in 36th District Court on a preliminary exam in June, just slightly over two months ago. They told her they couldn't take the clothes because it needed to

be—notwithstanding the appointment they gave her, it was too close in time to his court date, and *so I brought a back-up set of clothing for him.*

*The Court*: But we set the trial date on June 13th. Actually his calendar conference was on June 13th. His preliminary exam was June 1st, so they've known for two-and-a-half months what the trial date—or more than two months what the trial date was going to be. And we cannot exchange clothes in the courthouse. It's a violation of court policy to do so as well as for security reasons. Obviously it's a violation for the deputies to allow a change of clothes for a prisoner who is in their custody in the courthouse without proper security. All right. So what we've done is we've had the defendant flip his greens inside out so there's no markings indicating Wayne County Jail and we're ready to proceed.

*Defendant's Counsel*: And simply—and I understand that, Judge, and I simply want to state that notwithstanding the court rule and court procedure and so forth, and given the, frankly, if I may say, the ease with which a clothing change can be done versus the prejudice my client is going to suffer in sitting in *what is unquestionably a jail uniform that's going to impede negatively and coercively on his presumption of innocence in front of this jury, then I think that's a Constitutional violation regardless of when the—when the trial date was set.*

*The Court*: Well, you can tell that to the deputies who have been stuck by needles that have been hidden in clothing and all of those things, so the—there's reasons for the security issues. The defendant has had more than two months to arrange for proper clothing. I believe he also has the clothing he was arrested in, which is already in the jail. If he wished to opt to wear that as well, he could have done so. We'll turn his greens inside out so that the—that there are absolutely no markings indicating that he is in custody and we'll proceed to trial. [Emphasis added.]

## II. ANALYSIS

### A. The Trial Court Erred

A defendant may be denied due process of law if he or she is compelled to stand trial wearing jail clothing, *People v Lee*, 133 Mich App 299, 300; 349 NW2d 164 (1984), if the clothing "can be said to impair the presumption of innocence." *People v Lewis*, 160 Mich App 20, 31; 408 NW2d 94 (1987). Our Supreme Court explained in *People v Shaw*, 381 Mich 467, 480; 164 NW2d 7 (1969), that "[n]othing could more surely destroy the presumption of innocence and . . . the impartiality of the jury, than to force the defendant to be tried in prison clothes." Seven years after *Shaw*, the U.S. Supreme Court cited *Shaw* favorably when it explained in *Estelle v Williams*, 425 US 501, 504-505; 96 S Ct 1691; 48 L Ed 2d 126 (1976) that jail clothing inherently impacts the presumption of innocence because it serves as a "constant reminder of the accused's condition . . . [and] may affect a juror's judgment," leading to a conviction based on a presumption that the defendant is guilty, rather than the evidence presented. Therefore, generally, our courts have accepted as a default rule that "[a] defendant's timely request to wear civilian clothing *must* be granted." *People v Harris*, 201 Mich App 147,

151; 505 NW2d 889 (1993) (emphasis added, citations omitted). However, where a request to wear civilian clothing is not timely, *Shaw*, 381 Mich at 475, or where the trial court finds that prison clothing appears similar enough to civilian clothing that it would not affect the presumption of innocence, *Harris*, 201 Mich App at 152, a defendant may be compelled to stand trial in prison clothing without a violation of his due process rights.

Here, defendant's request to wear civilian clothing was timely because it was made before any jurors entered the courtroom, and therefore before jurors had the opportunity to see defendant in his jail uniform. Cf. *Shaw*, 381 Mich at 475 (request to wear civilian clothing not timely because it was made after the jury was impaneled and had opportunity to see the defendant in his jail clothing). The majority does not dispute that defendant's request was timely, yet concludes that the trial court made a finding that defendant's jail uniform did not impair his presumption of innocence. I disagree with the majority's reading of the transcript. The trial court found that "there are . . . no markings indicating that [defendant] is in custody . . ." However, the trial court did not directly address the unusual style of the jail garment itself or whether the average juror would likely impute from the jail clothing, even without the visible markings, that defendant was not in ordinary civilian attire but was likely in custody with the all the implications flowing therefrom. What the trial court actually found is simply not the same as a finding that the jail uniform did not impair defendant's presumption of innocence. Such a finding is required by case law, and simply does not exist in this record.

To support its conclusion, the majority cites *Harris*, 201 Mich App at 152, where this court drew a nexus between a defendant's presumption of innocence and how closely his jail clothing resembled civilian clothing. I agree that *Harris* is instructive in this case, but believe it supports a result opposite the one reached by the majority. In *Harris*, this Court concluded that where the trial court specifically found that the ". . . defendant's blue pants and shirt did not look like prison clothing," but rather looked "like what teenagers, young people, are wearing now," the defendant's presumption of innocence was not impaired because a jury would simply assume that the defendant was wearing street clothing. *Id*. (quotations omitted). Here, unlike in *Harris*, the trial court made no finding whatsoever that the jail uniform resembled street clothing, and therefore made no finding under *Harris* that the jail uniform would not impair defendant's presumption of innocence. As the majority notes, the trial court found that defendant was wearing "greens." The standard Wayne County jail uniform is colloquially referred to as "greens" because it is dark green cotton; it loosely resembles hospital scrubs. Absent some finding by the trial court to the contrary, I would conclude that no reasonable person could possibly mistake the jail uniform for street clothing, even with the jail markings concealed. Here, not only was the trial court silent regarding whether the uniform resembled street clothing, but defendant's counsel noted on the record that even turned inside out, defendant was wearing what was "unquestionably a jail uniform." I would therefore conclude that the jail uniform in which defendant was forced to be tried clearly marked defendant as a prisoner, even with the Wayne County jail markings concealed, and therefore impaired the presumption of innocence to which defendant was entitled. See *Shaw*, 381 Mich at 480; *Estelle*, 425 US at 504-505.

Moreover, although the majority is correct that the trial court issued a jury instruction, I disagree that the instruction was sufficient to remedy the damage defendant's clothing caused to his presumption of innocence. Again, the majority and I read the transcript differently. The trial court's jury instruction had nothing to do with defendant's clothing. The trial court simply

issued the standard jury instruction regarding the presumption of innocence; CJI2d 1.9. The trial court did not address at all during jury instructions defendant's clothing, or the prejudice that clothing entailed.

The majority notes that the trial court found that defendant had the clothing in which he was arrested, and could have worn that clothing at trial. However, those clothes were not the subject of the inquiry before the trial court or this Court—rather, the issue was, and remains, whether defendant's jail uniform adversely affected defendant's presumption of innocence. Moreover, the majority simultaneously cautions that "[w]e do not encourage trial courts to deny a criminal defendant's request to wear civilian clothing; a trial court should make reasonable efforts to accommodate such requests and where accommodation is not feasible or untimely, a court should create a detailed record explaining the reasons for the denial." I agree with the majority's advice to trial courts. Here, defendant's trial counsel had in his immediate possession a change of clothes for defendant. Permitting defendant to change into the clothing that his attorney had brought for him would have been minimally time consuming and would not have resulted in an undue delay of the proceedings. Indeed, accommodation here would have been feasible.

Additionally, the majority concludes that the trial court's decision to deny defendant's request was reasonable "given the court's concern for security and safety of the sheriff deputies." I acknowledge that the Supreme Court has previously held that the presumption that a defendant is entitled to be tried in civilian clothing may be overcome "as the necessary safety and decorum of the court may otherwise require." *Shaw*, 381 Mich at 473. However, in the case law regarding the prejudicial effect of the shackling of criminal defendants, which raises analogous issues regarding prejudice and the presumption of innocence, Michigan courts have consistently concluded that "a defendant may be shackled *only on a finding supported by record evidence* that this is necessary to prevent escape, injury to persons in the courtroom or to maintain order." *People v Dunn*, 446 Mich 409, 425; 521 NW2d 255 (1994) (emphasis added). See also *People v White*, 439 Mich 942, 942; 480 NW2d 109 (1992), *People v Payne*, 285 Mich App 181, 186; 774 NW2d 714 (2009). The trial court here made no finding supported by record evidence that permitting defendant to change into the clothing his counsel brought to court would pose a safety risk to courthouse officers. Rather, the trial court's finding was speculative and conjectural, based on prior instances where "deputies . . . have been stuck by needles that have been hidden in clothing." The trial court made no finding that *defendant's clothing* supplied by defendant's counsel, an officer of the court, posed a safety risk.

In short, I believe that the majority misreads the transcript and comes to an incorrect conclusion regarding whether the trial court erred when it denied defendant's timely request to wear the civilian clothing his counsel brought to court for him. For the foregoing reasons, I would conclude that the trial court erred.

B. The Trial Court's Error Was Not Harmless

Although there was evidence of defendant's guilt, I disagree with the majority that there was "substantial evidence" of defendant's guilt. Indeed, the mere existence of some evidence to support a conviction is not sufficient to meet the prosecution's "heavy burden to show that the error was harmless beyond a reasonable doubt in light of the uncertain effect of the defendant's

testimony on the jury." *People v Solomon*, 220 Mich App 527, 538; 560 NW2d 651 (1996). Accordingly, because the prosecution has not met its burden in this case, I would reverse and remand for a new trial.

The pertinent evidence adduced at trial was as follows. Witnesses observed defendant enter the home and go upstairs to the bedroom. An hour earlier, Sloan had seen Butler sleeping in the bedroom, but no one saw whether Butler was sleeping when defendant struck him. In fact, there were two, and only two, witnesses to what occurred in the bedroom: defendant and Butler. Butler did not testify. Defendant did. Defendant testified that Butler attacked him, unprovoked, when defendant asked him, "Why you . . . putting your hands on my mom?" It is undisputed that Butler took medication for schizophrenia and had, earlier that same day, inappropriately touched defendant's mother without provocation or invitation. Defendant admitted that he punched Butler in the nose, then hit him with a pole, but testified that he did so only in response to Butler's unprovoked attack. According to defendant, after the altercation Butler sat down on the bed and asked defendant for a cigarette. Defendant testified that when he left the room, Butler was "sitting on the bed by the window looking for cigarette butts." Sloan heard a noise, and saw defendant leave the house. Later, the other witnesses found Butler on the bed, bleeding.

The prosecution presented some evidence that conformed to its theory of the case. However, none of the prosecution's witnesses observed what actually occurred between defendant and Butler. The key question for the jury was not whether defendant struck Butler, but whether he did so in self-defense. To that end, the jury obviously did not find defendant's testimony credible—it convicted him. However, defendant was compelled to testify in his jail uniform, about which the trial court failed to make a finding that it was not identifiable as such. Accordingly, I cannot say whether the jury would have found defendant credible had his request to wear civilian clothing been granted. See *Estelle*, 425 US at 504-505 (jail clothing inherently impacts the presumption of innocence because it serves as a "constant reminder of the accused's condition . . . [and] may affect a juror's judgment"); see also *Shaw*, 381 Mich at 480.

It is *possible* that a jury would have convicted defendant had he been allowed to wear civilian clothes. However, showing a mere possibility of conviction is not the prosecution's burden under the harmless error standard. Rather, the prosecution must show *beyond a reasonable doubt* that the jury would have convicted defendant despite the trial court's error. *People v Belanger*, 454 Mich 571, 578-579; 563 NW2d 665 (1997) (emphasis added). To that end, the prosecution is required to show that "there is *no reasonable possibility* that the [error] complained of might have contributed to the conviction." *People v Anderson (After Remand)*, 446 Mich 392, 406; 521 NW2d 538 (1994) (emphasis added, citations and quotations omitted). Where, as here, the case turns largely on a credibility determination regarding the specific theory of self defense, I cannot conclude that the prosecution has met that burden. I would therefore conclude that the trial court's error was not harmless, and would remand for a new trial.

/s/ Cynthia Diane Stephens