**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**February 7, 2017**

**Diane M. Fremgen**
**Clerk of Court of Appeals**



**Appeal No. 2016AP1071-CR** **Cir. Ct. No. 2014CF2393**

**STATE OF WISCONSIN** **IN COURT OF APPEALS**
**DISTRICT I**

**STATE OF WISCONSIN,**

**PLAINTIFF-RESPONDENT,**

**V.**

**ANTHONY COLON,**

**DEFENDANT-APPELLANT.**

APPEAL from a judgment and an order of the circuit court for Milwaukee County: MEL FLANAGAN and MICHELLE ACKERMAN HAVAS, Judges.[1] *Affirmed*.

[1] The Honorable Mel Flanagan presided over the trial. The Honorable Michelle Ackerman Havas entered the order denying the defendant's postconviction motion.

¶1 DUGAN, J.[2] Anthony Colon appeals from his conviction for criminal damage to property, battery, and disorderly conduct, and the order denying his postconviction motion seeking a new trial. Colon seeks to overturn his conviction asserting that his constitutional rights to the presumption of innocence and equal protection of the laws were violated because during deliberations a juror saw him shackled to other defendants. He maintains that trial counsel was ineffective for failing to seek a mistrial on that ground. Upon a thorough review of the record and the submissions, and for the following reasons, the court affirms.

## BACKGROUND

¶2 Colon was charged with criminal damage to property, in violation of WIS. STAT. § 940.19(1); attempt to intimidate a witness by the use or the attempted use of force, in violation of WIS. STAT. § 940.45(1); strangulation and suffocation, in violation of WIS. STAT. § 940.235(1); battery, in violation of WIS. STAT. § 940.19(1); and disorderly conduct, in violation of WIS. STAT. § 947.01(1). The trial ended the afternoon of the second day and the jury began deliberating.

¶3 The following morning, the bailiff and her partner brought Colon, who was wearing street clothing, and other defendants clad in orange jail attire from the jail to the courthouse. Colon was chained to the other defendants. The bailiff was concerned that, while Colon was being transported to the courtroom, jurors may have seen him in chains and she told the judge about the issue.

[2] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2015-16). All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

¶4 Outside the jury's presence, the judge went on the record and provided a summary of what the bailiff said, which the bailiff confirmed and supplemented. The bailiff stated that when the elevator door opened on the courthouse's fifth floor, she saw two jurors sitting on opposite sides on the floor outside the courtroom. At the bailiff's direction, her partner took Colon to the sixth floor. Meanwhile, the bailiff exited the elevator on the fifth floor and unlocked the courtroom door allowing the two jurors to enter the jury room. The two jurors did not speak to her about the case although they may have engaged in "small talk."

¶5 The bailiff stated that later she escorted Colon in chains, together with the orange-clothed chained defendants, from the sixth to the fifth floor. As Colon exited the elevator and entered the fifth floor, he was "kind of loud and boisterous" stating "you guys called me out," which drew attention to him. The bailiff, who did not notice any jurors in the hall, told Colon to be quiet. When Colon entered the holding area, he became calmer and apologized to the bailiff. However, Colon continued to be concerned that jurors may have seen him chained to the orange-clothed defendants.

¶6 The judge offered defense counsel the opportunity to make a record. Defense counsel stated that Colon told him that the first time the elevator doors opened and he started exiting, he saw two jurors — a male with whitish-grey hair and one who worked for the JOURNAL SENTINEL newspaper; Colon then went to the sixth floor. Colon also told him that, when he later exited the elevator on the fifth floor, he saw the same juror with the whitish-grey hair in the hallway, walking away. Colon told his attorney that seeing the same juror again was the reason "why he got upset and was essentially saying, you guys are putting me in a

bad position by taking me out of the elevator right now. He said that juror then made eye contact with them, then walked the other way down the hallway."

¶7 The judge asked the bailiff to describe the two jurors that she saw when the elevator initially opened on five. The bailiff said "one was the younger gentleman that sits in the back row closest to the gallery" and "[t]he other one I'm not exactly sure where he sits, but he didn't have the white-grey hair. He had all black hair. His teeth are a little not — I don't know — I can pick him out." She said that neither had any facial hair.

¶8 The prosecutor commented that the juror who worked for JOURNAL SENTINEL had a goatee and appeared to have plaque psoriasis. Defense counsel responded "[t]hat's the one that my client described. He said he saw that guy." Defense counsel added that when he was on the fifth floor at about 8:25 a.m., he saw four or five jurors sitting a little further down the hall.

¶9 The prosecutor then asked the bailiff if Colon had exited the elevator when it first stopped on the fifth floor. The bailiff responded that Colon was standing at the side where the elevator buttons are located so he was not directly in front of the doors the first time they opened on the fifth floor. However, the second time, "we took them out, but I was on the floor. I didn't see any of the other jurors." The bailiff said that at that time, Colon was being very loud, which would have drawn the attention of others to Colon.

¶10 The prosecutor stated that the only question the judge needed to ask the jurors was if they saw anything. The judge responded that the following additional questions were necessary: (1) what any juror who saw anything observed; (2) whether any juror who saw anything talked to any other juror about

it; and (3) whether the juror(s) could set aside the observation(s)/disclosure of the observation(s).

¶11 The judge also stated:

> [F]rankly, I don't think it's a surprise that somebody is in custody. I've never had a jury tell me, oh, we didn't know. They've always understood that little things that we do, which is keeping him seated all the time and not standing up[3] means something, and they always mention that.

The judge further stated that, "I don't think this is a surprise, especially since it's in the evidence that he stated, I don't want to go back to jail again."

¶12 Defense counsel interjected, "I think there's an issue between us staying seated during the trial and him being led around in shackles with a butch [sic] of people in orange." The judge clarified that she meant that the jurors understood from the attorneys' and her behavior that the defendant was in custody and from that it would not be a surprise for them to learn that the defendant "might have to be in custody with other people."

¶13 The prosecutor added that Colon said he did not want to go back to jail, which the prosecutor had emphasized "quite a bit" in his closing argument. The prosecutor noted that the jury knew that Colon was arrested and taken into custody on June 27 so he did not think anyone was shocked that Colon was in custody. (The trial started on November 5, 2014; the juror incident arose on November 7.) The prosecutor also pointed out that Colon had worn the same

[3] The judge's comment suggests that no one in the courtroom stood up for the judge or the jury, which is the practice of some circuit court judges.

clothing throughout the trial suggesting that he was unable to change because he was in custody. Defense counsel agreed that Colon had not changed clothing.

¶14 Stating that the problem was that there was a statement that Colon had made a lot of noise in a busy hallway and neither the attorneys nor she knew how many people were present in the hallway, the judge asked the attorneys what they wanted her to do. Defense counsel suggested that, at least, they should question the two jurors who Colon had identified as having seen him. The prosecutor suggested questioning the jury and, if any juror had seen Colon outside the courtroom, asking whether the juror could still be a fair and impartial juror. Defense counsel added that he was requesting that the judge ask the entire panel if any of them saw Colon outside the courtroom earlier that morning and, if so, that she question any such juror(s) individually outside the presence of the rest of the jury about what the juror observed and whether those observations would impact the juror's decision in the case.

¶15 The judge and the prosecutor agreed with the defense counsel's proposal. However, the prosecutor commented that, if the judge was going to bring the jurors down one at a time from the jury room after a general indication of which jurors had seen Colon that morning, it might make a bigger issue by emphasizing the "custody point." The judge stated that was the reason she was "deferring to the defense because how they want to proceed is important."

¶16 Defense counsel responded,

> I know we all take great precautions to try to at least keep the illusion that Mr. Colon is out of custody, but the fact of seeing him in chains with group of guys in orange being led around by a deputy I think is overly prejudicial, and the issue ... is will those jurors take that into account when they're making their decision?

The judge indicated that the only time that the jurors would have seen Colon was when he was yelling, "look at me, look at me." Defense counsel responded, "We don't know that...."

¶17 The judge again asked defense counsel what Colon wanted her to do. Defense counsel requested that the judge ask the jury panel whether any juror saw Colon outside the courtroom that morning, followed by separate questioning of each such juror outside the presence of other jurors.

¶18 On the record and outside the presence of the jurors, the judge summarized the discussion of the juror issue and the parties' agreement about how it should be addressed, obtaining counsels' approval as to both the summary and the agreement. After that, the judge asked the bailiff to bring the jury into the courtroom. When the jury was present, the judge asked whether any jurors had seen Colon outside the courtroom. One juror responded affirmatively. The rest of the panel was removed from the courtroom.

¶19 The judge and the juror then engaged in the following colloquy:

> THE COURT: Good morning again, Mr.....
>
> Can you tell me what it was that you may have seen or heard in the hallway?
>
> THE JUROR: I was just sitting on the bench across from the elevators, glanced up and some gentlemen were coming out of the elevator.
>
> THE COURT: Okay. Anything else? Did you—Anything else that you observed?
>
> THE JUROR: (No audible response.)
>
> THE COURT: Did you discuss that with any of the other jurors?
>
> THE JUROR: No.

> THE COURT: Now, is there anything about what you saw at the time that could prejudice or bias you in this case in any way?
>
> THE JUROR: I don't believe so.
>
> THE COURT: And you understand that the evidence in this case is closed, so as we've discussed many times, it's the evidence that you hear in the courtroom and the law that I've explained to you and given to you, and anything that happens outside of the courtroom should not be used in reaching your verdict.
>
> Do you understand that?
>
> THE JUROR: I do.
>
> THE COURT: Do you believe that you can do that?
>
> THE JUROR: I believe so.
>
> THE COURT: Then also because that is something—whatever it is that happens outside the courtroom, it shouldn't be part of the deliberations, so I'd ask that you not share that with the other jurors.
>
> THE JUROR: Will do.

¶20 The judge excused the juror, with the proceedings continuing on the record outside the presence of the jury. The judge asked whether anyone wanted to make a record. The prosecutor declined. Defense counsel stated that he wanted to know,

> [w]hat the circumstances were when he saw the defendant. I don't know that he said he had a brief visualization of the defendant, but [defense counsel] not sure in what context, how long [he had] an opportunity to see him, if he saw him in shackles or near people in orange, if he saw anything of that.

¶21 The judge indicated that she had asked the juror what he saw, the juror said that he saw Colon in the elevator and, when she asked the juror if he had seen anything else, he said no. She stated that she thought it was very important

not to delve into the jury process during deliberations, she would not allow further questions because it might draw more attention to the issue and create a problem, and she did not see why the questions were necessary since the juror declared that his deliberations would not be prejudiced by what he saw and he would follow the court's instructions.

¶22 Defense counsel again stated that there was a big difference between cutting off an electronic bracelet and shackling Colon to the ground so that the chains were not seen and a juror seeing Colon "next to a bunch of guys in orange being led around by a deputy presumably in chains." He also stated that, although the juror may not have been aware of any prejudice, prejudice could be present "given the overly prejudicial circumstances in which he made this observation."

¶23 After hearing that argument, the judge explicitly found that "there's no evidence that [the juror] saw anybody being led around by a deputy in chains. He simply looked into the door of the elevator, and then the elevator closed, so that's a difference." The judge also asked for the State's position.

¶24 The prosecutor responded that it was safe to assume the juror saw the Colon in the prisoner transport elevator, and that the parties and the judge "know what he saw, and he said that he's not going to be prejudiced by it in any way, so that's all there is."

¶25 The judge stated, "that's the end of a proper examination of that juror. I'm not going to take it any further," noting that the juror was sworn to follow the law and the evidence in the case and she had confirmed his understanding of his obligations and that, in considering the case, he would not use anything he saw outside the courtroom.

¶26 Later that morning, the jury returned verdicts finding Colon guilty of the three misdemeanor charges: (1) criminal damage to property; (2) battery; and (3) disorderly conduct. It found him not guilty of the two felony charges: (1) intimidation of a victim; and (2) strangulation and suffocation. The criminal damage to property verdict was dated November 6, 2014, the previous day.

¶27 Postconviction counsel, as successor to trial counsel, filed a postconviction motion for a new trial asserting that trial counsel was ineffective because he did not move for a mistrial after the juror saw Colon in shackles. The judge who had assumed responsibility for the case as the result of a judicial rotation denied the motion, without a hearing, holding that counsel was not ineffective. She concluded that Colon was not prejudiced because there was not a reasonable probability that the trial judge would have granted a mistrial since the sole juror who observed the defendant said he could be impartial and would not let his observation affect his verdict. Additionally, the judge found that the lack of prejudice was demonstrated by the jury's acquittal of Colon on the more serious felony offenses that would have exposed him to additional 24 years of prison with application of the enhancers.

## ANALYSIS

¶28 The first issue Colon raises on appeal is whether his rights were violated because a juror saw him dressed in civilian clothes and shackled to other defendants wearing identifiable jail clothing. Colon cites federal and Wisconsin cases regarding defendants who are shackled in the courtroom and/or required to wear identifiable jail or prison clothing during trial. The second issue Colon raises is that his trial counsel was ineffective because he did not move for a mistrial based on the juror's observation of him outside the courtroom.

¶29 The prosecutor asserts that because Colon caused the juror to see him in restraints, Colon cannot contend that the viewing denied him a fair trial. He also maintains that Colon's trial was fair because it was based on the evidence; the judge reasonably exercised her discretion in addressing the juror's viewing of Colon; even though a juror saw Colon in custody, twelve jurors agreed unanimously that Colon was guilty of three charges; and the jury unanimously voted to convict Colon of criminal damage to property on November 6, before any juror saw Colon in custody outside the courtroom. He also maintains that defense counsel's trial strategy resulted in Colon's acquittal on the two felony counts and, that, even though defense trial counsel did not disclose why he did not request a mistrial, the acquittals imply that defense counsel may have had a sense that the trial could result in a favorable outcome. He further states that trial counsel acted as a competent attorney during the discussion of the juror's observation and throughout the trial. He also contends that, since the trial judge would not allow additional questioning of the juror, it is highly improbable that she would have granted a mistrial, if trial counsel had so moved.

¶30 Although on appeal Colon cites case law and constitutional principles for the juror viewing issue, he did not do so at trial or in his postconviction motion. Thus, the court begins by considering the circuit court's ruling on his postconviction ineffective assistance of counsel claim. Under the Sixth and Fourteenth Amendments to the United States Constitution, a criminal defendant is guaranteed the right to effective assistance of counsel. ***State v. Balliette***, 2011 WI 79, ¶21, 336 Wis. 2d 358, 371, 805 N.W.2d 334, 339 (citing ***Strickland v. Washington***, 466 U.S. 668, 686 (1984)). A defendant must show two elements to establish that his counsel's assistance was constitutionally ineffective: (1) counsel's performance was deficient; and (2) the deficient

performance resulted in prejudice to the defense. ***Id.*** As to the second prong of the ineffective assistance of counsel test, prejudice occurs when the attorney's error is of such magnitude that there is a "reasonable probability" that but for the error the outcome would have been different. ***State v. Erickson,*** 227 Wis. 2d 758, 769, 596 N.W.2d 749, 756 (1999). "Stated differently, relief may be granted only where there 'is a probability sufficient to undermine confidence in the outcome," i.e., there is a 'substantial, not just conceivable, likelihood of a different result.'" ***State v. Starks,*** 2013 WI 69, ¶55, 349 Wis. 2d 274, 305, 833 N.W.2d 146, 162 (quoting ***Cullen v. Pinholster,*** 131 S.Ct. 1388, 1403 (2011)) (internal quotation marks and citations omitted).

¶31 The standard of review of the ineffective assistance of counsel components, deficient performance and prejudice, is a mixed question of law and fact. ***State v. Johnson***, 153 Wis. 2d 121, 127, 449 N.W.2d 845, 848 (1990) (citing ***Strickland***, 466 U.S. at 698). Thus, the trial court's findings of fact, "the underlying findings of what happened," will not be overturned unless clearly erroneous. ***Id.*** (citations omitted). The ultimate determination of whether counsel's performance was deficient and prejudicial to the defense are questions of law which this court reviews independently. ***Id.*** "Courts may reverse the order of the two tests or avoid the deficient performance analysis altogether if the defendant has failed to show prejudice." ***Id.***

¶32 The decision as to whether or not to grant a mistrial is "within the sound discretion of the trial court." ***State v. Pankow***, 144 Wis. 2d 23, 47, 422 N.W.2d 913 (Ct. App. 1988). "The trial court must determine, in light of the whole proceeding, whether the claimed error [is] sufficiently prejudicial to warrant a new trial." ***Id.*** Not all errors warrant a mistrial and "the law prefers less drastic alternatives, if available and practical." ***State v. Bunch,*** 191 Wis. 2d 501, 512,

529 N.W.2d 923 (Ct. App. 1995). A mistrial is appropriate only when a "'manifest necessity'" exists for the termination of the trial. *See* ***id.*** at 507 (citation omitted).

¶33 The court begins with the trial court's finding that there was no evidence that the juror had seen Colon in shackles. Colon's mistrial argument is premised on the juror viewing Colon in shackles. However, that is contrary to the trial court's findings of fact. Colon has not addressed that finding. Moreover, the juror's statement of what he saw supports the trial court's finding. Colon has not established that the finding that there was no evidence that the juror viewed Colon in chains is clearly erroneous. Thus, the finding is sustained.

¶34 With respect to prejudice, having carefully considered the applicable law de novo the court concludes that, based on the record, Colon cannot establish that he was prejudiced by the absence of a mistrial motion. The record unequivocally supports the conclusion that, even if counsel had moved for a mistrial, the motion would have been denied.

¶35 The trial judge questioned the juror who saw Colon exiting the elevator and the juror did not report seeing Colon in chains or seeing him with others dressed in orange. What the juror noticed about Colon outside the courtroom is fairly innocuous suggesting at most that Colon was in custody — a fact that the court noted would have been apparent to the jury.

¶36 In addition, the juror did not share his observation of Colon with the other jurors and told the judge that nothing he had seen would bias or prejudice him in rendering a verdict. The judge reinforced her earlier instructions to the jury, reminding the juror that only the evidence presented in the courtroom and the law as explained by the court should be considered in deciding a case. She noted

that the juror stated that he understood the instructions and would abide by them. The jury's unanimous acquittal of Colon on the two most serious charges which would have resulted in a far longer term of incarceration for Colon than the trial court imposed also supports the judge's assessment that the juror incident had not impaired Colon's rights.

¶37 The judge declined to allow defense counsel to ask additional questions. She also made it clear that she believed the matter had been properly addressed. The record strongly supports the conclusion that, if defense counsel moved for a mistrial, the judge would have denied the motion. This court concludes that defense counsel's failure to move for a mistrial did not prejudice Colon. The absence of prejudice defeats any claim of ineffective assistance of counsel. ***State v. Kuhn,*** 178 Wis. 2d 428, 438, 504 N.W.2d 405 (Ct. App. 1993). Therefore, this court need not consider the ineffectiveness issue

¶38 Addressing Colon's issue regarding shackles the court adds, even if the juror had seen Colon in shackles outside the courtroom, Colon's rights to a fair trial and the presumption of innocence would not have been violated. Indeed, the right to a fair trial is guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution, ***Holbrook v. Flynn,*** 475 U.S. 560, 567 (1986) and, the presumption of innocence is one component of a fair trial. *See* ***Taylor v. Kentucky,*** 436 U.S. 478, 483-86 (1978). ***Estelle v. Williams,*** 425 U.S. 501, 512 (1976) holds that a defendant's right to a fair trial and the presumption of innocence is violated when the defendant is required to appear in trial in identifiable prison clothing. The Wisconsin Supreme Court stated "[p]rejudice is likely to be engendered psychologically by view of a man presumed to be innocent in the chains and handcuffs of the convicted." ***State v. Cassel,*** 48 Wis. 2d 619, 624, 180 N.W.2d 607, 611 (1970).

¶39 However, this case does not involve seeing Colon shackled in the courtroom. Courts have applied a different analysis when a juror sees a defendant shackled outside a courtroom. In ***Cassel,*** 48 Wis. 2d. at 623-24, the Wisconsin Supreme Court affirmed the denial of a new trial where, outside the courtroom, several jury members had observed the defendant in chains and handcuffs. The court held that whether a detainee outside a courtroom should be transported in chains and handcuffs is a matter for the sheriff or police because the custodian is responsible for the detainee's safekeeping and safe transportation. ***Id.*** at 625. The court reasoned that jurors "normally expect" a prisoner to be under some restraints in a situation where he would be able to escape and seeing a prisoner in chains or handcuffs may generate some sympathy. The court further noted that the observations by some jurors were "casual, momentary and inadvertent." ***Id.***

¶40 In this case, the viewing was even more limited than in ***Cassel***. A single juror observed Colon but he did not notice that Colon was restrained or that he was in the company of others recognizable wearing jail garb. Unlike ***Cassel***, 48 Wis. 2d at 625-26, the judge instructed the juror not to consider his observation of Colon in deliberating. Based on the facts and the applicable law, Colon has not established that his right to a fair trial or the presumption of innocence were violated by the juror's observation.

*By the Court.*—Judgment and order affirmed.

This order will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.