COURT OF APPEALS
DECISION
DATED AND FILED

May 1, 2018

Sheila T. Reiff
Clerk of Court of Appeals

Appeal No. 2017AP136-CR **Cir. Ct. No. 2012CF5626**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

CHAZ L. WILSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: JONATHAN D. WATTS and FREDERICK C. ROSA, Judges. *Affirmed*.

Before Kessler, Brash and Dugan, JJ.

¶1 PER CURIAM. Chaz L. Wilson appeals the judgment, entered on a jury's verdict, convicting him of one count of armed robbery as a party to a crime. *See* WIS. STAT. §§ 943.32, 939.05 (2011-12).[1] He also appeals the order denying his postconviction motion.[2] The sole issue on appeal is whether Wilson is entitled to a new trial in the interest of justice pursuant to WIS. STAT. § 752.35. We reject Wilson's argument and affirm.

I. BACKGROUND

¶2 The charges against Wilson stemmed from two cases that were consolidated for trial. In Milwaukee County Circuit Court case No. 2012CF5361, the State charged Wilson with two counts of first-degree recklessly endangering safety while armed based on events that took place on October 14, 2012. The trial court later dismissed one of the counts during trial.

¶3 In Milwaukee County Circuit Court case No. 2012CF5626, the case underlying this appeal, the State charged Wilson with one count of first-degree recklessly endangering safety while armed and one count of armed robbery as a party to a crime based on events that took place on October 20, 2012.

¶4 At trial, the State argued that on October 14, 2012, Wilson fired multiple gunshots at a man, A.N., with a silver or chrome .22 semiautomatic pistol.[3] The State also presented evidence that on October 20, 2012, four men

[1] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

[2] The Honorable Jonathan D. Watts presided over Wilson's trial. The Honorable Frederick C. Rosa presided over the postconviction proceedings.

[3] Given that the charges in Milwaukee County Circuit Court case No. 2012CF5361 are not at issue on appeal, we limit our discussion of them.

robbed a small grocery store at gunpoint and shot the owner in the leg. The men then fled the store carrying two cash registers.

¶5 The store owner in the October 20th shooting described being shot by a man with a small silver-colored gun. A forensic examination of the .22 shell casings recovered from both the October 14th and the October 20th crime scenes revealed that they were fired from the same gun. Police also recovered Wilson's fingerprint from the door of the grocery store. After viewing a lineup, the store owner identified Wilson as a participant in the robbery and related shooting reporting seventy to eighty percent certainty.

¶6 The trial court instructed the jury on one count of first-degree recklessly endangering safety while armed with a dangerous weapon in case No. 2012CF5361, and in case No. 2012CF5626, with one count of first-degree recklessly endangering safety while armed and one count of armed robbery as a party to a crime.

¶7 The jury returned not-guilty verdicts against Wilson on two charges of first-degree recklessly endangering safety but found him guilty of armed robbery as a party to a crime. During individual polling, however, Juror Number 14 expressed doubt regarding Wilson's guilt on the armed robbery charge. As a result, the trial court sent the jury back to the jury room to continue deliberating.

¶8 The jury subsequently returned with the same three verdicts: not guilty on two charges of first-degree recklessly endangering safety and guilty on one charge of armed robbery. During the polling that followed, all twelve members of the jury agreed jointly and individually that the verdicts were as stated by the trial court.

¶9 At this point in the proceedings, Wilson's trial counsel objected at a sidebar to the polling on the armed robbery charge. The trial court overruled the objection and accepted the verdicts. It then dismissed the jury from the courtroom.

¶10 After the jury was dismissed, the trial court made a record of the sidebar objection. Wilson's trial counsel argued that Juror Number 14 appeared "hesitant … insincere, and maybe a little forced under duress" during the polling. The trial court disagreed and called trial counsel's observations "completely speculative." The trial court then met with the jurors again and excused them.

¶11 Following a short recess, the prosecutor moved for judgment on the verdict and Wilson's trial counsel responded with two alternative motions: judgment notwithstanding the verdict and mistrial. This was the first time trial counsel brought up the fact that Wilson was wearing a visible restraint when the jury returned its first verdicts. Trial counsel argued: "When the defendant was brought out, and before the jury was sent back to redeliberate, he was exposed—fully exposed in the shackles to the jury. My fear is that could have prejudiced Juror No. 14 into succumbing to pressure in the jury room to agree to the guilty plea." Trial counsel explained that "[r]ight before they [i.e., the jurors] were brought out for their first verdict before … Juror No. 14 expressed his doubt, we all rose for the jury and we remained standing for the jury and these chains—stand up and show the judge—these chains were fully viewed, visible, and rattling." The bailiff then informed the trial court that it was the Sheriff's Department's policy for defendants to wear belly chains when a verdict is received.

¶12 The trial court noted that it was unaware of this possible issue and explained that it had focused its attention on the jury in the courtroom, not Wilson.

The trial court acknowledged, however, that the belly chain "may have been" observable. Because the trial court had already excused the jury, it could not give a curative instruction. The trial court ultimately deemed the defense objection forfeited.[4] The trial court also rejected trial counsel's claim that the jury's not-guilty verdicts on the recklessly endangering safety charges and its guilty verdict on the armed robbery charge were inconsistent.

¶13 The trial court subsequently sentenced Wilson to six years of initial confinement and four years of extended supervision.

¶14 During postconviction proceedings, Wilson argued that his due process right to a fair trial was violated when he was brought before the jury in shackles and belly chains. Wilson also argued that his trial counsel was ineffective for not immediately raising the issue, which deprived the trial court of the opportunity to correct the matter with a curative instruction. The postconviction court held hearings and heard testimony from trial counsel, Wilson, and a bailiff before denying Wilson's motion.

¶15 On appeal, Wilson abandons his ineffective assistance claim. The sole issue before us is whether Wilson is entitled to a new trial in the interest of justice on the armed robbery charge.

[4] Although the trial court used the term "waiver," this was actually a forfeiture. Forfeiture is the "'failure to make the timely assertion of a right.'" ***State v. Ndina***, 2009 WI 21, ¶29, 315 Wis. 2d 653, 761 N.W.2d 612 (citation omitted). Waiver, on the other hand, occurs when there is an affirmative "'intentional relinquishment or abandonment of a known right or privilege.'" ***State v. Haynes***, 118 Wis. 2d 21, 25, 345 N.W.2d 892 (Ct. App. 1984) (citation omitted).

II. DISCUSSION

¶16 Wilson argues that his due process right to a fair trial was violated when the jury saw him in shackles and belly chains. Consequently, he submits that we should exercise our authority under WIS. STAT. § 752.35 to grant him a new trial in the interest of justice.[5]

¶17 Exercise of our discretionary reversal power is rare; it is reserved for "'exceptional cases.'" *See* ***State v. Avery***, 2013 WI 13, ¶38, 345 Wis. 2d 407, 826 N.W.2d 60 (citation omitted). One of the grounds on which we may exercise our power is when "it appears from the record … that it is probable that justice has for any reason miscarried." *See* WIS. STAT. § 752.35. Wilson argues that the circumstances in his case constitute a miscarriage of justice.

¶18 Determining that justice has miscarried requires "'a finding of substantial probability of a different result on retrial.'" *See* ***State v. Thomas***, 161 Wis. 2d 616, 625, 468 N.W.2d 729 (Ct. App. 1991) (citation omitted). In other words, "'[a] probable miscarriage of justice exists only if the evidence and law are such that the defendant[] probably should have won and therefore deserve[s]

[5] WISCONSIN STAT. § 752.35 provides:

> **Discretionary Reversal.** In an appeal to the court of appeals, if it appears from the record that the real controversy has not been fully tried, or that it is probable that justice has for any reason miscarried, the court may reverse the judgment or order appealed from, regardless of whether the proper motion or objection appears in the record and may direct the entry of the proper judgment or remit the case to the trial court for entry of the proper judgment or for a new trial, and direct the making of such amendments in the pleadings and the adoption of such procedure in that court, not inconsistent with statutes or rules, as are necessary to accomplish the ends of justice.

another chance.'" ***J.K. v. Peters***, 2011 WI App 149, ¶29, 337 Wis. 2d 504, 808 N.W.2d 141 (citation omitted; brackets in ***Peters***).

¶19 In determining whether there has been a miscarriage of justice, we view the evidence in the light most favorable to the verdict and sustain it if "any credible evidence" supports it. *See* ***Thompson v. Howe***, 77 Wis. 2d 441, 453, 253 N.W.2d 59 (1977). "It is well established that factual findings are upheld unless they are clearly erroneous." ***State v. Kucharski***, 2015 WI 64, ¶27, 363 Wis. 2d 658, 866 N.W.2d 697.

¶20 We are not convinced that Wilson "probably should have won." *See* ***J.K.***, 337 Wis. 2d 504, ¶29. The postconviction court, in its oral decision, highlighted the gaps in the record as to which jurors saw what and what impact, if any, it had on the verdicts:

> First of all, Mr. Wilson testified that jurors saw him in restraints, and I don't dispute that that certainly was possible given the fact that he was standing with a belly chain on. However, we don't know which jurors saw the restraints. I don't know if the juror that was unsure during the initial deliberations, in fact, was one of the jurors that saw the restraints. I don't know if the jurors discussed in the jury room the fact that Mr. Wilson was in restraints, and I don't know how to determine that that would have changed the outcome of the verdicts. The verdicts that were returned were identical to the initial verdicts. And hypothetically speaking, if the jurors saw restraints and they were inclined to hold that to the detriment of Mr. Wilson, not only could they have upheld the verdict of guilty, but they could have changed the not guilty verdicts to guilty, also.

¶21 In an effort to work around these gaps, Wilson submits that prejudice against a restrained person is presumed. *See* ***State v. Tatum***, 191 Wis. 2d 547, 553, 530 N.W.2d 407 (Ct. App. 1995) (explaining that on direct appeal, prejudice against a restrained person in the courtroom is presumed where

there was no extreme need for the restraints). He asserts that the trial court erred when it allowed Wilson to be put in restraints without first exercising its discretion as to whether those restraints were necessary, and, given the presumption of prejudice, we must conclude that it affected the outcome of the trial. *See* ***State v. Grinder***, 190 Wis. 2d 541, 552, 527 N.W.2d 326 (1995) (holding that "a [trial] court must carefully exercise its discretion in deciding whether to shackle a defendant and then, on the record, must set forth its reasons justifying the need for restraints in that particular case").

¶22 The State, in response, relies on ***State v. Knighten***, 212 Wis. 2d 833, 844, 569 N.W.2d 770 (Ct. App. 1997), and federal cases to argue that a brief glimpse of a restrained defendant is *not* presumptively prejudicial. *See* ***Harrell v. Israel***, 672 F.2d 632, 637 (7th Cir. 1982) (explaining that for due process, "the harm to be avoided in this situation is not the shackling itself but the prejudice that could result if the jury were allowed to continuously view the defendant restrained in that manner"); *see also* ***United States v. Olano***, 62 F.3d 1180, 1190 (9th Cir. 1995) (holding that "[b]ecause a jury's brief or inadvertent glimpse of a defendant in physical restraints is not inherently or presumptively prejudicial to a defendant, [the defendant] must demonstrate actual prejudice to establish a constitutional violation") (internal citation omitted).

¶23 Wilson did not file a reply brief and, therefore, did not address the State's assertions or otherwise attempt to reconcile the language in ***Tatum*** with the ***Knighten*** decision, which was released two years later. A proposition asserted by a respondent on appeal and not disputed by the appellant's reply brief is deemed conceded. *See* ***Schlieper v. DNR***, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994); *see also* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (holding that failure to refute an

argument constitutes a concession). Accordingly, we treat Wilson's failure to dispute the State's argument on this point as a concession that a brief glance of a shackled defendant is not presumptively prejudicial.[6]

¶24 Wilson goes on to argue that the facts are on his side and he "probably should have won." According to Wilson: "It seems likely that if the case were tried again, there would be at least one hold out [on the jury], and perhaps more if the jurors did not see the defendant in shackles." He ends his brief by suggesting "[i]t is likely that Wilson's restraints were observed by many of the jurors throughout the trial."

¶25 The problem with Wilson's speculative assertions is summed up by the State: "Nothing in the record proves that any juror—including Juror No. 14—surrendered a belief in Wilson's innocence on the armed robbery charge because Wilson briefly appeared before them in restraints." To the contrary, "by polling the jurors, the [trial] court tested the uncoerced unanimity of the jury verdict by requiring individual responsibility and eliminated any uncertainty as to the announced verdict." *See* ***State v. Wery***, 2007 WI App 169, ¶22, 304 Wis. 2d 355, 737 N.W.2d 66.

¶26 Wilson additionally asserts in an undeveloped argument that the verdicts were logically inconsistent. This claim also fails. The trial court set forth

[6] The postconviction court did not make an express factual finding as to the length of time the jury might have had to view Wilson's restraints. However, during the postconviction hearings, Wilson's trial counsel testified that when the jury returned its first verdicts to the courtroom, Wilson stood only briefly and the jurors were not looking at Wilson when they entered the courtroom. *See* ***State v. Martwick***, 2000 WI 5, ¶31, 231 Wis. 2d 801, 604 N.W.2d 552 (noting that "if a [trial] court fails to make a finding that exists in the record, an appellate court can assume that the [trial] court determined the fact in a manner that supports the [trial] court's ultimate decision").

its reasons for rejecting this argument and Wilson does not mention the grounds the trial court relied upon let alone refute them.[7] *See* ***Schlieper***, 188 Wis. 2d at 322 (explaining that propositions can be deemed conceded where "an appellant ignores the ground upon which the trial court ruled and raises issues on appeal that do not undertake to refute the trial court's ruling").

¶27 The possibility that jurors briefly saw Wilson wearing restraints does not provide a sufficient basis for this court to order a new trial under WIS. STAT. § 752.35. We therefore affirm.

[7] The trial court explained:

> Defense argument that the verdicts are absurd or perhaps perverse is also rejected. The jury is the arbiter of guilt or not guilt[y] in these cases. The [c]ourt can easily see a consistent view of the evidence where this defendant is guilty of armed robbery, party to the crime, based upon the heinous armed robbery that occurred, and his [i.e., Wilson] being put there with the fingerprint, and that he either did those—all those elements or participated by intentionally aiding and abetting.
>
> As far as the not guilty as to the first[-]degree recklessly endangering safety, the jury could have concluded that [the grocery store owner]'s safety was not sufficiently endangered beyond a reasonable doubt. In fact, there's an argument in this record that the nature of the injury was not serious bodily harm and was not sufficient under a number of aspects or elements of first[-]degree recklessly endangering safety and the jury did not find such. So their acquittal is consistent with the State's failure to prove their case on that count, but it does not invalidate the sufficiency of the evidence on the armed robbery, party to a crime.
>
> Likewise the jury could have rejected any number of aspects of the evidence or elements to convict the defendant on first[-]degree recklessly endangering safety as to [A.N.].

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.