COURT OF APPEALS
DECISION
DATED AND FILED

January 29, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP263-CR **Cir. Ct. No. 2008CF982**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RICHARD WADE SHIRLEY,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: WILLIAM W. BRASH, III, Judge. *Affirmed.*

Before Curley, P.J., Fine and Kessler, JJ.

¶1 KESSLER, J. Richard Wade Shirley appeals a judgment of conviction, following a jury trial, of first-degree reckless homicide. Shirley also appeals an order denying postconviction relief. We affirm.

BACKGROUND

¶2 On March 18, 2008, Shirley was charged with one count of first-degree intentional homicide, stemming from the February 16, 2008, shooting death of Frederick Perry.[1] According to the original criminal complaint, Perry was one of three occupants of a blue Cadillac that pulled into a gas station, located at 4811 North Teutonia Avenue, Milwaukee, on the afternoon of February 16, 2008. Shirley pulled up to the gas pump adjacent to the Cadillac. An employee of the gas station told police that after a few minutes, while looking through a gas station window, he saw Shirley and Perry engaged in a struggle for a gun. The employee stated that he heard gunshots, ducked and then dialed 911. The employee also told police that he saw Shirley walk to his car after the shooting, "definitely favoring one leg" as he walked. Multiple other witnesses identified Shirley as walking away from the shooting with a limp.

¶3 The complaint states that Shirley was the victim of an unrelated gunshot wound, resulting in the partial loss of his left leg. Shirley used a prosthetic device from his left knee downward. At trial, Shirley appeared in a wheelchair and his legs were shackled. Both counsel tables were draped with a cloth reaching the floor, preventing the shackles from entering the jury's view. During *voir dire*, however, one juror, "Juror Number 34," stated that he noticed the restraints:

> [Defense Counsel]: Does anybody else believe that because he's sitting here, and you haven't heard the facts yet, does anyone else believe that Mr. Shirley must have done something wrong?
>
> ….

[1] Shirley was initially charged with first-degree reckless injury. After waiving his preliminary hearing, he was charged with first-degree intentional homicide.

> [Juror Number 34 raises his hand]
>
> ….
>
> [Defense Counsel]: Thank you. Juror Number 34…. [I]f you don't mind, what have you heard so far that would lead you to believe that Richard Shirley intentionally took the life of another person?
>
> [Juror Number 34]: Well, I didn't hear nothing that said he intentionally took the life of somebody, but if he's sitting there in cuffs, he did something.

¶4 *Voir dire* continued without further reference to the restraints in the presence of the jury panel; outside the presence of the jury, the State addressed Juror Number 34's comment. Both the trial court and Shirley's counsel stated that they did not recall Juror Number 34's comment, however after the court reporter provided the comment, the trial court agreed to allow the parties to individually question Juror Number 34 to determine whether he shared his observations with the other jurors.

¶5 When Juror Number 34 was returned to the courtroom, he stated: "I was sitting behind [the defendant] yesterday, and I noticed he had something on his feet…. But you can't make any assumptions, you know, on the case. I ain't heard no evidence." Upon answering the trial court's question about what he observed, Juror Number 34 stated: "Well, it looked like [the defendant] had cuffs on or something." Juror Number 34 stated that he had not told the other jurors about his observations and that his observations would not cause any prejudice or bias towards either Shirley or the State. The trial court instructed Juror Number 34 not to discuss his observations with the other jurors.

¶6 After Juror Number 34 was excused from the courtroom, both the State and defense counsel stated that they did not wish to question any other jurors regarding whether any of them observed the shackles. The trial court then asked

the parties whether they objected to continuing the trial with the current jury panel. The State did not object. After consulting with Shirley and Shirley's family, defense counsel stated that he wished to move forward with the jury panel.

¶7 During trial, multiple witnesses, including Shirley, testified. The issue of Shirley's restraints arose again when, outside the presence of the jury, Shirley's counsel informed the trial court that Shirley planned to testify in his own defense. The trial court stated that Shirley would continue to be shackled on the witness stand, but that he would be placed on the stand prior to the jury's entry:

> I also informed counsel that there is still - - there is an issue with regards to security that I defer to the sheriff's department with regards to that matter.
>
> That based on current status, that he'll be moved up here prior to the jury coming in, that he will be secured while in this location. It's still anticipated he'll rise when the jury comes in, sit down when the jury is in place.

¶8 After a discussion off the record, the trial court added:

> We're back on the record. I would note that counsel appealed the earlier decision to a higher authority in the sheriff's department who said that it is the sheriff's department policy to have defendants restrained when they're in that location in this particular situation. Having said that, are - - is everybody ready to proceed at this point?

¶9 Shirley's counsel responded: "Yes, and, Your Honor, preserving Mr. Shirley's Sixth Amendment issue and - - and, further, his Fifth Amendment issues with respect to being chained to the floor during the course of this trial." The trial resumed, and Shirley testified in his defense.

¶10 Shirley was convicted by the jury of the lesser-included offense of first-degree reckless homicide. He was sentenced to thirty-five years, consisting of twenty-five years' initial confinement and ten years' extended supervision.

Shirley filed a postconviction motion for a new trial, or, alternatively, for either resentencing or sentence modification. Shirley argued that his shackling during trial violated his due process rights and his right to present a defense. He also argued that he was sentenced based on inaccurate information and that new factors warranted sentence modification. The trial court, in a written decision, denied Shirley's motion. This appeal follows.

DISCUSSION

¶11 On appeal, Shirley contends that he was denied the right to a fair trial and to the appearance of a fair trial because at least one juror noticed Shirley's restraints, tainting the presumption of innocence. Shirley also contends that the restraints inhibited his ability to adequately present a defense. Alternatively, Shirley argues that he is entitled to resentencing or sentence modification.

I. Fair Trial.

¶12 A defendant is entitled "not only [to] a fair trial, but the appearance of a fair trial, and restraint not necessary to maintain order, decorum, and safety in the courtroom is violative of that principle." ***Flowers v. State***, 43 Wis. 2d 352, 362, 168 N.W.2d 843 (1969). It is within the trial court's discretion to order a defendant restrained during the trial. ***Id.*** at 363. However, the trial court must set forth its reasons for requiring a restraint. ***State v. Coulthard***, 171 Wis. 2d 573, 589, 492 N.W.2d 329 (Ct. App. 1992). We will not reverse a trial court's decision to maintain a defendant in restraints during trial unless it can be shown that the trial court erroneously exercised its discretion. *See* ***State v. Grinder***, 190 Wis. 2d 541, 550-51, 527 N.W.2d 326 (1995).

¶13 We have searched the record and have not located an explanation by the trial court as to why Shirley was required to be restrained. The extent of the trial court's explanation was simply: "there is an issue with regards to security that I defer to the sheriff's department…. I would note that counsel appealed the earlier decision to a higher authority in the sheriff's department who said that it is the sheriff's department policy to have defendants restrained when they're in that location in this particular situation." (Some formatting altered.)[2] What exactly "that location" and "this particular situation" mean is not explained in the record. We have previously held that "'[i]t is an erroneous exercise of discretion to rely primarily upon law enforcement department procedures instead of considering the risk a particular defendant poses for violence or escape.'" ***State v. Miller***, 2011 WI App 34, ¶7, 331 Wis. 2d 732, 797 N.W.2d 528 (citation omitted; brackets in ***Miller***). However, a trial court's failure to make a *sua sponte* inquiry regarding the need for restraints does not, by itself, entitle a defendant to a new trial. *Cf.* ***Flowers***, 43 Wis. 2d at 362. Rather, the defendant must also show that the presence of those restraints prejudiced him in the eyes of the jury. ***Id.*** at 362-64.

¶14 Although the trial court failed to explain the necessity of shackling Shirley, a disabled defendant, the error is not reversible under this set of facts. Not only does the record show that Shirley failed to strike the one juror that the record

[2] With regard to the trial court's referral to a "higher authority in the sheriff's department," we draw the trial court's attention to our recent decision, ***State v. Wilcenski***, No. 2012AP142–CR, unpublished slip op. (WI App Jan 16, 2013), in which we addressed blanket bail policies. We stated: "The judiciary has a duty to consider *on an individual basis* the appropriate conditions of release for one charged with a crime, and we do a disservice to both the community and those charged with crimes to delegate our obligation to a blanket program." ***Id.***, ¶17 (emphasis added). The same logic applies here. Delegating the discretionary decision of whether to restrain a defendant in the courtroom to the authority of the sheriff's department "does not fulfill the [trial] court's responsibility to exercise discretion" in determining the particular risk a specific defendant poses to the security in, or decorum of, the courtroom "on an individual basis." ***Id.***, ¶17 n.3.

demonstrates saw the restraints, it also shows that no objection to the shackling was raised until Shirley was about to take the witness stand. If a defendant has an objection, he must raise it when there is still an opportunity for the court to remedy the situation. By the lack of a timely objection,[3] Shirley forfeited his objection to appearing before the jury in shackles. *See* ***Estelle v. Williams***, 425 U.S. 501, 508 n.3 (1976) (discussing waiver); ***State v. Ndina***, 2009 WI 21, ¶29, 315 Wis. 2d 653, 761 N.W.2d 612 ("'Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right.'") (citation omitted).

¶15 Further, Shirley has not demonstrated that the restraints in this case caused jury prejudice. After the individual *voir dire* of Juror Number 34, Shirley's counsel consulted with both Shirley and Shirley's family and decided to proceed with the jury panel. The trial court questioned Juror Number 34 about what he had seen, obtained assurances from Juror Number 34 that he would not be influenced by the shackles, and then instructed Juror Number 34 not to discuss his observations with the other jurors. We presume jurors follow the trial court's instructions. ***State v. Truax***, 151 Wis. 2d 354, 362, 444 N.W.2d 432 (Ct. App. 1989). Nothing in the record indicates that any of the other jurors saw Shirley in restraints—both the defense and State's tables were covered with cloths and Shirley was placed on the witness stand outside of the presence of the jury. "There is little risk of prejudice if the jury cannot see the restraint." ***Miller***, 331

[3] We anticipate that shackling may not always require an evidentiary hearing when the decision to restrain is based on a defendant's conduct in the courtroom. However, because the decision to restrain a defendant must be based on a court's finding of a particularized need as to the individual defendant, we anticipate that the issue will ordinarily be resolved by a pretrial evidentiary hearing. *See* ***State v. Champlain***, 2008 WI App 5, ¶33, 307 Wis. 2d 232, 744 N.W.2d 889 (Ct. App. 2007) ("'It is for the trial court rather than the police to determine whether such caution is necessary to prevent violence or escape.'") (citation omitted).

Wis. 2d 732, ¶10. Therefore, Shirley has not demonstrated that he was prejudiced by the trial court's decision to keep him restrained during his trial.

II. Shirley's ability to defend himself.

¶16 Shirley also argues that the trial court's decision to have him restrained affected his ability to defend himself. He contends that the shackles made it impossible for him to approach exhibits, make demonstrations during his testimony and show the jury which leg his prosthesis was on.

¶17 The record shows that during his testimony, Shirley was able to direct his counsel's hand to point out specific items on the exhibits, and was able to point to certain exhibits himself. Shirley does not argue that either his counsel or he, himself, attempted to inform the trial court that being unable to approach the exhibits would pose a difficulty. Shirley does not contend that he ever asked the trial court for any accommodations during his testimony with regard to approaching exhibits or providing demonstrations. Although we are unable to discern any necessity for shackling Shirley to the witness stand, we cannot conclude that the restraints inhibited his ability to participate in his defense. The record reflects that Shirley is intelligent and articulate, and seemingly had little difficulty communicating while on the witness stand.

III. Resentencing and Sentence Modification.

¶18 Shirley also asserts that he is entitled to resentencing or sentence modification because the trial court relied on inaccurate information during sentencing. Specifically, Shirley contends that the trial court relied on: (1) the presumption that the Department of Corrections (DOC) would provide Shirley with adequate health care; and (2) inaccurate information leading to its conclusion

that Shirley's description of the shooting was physically impossible. Shirley also contends, alternatively, that the existence of new factors warrants sentence modification.

¶19 A defendant has a due process right to be sentenced on the basis of accurate information. ***State v. Tiepelman***, 2006 WI 66, ¶9, 291 Wis. 2d 179, 717 N.W.2d 1. Whether a defendant has been denied this right presents a constitutional issue that this court reviews independently. ***Id.*** "[I]n a motion for resentencing based on a [trial] court's alleged reliance on inaccurate information, a defendant must establish that there was information before the [trial] court that was inaccurate, and that the [trial] court actually relied on the inaccurate information." ***Id.***, ¶2.

¶20 Shirley contends that the trial court erroneously relied on the Presentence Report (PSR) which stated that Shirley was an amputee, but concluded that this fact did not preclude a prison sentence. Because there was no further discussion of his disability, Shirley contends, it is implicit that the trial court relied on the assumption that Shirley's medical needs would be met while in prison. Shirley contends that the DOC failed to provide adequate medical care, resulting in a bone marrow infection, extreme pain, a misdiagnosis, and the development of osteomyelitis, which Shirley contends creates a constant risk of further amputations. Shirley further argues that the trial court relied on inaccurate information regarding whether Shirley's description of Perry's shooting was possible.

¶21 A review of the sentencing record does not indicate that the trial court relied on the quality of medical treatment it expected Shirley to receive in prison when making its sentencing decision. The PSR recommended incarceration

and suggested that Shirley receive "a mental health evaluation, needed medical attention, and AODA assessment and any treatment deemed necessary, and employment skills training as well as victim awareness training." The report did not emphasize Shirley's need for medical treatment over other considerations. Indeed Shirley's counsel did not even raise the issue of Shirley's medical condition or treatment needs at the sentencing hearing. With regard to Shirley's contention that the trial court relied on inaccurate information as to how Perry was shot, we conclude that Shirley's argument, in essence, is a rehashing of his trial testimony. Although Shirley submitted a report allegedly demonstrating the possibility of his version of events, the jury heard Shirley's testimony and rejected it. The trial court did not rely on inaccurate information by not believing Shirley's account.

¶22 Finally, Shirley has not shown that a new factor warrants sentence modification. Shirley contends that the deterioration of his health as a result of the conditions of his confinement is a new factor.

¶23 Whether a fact or set of facts presented by the defendant constitutes a "new factor" is a question of law that we review independently. ***State v. Harbor***, 2011 WI 28, ¶33, 333 Wis. 2d 53, 797 N.W.2d 828. A new factor is "'a fact or a set of facts highly relevant to the imposition of sentence, but not known to the trial judge at the time of the original sentencing, either because it was not then in existence or because … it was unknowingly overlooked by all the parties.'" ***Id.***, ¶40 (citation omitted). "The determination of whether that new factor justifies sentence modification is committed to the discretion of the [trial] court, and we review such decisions for erroneous exercise of discretion." ***Id.***, ¶33.

¶24 We conclude that the conditions of Shirley's confinement, and his subsequent health concerns, are not new factors warranting sentence modification. The trial court did not rely on Shirley's health or an expectation that the DOC would provide adequate health care when it imposed Shirley's sentence. The record demonstrates that the trial court believed its sentence was necessary to accomplish the primary objective of protecting the community, stating the "[n]eeds and rights of the public are to be free from this kind of behavior." The trial court also addressed Shirley's rehabilitative needs and deterrence as additional sentencing objectives. The trial court properly relied on the appropriate sentencing objectives. *See* ***State v. Gallion***, 2004 WI 42, ¶40, 270 Wis. 2d 535, 678 N.W.2d 197.

¶25 Because Shirley's medical condition and the conditions of the confinement facility were not highly relevant to Shirley's sentence, we conclude that Shirley has not demonstrated new factors warranting sentence modification by clear and convincing evidence. *See* ***Harbor***, 333 Wis. 2d 53, ¶36 (the defendant bears the burden to establishing a new factor by clear and convincing evidence).

¶26 For the foregoing reasons, we affirm.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.