IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON, Respondent, v. DAVID ALAN RHODES, Appellant.	No. 40132-1-II UNPUBLISHED OPINION

Worswick, J. — David Rhodes appeals from his conviction for second degree assault, arguing that he received ineffective assistance of counsel. Concluding that his arguments fail, we affirm.[1]

FACTS

Following an altercation with another inmate in the Grays Harbor County Jail, the State charged Rhodes with second degree assault.[2] During jury selection, in response to the State's question of whether any jurors would have difficulty deciding the case "without knowing everything," prospective juror fifteen replied:

> I read the paper a lot and I always go through the court stuff and I seen [sic] [Rhodes'] name in there quite a bit. I mean I don't remember every charge that was against him, but I do remember seeing his name in there quite a bit.

Report of Proceedings (RP) (Oct. 13, 2009) (Jury Selection) at 21-22. On the State's motion, and without objection from Rhodes, the trial court excused prospective juror fifteen.

After the jury found Rhodes guilty as charged, his counsel made a record of some juror

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[1] A commissioner of this court initially considered Rhodes's appeal as a motion on the merits under RAP 18.14 and then transferred it to a panel of judges.

[2] In light of the issues raised, we need not review the substantive facts.

contact with Rhodes during a recess. His counsel reported that a number of jurors saw Rhodes as he was being escorted by guards. The lieutenant in charge of the guards said they encountered three jurors before changing direction and said that because Rhodes was behind him, he did not believe that any jurors saw Rhodes in restraints. Rhodes himself stated, "I made eye contact with a few of them and we fled back into the building. I got grabbed by this arm and was manhandled back into the building." RP (Oct. 13, 2009) (Colloquy After Verdict) at 3. Rhodes's counsel did not make any motions or requests of the court.

ANALYSIS

On appeal, Rhodes argues that his trial counsel provided ineffective assistance of counsel. To establish ineffective assistance, he must show: (1) that his counsel's performance was deficient in that it fell below an objective standard of reasonableness based on all the circumstances; and (2) the deficient performance prejudiced him because, had the errors not occurred, the result of his trial probably would have been different. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995).

First, Rhodes argues that his counsel was ineffective when in response to prospective juror fifteen's statement about frequently seeing Rhodes's name in the newspaper crime section, he did not move to strike the remaining prospective jurors, ask for a curative instruction or inquire of the remaining prospective jurors about any effect that statement would have on their ability to render a fair verdict. *State v. Parnell*, 77 Wn.2d 503, 507, 463 P.2d 134 (1969), *abrogated by State v. Fire,* 145 Wn.2d 152, 34 P.3d 1218 (2001). But in *Parnell*, a prospective juror informed the

court that he had, inadvertently, watched a portion of the preliminary hearing involving Parnell during an earlier visit to the courthouse. 77 Wn.2d at 504. Parnell moved to excuse that prospective juror for cause but the trial court denied the motion. *Parnell*, 77 Wn.2d at 504. Parnell used a preemptory challenge to excuse that prospective juror. *Parnell*, 77 Wn.2d at 504-05. The Supreme Court reversed his conviction, concluding that the trial court erred in not dismissing the prospective juror for cause. *Parnell*, 77 Wn.2d at 507-08. In contrast, at Rhodes's trial, the court excused prospective juror fifteen for cause, so Rhodes was not forced to use a preemptory challenge on him. Rhodes does not show that his counsel's failure to take further action after prospective juror fifteen was excused fell below an objective standard of reasonableness. And even if it did, he does not show that the result of his trial probably would have been different. It is not reasonably probable that the trial court would have granted a motion to strike the remaining prospective jurors, had such a motion been made. And it is not reasonably probable that a curative instruction, or further questioning of the prospective jurors, would have changed the result of Rhodes's trial.

Second, Rhodes argues that his trial counsel was ineffective when he did not move for a mistrial after some jurors encountered him during a recess while he was in restraints and being accompanied by guards. But at most, some jurors briefly saw Rhodes in restraints. And a brief glimpse of a defendant in restraints is not typically grounds for a mistrial. *State v. Gosser*, 33 Wn. App. 428, 435, 656 P.2d 514 (1982). Rhodes contends that because he was seen being "manhandled" by his guards, the jury was prejudiced against him. RP (Oct. 13, 2009) (Colloquy After Verdict) at 3. But his description is inconsistent with the guards' description of the

encounter with the jurors. Rhodes does not show that his counsel's failure to move for a mistrial fell below an objective standard of reasonableness. And even if it did, he does not show that the trial court probably would have granted a mistrial.

Rhodes's claims of ineffective assistance of counsel fail. We affirm his conviction.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Worswick, J.

We concur:

Hunt, J.

Penoyar, C.J.