COURT OF APPEALS
DECISION
DATED AND FILED

September 9, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-0026-CR

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

RASHON MISTER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Eau Claire County: THOMAS H. BARLAND, Judge. *Affirmed.*

Before Cane, P.J., Myse and Hoover, JJ.

HOOVER, J. Rashon Mister appeals a judgment of conviction for delivery of over forty grams of cocaine, party to a crime,[1] in violation of

[1] Mister was charged along with two codefendants, Demetri Brown and Vincent Williams. The alleged deliveries occurred from June through December 1995. The trial court granted the defendants' motions to sever and scheduled their trials serially.

§ 161.41(1)(cm)4, STATS. Mister argues that the trial court erroneously exercised its discretion: (1) by not granting a mistrial after the jury panel observed him wearing jail clothes and shackles in the courtroom, such error depriving Mister of his constitutional right to a fair trial; and (2) by admitting other-acts evidence of a seizure of marijuana from Mister's codefendants. We conclude that the trial court properly exercised its discretion by denying Mister's motion for mistrial. Further, we do not decide whether it was error to admit the other-acts evidence because if it was error, it was harmless. We therefore affirm.

The relevant facts are undisputed. Prior to jury selection on the first day of trial, jail personnel brought Mister into the courtroom wearing a blue jail uniform and shackles. The entire jury panel observed Mister. Jail personnel removed him from the courtroom when they learned that a communication error had occurred, and that he was supposed to wear civilian clothes to the courtroom. For the remainder of the trial Mister wore street clothes and entered and exited the courtroom unshackled and unescorted.

After the jury was selected, defense counsel moved for a mistrial based on the panel seeing Mister in jail clothes and shackles. Implicit in the motion was concern that the jury would infer dangerousness from Mister's appearance. In denying the motion, the trial court reasoned that the jury's view of Mister would be rendered harmless for two reasons. First, throughout the trial the jury would observe Mister in civilian clothes, without shackles and without escort. Second, the jury was almost certain to learn at trial that Mister was in jail on an unrelated offense. This evidence would supply an alternative explanation for the shackles and jail uniform.

It is a cause for grave concern when a jury panel observes a defendant in shackles. Prejudice is likely to be engendered by viewing 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). A shackled defendant also runs the risk of implying the defendant is particularly dangerous, not to be trusted even in the courtroom. Shackling is only permissible if it is necessary to further an essential state interest, such as trial security. ***Holbrook v. Flynn***, 475 U.S. 560, 568 (1986); ***Estelle v. Williams***, 425 U.S. 501, 505 (1976).

Mistrial may be the only remedy in certain instances to address prejudice. Less drastic redress may, in other circumstances, suffice to neutralize any prejudice and preserve the defendant's right to a fair trial. It is within the trial court's discretion to determine whether the prejudice, in light of the whole proceeding, warrants a mistrial. *See* ***State v. Pankow***, 144 Wis.2d 23, 47, 422 N.W.2d 913, 921 (Ct. App. 1988). This court must decide whether the panel's view of Mister in a jail uniform and shackles was so prejudicial under all of the circumstances that the trial court's refusal to grant a mistrial was an erroneous exercise of discretion.

We will reverse the trial court's decision to deny a mistrial only on a clear showing of an erroneous exercise of discretion. ***Id.*** A trial court properly exercises its discretion when it has examined the relevant facts, applied the proper standard of law and engaged in a rational decision-making process. ***Mullen v. Coolong***, 153 Wis.2d 401, 406, 451 N.W.2d 412, 414 (1990). We conclude that the trial court properly exercised its discretion by denying Mister's motion for a mistrial.

The evidence at trial and the court's remedial responses neutralize any prejudice inherent in the initial viewing. The court correctly concluded that the jury would be offered a reasonable explanation for the jail uniform and shackles.[2] When jail personnel were informed that Mister was to attend the trial in civilian clothes, he was immediately taken into a back room and allowed to change. He remained unshackled for the rest of the trial. The court's decision to permit Mister to enter and leave the courtroom without escort was a potent response to the prejudicial effect of the panel's first view of him, presumably dispelling any impression of dangerousness.[3] Moreover, the court invited defense counsel to request a remedial jury instruction, although it expressed concern that such an instruction might aggravate the situation.[4] The jury was instructed several times to presume Mister innocent and was charged to reach its verdict based only upon the evidence received at trial. In sum, the jury's view was met with immediate steps of a nature likely to remedy any prejudice. The trial court properly exercised its discretion by weighing the curative relief offered to Mister against potential prejudice and denying the mistrial motion.

Mister next contends that the trial court erroneously exercised its discretion by admitting other-acts evidence of a seizure in Sauk County of a large quantity of marijuana from his codefendants. Mister was not present nor mentioned during the seizure. In admitting the evidence, the court ruled that the State had laid the foundation to present a jury issue of conspiracy. The

[2] Why the evidence of Mister's incarceration for an unrelated conviction was before the jury was not elucidated in the briefs nor advanced as an appeal issue.

[3] Particularly when combined with the explanation that Mister was a prisoner as a result of an unrelated conviction.

[4] No such instruction was requested.

prosecution intended to introduce evidence of numerous bags containing remnants of marijuana found in Mister's closet in a residence from which the three codefendants sold drugs. The court admitted the evidence to support a common scheme, plan and Mister's capacity to participate in the conspiracy; i.e., the defendants' ability to obtain a large quantity of controlled substances in Milwaukee and transport it to Eau Claire (through Sauk County) for distribution in Eau Claire.

We need not decide whether the trial court erred by admitting the other-acts evidence; even if such admission were error, it is harmless. The test for appellate review of harmless error is whether there is a reasonable possibility that the error contributed to the conviction. ***State v. Harris,*** 199 Wis.2d 227, 255, 544 N.W.2d 545, 556 (1996). First we note that, from a practical view, Mister's connection with the other-crimes evidence was remote at best and thus was not unduly prejudicial. More significantly, and dispositively, we are convinced from the overwhelming evidence of guilt that the outcome of the trial would have been the same regardless of the admission of other-acts evidence.

The authorities seized physical evidence from Mister's bedroom, including a note to Mister that said "Kevin needs about 3 more bags," another note that appeared to be a tally sheet of revenues, a number of knotted baggies common in the cocaine trade and hand scales. In addition to the physical evidence, a

number of witnesses implicated Mister.[5] Kimberly Tober testified that she purchased cocaine from Mister, Brown and Williams and that each told her she could buy from whichever one was there. Debra Bertrang also testified that she purchased cocaine from Williams and Brown, and that Mister sometimes responded to Brown's and Williams's pager numbers. She also testified that Brown stated "they were all in it together" and she could buy from any one of them. Karen Fox testified that all three codefendants had pagers and large amounts of money, although she did not believe they had jobs. She also testified that Mister and Williams had been at her apartment with white rocks, which she knew to be rock cocaine, on a plate, and that persons came to the door asking for dimes and eighths, a common reference to drug quantities. Finally, Langham testified that Mister sold cocaine to various people and that he instructed others to give cocaine to certain customers when they came over. She also testified that Mister kept cocaine in the closet she shared with him and that the other codefendants came in at various times and got cocaine out of the closet.

The connection between the other crimes evidence and Mister was attenuated at best. The evidence of the defendant's guilt was overwhelming. Under these circumstances it is not reasonably possible that receipt of the

[5] The defense attempted to discredit the State's witnesses through various impeachment modes, including motive to falsify and prior inconsistent statements. For example, Mister's roommate, Stephanie Langham, gave a statement to law enforcement implicating the defendant in drug sales, but recanted at trial. There were, however, indicia of the witnesses' credibility upon which the jury could rely in assessing the weight to be given to their testimony. Thus, one of the allegations Langham made in her statement to police was that she became aware of the codefendants' drug selling when Brown and Williams were caught in Baraboo with a pound of marijuana and told her that they were glad they were not caught with the "other stuff." Baraboo is located in Sauk County. The evidence that Brown and Williams were in fact caught in Sauk County with a pound of marijuana corroborated her statement and enhanced its credibility.

other-acts evidence contributed to his conviction. Therefore, if its admission constituted error, it was harmless.

By the Court.—Judgment affirmed.

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