COURT OF APPEALS
DECISION
DATED AND FILED

November 3, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2011AP413-CR **Cir. Ct. No. 2009CF99**

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

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JEFFREY T. TURNER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dodge County: STEVEN G. BAUER, Judge. *Affirmed*.

¶1 HIGGINBOTHAM, J.[1] Jeffrey Turner appeals a judgment of conviction entered upon a guilty verdict for disorderly conduct. Turner argues that

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(c) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

the circuit court erred by failing to provide specific reasons on the record for keeping him in restraints and guarded at the jury trial, which ultimately caused him to be prejudiced in the eyes of the jury. Turner also argues that trial counsel was ineffective for failing to raise those issues at trial. Because we conclude that Turner suffered no prejudice as a result of either the court's or counsel's actions at trial, we affirm.

BACKGROUND

¶2 The following facts are taken from Turner's trial on February 11, 2011. On March 31, 2009, Turner was charged with assault by prisoners as a repeater and disorderly conduct as a repeater. These charges stemmed from allegations that Turner assaulted a guard at Fox Lake Correctional Institution. Turner was serving a sentence at Fox Lake for an unrelated conviction. During this assault, the State alleged that Turner threw a cup of urine at a correctional officer working at the prison.

¶3 On the day of trial, Turner was brought into the courtroom prior to the seating of the jury. Turner was wearing standard-issued prison garments. Turner was also cuffed at the wrists and ankles. The court brought up the issue of the defendant's restraints almost immediately, offering Turner an opportunity to have one of his hands released so that he could take notes. Turner and his attorney ultimately declined to have one of his hands released.

¶4 The court and both parties then addressed the procedure that would govern Turner's testimony. Specifically, the court stated that Turner would take the stand prior to the jury's entry into the courtroom and his hands would be removed from restraints so that the jury could not see them. The court then

inquired as to the danger that Turner presented, to which an in-court corrections officer replied that Turner presented no danger.

¶5 Later in trial, Turner took the stand to testify regarding the incident. Prior to the jury entering the courtroom, the prosecutor on the case, District Attorney Klomberg, asked the court if it wanted to make a record regarding the presence of corrections officers in the courtroom who would be flanking the defendant on the stand. The court declined to make a record. Turner then took the stand out of the presence of the jury, and the court made an inquiry into what the jury would be able to see regarding Turner's handcuffs and shackles. The parties made recommendations to Turner on how to cover up the restraints, including taking the cuffs off his hands and pulling his shirt out to cover up the restraints. Among other things, the judge seated himself in a jury chair to assess whether the jury would be able to see any of the restraints. After assuring himself that Turner's restraints were not visible to the jury, the court swore Turner in so that Turner could remain seated, with his restraints concealed, when the jury returned.

¶6 That same day, trial concluded and the jury returned with verdicts of not guilty with regard to the charge of assault by prisoner, and guilty with regard to the disorderly conduct charge.

DISCUSSION

¶7 On appeal, Turner argues that the circuit court erred in failing to state any specific reasons for keeping Turner in restraints during trial, both while seated at the defense table and on the witness stand. Turner contends that the court's error caused him to be prejudiced in the eyes of the jury. We conclude that although the circuit court erred by not making a *sua sponte* inquiry into the necessity of restraints, Turner was not prejudiced by the court's error.

¶8 "It is the general rule that under ordinary circumstances freedom from handcuffs, shackles, or manacles of a defendant during the trial of a criminal case is an important component of a fair and impartial trial." ***Sparkman v. State***, 27 Wis. 2d 92, 96-97, 133 N.W.2d 776 (1965) (citation omitted). The circuit court "maintains the discretion to decide whether a defendant should be shackled during a trial as long as the reasons justifying the restraints have been set forth in the record." ***State v. Grinder***, 190 Wis. 2d 541, 550, 527 N.W.2d 326 (1995). We will not reverse a circuit court's decision to maintain a defendant in restraints during trial unless it can be shown that the court erroneously exercised its discretion. ***Id.*** at 500-51.

¶9 The facts of ***Grinder*** are analogous to the case at bar. In ***Grinder***, the Wisconsin Supreme Court held that the circuit court had erred when it failed to establish on the record any reasons for keeping the defendant restrained during trial. ***Id.*** at 544-45. Specifically, the ***Grinder*** court noted that courts should "evaluate the likely effects of a particular procedure, based on reason, principle, and common human experience." ***Id.*** at 551 (citation omitted). As set forth in ***Sparkman*** and ***Grinder***, the court was obliged to evaluate the defendant's risk by taking into account things like the defendant's background, the nature of the charges, and the security risks imposed on the courtroom. ***Id.*** at 552. The ***Grinder*** court ultimately concluded that the defendant had not been prejudiced because the circuit court had taken affirmative steps to ensure that the jury would not see the defendant's restraints. ***Id.*** at 553.

¶10 Similarly, in the instant case, the circuit court, at the time Turner was initially brought into the courtroom, inquired as to the danger that Turner presented while in the courtroom. In response, the prison guard escort indicated that Turner was not a danger. After this initial exchange, the court made no

further inquiry nor did it assert any reasons for keeping Turner in restraints. However, as in ***Grinder***, the circuit court here made substantial efforts to ensure that the jury would not be able to see Turner's restraints at either the defense table or on the witness stand.

¶11 The State argues that the circuit court was not required to address Turner's restraints on the record. The State contends that a court does not have a *sua sponte* duty to raise the necessity of restraints on the record, *citing* ***State v. Miller,*** 2011 WI App 34, ¶11, 331 Wis. 2d 732, 797 N.W.2d 528. However, the facts in ***Miller*** are distinguishable. In ***Miller***, the appellate court held that a circuit court has no *sua sponte* duty to raise the necessity of restraints on a defendant in the courtroom when those restraints are hidden. ***Id.*** The defendant's restraints in ***Miller*** were limited to a waist restraint hidden under the defendant's shirt, and completely out of view to anyone in the courtroom. In the instant case, Turner's restraints were chains attached to his ankles and wrists. Turner's restraints were easily visible. Accordingly, ***Miller*** is not applicable.

¶12 A circuit court's failure to make a *sua sponte* inquiry regarding the need for restraints does not alone, however, entitle a defendant to a new trial. ***Flowers v. State***, 43 Wis. 2d 352, 362, 168 N.W.2d 843 (1969). Rather, the defendant must also show that the presence of those restraints prejudiced him in the eyes of the jury. ***Id.*** at 362-64. Turner has presented no evidence to demonstrate that he was prejudiced before the jury; nor is there any evidence in the record that the jury actually saw Turner's restraints. Turner merely offers conclusory allegations that because he did not raise his hands above the defense table, and he was seated in the witness stand prior to the jury's reentry into the courtroom, the jury must have inferred that Turner was restrained. Courts in this state have long held that mere conclusory allegations without factual support are

insufficient. ***State v. Bentley***, 201 Wis. 2d 303, 313, 548 N.W.2d 50 (1996). The record demonstrates that the circuit court went to great lengths to ensure that the jury would not be able to see any of Turner's restraints. Based on the above, we conclude Turner was not prejudiced by the court's failure to state specific reasons on the record for keeping Turner in restraints during trial.

¶13 Turner next argues that the court failed to state a reason, on the record, for the presence of guards behind him during his testimony on the witness stand. Turner contends that, in a manner similar to the presence of restraints on his person, the presence of guards behind him during his testimony prejudiced him in the eyes of the jury. ***Flowers***, 43 Wis. 2d at 362. In ***Flowers***, the circuit court also stationed a deputy behind the defendant during his testimony. ***Id.*** On review, the Wisconsin Supreme Court held that there was no evidence on the record to show that the defendant was prejudiced in the eyes of the jury. ***Id.*** The court determined that in order to find that the defendant was prejudiced by the stationing of a guard behind him, the defendant had to have (1) raised that objection on the record, and (2) established "how close the deputy was sitting to the defendant, whether the deputy was armed, or how he conducted himself." ***Id.*** at 362-63.

¶14 Turner has presented no evidence that he ever made an objection to the guards' presence behind him during his testimony at trial. In fact, it was the State who raised the issue of the necessity of guards at trial. Further, the record provides no information relating to the proximity of the guards to Turner during his testimony or their demeanor, and Turner has made only conclusory allegations that their presence was prejudicial to him. Because Turner has not developed his argument nor provided evidence necessary to establish the facts required to determine whether the circuit court erred, we refuse to exercise our discretion in reviewing this issue at this time. *See* ***Flowers***, 43 Wis. 2d at 363.

¶15 Finally, Turner contends on appeal that his defense counsel was ineffective for failing to object to Turner's restraints where the court did not consider Turner a threat. Turner asserts that, at a bare minimum, defense counsel should have asked the court for a limiting instruction asking the jury not to consider Turner's leg restraints or the presence of guards. *See* ***State v. Champlain***, 307 Wis. 2d 232, 247, 744 N.W.2d 889 (Ct. App. 2007).

¶16 In order to establish that counsel provided ineffective assistance, a defendant must demonstrate that defense counsel made errors so serious that counsel's performance was deficient, and that this deficient performance so prejudiced the defendant as to deprive him of a fair trial. ***Strickland v. Washington***, 466 U.S. 668, 686 (1984). It is presumed that a defendant received adequate assistance and that all of counsel's decisions could be justified in the exercise of reasonable professional judgment. *See* ***State v. Kimbrough***, 2001 WI App 138, ¶¶31-34, 246 Wis. 2d 648, 630 N.W.2d 752. An attorney's performance is deficient only if the defendant proves that the attorney's challenged acts or omissions were objectively unreasonable under all the circumstances of the case. ***Id.***, ¶31, citing ***Strickland***, 466 U.S. at 688.

¶17 As to the second prong, a defendant must prove that counsel's challenged acts or omissions actually prejudiced the defense to the extent that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Strickland***, 466 U.S. at 694. If a defendant cannot meet the second prong of the ***Strickland*** test, there is no need for a reviewing court to address the first prong. ***Id.*** at 697.

¶18 The record demonstrates that although defense counsel failed to raise any objection to either the presence of guards or the need to keep Turner

restrained, the prosecutor raised both issues with the court. After this inquiry, the court and parties then extensively discussed how to keep the restraints from being visible to the jury. Turner has provided no evidence that the jury saw the restraints. *See* ***Kimbrough***, 246 Wis. 2d 648, ¶31-34; ***Flowers***, 43 Wis. 2d at 363. Turner has also failed to establish any of the facts necessary for this court to determine whether the presence of guards prejudiced Turner in the eyes of the jury. ***Flowers***, 43 Wis. 2d at 363. Because Turner was not prejudiced by the court's failure to state specific reasons on the record for Turner's restraints during trial and has shown no evidence that the guards placed behind him during his testimony on the witness stand prejudiced him pursuant to ***Flowers***, and because counsel and the circuit court worked extensively to ensure that at no time was the jury allowed to see Turner in restraints during the trial, we conclude that defense counsel's failure to specifically object to the restraints or guards did not constitute ineffective assistance of counsel. *See* ***Strickland***, 466 U.S. at 694-95.

By the Court.—Judgment affirmed.

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