STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Appeal Case No. 2016AP001071-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

ANTHONY COLON,

Defendant-Appellant.

ON APPEAL FROM A DECISION AND JUDGMENT OF CONVICTION ENTERED ON NOVEMBER 7, 2014, IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE MEL FLANAGAN, PRESIDING

# BRIEF OF PLAINTIFF-RESPONDENT

John T. Chisholm
District Attorney
Milwaukee County

Benjamin Verhulst
Assistant District Attorney
State Bar No. 1090819
Attorneys for Plaintiff-Respondent

District Attorney's Office
821 West State Street, Room 405
Milwaukee, WI 53233-1485
(414) 278-4646

## TABLE OF CONTENTS

**Page**

## TABLE OF AUTHORITIES

## CASES CITED

**Page**

## WISCONSIN STATUTES CITED

STATE OF WISCONSIN

C O U R T  OF  A P P E A L S

DISTRICT I

Appeal Case No. 2016AP001071-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

vs.

ANTHONY COLON,

Defendant-Appellant.

ON APPEAL FROM A DECISION AND JUDGMENT OF CONVICTION ENTERED ON NOVEMBER 7, 2014, IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE MEL FLANAGAN, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

## ISSUES PRESENTED

I. Was Colon deprived of his right to a fair trial when a single juror observed him coming out of the elevator shackled to inmates in jail clothes?

Trial Court Implicitly Answered: No.

II. Was trial counsel ineffective for failing to request a mistrial after a single juror observed Colon coming out of the elevator shackled to inmates in jail clothes?

Trial Court Answered: No.

## STATEMENT ON ORAL ARGUMENT AND PUBLICATION

The County requests neither oral argument nor publication. The briefs in this matter can fully present and meet the issues on appeal and fully develop the theories and legal authorities on the issues. *See* Wis. Stat (Rule) 809.22(1)(b). Further, as a matter to be decided by one judge, this decision will not be eligible for publication. *See* Wis. Stat (Rule) 809.23(1)(b)4.

## STATEMENT OF THE CASE

On June 4, 2014, the State charged Colon with five counts: Criminal Damage to Property, Felony Intimidation of a Victim, Strangulation and Suffocation, Misdemeanor Battery, and Disorderly Conduct. (R1, R2) Each of those counts was charged as a habitual criminality repeater under Wis. Stat. § 939.62(1)(a) based on Colon's 2011 conviction for being a felon in possession of a firearm contrary to Wis. Stat. § 941.29(2)(a). (R2)

On November 5, 2014, this case proceeded to trial. (R1:3) The jury heard the testimony of C.N., the victim of the offenses. (R1:3, R2). On November 6, the trial reconvened and the jury heard from Margaret Borges, Police Officer Kenneth Justis, and Police Sergeant Amy Rivera. (R1:3) Colon chose not to testify and closing arguments were completed that afternoon. (R1:4) The jury began deliberating at 4:15pm and signed their first guilty verdict that afternoon. (R1:4, R41:23)

On the morning of November 7, 2014, the deputies were bringing Colon from the jail to the courtroom on the fifth floor of the courthouse. (R41:2) When the elevator doors opened, the bailiff observed two jurors sitting on the floor outside the courtroom. (R41:2) The bailiff instructed her partner to continue up to the sixth floor and got off by herself. (R41:3)

The bailiffs later went up, got Colon from the sixth floor, and brought him back to the fifth floor. (R41:3) When the elevator doors opened on the fifth floor, Colon "got kind of loud and boisterous". (R41:3) The bailiffs did not observe any jurors and they took Colon into the holding area. (R41:4) Colon

was in street clothes, but was restrained together with defendants who were in jail orange. (R41:14) Colon then calmed down and apologized to the bailiff. (R41:4)

Colon's trial counsel was Attorney Daniel Meylink. (R41:1) He informed the court that Colon, upon being brought back down to the fifth floor, observed a juror in the hallway and became upset. (R41:5) Attorney Meylink informed the court that Colon told him after he had become upset, the juror made eye contact with him and then walked away down the hallway. (R41:5) The parties were able to identify the juror by his reported appearance, and the bailiff confirmed that he was not one of the two jurors who had been seated in the hall when the elevator stopped the first time. (R41:6)

The parties discussed appropriate solutions and agreed to question the jurors as to whether they had seen Colon in the hallway. (R41:15) One juror responded affirmatively, and he was questioned outside the presence of the other jurors. (R41:16-17) He reported, "I was just sitting on the bench across from the elevators, glanced up and some gentlemen were coming out of the elevator." (R41:17)

The juror stated he had not discussed it with the other jurors and promised not to do so. (R41:17-18) He stated that he did not believe that anything he saw would prejudice or bias his decision, and the court instructed him that he was to decide the case based solely on the law and the evidence that he had heard in the courtroom. (R41:17) The juror stated he understood and could do that. (R41:18) The juror went up to deliberate with the rest of the jury (R41:18)

Attorney Meylink asked if they could question the juror further, but the court refused. (R41:19) The court explained that because the juror stated that his verdict would not be affected and that he would follow the court's instruction, the court did not believe any further action was necessary. (R41:19) The court further stated,

> He's agreed and is sworn to follow the requirements of his oath, which is to follow the law and the evidence in the court. I have affirmed again that he understands that and will do that, and, in fact, will not use anything that he saw today or any other time outside the courtroom. That's what

> jurors have to do, and I'm not going to pester him about this any further. No, I'm not going to bring him down for anymore questions.

(R41:20-21)

The same morning, the jury returned its verdicts. (R41:23) The jury returned verdicts of guilty as to Criminal Damage to Property, Misdemeanor Battery, and Disorderly Conduct. (R41:23-24) The jury returned verdicts of not guilty as to Intimidation of a Victim and Strangulation. (R:41:24) The jurors were polled and each indicated that they agreed with the verdicts. (R41:24-26)

On December 23, 2014, the court sentenced Colon to six years imprisonment: one year in custody and one year extended supervision on each of the three counts. (R1:6)

On May 3, 2016, Colon filed a postconviction motion for a new trial, alleging ineffective assistance of counsel because Attorney Meylink did not move for a mistrial. (R27) The court denied Colon's motion, ruling there was not a reasonable probability the judge[1] would have granted a mistrial. (R28:2)

## STANDARD OF REVIEW

I. "A circuit court's discretionary decision will not be reversed unless the court erroneously exercised its discretion. A circuit court erroneously exercises its discretion if it makes an error of law or if it fails to base its decision upon the facts in the record." *Barricade Flasher Serv., Inc. v. Wind Lake Auto Parts, Inc.*, 2011 WI App 162, ¶ 5, 338 Wis. 2d 144, 148, 807 N.W.2d 697, 699.

II. The standard of review of the ineffective assistance of counsel components of performance and prejudice is a mixed question of law and fact. Thus, the trial court's findings of fact, the underlying findings of what

[1] The trial was presided over by Judge Mel Flanagan. In May of 2016, the same court was presided over Judge Michelle Havas, who denied the defendant's postconviction motion.

> happened, will not be overturned unless clearly erroneous. The ultimate determination of whether counsel's performance was deficient and prejudicial to the defense are questions of law which this court reviews independently. *State v. Johnson*, 153 Wis. 2d 121, 127–28, 449 N.W.2d 845, 848 (1990).

## ARGUMENT

### I. BECAUSE COLON CAUSED A JUROR TO SEE HIM IN RESTRAINTS, HE CANNOT CLAIM THAT THIS DENIED HIM A FAIR TRIAL

Colon cannot complain that his fair trial rights were violated when he drew attention to himself while shackled to other jail inmates. Colon argues that he was denied his right to a fair trial when one juror saw him shackled to other inmates. However, because he drew the juror's attention to himself while he was shackled, he forfeited any right to not being seen in that situation.

The courts have been very clear that defendants can forfeit even their most fundamental rights by their conduct. In *Illinois v. Allen*, the United States Supreme Court held that Allen forfeited his right to be present for his trial by his conduct. 397 U.S. 337, 90 S. Ct. 1057, 25 L. Ed. 2d 353 (1970). In *State v. Cummings*, the Wisconsin Supreme Court held that a defendant could forfeit his right to counsel by his conduct. 199 Wis. 2d 721, 546 N.W.2d 406 (1996). In *State v. Anthony*, the Wisconsin Supreme Court extended the principle to a defendant's right to testify. 2015 WI 20, 361 Wis. 2d 116, 860 N.W.2d 10, cert. denied, 136 S. Ct. 402, 193 L. Ed. 2d 314 (2015).

The defendant's right to be seen free of restraints is less protected than any of the above rights. In *State v. Grinder*, the Wisconsin Supreme Court ruled that a trial court even has discretion to keep the defendant in restraints during the trial, so long as the court states its reasons on the record. 190 Wis. 2d 541, 527 N.W.2d 326 (1995).

The State does not concede that Colon's right to a fair trial was violated. However, it assumes for the sake of

argument that a defendant has a right to never have a juror know he is in custody. In this case, the reason Colon was seen is not due to the action of the State or the court. Colon was seen by the juror because he was upset and drew attention to himself. (R41:7) Colon told his attorney that after he was brought back down to the fifth floor, "when he's brought out of the elevator, that same juror with the white-gray hair was in the hallway but walking away." (R41:5) The bailiff told the court that Colon was being very loud and drawing attention to himself. (R41:7) And he told his attorney that the juror then made eye contact with him before continuing to walk down the hallway. (R41:5).

The bailiffs worked to prevent jurors from seeing Colon in custody. When the elevator opened on the fifth floor for the first time and the bailiff observed two jurors, she sent Colon up to the sixth floor. (R41:3) When the bailiff brought Colon down from the sixth floor to the fifth floor, she told the court she didn't see any jurors "but I - - you know - - I don't know because he made kind of a scene." (R41:3-4) The bailiff stated she thought Colon drew attention to him being in custody. (R41:4)

The juror observing Colon shackled to other inmates did not result from a mistake or omission of a government official. Colon created the situation himself, and cannot now complain that someone else denied him a fair trial because of that very situation.

## II. COLON WAS NOT DENIED A FAIR TRIAL BECAUSE THE OUTCOME WAS BASED ON THE EVIDENCE

Colon's received a fair trial with verdicts based on the evidence introduced at trial. Colon argues that his right to a fair trial was violated because a single juror saw him shackled to other inmates. But the question of a fair trial is not one that has a bright line rule. In *Holbrook v. Flynn*, the United States Supreme Court explained,

> Central to the right to a fair trial, guaranteed by the Sixth and Fourteenth Amendments, is the principle that one accused of a crime is entitled to have his guilt

> or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial.

475 U.S. 560, 567, 106 S. Ct. 1340, 1345, 89 L. Ed. 2d 525 (1986). The Court went on to explain that we have decided to trust in the adversary system and the presumption of innocence rather than trying to eliminate any reminder that the State has accused the defendant of committing a crime. *Id*. In this case, those pillars remained standing and the jury reached their verdicts based on the evidence.

In *State v. Cassel*, the Wisconsin Supreme Court considered an analogous situation to the present case. 48 Wis. 2d 619, 180 N.W.2d 607 (1970). There, multiple jurors observed the defendant in restraints outside of the courtroom, but the Court ruled that the defendant did not have a right to a new trial. What happened in this case are even less prejudicial. In *Cassel*, the trial court did not instruct the jurors prior to their deliberations. Multiple jurors observed the defendant, and the defendant was convicted of the sole count. In the present case, only one juror observed Colon, he agreed to consider only the evidence, and he voted to acquit on two felony charges.

Colon recognizes *Cassel* but believes it is inapplicable because it assumes jurors expect the defendant to be in custody. (Appellant's Brief at 12) On the contrary, *Cassel* speaks directly to a number of the issues in this case. The Court stated, "Here, the views by some members of the jury were casual, momentary and inadvertent. The dramatics of such a situation is essentially different than a court scene." 48 Wis. 2d at 625, 180 N.W.2d at 611. In the present case, the juror's observation was casual, momentary, inadvertent, and caused by Colon. Also like *Cassel*, the observation had no impact in the jury's verdicts. (R41:18)

**a. The court reasonably exercised its discretion in dealing with the situation as it arose.**

When the trial court learned about the situation in the hallway, it made a reasoned and reasonable decision. Colon seeks review of "a decision" (Appellant's Brief at 5) made by

the trial court. When the court uses its discretion in dealing with issues that come up in a trial, that decision will stand unless it makes an error of law or fails to base its decision upon facts in the record. *Barricade Flasher Serv., Inc. v. Wind Lake Auto Parts, Inc.*, 2011 WI App 162, ¶ 5, 338 Wis. 2d 144, 148, 807 N.W.2d 697, 699 (internal citations omitted). Here, Colon has not pointed out any errors of law and the facts are clear. The court, with the advice of the parties, decided to bring the jury down and figure out which juror(s) had seen the defendant, and whether that juror(s) could still be fair and impartial. (R41:14-15) The court did so, learned that one juror observed the defendant, learned that the juror believed he could be impartial, and instructed him to evaluate on the evidence and not share his observations with others. (R41:17-18) When Attorney Meylink requested further questioning, the court explained why that would not be necessary or helpful. (R41:20-21) Therefore, Colon has not shown any decision in which the court made a mistake of law or in which the decision was not reasonable based on the record.

**b. Twelve jurors agreed unanimously that Colon was guilty.**

Even though only one juror saw Colon in custody, all twelve voted to convict him of three charges. Colon contends that seeing him in custody prevented the jury from reaching a fair verdict. But eleven jurors who had no knowledge of his custodial status also voted to convict him. The only juror who had a clue that Colon was in custody told the court that it would not affect his weighing of the evidence. (R41:17-18) Colon presents no evidence that would indicate anything else.

Further, the jury voted to convict Colon of Criminal Damage to Property on November 6, before any juror had seen Colon in custody (R41:23). Therefore, the defendant's guilt or innocence was determined by jurors weighing the evidence and the defendant received a fair trial.

**c. The jury agreed that Colon was only guilty of three misdemeanor charges and acquitted him of two felony charges.**

When the jury considered the evidence, it did not mindlessly convict Colon. The jury weighed the evidence, convicted him of three counts, and acquitted him of two others. (R41:23-24) If the jury would have reached a decision based on anything but the evidence, there would be no way to explain this discrepancy. But if the jury weighed the evidence and found the evidence to be sufficient

## III. ATTORNEY MEYLINK WAS NOT INEFFECTIVE WHEN HE DID NOT MOVE FOR A MISTRIAL

Attorney Meylink served as effective counsel during Colon's trial. In order to show that trial counsel was ineffective, Colon must show that trial counsel's performance was deficient and that this deficiency prejudiced Colon. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984). He can show neither.

### a. Attorney Meylink's trial strategy won an acquittal on two felony charges.

Colon first fails to establish that Attorney Meylink's performance was deficient. In the first prong of the *Strickland* test, Colon must point to specific acts or omissions of trial counsel that are "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690, 104 S. Ct. at 2066, 80 L. Ed. 2d 674. Following a finding of guilt, there is a strong "presumption that counsel acted reasonably within professional norms." *Johnson*, 153 Wis. 2d at 127–28, 449 N.W.2d at 848.

Colon argues that Attorney Meylink was deficient because he did not request a mistrial after a juror saw him shackled to jail inmates. (Appellant's Brief at 15) As support, Colon relies on *State v. Champlain*, a case in which the trial attorney never raised the issue of his client wearing a taser armband during the trial. 2008 WI App 5, ¶ 2, 307 Wis. 2d 232, 239, 744 N.W.2d 889, 892. Colon then goes on to acknowledge that Attorney Meylink not only raised the issue, but continued to argue until the trial court denied his request for further questioning of the juror.

Colon also attempts to distinguish an similar case, *State v. Krueger*, 2011 WI App 1, 330 Wis. 2d 834, 794 N.W.2d 927. In that case, trial counsel did not request a mistrial even after the court indicated it would entertain such a motion. *Id.* at ¶ 7. In that case, the Court of Appeals did not find deficient performance because the choice was strategic: "Krueger cannot complain that he should be given a new trial now after the result of the trial he chose to continue to its conclusion turned out to be unsatisfactory to him." *State v. Krueger*, 2011 WI App 1, ¶ 9, 330 Wis. 2d 834, 794 N.W.2d 927.

In this case, the trial court did not indicate it would entertain a mistrial motion. In fact, the trial court refused to even question jurors further. Further, Colon was acquitted on two felony counts. (R1) While Attorney Meylink did not state why he was not moving for a mistrial, it may be that he had some sense of how the trial was going. Attorney Meylink acted as a competent attorney during the discussion of the juror's observation and throughout the trial as a whole.

**b. There is no evidence that, had Attorney Meylink moved for a mistrial, his motion would have been successful.**

Even if the Court finds that Attorney Meylink's performance was deficient, Colon fails to show prejudice. When considering *Strickland*'s second prong, the defendant must demonstrate that the lawyer's errors were so serious as to deprive the defendant of a fair trial. *Johnson*, 153 Wis. 2d at 127, 449 N.W.2d at 848. Additionally, the defendant must show "that there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d 674. A reasonable probability "is a probability sufficient to undermine confidence in the outcome." *Id*. The Wisconsin Court of Appeals has also noted that it is relevant to the prejudice determination when trial counsel succeeded in getting even a partial acquittal. *State v. Snider*, 2003 WI App 172, 266 Wis. 2d 830, 851, 668 N.W.2d 784, 794, n.10.

In this case, the defendant provides no evidence that a motion for a mistrial would have been successful or that the

end result would have been different. In fact, the trial court refused to even bring the juror back down for further questioning. (R41:21) It is highly improbable that the court would then turn around and grant a mistrial based on the same facts. Colon would not have achieved a different verdict if his attorney had made an unsuccessful motion. Even if the trial court granted a mistrial, Colon does not allege or show evidence that another jury would have returned different verdicts.

Further, Attorney Meylink's choices won Colon an acquittal on two felony counts. Because one guilty verdict had been signed the afternoon before, the jury only convicted Colon of two counts after the juror observed him. Colon does not even address how that could have been different if his attorney had moved for a mistrial.

## CONCLUSION

For the forgoing reasons, the State respectfully requests that the Court uphold the Circuit Court's judgment of conviction.

Dated this _____ day of October, 2016.

Respectfully submitted,

JOHN T. CHISHOLM
District Attorney
Milwaukee County

_____
Benjamin Verhulst
Assistant District Attorney
State Bar No. 1090819

## CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19 (8) (b) and (c) for a brief produced with a proportional serif font. The word count of this brief is 3,391.

_____ _____

Date Benjamin Verhulst
Assistant District Attorney
State Bar No. 1090819

## CERTIFICATE OF COMPLIANCE WITH RULE 809.19 (12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19 (12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

_____ _____

Date Benjamin Verhulst
Assistant District Attorney
State Bar No. 1090819

P.O. Address:
Milwaukee County District Attorney's Office
821 West State Street- Room 405
Milwaukee, Wisconsin 53233-1485
(414) 278-4646
Attorneys for Plaintiff-Respondent.