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STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2016AP001071 CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ANTHONY COLON,

Defendant-Appellant.

ON NOTICE OF APPEAL TO REVIEW A DECISION ENTERED IN CIRCUIT COURT FOR MILWAUKEE COUNTY, HONORABLE MEL FLANAGAN PRESIDING

REPLY BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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Issues Presented

I. Did Mr. Colon create the situation that led to jurors seeing him shackled to other inmates, thereby forfeiting any right to not be seen in that situation?

II. Did the fact that the court conducted a colloquy with the juror who admitted to

seeing Mr. Colon obviate the need for Attorney Meylink to move for a mistrial?

Position on Oral Argument and Publication

Neither Oral Argument nor Publication is requested.

STATEMENT OF FACTS

On June 7, 2014, a criminal complaint was filed in Milwaukee County wherein Mr. Colon was charged with one count of Disorderly Conduct, contrary to Wisconsin Statutes §947.01(1); one count of Battery, contrary to Wisconsin Statutes §940.19(1); one count of Strangulation and Suffocation, contrary to Wisconsin Statutes § 940.235(1); one count of Intimidating Victim/Use of Attempt Force, contrary to Wisconsin Statutes §940.45(1); and one count of Criminal Damage to Property, contrary to Wisconsin Statutes §943.01(1). R2.

On November 5, 2014, a jury trial on this matter began in front of the Honorable Mel Flanagan. R37. A jury of 13 citizens from Milwaukee County was selected. R37. On November 6, 2014, testimony was closed and the jury was charged to deliberate. R40. On November 7, 2016, at about 8:25am, Mr. Colon was being escorted by two bailiffs – one male and one female – from the Milwaukee County Jail bullpen to the bullpen on the fifth floor of the courthouse. (Colon Affidavit ¶2) Mr. Colon was wearing his trial clothes while shackled to five other inmates who were dressed in orange jail clothes. (Colon Affidavit ¶3)

Before letting the inmates off the elevator on the fifth floor, the female bailiff exited first to make sure the area was clear. (Colon Affidavit ¶4) Mr. Colon noticed that there were two jurors – one male and one female – in the hallway and mentioned this to the female bailiff immediately. (Colon Affidavit ¶5) The male juror, who was wearing jeans and a maroon zip-up hoodie sweater with a black graphic tee underneath and sitting cross-legged facing the elevator, made eye contact with Mr. Colon. (Colon Affidavit ¶6) Immediately after making eye contact, this juror lowered his head and directed his attention to his phone. (Colon Affidavit ¶6)

The female bailiff then ushered Mr. Colon and the other inmates back onto the elevator and directed the male bailiff to take them up to the sixth floor bullpen until she could clear the hallway of jurors. (Colon Affidavit ¶7) While on the way up to the sixth floor, Mr. Colon asked the male bailiff how something like this could happen. The bailiff responded that jurors are directed to use a back passage to get into the courtroom but that they do not always do so. (Colon Affidavit ¶8) Once on the sixth floor, the female bailiff, who was still on the fifth floor, informed the male bailiff

over walkie-talkie that it was clear to return to the fifth floor. (Colon Affidavit ¶9)

At this time, Mr. Colon was at the end of the line and thus the last to walk off the elevator on the fifth floor. (Colon Affidavit ¶10) The male bailiff was immediately behind him. As soon as Mr. Colon stepped off the elevator, he noticed a third juror in the hallway. (Colon Affidavit ¶11) This juror was wearing a black pea coat and holding a Starbucks coffee cup and a cell phone. (Colon Affidavit ¶11) This juror and Mr. Colon made eye contact and the juror turned away quickly. (Colon Affidavit ¶12) At this time, Mr. Colon became upset and complained to both bailiffs that they had not noticed that there were jurors in the hallway in front of the elevator both times they had alighted on the fifth floor. (Colon Affidavit ¶13) The bailiffs took Mr. Colon to the fifth floor bullpen, where he asked to see his attorney. (Colon Affidavit ¶14)

ARGUMENT

I. MR. COLON DID NOT CAUSE HIMSELF TO BEEN SEEN BY JURORS AND CONSEQUENTLY

DID NOT FORFEIT HIS RIGHT TO NOT BE SEEN IN THAT SITUATION.

In its response, the State argues that Mr. Colon caused a juror to see him in restraints and that, consequently, he has no right to claim that this denied him a fair trial. In doing so, the State grossly misstates the facts. Mr. Colon was twice escorted from an elevator into a hallway containing jurors by the bailiffs entrusted to take him to the fifth floor bullpen while he awaited a verdict. On the first pass, when Mr. Colon saw two jurors and made eye contact with one of them, said and did nothing to draw further attention to himself. He initially made his displeasure known to the male bailiff in the privacy of the elevator while they were waiting for the female bailiff to clear the hallway of jurors. On the second pass, when he made eye contact with yet another juror, Mr. Colon succumbed to a natural human impulse: frustration. This situation was not of Mr. Colon's creation and at no point did he purposefully make a scene to draw the attention of the jurors to himself. On the contrary, he expressed his frustration *as a result* of having already been observed shackled to five inmates wearing orange jail clothes. The court even

acknowledged this when it told Attorney Meylink that "your client will be kept nearby hopefully with a little more care this time in case we need him over here." R:41-22. Mr. Colon, as part of his right to a fair trial, has no corollary duty to ignore actions and situations that are prejudicial to himself.

The State further cites *State v. Grinder*, in which the Wisconsin Supreme Court ruled that a trial court has the 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). This did not happen here. The court did not at any time find that Mr. Colon needed to be kept restrained or in jail clothes. It is disingenuous for the State to now brush off the court's decision to allow Mr. Colon to wear street clothes with a condescending assumption, "for the sake of argument[,] that a defendant has a right to never have a juror know he is in custody." (State's Response Brief at 5-6) Preventing jurors from knowing that a defendant is in custody is precisely the reason why courts allow defendants to wear civilian clothes to their trials.

The State cites *Holbrook v. Flynn* for the proposition 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." (State's Response Brief at 7) Certainly, the fact that the State is using its resources to accuse an individual and attempt to prove him guilty of a crime is inescapable. Nevertheless, there are certain situations that were known by the very court that penned *Holbrook* to cause undue prejudice to a defendant – specifically, seeing a defendant shackled or in prison clothes. In the *Holbrook* opinion, the court specifically makes mention of *Estelle v. Williams*, quoting that "'the constant reminder of the accused's condition implicit in such distinctive, identifiable attire may affect a juror's judgment.'" *Holbrook,* 475 U.S. 560, 568, 106 S.Ct. 1340, 89 L.Ed. 2d 525 (1986) (quoting *Estelle v. Williams*, 425 U.S. 501 at 504-505 (1976).) The *Holbrook* decision also quotes *Illinois v. Allen*, stating that '"[n]ot only is it possible that the sight of shackles and gags might have a significant effect on the jury's feelings about the defendant, but the use of this technique is itself something of an affront to the very dignity and decorum of judicial proceedings that the judge is seeking

to uphold." *Id.* (quoting *Illinois v. Allen*, 387 U.S. 337, 344 (1970)). In this case, Mr. Colon was shackled, not shackled and gagged, and he himself was not wearing prison clothes, but he was shackled to five inmates wearing bright orange jail clothes. It is a fair and reasonable conclusion that the *Holbrook* court would find that Mr. Colon's right to a fair trial was violated.

II. THE FACT THAT THE COURT CONDUCTED A COLLOQUY WITH THE JUROR WHO ADMITTED TO SEEING MR. COLON DID NOT OBVIATE THE NEED FOR ATTORNEY MEYLINK TO MOVE FOR A MISTRIAL.

The State argues that the court reasonably exercised its discretion in dealing with this situation as it arose, and Attorney Meylink was not ineffective when he did not move for mistrial because there is no evidence that such a motion would have been successful. Part of an attorney's duty at trial is to preserve any issues for appeal. The State's argument that "the trial court did not indicate it would entertain a mistrial motion" (State's Response Brief at 10) is beside the point. Wisconsin Statute 805.11(1) states that "[a]ny party who

has fair opportunity to object before a ruling or order is made must do so in order to avoid waiving error." The courts have found numerous times that in order to preserve an alleged error for review, trial counsel must object in a timely manner and give specific grounds for the objection. *State v. Torkelson*, 2007 WI App 272, ¶25, 306 Wis.2d 673, 743 N.W.2d 511 (2007), *State v. Nelis*, 2007 WI 58 300 ¶31, Wis. 2d 415, 733 N.W.2d 619 (2007), *State v. Prineas*, 2009 WI App 28 ¶11, 316 Wis.2d 414, 766 N.W.2d 206 (2009), *State v. Delgado*, 2002 WI App 38 ¶12, 250 Wis.2d 689, 641 N.W.2d 490 (2002). The fact that the trial court did not *sua sponte* indicate it would entertain or grant a motion for mistrial is all the more reason for Attorney Meylink to have made a specific and contemporaneous objection in order to preserve any potential error.

The fact that the judge conducted a colloquy with the juror who admitted to seeing Mr. Colon does not mean that the issue was satisfactorily resolved.

The State further argues that because the court questioned the one juror who admitted to seeing Mr. Colon, and because that juror, upon

instruction from the court to be fair, stated that he believed he could be impartial when evaluating the evidence, the issue was satisfactorily resolved. The colloquy between the court and the juror in question, however, was leading and did not leave the juror any room to openly state any bias he may have had.[1] The Seventh Circuit Court of Appeals has recognized that situations like this, when the judge does not leave room for a juror to fully express his opinion, can lead to unreliable voir dire. "A juror would be hard-pressed to disagree with a premise stated by the district court with which the district court asks the juror to agree." *U.S. v. Sloan*, 492 F.3d 884, 892 (2007). After the judge questioned the juror, Attorney Meylink stated that he had some questions of his own that he would like to ask, regarding the specific circumstances under

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[1] The colloquy:

The Court: Now, is there anything about what you saw at that time that could prejudice or bias you in this case in any way?

The Juror: I don't believe so.

The Court: And you understand that the evidence in the case is closed, so as we've discussed many times, it's the evidence that you hear in the courtroom and the law that I've explained to you and given to you, and anything that happens outside of the courtroom should not be used in reaching your verdict. Do you understand that?

The Juror: I do.

The Court: Do you believe you can do that?

The Juror: I believe so.

which the juror saw Mr. Colon. The court denied that request. R:41:18. At this time, Attorney Meylink ought to have moved for a mistrial in order to preserve the error for appeal.

CONCLUSION

For the forgoing reasons, Mr. Colon respectfully requests that the Court issue an order vacating his judgment of conviction and granting him a new trial, or granting him a *Machner* hearing pursuant to *State v. Machner*, 92 Wis.2d 797, 285 N.W.2d 905 (Ct. App 1979).

Dated this 9th day of November, 2016.

Respectfully Submitted,

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APPENDIX

CERTIFICATION FOR APPELLATE BRIEF

I hereby certify this brief conforms to the rules contained in §809.19(4) for a reply brief and appendix produced with a monospaced font. The length of this brief is 12 pages.

Signature: _____

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CERTIFICATION 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.

Signature: _____

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