STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

STATE OF WISCONSIN,

Plaintiff-Respondent,

v. Case No. 2016AP001071 CR

ANTHONY COLON,

Defendant-Appellant.

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

BRIEF AND APPENDIX OF DEFENDANT-APPELLANT

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Issues Presented

I. Did the fact that a juror saw Mr. Colon, dressed in civilian clothes and shackled to other inmates wearing identifiable jail clothes, in an elevator of the courthouse impair the presumption of innocence and consequently deny him equal protection of the laws?

II. Was trial counsel ineffective for failing to move for a mistrial after Mr. Colon was observed by a juror while shackled to other inmates who were dressed in identifiable jail clothes?

Position on Oral Argument and Publication

Neither Oral Argument nor Publication is requested.

STATEMENT OF THE CASE

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 the morning of November 7, 2014, Mr. Colon, in civilian attire, was being transported on the inmate elevator, shackled to several other inmates who were dressed in orange. R41:2, 14-15. When the elevator door opened on the 5th floor, the bailiff saw two jurors sitting on the floor outside the courtroom. R41:2, 14-15. The Court called the jury back to the courtroom and asked

if any of them had seen Mr. Colon in the elevator or in the hallway. Juror #1 replied that he had seen Mr. Colon coming out of the elevator. R41:16-17.

On November 7, 2014, the jury found Mr. Colon guilty on Counts 1, 4, and 5 and not county on counts 2 and 3. R41:23-27.

On December 23, 2014, Mr. Colon was sentenced to serve 6 years in the Wisconsin State Prison System, bifurcated as 1 year of initial confinement followed by 1 years of extended supervision on each count. R.42. All three counts were ordered to run consecutively. R42:47. On May 2, 2016, Mr. Colon requested post-conviction relief from this judgment. R27. The Court denied Mr. Colon's motion. R32. Mr. Colon appeals the decision denying his motion for post-conviction relief.

ARGUMENT

I. MR. COLON WAS DENIED EQUAL PROTECTION OF THE LAWS WHEN A JUROR OBSERVED HIM, DRESSED IN CIVILIAN CLOTHES AND SHACKLED TO OTHER INMATES DRESSED IN IDENTIFIABLE JAIL CLOTHES IN AN ELEVATOR OF THE COURTHOUSE.

The Sixth and Fourteenth Amendments of the United States Constitution guarantee the universal right to a fair trial, in which the presumption of innocence plays a fundamental role. *Estelle v. Williams,* 425 U.S. 501, 503, 96 S.Ct. 1691 (1976). In *Holbrook v. Flynn*, the Supreme Court specified that the adversary system and the presumption of innocence are the pillars of a defendant's due process rights. *Holbrook v. Flynn*, 475 U.S. 560, 567, 106 S.Ct. 1340, (1986). Justice Marshall, writing the opinion of a unanimous Court, maintained that "[w]hen defense counsel vigorously represents his client's interests and the trial judge assiduously works to impress jurors with the need to presume the defendant's innocence, we have trusted that a fair result can be obtained." *Id.* At 474-475.

Mr. Colon, an inmate at the House of Correction, wore civilian clothes for the duration of his trial. R41:4, 9-10. On the morning of November 7, 2014, the third day of trial, the jury was deliberating. R41. Mr. Colon was being transported to the courtroom, in civilian clothes but shackled to other inmates who were wearing easily identifiable orange jail scrubs. R41:2, 14-15. He was placed

in an elevator with these other inmates. R41:2. It was in this position, tied to men dressed in bright orange, that Mr. Colon came upon two jurors when the elevator door opened. R41:3.

The prejudicial effect of seeing a defendant in jail clothes is an accepted injury to the right to a fair trial. *See Estelle* at 505 (citing a number of cases that confirm the harm done to the presumption of innocence by the appearance of a defendant dressed in jail clothes before a jury). A number of unpublished Wisconsin Court of Appeals decisions have held that a defendant's attire must be identifiable as jail clothes for it to be prejudicial. *See State v. Reed*, 322 Wis.2d 572 (2009), *State v. Hollis*, 214 Wis.2d 591 (1997), *State v. Wherry*, 188 Wis.2d 605 (1994). In this case, Mr. Colon himself was not dressed in jail attire; however, the principle can be extended in light of the circumstances in Mr. Colon's case.

Mr. Colon was visibly shackled to other men who were in clearly identifiable jail attire. The jury, until that point, had not seen any evidence that Mr. Colon was incarcerated. Logically, the scenario with the highest potential for prejudice would have been if Mr. Colon had been both shackled to other inmates and dressed in jail clothes. If Mr. Colon had

been standing in an elevator with other inmates, unshackled, the potential for prejudice would have still existed, but been much lower. As it is, for a juror to see Mr. Colon shackled to other men who were obviously inmates could have left no room for doubt as to the fact that Mr. Colon himself was incarcerated for the duration of his trial. With the jury at the crucial stage of deliberation, this nexus of events created the potential for enormous prejudice.

Wisconsin law regarding the shackling of a defendant before a jury is mixed. In *Sparkman v. State*, the Wisconsin Supreme Court held that a criminal defendant should generally not be restrained during a trial because to be seen unrestrained by the jury 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). In *State v. Cassel*, the Court expanded upon the *Sparkman* ruling made a distinction between restraining a defendant inside the courtroom and outside the courtroom. *See State v. Cassel*, 48 Wis.2d 619, 625, 180 N.2d 607 (1970).

In *Cassel*, the Court found that whether or not a defendant is to be restrained inside the courtroom, before the jury, is a matter for the

court itself to decide. Conversely, whether or not that same defendant is to be restrained outside the courtroom is a matter for the sheriff or police to decide. *Id.* The Court specifically wrote that "[p]eople normally expect to see a prisoner under some restraints in situations where he is able to escape if not in restraints." *Id.* Not all criminal defendants are incarcerated while their case is pending. Indeed, the conclusion that a defendant may be incarcerated is precisely the conclusion that the *Sparkman* Court sought to avoid. The *Cassel* ruling assumes that the jury either knows or expects that a defendant is a jail inmate.

In the case of Mr. Colon, the fact that he was observed both shackled and so restrained to other individuals clearly wearing identifiable jail clothes could have left no doubt in the mind of any jurors who observed him as to his own incarcerated status. If he had been observed shackled but without other prisoners in the elevator, that alone would have been prejudicial. The combination of the shackles and the clothing of his fellow inmates has the same effect upon the observer as if he were himself wearing jail clothes.

The fact that at least one juror observed Mr. Colon in this state deprived him of his

right to a fair trial under the Sixth and Fourteenth Amendments.

II. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO MOVE FOR A MISTRIAL AFTER MR. COLON WAS OBSERVED BY A JUROR WHILE SHACKLED TO OTHER INMATES AND IN IDENTIFIABLE JAIL CLOTHES IN THE COURTHOUSE.

Ineffective assistance of counsel is established through a two prong test. *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052 (1984). The defendant must first show that trial counsel's performance was deficient; second, the defendant must show that trial counsel's errors were prejudicial. *Id.*

Failing to Request a Mistrial Constituted Deficient Performance

Deficient performance consists of conduct that falls below an objective standard of reasonableness, "making errors so serious that he or she was not functioning as the 'counsel' the Sixth Amendment guarantees." *State v. Champlain*, 2008 WI App 5, ¶8, 307 Wis.2d 232,

744 N.W.2d 889, (2008) (citing *Strickland* at 687-688). In *Champlain*, the defendant appeared before the jury wearing a security arm band taser. *Id.* at ¶5. Trial counsel never raised the issue with the court. *Id.* at ¶8. Consequently, the court was never prompted to consider the arm band's necessity and what, if any, effect it would have on the jury. *Id.*

In the case of Mr. Colon, it was the bailiff transporting Mr. Colon at the time he was observed by the jurors who brought the incident to the attention of the court. R41:2. Attorney Daniel Meylink expressed concern about the potential prejudicial effects of members of the jury seeing his client shackled to other inmates. R41:12.

The court asked the jury if any of them had seen Mr. Colon that morning. R41:16. One juror replied in the affirmative and was examined further outside the presence of the rest of the jury. R41:16-17. The court admonished the juror that "anything that happens outside of the courtroom should not be used in reaching your verdict." R41:18. The juror responded that he understood. R41:18. The court also admonished the juror not to share any of his observations outside of the courtroom with the rest of the jurors, which

the juror also agreed to. R41: 18. After the juror was excused, Attorney Meylink continued to express concern that, even though the juror stated he was not biased or prejudiced, his true thoughts may be different. R41:19-20. The court declined to engage in further examination of the juror and did not give a special instruction to the jury as a whole. R41:20-21. Crucially, at no point did Attorney Meylink request a mistrial. This omission is an error serious enough to constitute conduct that falls below an objective standard of reasonableness as held in *Strickland.*

Failing to Move for a Mistrial Constitutes Prejudicial Deficiency

Attorney Meylink's failure to move for mistrial constitutes both deficient performance and prejudice. The mistrial waiver rule in Wisconsin is as follows:

> "[I]f a litigant has raised a claim of error of so serious a nature that it may warrant a mistrial, *the litigant must not only claim error but must demand the mistrial,* for to fail to demand a mistrial is tantamount to an acknowledgement that the error is harmless, or at least it is not prejudicial

> to the degree that the aggrieved party is not willing to proceed on the assumption, or hope, there will be a favorable verdict despite the error."
>
> *Lobermeier v. General Tel. Co.*, 119 Wis.2d 129, 349 N.W.2d 466, 470 (1984).

Attorney Meylink did express concern over the fact that his client was observed shackled to other inmates by jurors but he did not move for a mistrial, thereby waiving the error. Doing so would have preserved evidentiary and procedural rulings for appellate review and may reasonably have resulted in a different outcome for Mr. Colon.

In *State v. Krueger*, the defendant's attorney objected to the trial court's decision to allow the trial to proceed despite Mr. Kreuger's failure to appear. *State v. Krueger*, 2011 WI App 1, ¶7, 330 Wis.2d 834, 794 N.W.2d 927 (2011). The judge informed Mr. Krueger's attorney that if Mr. Krueger did appear and had a good reason for being late, then the court would entertain a motion for a mistrial. *Id.* at ¶5. Once Mr. Krueger did arrive, he was able to provide an explanation for his tardiness and the court specifically asked if the defense was "'making any motion?'" *Id.* at 7. Trial counsel told the court that no motions would be made.

Id. On appeal, the Court of Appeals found that the decision not to move for a mistrial was a strategic decision made by the defense and therefore constituted a waiver. *See* State v. Krueger.

Counsel's choices are deficient if they are mistakes, rather than the part of a reasoned, deliberate defense strategy. *State v. Moffett,* 147 Wis.2d 343, 353, 433 N.W.2d 572 (1989). Mr. Colon was never consulted about the possibility of moving for a mistrial. Nor is there any reason to believe that the failure to move for a mistrial was a deliberate strategic choice on the part of trial counsel. The failure to do so was therefore not a reasoned decision but deficient conduct by trial counsel. Had Attorney Meylink moved for a mistrial, the court would have had the opportunity to consider and rule on the matter and that ruling would have been preserved for appellate review. Not doing so deprived Mr. Colon of a fair trial whose result is reliable. *See State v. Moffett.*

CONCLUSION

For all the foregoing reasons, the Circuit Court made errors prejudicial to Mr. Colon. Therefore, Mr. Colon respectfully asks this Court to reverse the decision of the Circuit Court and remand this case with an order vacating the judgement of conviction and ordering a new trial.

Dated this 12th day of August, 2016.

Respectfully Submitted,

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CERTIFICATION FOR APPELLATE BRIEF

I hereby certify this brief conforms to the rules contained in §809.19(8)(b) and (c) for a brief and appendix produced with a monospaced font. The length of this brief is 18 pages.

Signature: Patricia M. Padurean

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Pursuant to Rule 809.19(12)(f), I certify that the text of the electronic copy of this brief is identical to the paper copy of the brief.

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CERTIFICATION FOR APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with §809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under §809.23(3)(a); and (4) portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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