

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 8, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

No. 99-2081-CR

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

BRUCE SANDERS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dodge County:
JOHN R. STORCK, Judge. *Affirmed.*

Before Eich, Vergeront and Deininger, JJ.

¶1 PER CURIAM. Bruce Sanders appeals from a judgment of conviction on one count of battery by a prisoner. The issues are whether the court responded erroneously when the jury returned a nonunanimous verdict, and

whether Sanders's appearance before the jury in jail clothes and shackles warranted a mistrial. We affirm.

¶2 Sanders first argues that the trial court erred in its instruction to the jury after the jury originally returned a nonunanimous verdict. The jury presented an apparent verdict of guilt after approximately thirty minutes of deliberation. However, during a polling of the jury, two jurors indicated that guilt was not their verdict. The trial court, after consulting with counsel, concluded that the jury did not understand that a verdict must be unanimous. The court then recalled the jury, reinstructed on the unanimity requirement, and said: "At this time I am going to send the jury back in to continue their deliberations to determine whether or not a verdict can be reached which can legally be received." The jury returned with a unanimous guilty verdict after nineteen minutes.

¶3 Sanders did not object to this procedure or move for a mistrial. The State argues that the issue has been waived, but Sanders responds that it should be reviewed as a plain error. We do not resolve the waiver issue, because we are satisfied that the argument should be rejected on the merits.

¶4 Sanders argues that the jury was deadlocked when the ten-juror verdict was brought in, and the trial court should have either given an instruction appropriate for that circumstance or declared a mistrial. He argues that repeating the unanimity instruction, when the jury had already reached a 10-2 decision, had a coercive effect by creating the impression that the minority jurors might feel they were required to go along with the majority to create unanimity.

¶5 We do not agree. The trial court's conclusion that the jury was not deadlocked was reasonable. The jury had been deliberating for only thirty-two minutes, with one interruption for a jury question. The jury's attempt to return a

ten-juror verdict does not suggest deadlock, but instead suggests misunderstanding of the legal requirements for a verdict. When juries understand the unanimity requirement and are deadlocked, they ordinarily advise the court of that fact, and do not attempt to return what they know will be an invalid verdict. Here, the trial court repeated the unanimity requirement, and then sent the jury back to determine “whether or not a verdict can be reached which can legally be received.” With this last phrase, the court made it clear that the jury was not required to reach unanimity before being released, and that it was possible the jury might not be able to reach a legally receivable verdict.

¶6 Sanders also argues that the court should have declared a mistrial because the numerical breakdown of the jury was exposed in open court. He likens the case to *State v. McMahan*, 186 Wis. 2d 68, 519 N.W.2d 621 (Ct. App. 1994), in which we held that the trial court erred by asking for the numerical division of a jury that had informed the court it was “stuck.” Sanders argues that it was potentially coercive to have the precise division of the jury identified, and that the coercive effect was heightened in this case because the two jurors were exposed in open court.

¶7 In *McMahan*, we noted that we could not know or speculate about what effect the incident had on the deliberations, but that we could only “look at the totality of the circumstances.” *McMahan* at 95. We conclude that a mistrial was not warranted under the circumstances present here. One significant difference is that the split jury was revealed by accident, rather than by the trial court making a specific inquiry about the jury’s division. This difference is significant because one of the coercive elements of an inquiry by the court is that the jury may understand the court to be making some sort of implied statement of

pressure or threat to make the jury's life unpleasant if a unanimous verdict is not reached. That element is absent here.

¶8 Another significant aspect of this case is that, unlike a deadlock situation in which the jury expresses difficulty reaching a unanimous verdict, we do not know the precise views of the two jurors when they said guilt was not their verdict. If the jury misunderstood the unanimity requirement, it might have simply stopped deliberation upon reaching what it believed was a sufficient number of guilty votes for a proper verdict. We do not know whether the two jurors were in favor of a not guilty verdict at that point, or whether they had just not yet reached a firm conclusion. The possibility that the two jurors were merely undecided makes it more difficult to conclude there was a coercive effect in this case.

¶9 Sanders next argues that his right to a fair trial was violated when he was brought before the jury in jail clothing and shackles. This occurred when Sanders was brought in to hear the jury's first, nonunanimous, verdict. The jury then retired for further deliberation, and Sanders's attorney moved for a mistrial on this ground. In response, the trial court stated that it did not believe the jury could see the shackles where Sanders was sitting, and it denied the motion.

¶10 The court's statement about the jury's ability to see the shackles was essentially a finding of fact. Sanders' attorney did not object to that statement at the time, and on appeal Sanders provides no basis for us to conclude that the finding was erroneous. We regard that finding as dispositive as to the shackles.

¶11 As to the jail clothes, as Sanders notes, the usual concern with appearing before the jury in jail clothes is that it gives the jury an impression of guilt, contrary to the presumption of innocence. In Sanders' case, however, the

jury was well aware that Sanders was a prisoner convicted of some crime, since the facts of the case involved an incident in a prison, and the charge was battery by a prisoner. Sanders's status as a prisoner was apparently not disputed at trial, so it is difficult to imagine his appearance in jail clothes as being a significant influence on the jury's consideration of the charge then being considered. Sanders argues that the effect of his clothing was demonstrated by the two disagreeing jurors' quick conversion to guilty votes. However, even if Sanders' attire could have had some prejudicial effect, the inference is not a strong one because, as discussed above, we do not know what the views of those jurors were when the first verdict was brought in.

¶12 Finally, Sanders argues that we should use our power of discretionary reversal under WIS. STAT. § 752.35 (1997-98) and conclude that the real controversy was not fully tried because of the irregularities we have discussed above. We reject this argument for the reasons already expressed above.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

