

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 9, 2002

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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Appeal No. 01-3096-CR

Cir. Ct. No. 99-CF-986

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

GARY J. SCHMIDT,

DEFENDANT-APPELLANT.

APPEAL from judgments of the circuit court for Kenosha County:
MICHAEL S. FISHER, Judge. *Affirmed.*

Before Nettesheim, P.J., Brown and Snyder, JJ.

¶1 PER CURIAM. Gary J. Schmidt appeals from judgments convicting him of first-degree recklessly endangering safety, battery while armed, eluding an officer and disorderly conduct. On appeal, he challenges certain of the prosecutor's remarks in closing argument and the circuit court's refusal to grant him a mistrial on two separate occasions. We conclude that Schmidt waived his

challenge to the prosecutor's closing argument, and we affirm the circuit court's refusal to grant a mistrial.

¶2 Schmidt was tried for attempted first-degree intentional homicide. The charges arose out of Schmidt's confrontation with the victim, a fellow rooming house resident. Schmidt stabbed the victim and then eluded police. The jury convicted Schmidt of the lesser offense of first-degree recklessly endangering safety.

¶3 After the jury was selected but before opening statements, the court learned that several jurors had seen Schmidt in ankle shackles while he was being moved from the courtroom to a conference room. Schmidt then moved for a mistrial. The court decided that it would follow the procedure in *State v. Knighten*, 212 Wis. 2d 833, 569 N.W.2d 770 (Ct. App. 1997), to determine whether a mistrial was necessary.

¶4 The court determined how many jurors had seen Schmidt in shackles and then instructed the jury that Schmidt's custodial status was not relevant to the question of his guilt or innocence. The court asked the jurors if the fact that Schmidt was in custody would influence how they judged his guilt or innocence. None of the jurors indicated that Schmidt's custodial status would be a factor in his or her consideration of the case. All of the jurors indicated their agreement with the court's instruction that Schmidt's custodial status would have no bearing on their decision in the case. The court once again instructed the jurors that Schmidt's custodial status could not play any role in their consideration of the case.

¶5 On appeal, Schmidt argues that the circuit court failed to state its reasons for shackling him in the first place. Schmidt does not cite to that portion

of the record, and we have not located any portion of the record, in which he objected to being shackled inside the courtroom. Therefore, this issue is waived. *See State v. Kaster*, 148 Wis. 2d 789, 804-05, 436 N.W.2d 891 (Ct. App. 1989).¹

¶6 We turn to the circuit court’s refusal to grant Schmidt a mistrial after the jurors saw him in shackles. Whether to grant a mistrial is within the circuit court’s discretion. *Knigheten*, 212 Wis. 2d at 844. We will affirm a circuit court’s discretionary decision “if it is supported by a logical rationale, is based on facts of record and involves no error of law.” *State v. Richard A.P.*, 223 Wis. 2d 777, 791, 589 N.W.2d 674 (Ct. App. 1998).

¶7 We conclude that the circuit court properly employed a *Knigheten* analysis to address Schmidt’s mistrial motion. In *Knigheten*, the defendant wore ankle shackles at trial because he had previously escaped. *Knigheten*, 212 Wis. 2d at 841. Before jury selection, a potential juror observed Knigheten in a hallway wearing shackles. *Id.* at 842-43. During voir dire, the juror stated that she was affected by seeing Knigheten shackled. *Id.* at 843. Of the potential jurors, only the one who had actually seen Knigheten in shackles expressed some link between the shackles and Knigheten’s innocence or guilt. *Id.* The court then instructed the potential jurors that although Knigheten was in custody, his status was to have no bearing on the issue of guilt or innocence. *Id.* at 843-44. The court denied Knigheten’s motion for a mistrial after concluding that the issue was defused by the cautionary instruction coupled with the jurors’ assurances to defense counsel that Knigheten’s custodial status would not influence the verdict. *Id.* at 844. On

¹ Also waived is Schmidt’s claim that the prejudicial effect of his shackles was exacerbated by the presence of a sheriff’s deputy who was watching over Schmidt in the courtroom.

appeal, this court affirmed the circuit court, holding that the cautionary instruction and the jurors' assurances were sufficient grounds to deny the mistrial motion. *Id.* at 845.

¶8 In this case, the circuit court questioned the jurors about what they had seen, instructed them that the shackles were not relevant to guilt or innocence, obtained assurances from the jurors that they would not consider the shackles, and then instructed the jurors again to disregard the shackles. We conclude that the court followed the guidance of *Knigheten* in defusing the shackles issue and obviating the need for a mistrial.² The court found the relevant facts, relied on proper law, stated its reasons and made a reasonable decision.

¶9 Schmidt complains that he did not have an opportunity to question the jurors regarding their feelings about seeing him shackled. However, he did not ask for that opportunity, and the argument is waived. *See Kaster*, 148 Wis. 2d at 804-05.

¶10 Schmidt also argues that the jurors were questioned about their reaction to Schmidt's custodial status, not his presence in shackles, and this approach did not allow the court to fully explore the jurors' reactions to the shackles. We are not persuaded. Any reasonable juror would have linked the court's remarks about Schmidt's custodial status to the court's inquiry about whether any juror had seen Schmidt in shackles.

² Schmidt argues that *State v. Knigheten*, 212 Wis. 2d 833, 569 N.W.2d 770 (Ct. App. 1997), is distinguishable on its facts. While there may be certain factual distinctions, *Knigheten* was properly relied upon by the circuit court in this case.

¶11 Schmidt argues that the circuit court did not address the prejudice arising from the jurors' view of him in shackles. We disagree. By questioning the jurors and giving them a cautionary instruction, the court addressed potential prejudice. We assume a jury follows the cautionary instruction it receives. *Id.* at 845.

¶12 Schmidt again sought a mistrial after Captain Robert Reschke testified. Reschke responded to the report of the stabbing in which Schmidt was involved. He joined another officer at a van parked at the back of the house where they believed the suspect was sitting. Schmidt was sitting in the van. Reschke described how Schmidt refused to exit the van and refused to answer the officers' questions or roll down the van's window. In response to the prosecutor's question, "What happens next?," Reschke stated that "[d]ispatch advised that Mr. Schmidt had one prior carrying a concealed weapon charge." Schmidt objected, and the court struck the testimony. Thereafter, Schmidt moved for a mistrial on the grounds that prejudicial evidence of a prior conviction should not have been admitted.

¶13 The parties and the court then discussed what Reschke had said during his testimony. The attorneys believed that Reschke had referred to "CCW," an abbreviation for carrying a concealed weapon, rather than using the entire phrase. The State requested a curative instruction in lieu of a mistrial. The court found that while "CCW" might not be known to the jury, the information should not have been placed before the jury. The court noted that it had stricken the testimony and offered to give a curative instruction to the jury. However, the court observed that a curative instruction might highlight the prior conviction information for the jury. Schmidt stated that he would be satisfied with a general instruction that the jury was not to consider stricken testimony.

¶14 At a later point in the trial, counsel and the court reviewed the court reporter's transcript and determined that Reschke had actually mentioned "carrying a concealed weapon," rather than "CCW." Schmidt then renewed his mistrial motion. The State argued that the offending testimony was given by one witness out of more than ten and that the prejudice was not sufficient to warrant a mistrial. The circuit court agreed that the testimony did not unduly prejudice Schmidt such that a mistrial was the only remedy.³

¶15 We will reverse the circuit court's mistrial ruling only on a clear showing of an erroneous exercise of discretion. *State v. Bunch*, 191 Wis. 2d 501, 506, 529 N.W.2d 923 (Ct. App. 1995). In deciding a motion for a mistrial, the court "must consider the entire proceeding and determine whether the claimed error is sufficiently prejudicial to warrant a new trial." *State v. Adams*, 223 Wis. 2d 60, 83, 588 N.W.2d 336 (Ct. App. 1998). Not all errors warrant a mistrial, and it is preferable to employ less drastic alternatives to address the claimed error. *State v. Adams*, 221 Wis. 2d 1, 17, 584 N.W.2d 695 (Ct. App. 1998).

¶16 The circuit court properly exercised its discretion in denying Schmidt's motion for a mistrial due to Reschke's testimony. The court considered the impact of the testimony, which was isolated, and that the prior conviction was not relevant to the charges against Schmidt. The court concluded that a curative instruction would address the prejudice, and Schmidt accepted a general instruction regarding stricken testimony.

³ Schmidt argues that the court did not give him an opportunity to revisit the issue of a curative instruction after it was confirmed that Reschke referred to "carrying a concealed weapon" rather than "CCW." Schmidt did not ask the court for that opportunity. The argument is waived. *State v. Kaster*, 148 Wis. 2d 789, 804-05, 436 N.W.2d 891 (Ct. App. 1989).

¶17 Schmidt argues that a mistrial was warranted because the circuit court had previously rejected the State's request to introduce other acts evidence. This argument does not sway us in favor of a mistrial. The proffered other act involved Schmidt chasing his father with a knife, not carrying a concealed weapon. We also decline to infer, as Schmidt does, that Reschke's testimony was deliberately inserted into the record to prejudice the jury. Schmidt did not ask the circuit court to make any findings in this regard, and we are precluded from finding facts. See *Kovalic v. DEC Int'l*, 186 Wis. 2d 162, 172, 519 N.W.2d 351 (Ct. App. 1994).

¶18 Schmidt also argues that Reschke's testimony was prejudicial because it was relevant to the first-degree intentional homicide charge. Schmidt claimed he did not have the requisite intent. However, the jury acquitted him of that charge and convicted him of first-degree recklessly endangering safety, which lacks the element of intent. See *State v. Kanarowski*, 170 Wis. 2d 504, 510, 489 N.W.2d 660 (Ct. App. 1992). Therefore, we fail to see how Reschke's testimony influenced the jury's verdict.

¶19 Finally, Schmidt protests certain aspects of the prosecutor's closing argument. During his closing argument, Schmidt argued that the State did not offer into evidence the knife used in the stabbing or any other evidence that Schmidt was involved in the stabbing. In rebuttal, the prosecutor argued that Schmidt did not present any evidence that he was not involved in the stabbing. Schmidt argues that this was an impermissible comment upon his silence. After closing arguments ended and the jury was instructed, Schmidt moved for a mistrial. The court denied the motion on the grounds that the prosecutor's remarks constituted proper argument.

¶20 Schmidt challenges these remarks on appeal. This challenge is waived because Schmidt did not make a contemporaneous objection at the time of the remarks. *State v. Guzman*, 2001 WI App 54, ¶25, 241 Wis. 2d 310, 624 N.W.2d 717, *review denied*, 2001 WI 88, 246 Wis. 2d 166, 630 N.W.2d 219 (Wis. May 8, 2001) (No. 99-2249-CR). Objecting after the jury retired to deliberate did not provide the circuit court with an opportunity to address the alleged error. *See id.*

¶21 Even if we were to reach the merits of Schmidt's claim, we would hold that the remark was not improper. The State is permitted to argue that no evidence has been introduced to show the defendant's innocence. *Bies v. State*, 53 Wis. 2d 322, 325, 193 N.W.2d 46 (1972).

By the Court.—Judgments affirmed.

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

