

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 21, 2003

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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.

Appeal No. 02-1839-CR

Cir. Ct. No. 01-CF-1427

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

v.

RICKEY V. GRAY,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: JEAN W. DI MOTTO, Judge. *Affirmed.*

Before Vergeront, P.J., Dykman and Lundsten, JJ.

¶1 DYKMAN, J. Rickey Gray appeals from a judgment convicting him of one count each of: (1) failure to comply with attempt to take a person into custody, (2) resisting an officer, (3) disorderly conduct, and (4) battery to an officer. Gray contends that the trial court erroneously exercised its discretion when, without a hearing, it ordered that he be shackled for much of his trial. We

conclude the trial court did not adequately identify on the record the factors warranting the restraints. However, we conclude that the court's erroneous exercise of discretion was harmless. We therefore affirm the trial court's denial of Gray's mistrial motion.

BACKGROUND

¶2 According to the criminal complaint, Gray broke into an apartment belonging to his girlfriend, Diane Corprue, and began threatening her and pushing her around. Corprue was able to escape and called the police from a neighbor's house. When the police arrived at Corprue's apartment, Gray refused to leave. The officers broke down the front door and found Gray in the darkened kitchen. Gray would not show his hands to the officers, but yelled at them to "come and get me." The officers used pepper spray on Gray, but it appeared to have no effect. When Gray lunged for a set of knives, an officer grabbed him. Gray continued to struggle, hitting the officer and verbally threatening him. Finally, four officers subdued Gray and took him into custody. As a result of the altercation with Gray, one officer suffered several bruises and a laceration on his hand requiring five stitches.

¶3 An amended information charged Gray with five counts: failure to comply with officer's attempt to take a person into custody, resisting an officer, disorderly conduct, battery and battery to a law enforcement officer, violations of WIS. STAT. §§ 946.415(2), 946.41(1), 947.01, 940.19(1) and 940.20(2) (2001-02).¹

¹ All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

Before trial the State dismissed the battery charge arising from Gray's conduct towards Corprue.

¶4 On the third day of Gray's four-day jury trial, before the State had completed its case, the court informed counsel that, because of Gray's volatility that morning, the bailiffs had determined that Gray needed to be restrained in some manner. The trial court proposed that using leg irons and placing a skirt around the counsel table would be the most workable option for concealing Gray's restraints from the jury. In explanation of its decision to restrain Gray, the trial court stated:

[Attorney Alejandro Lockwood, Gray's trial counsel] indicated that he thought his client was fine this morning. He did meet with [Gray] and indicated to him that that decision was exclusively the bailiffs' decision because it was a security issue. It's not my decision. It's not defense counsel's decision. It's not the State's decision. It is a security safety concern that I delegate to my bailiffs because they are the experts in that area. None of us as counsel or judge are as expert as they are.

¶5 The bailiffs then placed a black skirt around the defense counsel table to hide the restraints. In addition, the bailiffs sat in different seats in the jury box to verify that the jury would not be able to see Gray's shackles. Gray was seated when the jury entered the courtroom.

¶6 The next day, the trial court made further adjustments to hide the shackles from the jury's view when Gray testified. The trial court had Gray take the witness stand before the jury entered the courtroom so that he would not have to walk to the stand in leg irons. The diagram of Corprue's apartment was placed on an easel between the bench and the witness chair so that Gray could point to it without having to stand. To prevent noise from Gray's leg irons, the court had a rubber mat under the witness chair removed so that the carpeting would muffle

any sound from the restraints. The trial court observed that the changes should not strike the jury as unusual:

It makes some sense that the jury would see the diagram in a different place since it's now the defense case that [the] changes would look like it's simply the change in who is putting on the case as opposed to anything else. The diagram is well seen by all jurors in every place and the defendant can simply turn and mark and even rise slightly and mark on that diagram.

¶7 When Lockwood, Gray's trial counsel, objected that he did not understand why Gray was a security risk, the trial court repeated that shackling Gray was the bailiffs' decision, as they were the experts in that area. The trial court expressly declined to further explain the need for the restraints, stating that it "will not subject [the bailiffs] to cross-examination of their decision based merely on your contact with [Gray] being such that you feel quite comfortable with him. That's not the issue." In response, Lockwood asserted that there was no indication that Gray had misbehaved in the presence of the court or the jury and moved for a mistrial on the grounds that the leg shackles infringed upon Gray's right to testify openly and freely and negated the presumption of innocence.

¶8 Observing that Lockwood had not commented upon the workability of the arrangements for hiding Gray's restraints, the trial court rejected the suggestion that relocating the diagram to the witness stand would lead the jury to conclude that Gray was wearing leg shackles. The trial court denied Gray's motion for a mistrial, finding that nothing "about the arrangement in any way prejudices the defense in the first place by revealing the restraint status of the defendant and secondly, it does not in any fashion deprive him of his right to a fair trial and the right to testify freely and openly." The jury returned a guilty verdict. Gray appeals.

DISCUSSION

¶9 The decision whether or not to grant a motion for a mistrial is discretionary with the trial court. *State v. Pankow*, 144 Wis.2d 23, 47, 422 N.W.2d 913 (Ct. App. 1988). The trial court must consider the entire proceeding and determine if the claimed error so prejudices the defendant that a new trial is a “manifest necessity.” *State v. Givens*, 217 Wis. 2d 180, 191, 580 N.W.2d 340 (Ct. App. 1998). We will reverse the denial of a mistrial only upon a clear showing that the trial court has erroneously exercised its discretion. *State v. Adams*, 223 Wis. 2d 60, 83, 588 N.W.2d 336 (Ct. App. 1998).

¶10 The general rule is that a defendant should be free of restraints during trial to ensure not only a fair trial, but the appearance of a fair trial. *Flowers v. State*, 43 Wis. 2d 352, 362, 168 N.W.2d 843 (1969). “[T]he restraints may psychologically engender prejudice in the minds of jurors when they view ‘a man presumed to be innocent in the chains ... of the convicted.’” *State v. Grinder*, 190 Wis. 2d 541, 551-52, 527 N.W.2d 326 (1995) (quoting *State v. Cassel*, 48 Wis. 2d 619, 624, 180 N.W.2d 607 (1970)). However, the trial court has discretion to decide if shackling the defendant is warranted, as long as reasons justifying the restraints are set forth in the record. *Id.* at 550. We will not reverse the trial court on this issue unless it can be demonstrated that the trial court erroneously exercised its discretion. *Id.* at 551.

¶11 Gray contends that the trial court erroneously exercised its discretion because it did not allow a hearing on the issue of restraints, nor did the court place on the record its assessment of Gray’s particular risk of violence or escape. According to Gray, the trial court improperly delegated to the bailiffs the decision whether to use restraints. We agree with Gray that the trial court failed to set forth

a reasoned justification for shackling him. But we conclude that the trial court's erroneous exercise of discretion was harmless error.

¶12 In *Grinder*, the trial court relied on jail policy as the sole reason justifying the defendant's restraints during trial. This was an erroneous exercise of discretion because the trial court's decision did not reflect consideration of the relevant factors: the nature of the charges, the defendant's background, possible security risks in the courtroom, and information from defense counsel regarding the defendant's conduct while in custody. *Grinder*, 190 Wis. 2d at 552. *Grinder* does not require the trial court to hold a hearing on the issue of whether the defendant be shackled, but the trial court must set forth on the record "its reasons justifying the need for restraints in that particular case." *Id.* at 552.

¶13 Gray argues that this case is analogous to *Grinder* because the trial court refused to question the bailiffs' opinion that Gray should be restrained, and in fact refused to further explain the basis for its decision on the record. Although the order that Gray be shackled resulted from the bailiffs' report of Gray's behavior, as opposed to a general policy to restrain defendants in custody, we agree with Gray that the trial court's ruling does not meet the standard established in *Grinder*. The trial court rejected Gray's requests for a hearing on the issue of restraints saying, "It's not my decision. It's not defense counsel's decision. It's not the State's decision. It is a security safety concern that I delegate to my bailiffs because they are the experts in that area." Instead of considering the factors itself, the trial court delegated this judicial decision to non-judicial officers, the court's bailiffs. This constitutes an erroneous exercise of discretion.

¶14 However, even though the trial court's transfer of the judicial function was an erroneous exercise of discretion, we conclude that the error is

harmless because the trial court took adequate precautions to prevent the jurors from seeing Gray's leg irons. The diagram of Corprue's apartment was moved into the witness box so that Gray could refer to it without having to stand or move about. The bailiffs used a box to block the jury's view of Gray's legs while on the stand and placed a skirt around the defense counsel table. To further minimize the fact that Gray would not be able to rise for the jury because of the restraints, the trial court ordered Sergeant Halama, the defense's first witness, to be seated on the witness stand when the jury entered the courtroom. The trial court concluded that with these accommodations, it was "highly unlikely that [the jury] will ever suspect that there is restraint on any portion of the defendant's body."

¶15 Gray asserts that precautions used to prevent the jury from seeing his shackles were "inherently prejudicial" because the decision to restrain Gray was made halfway through the trial. But there is no evidence that the jury saw Gray's shackles, either while he was on the witness stand or seated at the counsel table. While the preferred safeguard would be to place skirts on both the defense and prosecution counsel tables, as was done in *Grinder*, 190 Wis. 2d at 545, Gray's trial counsel failed to object when a table skirt was not provided for the prosecution table. Therefore, Gray has waived the right to argue that claimed error on appeal. Further, the lack of a table skirt for the prosecution does not change the fact that Gray's claim of prejudice is not based on the jurors actually seeing him in restraints, but rests upon his speculation that the jurors must have concluded that Gray was wearing restraints because of the table skirt, the relocation of the diagram in the witness stand, and Gray's staying in his seat when the jury entered. Here, as in *Grinder*, "the circuit court's erroneous exercise of discretion did not result in a denial of a fair trial ... because the court took adequate steps, in advance of any problems which might have occurred, to conceal

the shackles from the view of the jury.” *Id.* at 552. Therefore, the fact that Gray was shackled during his trial did not contribute to the jury’s guilty verdict and the trial court’s error was harmless.

By the Court.—Judgment affirmed.

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