COURT OF APPEALS
DECISION
DATED AND FILED

May 1, 2012

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2011AP2622-CR **Cir. Ct. No. 2009CM1599**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ALLEN K. UMENTUM,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Brown County: WILLIAM M. ATKINSON, Judge. *Affirmed*.

¶1 HOOVER, P.J.[1] Allen Umentum appeals a judgment of conviction, entered on a jury verdict, for invasion of privacy and entry into a locked room,

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

both with the repeater enhancement. He also appeals an order denying postconviction relief. On appeal, Umentum argues the circuit court's standing order, which required him to be restrained at trial without a particularized determination as to the necessity of the restraint, violated his constitutional rights. He also contends his trial counsel was ineffective for failing to object to the court's order and he is entitled to a new trial in the interest of justice. We reject Umentum's arguments and affirm.

BACKGROUND

¶2 On June 10, 2009, the Brown County circuit court issued a standing order that provides "in-custody defendants granted the right to appear at jury trial in civilian clothing shall wear a stun belt." The stun belt "shall be placed and worn only in a manner that does not reveal its presence to any observer." In support of this order, the court noted the courthouse is open to the public without any screening checkpoints, and:

> The movement of in-custody prisoners in this environment poses special security problems:
>
> a. Heightened risk of accessing weapons by someone leaving them in a public area;
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> b. Heightened risk of weapons being provided to prisoners as they are transported through public areas;
>
> c. Heightened risk of interaction or intervention to free prisoners as they are being transported through public areas;
>
> d. Heightened risk of flight by prisoners because of the opportunity created as they are transported through public spaces; and
>
> e. Circuit Court bailiffs are unarmed individuals.

The order further states that "Defendants and their counsel may, by motion, and for good cause shown, seek relief from this Order."

¶3 On September 8, 2009, the State charged Umentum with invasion of privacy and entry into a locked room, both as a repeater. The charges stemmed from allegations that Umentum entered a locked room at a tanning salon to observe a female tanning.

¶4 Umentum was in custody at the time of trial. On the morning of trial, Umentum dressed in civilian clothes and a sheriff's deputy placed a stun belt underneath Umentum's shirt. No mention was made of the stun belt before or during trial. Umentum testified in his own defense. A jury subsequently found him guilty.

¶5 Umentum brought a postconviction motion, alleging: (1) the court erred by compelling him to wear a stun belt without making a factual determination regarding the necessity of the restraint; (2) his trial counsel was ineffective for failing to object to the court's order to wear the stun belt; and (3) a new trial should be granted in the interest of justice. Specifically, Umentum argued the stun belt "may have been visible to the jurors" and wearing the stun belt created a heightened sense of anxiety and fear, which interfered with his ability to participate in trial.

¶6 At the postconviction hearing, Umentum's trial counsel testified he did not know and did not determine whether Umentum was in fact wearing a stun belt at trial. Counsel explained that he assumed, based on the court's standing order, that Umentum would be wearing a stun belt, and therefore, he examined Umentum as he was escorted into the courtroom to determine whether it was visible. Counsel did not object to the restraint because it was not visible and,

based on Umentum's pretrial actions, he believed the court would have required Umentum to wear the belt. Counsel testified that, during trial, Umentum never complained about the stun belt, expressed any concerns about the belt, or exhibited any physical discomfort caused by the belt.

¶7 Umentum testified that when he was fitted with the belt on the morning of trial, the officer told him the belt would only be used if he made any adverse movements. He explained, "I didn't think it was even going to be used so I didn't really pay that much attention to it at the time." Umentum then testified he believed the belt affected his ability to testify because he was afraid of being shocked. Although he explained the belt made him "very reluctant to speak up about anything," he agreed that the stun belt did not have any impact on the version of facts he presented at trial. Umentum also testified that the stun belt affected his bodily functions and caused him to "wet [him]self" while he was testifying. He explained that he never told anyone about wetting himself because he was embarrassed.

¶8 The court first determined the stun belt was not visible to the jury. The court explained that, before trial, it always examines a defendant to determine whether the stun belt is visible and, here, it did not observe the stun belt. The court found Umentum's trial counsel "highly credible" and noted counsel also looked for, but did not observe, the belt.

¶9 The court then determined Umentum's trial counsel was not ineffective for failing to move for relief from the court's stun belt order. The court reasoned it would not have granted such a motion because "the courtroom has four separate exits that provide an avenue of escape for defendants," and Umentum "was using whatever tactics … he could come up with to avoid going to trial."

Specifically, the court observed that Umentum had failed to appear for the last trial, the court issued a warrant for his arrest, and Umentum had to be apprehended.

¶10 Finally, the court found the stun belt did not affect Umentum's testimony. It noted that, at the beginning of Umentum's testimony, he testified he did not think the belt was going to be used. The court also found Umentum did not wet his pants because the court sits four feet away from Umentum and would have noticed. The court denied Umentum's postconviction motion.

DISCUSSION

¶11 A circuit court has discretion to decide whether a defendant should be restrained during trial. ***State v. Grinder***, 190 Wis. 2d 541, 552, 527 N.W.2d 326 (1995). Generally, 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). However, a circuit court may exercise its discretion to require restraints when they are "necessary to maintain order, decorum, and safety in the courtroom …." ***Id.*** If the court determines a defendant should be restrained, it "must set forth its reasons justifying the need for restraints in that particular case." ***Grinder***, 190 Wis. 2d at 552.

¶12 Umentum first argues the circuit court's standing order, which required him to be restrained without a particularized determination about the necessity of the restraint, violated his constitutional rights to due process and equal protection. Specifically, he argues the court was required to make a case-by-case determination about the necessity of a restraint and it was unfair that he was ordered to appear at trial in a stun belt merely because he was in custody. Intertwined with this argument, Umentum also contends that, irrespective of any

particularized determination, the stun belt itself caused adverse psychological effects that interfered with his right to testify.

¶13 The State responds that the court was not required to make a particularized determination because in ***State v. Miller***, 2011 WI App 34, ¶1, 331 Wis. 2d 732, 797 N.W.2d 528, we held "a circuit court need not consider the necessity of a restraint that is not visible to the jury." It also argues Umentum had the option of moving for relief from the order but did not, and the order is not unfair to in-custody defendants because it allows them to appear without visible restraints in front of the jury.

¶14 We begin by observing that Umentum never objected to the court's standing order requiring him to wear the stun belt at trial. Moreover, Umentum's second appellate argument, regarding ineffective assistance of counsel, states "counsel's failure to challenge the circuit court's standing policy mandating the use of a stun belt[] was ineffective assistance of counsel because counsel intentionally waived the issue for appeal." (Capitalization omitted.) If counsel was ineffective for failing to preserve this issue for appeal, it does not follow that Umentum can independently raise the "waived" issue outside an ineffective assistance of counsel framework.[2]

[2] We recognize that structural errors can be addressed on appeal even in the absence of an objection; however, it does not appear that Umentum is asserting a structural error. If there was a structural error, the error could not be "waived" and there would be no need for an ineffective assistance of counsel claim.

¶15 Therefore, we address Umentum's argument regarding the stun belt under his ineffective assistance of counsel claim.[3] To succeed on a claim of ineffective assistance of counsel, Umentum must prove both that his counsel's performance was deficient and that he was prejudiced by the deficient performance. *See* ***Strickland v. Washington***, 466 U.S. 668, 687 (1984). Counsel acted deficiently if he or she "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." ***Id.*** Prejudice is proven if the defendant shows "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." ***Id.*** at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." ***Id.*** If a defendant fails to establish either prong of the ***Strickland*** test, we need not determine whether the other prong is satisfied. ***Id.*** at 697.

¶16 In this case, we conclude that, irrespective of whether Umentum's counsel was deficient for failing to object to the standing order, Umentum was not prejudiced by any deficiency. Umentum argues he was prejudiced by counsel's failure to object to the use of the stun belt because the belt interfered with his right to testify.[4] Specifically, he argues the stun belt compromised his credibility before the jury because it changed his demeanor, negatively affected his memory, negatively affected his ability to speak up, and caused him to "wet himself" during his testimony.

[3] Because Umentum concedes his trial counsel waived his ability to challenge the standing order, we do not address any due process and equal protection assertions Umentum made to explain why the court erred by failing to make a particularized determination.

[4] Umentum does not renew his postconviction argument that the stun belt was visible to the jury.

¶17 Umentum's argument, however, is completely undermined by his postconviction testimony and the circuit court's postconviction findings. At the postconviction hearing, Umentum testified he did not believe the officer would use the stun belt. The circuit court relied on this testimony when it determined the stun belt did not make Umentum nervous. As to Umentum's contention that wearing the belt affected his memory, he testified at the postconviction hearing, "[A]ll the facts I testified to is what I believe what happened. I don't think there would be any difference … to the facts." Finally, although Umentum argues the belt made him so nervous that he "wet himself" during his testimony, the circuit court rejected that assertion, reasoning it was four feet away from Umentum and "would have noticed." Umentum has not demonstrated "a probability sufficient to undermine confidence in the outcome." *See* ***id.*** at 694.

¶18 Finally, Umentum argues that he is entitled to a new trial in the interest of justice because the real controversy has not been tried. *See* WIS. STAT. § 752.35. In support, he contends the real controversy was not tried because the stun belt interfered with his testimony. Our discretionary reversal power is formidable, and we exercise it sparingly and with great caution. ***State v. Williams***, 2006 WI App 212, ¶36, 296 Wis. 2d 834, 723 N.W.2d 719. Because we have already considered and rejected Umentum's argument that the stun belt interfered with his testimony, we decline to grant a new trial in the interest of justice on that basis.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.