COURT OF APPEALS
DECISION
DATED AND RELEASED

May 16, 1996

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

NOTICE

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No. 95-0396-CR

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

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

PEDRO P. AVILA,

Defendant-Appellant.

APPEAL from a judgment and an order of the circuit court for Dodge County: JOSEPH E. SCHULTZ, Judge. *Affirmed*.

Before Gartzke, P.J., Sundby and Vergeront, JJ.

GARTZKE, P.J. Pedro Avila appeals from a judgment convicting him on one count of burglary, § 943.10(1)(a), STATS., and from an order denying his postconviction motion.[1]

[1] Section 943.10(1), STATS., provides in material part:

The issues are: (1) whether the officers conducted a proper investigatory stop of the van that Avila drove on October 8, 1993; (2) whether the officers had probable cause to arrest him; (3) whether the jury could reasonably infer from the evidence that Avila intended to steal in the building he entered; (4) whether the admission of "other acts" evidence was error; (5) whether Avila was denied a fair trial because he appeared before the jury in handcuffs; (6) whether the trial court properly found that a witness was unavailable; and (7) whether Avila's sentence is excessive. We decide each issue adversely to Avila and affirm.

I. INVESTIGATIVE STOP

Avila moved the trial court to suppress evidence the police acquired after their investigative stop of the van he was driving. He contends the officers had no basis for conducting an investigative stop. At the conclusion of the evidentiary hearing, the court denied his motion. The court ruled the police had "probable cause to stop the vehicle." It based its ruling on all of the evidence in the record and the reports the police had received from the police in another county.

The absence of specific factual findings does not prevent our review. When a trial court fails to make specific findings to support its ruling on a suppression motion, we may assume that the court made the necessary findings. ***State v. Wilks***, 117 Wis.2d 495, 503, 345 N.W.2d 498, 501 (Ct. App. 1984), *aff'd*, 121 Wis.2d 93, 358 N.W.2d 273 (1984). When a finding is not made on an issue, we will assume it was determined in favor of or in support of the decision. ***Sohns v. Jensen***, 11 Wis.2d 449, 453, 105 N.W.2d 818, 820 (1960). We review the trial court's findings of historical fact under the clearly erroneous standard. However, we review de novo constitutional facts, such as the reasonableness of a search and seizure. ***State v. Turner***, 136 Wis.2d 333, 344, 401 N.W.2d 827, 832 (1987). Our review extends beyond the evidentiary hearing

(..continued)

> Whoever intentionally enters any of the following places without the consent of the person in lawful possession and with intent to steal or commit a felony in such place is guilty of a Class C felony:
>
> (a) Any building or dwelling; ....

itself. We "may take into account the evidence at the trial, as well as the evidence at the suppression hearing." ***State v. Griffin***, 126 Wis.2d 183, 198, 376 N.W.2d 62, 69 (Ct. App. 1985).

An investigative stop of a motor vehicle is a seizure within the meaning of the Fourth Amendment to the United States Constitution. ***State v. Guzy***, 139 Wis.2d 663, 672, 407 N.W.2d 548, 552-53 (1987). A law enforcement officer may make an investigative stop prompted by an officer's suspicion that the occupants have committed a crime, even though the officer lacks probable cause to arrest. ***Id***. at 675, 407 N.W.2d at 554. The officer must, however, "have a suspicion grounded in specific, articulable facts and reasonable inferences from those facts, that the individual has committed a crime." An unparticularized suspicion or hunch is insufficient. ***Id***. The reasonableness of an investigative stop depends upon the facts and circumstances present at the time of the stop. ***Id***. at 679, 407 N.W.2d at 555.

We conclude that the officers' suspicion that the occupants of the van had been involved in criminal activity was based on specific and articulable facts and on reasonable inferences from those facts that they had committed a crime. The stop was reasonable.

The essential facts developed at the evidentiary hearing and at the trial are undisputed. At about 8:00 p.m. on October 7, 1993, detectives from the Rock County sheriff's department began surveillance in Milwaukee of a dark brown cargo van with dual wheels. The van was parked in front of Avila's residence, and the officers were informed by the Milwaukee police department that they had had several contacts with Avila while he drove it. However, nothing in the record shows that the officers knew Avila was or would drive it on October 7.

The van was under surveillance because it was a "suspect vehicle" in a burglary in the Rock County area which had occurred in September. On the night of that burglary, the van bore a license plate bearing the same number as the van the officers surveilled on October 7. A vehicle matching the description of the van was also a suspect vehicle in a couple of other area burglaries. The license plate number belonged to a Meguel Rivera residing at

771 Greenfield in Milwaukee but the officers had learned there was no such address.

The van remained parked at Avila's residence until about 10:15 p.m., and then was driven to Old Ashippun in Dodge County where it parked near the entry drive to the Lorenz Company for about forty to forty-five minutes. While the van was parked, its lights were off, there was no movement, and its hood was down. The area was primarily rural and unlighted, but part of an industrial park and a large shed were nearby. At about 11:40 p.m. the van left, and shortly after it entered Waukesha County, a Town of Oconomowoc officer stopped it at the request of Dodge County or Rock County officers.

The facts known to the officers added up to grounds for a reasonable suspicion that the occupants of the van had been engaged in criminal activity. The van itself had been suspected of being involved in two or more previous burglaries in Rock County. Its license plate registration was to a non-existent address. It parked in a rural area containing an industrial park late at night for no apparent reason, such as a mechanical breakdown. It was reasonable for the police to suspect criminal activity because the van had traveled from Milwaukee to an industrial park area late at night and remained parked at a dark spot near a shed for forty-five minutes. Other explanations are possible--that the occupants were lovers or fatigued--but the police could reasonably infer criminal reasons accounted for its movements.

II. PROBABLE CAUSE FOR ARREST

Avila contends that his arrest occurred immediately after the Oconomowoc officer stopped it. That is not what the evidence shows. The occupants in the van were Avila, Mercado and Ramirez. The undisputed testimony is that the arrest occurred well after the stop—after all three were ordered out of the van, after they were taken to separate squad cars, after detective Schieve had interviewed Mercado and obtained information inculpating Avila, and after Schieve gave that information to detective Beier.

It is immaterial that Avila and the other occupants were ordered out of the van at gunpoint and handcuffed. An investigative stop does not

become an arrest merely because the police draw their weapons. ***State v. Washington***, 120 Wis.2d 654, 662, 358 N.W.2d 304, 308 (Ct. App. 1984), *aff'd*, 134 Wis.2d 108, 396 N.W.2d 156 (1986). Nor does handcuffing convert a stop into an arrest. ***United States v. Bautista***, 684 F.2d 1286, 1289 (9th Cir. 1983), *cert. denied*, 459 U.S. 1211 (1982). ***State v. Swanson***, 164 Wis.2d 437, 448, 475 N.W.2d 148, 153 (1991).

Probable cause is that amount of evidence which would lead a reasonable police officer to believe that the defendant probably committed a crime. ***State v. Nordness***, 128 Wis.2d 15, 35, 381 N.W.2d 300, 308 (1986). The evidence need only be sufficient to lead a reasonable police officer to believe that guilt is more than a possibility. ***State v. Paszek***, 50 Wis.2d 619, 625, 184 N.W.2d 836, 840 (1971). When the facts are undisputed, an appellate court independently reviews the trial court's conclusion that probable cause existed. ***Wilks***, 117 Wis.2d at 501, 345 N.W.2d at 500.

The evidence supports the trial court's conclusion that the officers had probable cause to arrest Avila. All of the facts surrounding the investigatory stop are pertinent to the issue. In addition to those facts, Mercado implicated Avila in a burglary. Mercado told detective Schieve that when the van stopped in Old Ashippun, Avila motioned toward a building and said to Mercado, "Let's go over and check that building out." Mercado stayed behind while Avila and Ramirez went to the building. When Schieve asked Mercado if he knew what Avila and Ramirez were going to do, Mercado responded that they were going to break into the building. Schieve relayed that information to detective Beier, who then arrested Avila.

III. "OTHER ACTS" EVIDENCE

Avila challenges rulings which he asserts erroneously permitted the jury to hear "other acts" evidence: the reason for surveilling the van, Avila's suspected involvement in other burglaries, a witness's reference to "knowing [Avila's] past criminal activities," a witness's statement that he had testified "on this case in Sheboygan County," Avila's driver's license which falsely identified him as another person, and another occupant in the van having provided the police with a false driver's license.

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of the a person in order to show that the person had acted in conformity with that character, but that rule does not exclude evidence offered for other purposes, such as proof of motive, opportunity, intent and the like. Section 904.04(2), STATS. When other acts evidence is offered, the trial court must first determine whether it is relevant to an issue, and if it is, whether it is admissible under § 904.04(2), and if it is, then whether its probative value is substantially outweighed by the danger of unfair prejudice. ***State v. Alsteen***, 108 Wis.2d 723, 729, 234 N.W.2d 426, 429 (1982).

The reason for surveillance of the van--that it was suspected of having been used in several burglaries in Rock County--is not other crimes evidence. Vans do not commit crimes. Avila does not appear to have been a suspect in the other burglaries. The police did not know he drove the van that night until after they stopped it.

Defense counsel asked Schieve whether the false name on Avila's driver license increased Schieve's belief that Avila might have been involved in a burglary. The officer replied, "It would make me believe that he was trying to hide from something, and knowing his past, knowing his past criminal activity, yeh, it makes you wonder why he was using another name." On its own motion, the trial court ordered the testimony struck and directed the jury to disregard it. We will presume that a jury acts in accordance with a curative instruction. ***State v. Pitsch***, 124 Wis.2d 628, 625 n.8, 369 N.W.2d 711, 720 (1985). A curative instruction to the jury regarding improperly admitted bad conduct evidence does not necessarily mean that the error was harmless, ***State v. Staples***, 99 Wis.2d 364, 371, 299 N.W.2d 270, 274 (Ct. App. 1980), but we are not satisfied that error had occurred. Schieve's reference to Avila's "past criminal activity" could have referred only to Avila's previous activities that evening. In any event, the test for harmless error is whether a reasonable possibility exists that the error contributed to the conviction. ***State v. Dyess***, 124 Wis.2d 525, 543, 370 N.W.2d 222, 231-32 (1985). Because the jury had evidence (which we review in Part IV) on which it could find beyond a reasonable doubt that Avila had participated in the burglary at the Lorenz Company, there is no possibility that the error, if error it was, contributed to the conviction.

Defense counsel asked detective Beier whether he had taken a picture of Avila's tennis shoe which matched tracks leading to and from the

Lorenz Company building. Beier replied that he had. Then he said that another officer had the pictures. During the confusion, Beier volunteered that he had misspoken and, "the tennis shoe I was talking about with that photograph, I testified on this case in Sheboygan County also." When the court asked, "Did anybody take pictures of the tennis shoes?" Beier said, "No. It was the detective from Sheboygan County, and that's where I referred to them."

Beier's volunteering that he had testified "on this case in Sheboygan County" was inexcusable. Beier must have known better. However, the trial court struck Beier's testimony, and ordered the jury to disregard it, and therefore Beier's error was presumptively cured. Assuming we must nevertheless decide whether the error was harmless, notwithstanding the curative instruction, ***Staples***, 99 Wis.2d at 371, 299 N.W.2d at 274, we are satisfied that because other evidence showed Avila had burglarized the Lorenz building, no reasonable possibility exists that the error contributed to the conviction. ***Dyess***, 124 Wis.2d at 543, 370 N.W.2d at 231-32.

Detective Schieve testified that Avila had a driver's license which identified him as Jose Morales Rolon. Avila objected that reference to his driver's license was irrelevant, since identification of him had been stipulated. A trial court has broad discretion in determining relevancy. ***State v. Oberlander***, 149 Wis.2d 132, 140, 438 N.W.2d 580, 583 (1989). Although the trial court did not spell out its reasoning, it did not have to. The jury could infer that Avila believed possessing a false identification would interfere with the ability of the police to investigate the incident. *Compare* ***State v. Bergeron***, 162 Wis.2d 521, 530, 470 N.W.2d 322, 325 (Ct. App. 1991) (defendant's use of alias relevant to intent to cover up participation in crime).

Because Avila did not object to the testimony regarding his driver's license on grounds that it was prohibited other acts evidence or postscribed by § 904.04(2), STATS., he will not be heard to claim on appeal that the rule of evidence was violated. An evidentiary error may not be raised on appeal unless an objection stating the specific ground is made. Section 901.03(1)(a), STATS. The purpose of an objection is to alert the trial court to the reasons why the evidence should not be admitted and to give opposing counsel an opportunity to meet the objection.

Defense counsel objected to testimony that an occupant in the van also falsely identified himself to detective Schieve. Counsel objected on grounds that the testimony was prohibited "other acts" evidence under § 904.04(2), STATS. However, the court appears to have accepted the district attorney's explanation that Avila's keeping company with other persons who used false names bore on Avila's desire to engage in criminal activity. While the relevance seems weak to us, the ruling is within the trial court's discretion. That purpose is not prohibited under § 904.04(2), and we see no basis for concluding that the probative value of evidence was substantially outweighed by unfair prejudice.

We conclude that Avila's challenges to "other acts" evidence fail to establish reversible error.

IV. EVIDENCE SUPPORTS VERDICT

The scope of our review of the evidence to support a conviction is quickly stated.

> [A]n appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it.

State v. Poellinger, 153 Wis.2d 493, 507, 451 N.W.2d 752, 757-58 (1990) (citations omitted).

The jury heard testimony regarding surveillance of the van and its proximity to Lorenz Company for approximately forty-five minutes. They heard one of the surveilling officers testify that the van's movements just before it stopped led him to believe that its occupants "were looking for a building to burglarize." Footprints led from the area where the van was parked toward the Lorenz Company. The footprints matched tennis shoes taken from Avila. Numerous tennis shoe footprints were both inside and outside the Lorenz building. For safety reasons, Lorenz Company does not allow tennis shoes in the building.

While a rear door was unlocked when the police arrived and showed no evidence of damage, a co-owner of the Lorenz Company testified that the doors had been locked that night. The lock to the overhead door had been damaged to the point it could not be unlocked. That door is used for ingress and egress of vehicles. The building contained large and small tools worth perhaps $100,000, all readily transportable in a large van. The van contained bolt cutters, a pry bar, flashlights and a sledge hammer.

Avila's van contained nothing taken from the building, but the crime of burglary does not require that property has been stolen. Rather, it requires only entry with intent to steal. Section 943.10(1), STATS. The jury was entitled to infer from the evidence that Avila entered the building, roamed through it, and unsuccessfully attempted to open the large overhead door with a view to driving into or to removing personal property from the building and transporting them in the van.

V. APPEARANCE IN HANDCUFFS

Avila moved for a mistrial on grounds that he appeared before the jury in handcuffs. The trial court noted that while Avila had indeed appeared in handcuffs, his counsel could have prevented that by discussing the matter with the jailer before Avila appeared at the trial. Counsel appeared after Avila was brought into the courtroom, and counsel conceded that he was fifteen minutes late. The court noted that the handcuffs had been removed from Avila when the jury came in, and before the jury was impanelled. It is undisputed that during the trial itself Avila was not in handcuffs.

A defendant's appearance in shackles may engender prejudice in the jurors' minds when they view a man presumed to be innocent in the chains of the convicted. ***State v. Grinder***, 190 Wis.2d 541, 551, 527 N.W.2d 326, 330 (1995). For that reason, a trial court must carefully exercise its discretion when deciding whether to shackle a defendant and then, on the record, set forth its reason for justifying the need for restraints in a particular case. ***Id***. at 552, 527 N.W.2d at 330. In the case before us, nothing of the sort occurred. Defendant simply appeared in the courtroom in handcuffs while jurors were present but the jury had not been impanelled.

Due process includes the right not to be compelled to appear in handcuffs. ***Boswell v. Alabama***, 537 F.2d 100, 103 (5th Cir. 1976). Avila was not "compelled" to appear in handcuffs. He was inadvertently brought to the courtroom in handcuffs and the fault is with defense counsel who was not present early enough or before the appointed time to make sure that this did not happen.

The length of time that a jury sees a defendant in circumstances which may prejudice him or her may be a factor in determining whether a defendant was prejudiced. Brief and inadvertent confrontations between a shackled defendant and one or more jurors is insufficient to show that the defendant was prejudiced. In ***United States v. Williams***, 809 F.2d 75, 83 (1st Cir. 1986), at least two jurors inadvertently saw the defendant being handcuffed by marshals in a hallway during recess, and the ***Williams*** court rejected the defendant's claim of prejudice, in the absence of a showing of actual prejudice. According to the ***Williams*** court, the other federal circuit courts are of the same view. ***Id***. at 84.

VI. UNAVAILABILITY OF WITNESS

The district attorney sought leave to put in evidence the testimony of Joe Trejo at Avila's preliminary examination in lieu of calling Trejo as a witness. She explained that she had subpoenaed Trejo about a month before the trial, but when she telephoned him the previous night regarding his appearance, he said he was leaving the state by 8:00 a.m. the next day because his brother had died in Texas. Trejo added that he had learned only that day that his brother had died and he could not get a later flight. Avila's counsel objected on confrontation grounds because, he argued, the State had not

established that Trejo was unavailable. The trial court ruled that the State had made a good faith effort to obtain Trejo's presence at the trial, that Trejo was unavailable, and that his former testimony was admissible.

The district attorney then read to the jury part of Trejo's testimony at Avila's preliminary on October 8, 1993. Trejo had interpreted for a man who identified himself as Juan Jose Morales, and he identified Avila as the man. When Trejo asked the man where he had been going that night in Ashippun, the man responded that he was going to Waukesha to visit a lady and "got lost." Defense counsel cross-examined Trejo with a single question: whether he asked the man if there was any other reason he was out that night and Trejo responded negatively.

On appeal, Avila contends that the State failed to establish that Trejo was an unavailable witness. We reject the contention.

To satisfy the Confrontation Clause, "the prosecution must either produce, or demonstrate the unavailability of, the declarant whose statement it wishes to use against the defendant." ***Ohio v. Roberts***, 448 U.S. 56, 65 (1980). Trejo was not present at the trial, but a witness is not "unavailable" unless the State has made a good faith effort to obtain the witness's presence at the trial. ***Barber v. Page***, 390 U.S. 719, 724-25 (1968). The length to which the State must go to produce the witness is judged by the standard of reasonableness, ***Roberts***, 448 U.S. at 74, and reasonableness is a question of law.

We sustain the trial court's finding that the district attorney made a good faith effort to obtain Trejo's presence. The district attorney had made advance preparations by a subpoena to compel Trejo to appear. When she learned the night before the trial that Trejo would not appear because of circumstances that had happened that very day, her alternatives were to have Trejo arrested to compel his appearance, to seek leave to introduce Trejo's prior testimony at Avila's preliminary examination, or to seek a continuance.

Good faith did not require the district attorney to arrest Trejo to compel his testimony at the trial, given the relatively insignificant value of his testimony. The record established, even without Trejo's testimony, that when the police stopped the van Avila had a false driver's identification. The only other evidence of interest to the jury's attention was Avila's claim that on the

night of October 7 he was looking for a lady and "got lost." But that did not explain how Avila's footprints were found in the vicinity of the building and did not explain the statement by the other occupant that Avila and another occupant left the car to commit a burglary. Avila does not contend that the district attorney should have sought a continuance.

We affirm the trial court ruling that Trejo was an unavailable witness.

VII. SENTENCE

Avila asserts that his character appears to be the only real factor the court considered when sentencing him to five years in prison, and that the sentence is unconscionable in view of various factors: the gravity of the offense was minimal and more in line with a misdemeanor trespass then a felony burglary, the court's unsubstantiated comment that defendant is an inveterate criminal and a poor candidate for probation, and the trial court was apparently biased against Avila. We reject his contentions and affirm the sentence.

When sentencing Avila, the court said the presentence investigation disclosed that Avila is an inveterate professional criminal with a record dating back to shortly after he arrived in the United States. The court noted that Avila had been on probation a number of times and that his probation had been revoked. The court said his personality carries over into his driving habits reflected by some twenty convictions for operating after revocation and his classification as a habitual traffic offender. The court noted that according to the presentence report, Avila expressed little remorse and seems unwilling to abide by the laws of the State of Wisconsin. The court said that citizens deserve protection from Avila, and they will be protected if he is incarcerated in state prison.

When Avila raised the propriety of his sentence in his postconviction motion, the judge who heard that motion was not the trial judge. We examine the record de novo in reviewing the sentence to determine whether the trial court erroneously exercised its discretion when sentencing Avila. The presumption is that the trial court properly exercised its discretion. ***State v. Thompson***, 146 Wis.2d 554, 565, 431 N.W.2d 716, 720 (Ct. App. 1988).

We will affirm the sentence if a reasonable basis exists for it. ***McCleary v. State***, 49 Wis.2d 263, 277-78, 182 N.W.2d 512, 519 (1971).

We start with the fact that the five-year sentence imposed on Avila was far less than the ten-year statutory maximum. Sections 943.10(1)(a) and 939.50(3)(c), STATS. The sentence is facially far from unconscionable and is reasonable.

The primary factors upon which a sentencing decision should be based are the gravity of the offense, the character of the offender and the need for protection of the public. ***State v. Smith***, 100 Wis.2d 317, 325, 302 N.W.2d 54, 58 (Ct. App. 1981), *overruled on other grounds*, ***State v. Fickus***, 119 Wis.2d 154, 350 N.W.2d 82 (1984). The weight to be given each factor is within the discretion of the sentencing court. ***Id***. And the sentence may be based on any one or more of the three primary factors. ***Id***. Here the trial court placed great weight on Avila's character, but the court was entitled to do so.

The trial court imposed the sentence after reviewing a presentence investigation report. The court's reference to Avila as an inveterate and professional criminal is borne out by his record. The district attorney called to the court's attention that Avila had been convicted of a felony in 1981 and another in 1986 plus five misdemeanors and that he had been on probation six times and four probation sentences were revoked.

To suggest that the gravity of the offense was minimal and more in line with a misdemeanor trespass is to ignore the record. The jury could, as it did, believe that Avila had entered the building with intent to steal. While there is no evidence of a forced entry to the rear of the building, there is evidence that he attempted to break the lock to the large overhead door with a view to removing items from the building by use of the van. This was no mere trespass.

We turn to the claim that the trial judge was biased against Avila. His counsel complains that the court began to seat the jury without Avila or his attorney present. The fact is that defense counsel, by his own admission, was fifteen minutes late. The claim that the trial court admonished counsel for a last second instruction request has no basis. When counsel orally requested an instruction, the court merely noted that it was accustomed to having defense counsel submit a request in writing. If counsel believed, as he claims on appeal,

that the trial court erred by reading a proposed "guilty" verdict to the jury despite a request that the "not guilty" verdict be read first, counsel should have argued that error occurred. That the court gave no explanation for its decision on some legal arguments, objections and motions may show an erroneous exercise of discretion but not necessarily bias. Counsel's displeasure is no ground for our finding bias.

VIII. CONCLUSION

For the reasons stated, we affirm the conviction and order.

By the Court.—Judgment and order affirmed.

Not recommended for publication in the official reports.

SUNDBY, J. (*dissenting*). I cannot accept that it is the defendant's responsibility to ensure that he or she does not appear before the jury in jail garb and handcuffs. I therefore respectfully dissent. Our Supreme Court has held that physical restraints placed on a defendant "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, 330 (1995) (quoting ***State v. Cassel***, 48 Wis.2d 619, 624, 180 N.W.2d 607, 611 (1970)).

We recognize that a defendant in a criminal trial has a due process right not to be "compelled" to appear in handcuffs. *See* ***Boswell v. Alabama***, 537 F.2d 101, 103 (5th Cir. 1976). The majority holds, however, that "Avila was not `compelled' to appear in handcuffs. He was *inadvertently* brought to the courtroom in handcuffs and the fault is with defense counsel who was not present early enough or before the appointed time to make sure that this did not happen." Maj. op. at 15 (emphasis added).

We are not to find facts. *See* ***Wurtz v. Fleischman***, 97 Wis.2d 100, 107-08, 293 N.W.2d 155, 159 (1980). Further, there are no facts in the record to support the State's claim that Avila was brought into the courtroom in handcuffs "inadvertently." The State cites to that part of the record where defense counsel moved for a mistrial because Avila was brought into the courtroom in a jump suit in handcuffs. The following exchange occurred:

> [COUNSEL]: ... I would move for a mistrial based ... on the fact that the defendant was brought into the court in a jump suit with sandals on and in handcuffs. I did not know he was going to be brought in that way. I think any deputy should know that its appropriate not to bring a defendant into court like that because there is an automatic presumption of guilt. I did discuss with the Court off the record when this happened. The Court called us up to the bench and we discussed privately ... a curative instruction or curative explanation by the Court would be in line at that time. I noted that [when] we picked the jury, the Court did not give any explanation. And I would move for a mistrial based on that.

THE COURT. Well, your motions for mistrial are denied. First of all, with respect to him having been brought into the courtroom in shackles and in jail garb, it certainly isn't the DA's fault. I suppose, [counsel], you should have been here at about five minutes to 9, you should have had his civilian clothes all ready for him, and you should have assured yourself that he wouldn't be marched into the courtroom in jail garb. Likewise, you should have arranged to meet him outside the courtroom and you should have asked the Court, when he was outside the courtroom, to remove his manacles.

[COUNSEL]: Your Honor, just for the record, I would object to that. I have no control over the defendant, and to put the responsibility on me is improper. That's completely without my control, the fact that he is brought in with handcuffs. I can't order the deputy to take off handcuffs. And plus, he came in a different entrance than I came in. He came in through the side door, not the back of the courtroom.

I find nothing in this colloquy remotely resembling a finding by the trial court that the deputies brought Avila into the courtroom in handcuffs inadvertently. I don't find in the record any "Oops, I'm sorry." It does not contribute to fair decisionmaking when the State misstates the record. Apparently the prosecutor momentarily forgot that she had special responsibilities under Supreme Court Rule 20:3.8, Comment:

> A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to

> see that the defendant is accorded procedural justice
> ....

Our court does not serve the ends of justice when we accept without question factual statements of prosecutors which have no support in the record. Therefore, we cannot excuse this violation of Avila's due process rights on grounds of mistake or inadvertency.

The trial court's statement that "it certainly isn't the DA's fault" that Avila was brought into the courtroom in handcuffs and jail garb is an incorrect statement of the law. Of course, it was the DA's fault. She was the prosecutor and it was her duty to see that the defendant got a fair trial. A criminal defendant is at the mercy of the State until the court or the jury speaks. In the final analysis, it is the court which controls the conduct of a criminal trial. The State does not claim that Avila's conduct required that he be restrained during trial, as was the case in ***United States v. Stewart***, 20 F.3d 911 (8th Cir. 1994), yet that was the inevitable conclusion the jurors would reach upon seeing the defendant in restraints. In certain extreme situations, a trial court can restrain a criminal defendant in the courtroom where the defendant has demonstrated that he or she is dangerous or disruptive. *See* ***Illinois v. Allen***, 397 U.S. 337, 344 (1970). Here, the trial court was not asked to exercise its discretion to place Avila in handcuffs and jail garb. Apparently, it was the jailer's routine procedure to bring jail inmates into court in restraints. It became the responsibility of the trial court to correct the situation. According to Avila, the entire jury panel saw that he was in custody in handcuffs and jail garb.

Defense counsel discussed with the trial court off the record what to do about what had happened. The trial court called counsel to a bench conference and discussed the possibility of a curative instruction or curative explanation to the jury after the jury had been picked. However, the trial court did not follow through on giving such instruction or explanation. Throughout the proceedings, the trial court demonstrated a notable reluctance to permit

either defense counsel or the prosecutor to be heard. Repeatedly the trial court refused to allow the attorneys to approach the bench. During *voir dire*, counsel for the defendant pleaded: "Judge, if I may approach the bench please?" To which the court responded: "Next question." The prosecutor pleaded: "Could I just speak with the Court? Could I approach the bench with [defense counsel]?" The court responded: "No. Let's select the jury. Start."

The trial court's failure to give a curative instruction to the jury was consistent with the way it conducted this trial. In view of the limited time Avila appeared before the jury in jail garb, handcuffs and shackles, a curative instruction would have dispelled the jury's perception either that Avila was already considered guilty or that he was dangerous or disruptive so that he needed to be restrained in the courtroom. If the court had instructed the jury that bringing Avila into the courtroom in shackles and handcuffs was inadvertent and that they should attach no significance to that fact, any bias may have been removed. However, jail clothing, handcuffs and shackles are inherently prejudicial because they send to the jury impermissible messages, including that defendant has already been deprived of his liberty. *See* ***Estelle v. Williams***, 425 U.S. 501, 503-05 (1976).

I have seen nothing in my ten years on the court to alter my conclusion that elemental fairness is not antithetical to the efficiency of the criminal justice system. Avila was not treated fairly and is entitled to be retried by a jury not tainted by the prejudicial acts of the government.