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November 24, 2020

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You are hereby notified that the Court has entered the following opinion and order:

2019AP2113-CR	State of Wisconsin v. Brian Anthony Grant (L.C. # 2017CF1540)
2019AP2114-CR	State of Wisconsin v. Brian Anthony Grant (L.C. # 2017CF2238)

Before Brash, P.J., Donald and White, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Brian Anthony Grant appeals judgments of conviction entered after a jury found him guilty of multiple felonies. During jury deliberations, he moved for a mistrial on the ground that three jurors saw him in handcuffs while he was in the courthouse hallway. On appeal, Grant contends that the circuit court erred by denying the motion. Based upon our review of the briefs and records,

we conclude at conference that these cases are appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2017-18).[1] We summarily affirm.

In Milwaukee County Circuit Court case No. 2017CF1540, which underlies appeal No. 2019AP2113-CR, the State charged Grant, as a repeat offender, with attempted armed robbery by threat or use of force, first-degree recklessly endangering safety by use of a dangerous weapon, and possessing a firearm as a felon.[2] While that case was pending, the State filed Milwaukee County Circuit Court case No. 2017CF2238, which underlies appeal No. 2019AP2114-CR. There, the State charged Grant, as a repeat offender, with four counts of felonious intimidation of a witness. The matters were joined and proceeded to a jury trial.

Amber testified at trial that on January 27, 2017, she spent the evening with Thomas, the father of her child, at her apartment in the 2800 block of West Wisconsin Avenue. As the pair left the apartment, Grant approached them in the hallway of the building. Amber said that she and Grant had an "off and on relationship" and were not dating at that time. Grant produced a gun and demanded that she give him her phone. Amber surrendered the phone and fled from the building. She ran towards a marked police vehicle that happened to be nearby and told the officers what had happened. As she spoke to them, three shots rang out.

[1] All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

[2] The complaint refers to the victim of the attempted armed robbery as "A.S." and to the victim of first-degree recklessly endangering safety as "T.H." For ease of reading, we, as did the State, refer to A.S. and T.H. by the pseudonyms Amber and Thomas, respectively. We also refer to one of the citizen trial witnesses, J.A., by the pseudonym Jason. *See* WIS. CONST. art. I, § 9(m), WIS. STAT. RULE 809.86(5).

Thomas testified that after Amber fled, he and Grant struggled. Thomas eventually escaped but heard gunshots as he fled. Outside the apartment building, he encountered the police officers who were already talking to Amber and gave them his statement.

Two police officers testified about their interaction with Amber and Thomas on January 27, 2017. The officers also described unsuccessful efforts to stop a person near the 2800 block of West Wisconsin Avenue that night who appeared to match the description of the suspect that Amber had named as "Brian Grant." A detective testified that officers subsequently arrested Grant in March 2017, after executing a search warrant at his residence.

Amber testified that Grant contacted her while he was in jail following his arrest. She said that she had at least ten video calls with him at the jail and that he sent her letters. The letters included instructions about the steps she should take to recant her allegations about his actions on January 27, 2017. Amber testified that Grant also wrote a letter to her friend Jason, instructing him to persuade Thomas either not to come to court or, alternatively, to say that he didn't remember what happened on January 27, 2017. Amber went on to testify that after Grant sent these letters, she and Jason developed a romantic relationship.

Jason testified about an incident that occurred while the trial was underway. He said that he was in a courthouse hallway and encountered Grant, who was accompanied by a law enforcement officer. Grant made a rude remark and then said: "I know where you stay at." A bailiff also testified about this encounter. The bailiff said that he was taking Grant back to jail when they passed a man in the hallway. According to the bailiff, Grant exchanged angry words with the man, indicated that Grant knew where the man lived, and "proceeded to say an address."

The bailiff said that when he returned Grant to the custody of jail staff, Grant said that "what happened upstairs is between you and me."

Grant presented the testimony of Milwaukee County Deputy Sheriff Jeffrey Paape as the sole defense witness. Paape testified about Milwaukee County Jail records of letters Grant sent and received during certain periods that he was an inmate there. Grant also stipulated that he had a prior felony conviction.

After the jury retired to deliberate, it asked to see the exhibits, including video recordings. The following day, the parties and the circuit court convened in the courtroom to address logistical matters prior to bringing in the jury to watch the recordings. After a period of discussion, defense counsel stated: "I just, Mr. Grant advised me when we [sic] came down the hall in cuffs three jurors saw him." The circuit court responded that "normally ... that's not great idea," but noted that the jury had already heard testimony that Grant was in custody. Defense counsel then moved for a mistrial.

The circuit court immediately ruled on the motion. The circuit court first found that Grant had previously interacted with Jason in the courthouse hallway and that Grant's behavior during that interaction "could be perceived as intimidation or attempted intimidation." The circuit court noted that the jury had heard testimony about that interaction, including testimony from a bailiff "as to the circumstance which included Mr. Grant being in that [bailiff]'s custody for transport back to the jail.... Now the jury knows he's in custody." The circuit court also considered that the jury had heard testimony about "custodial conversations" between Grant and Amber. In light of the substantial evidence of Grant's custodial status, the circuit court denied the motion for a mistrial.

The jury acquitted Grant of recklessly endangering safety and found him guilty of the other six charges. He appeals, raising the single claim that the circuit court should have declared a mistrial based on his allegation that three jurors saw him in handcuffs in the courthouse hallway while deliberations were underway.

Whether to grant a mistrial rests in the circuit court's discretion. *See* ***State v. Knighten***, 212 Wis. 2d 833, 844, 569 N.W.2d 770 (Ct. App. 1997). A circuit court properly exercises its discretion if the circuit court examines the relevant facts, applies a proper legal standard, and reaches a reasonable conclusion. *See* ***State v. Edmunds***, 2008 WI App 33, ¶8, 308 Wis. 2d 374, 746 N.W.2d 590. When ruling on a motion for mistrial, the circuit court must determine whether the alleged error was sufficiently prejudicial as to warrant a new trial in light of the proceeding as a whole. *See* ***State v. Doss***, 2008 WI 93, ¶69, 312 Wis. 2d 570, 754 N.W.2d 150. On appellate review, a party challenging the circuit court's decision to deny a motion for mistrial must make "'a clear showing'" that the circuit court erroneously exercised its discretion. *See* ***id.*** (citation omitted).

"The deference which we accord the [circuit] court's mistrial ruling depends on the reason for the request. When the basis for a defendant's mistrial request is the State's overreaching or laxness, we give the [circuit] court's ruling strict scrutiny out of concern for the defendant's double jeopardy rights." ***State v. Bunch***, 191 Wis. 2d 501, 507, 529 N.W.2d 923 (Ct. App. 1995) (citation omitted). Where, however, "the defendant seeks a mistrial on grounds not related to the State's alleged laxness or overreaching, we give the [circuit] court's ruling 'great deference.'" ***Id.*** (citation omitted). Here, the motion for a mistrial was not premised on any alleged overreaching or laxness on the part of the prosecution. Rather, the motion was based on an allegation that three jurors glimpsed Grant in handcuffs as he moved through the courthouse. Accordingly, we give great

deference to the circuit court's ruling denying a mistrial, *see* ***id.***, and we search the record for reasons to sustain the circuit court's exercise of discretion, *see* ***State v. Herschberger***, 2014 WI App 86, ¶43, 356 Wis. 2d 220, 853 N.W.2d 586. With the foregoing in mind, we turn to Grant's arguments that the circuit court erroneously denied a mistrial in this case.

Grant first contends that the three jurors' observation of him in handcuffs was "necessarily prejudicial ... because it suggest[ed] to the jury that [] Grant is dangerous." We disagree. Courts have long recognized that "a juror's observation of a restrained defendant outside a courtroom is not likely to arouse a juror's prejudice because people expect to see prisoners in restraint when they are in a position where they could escape." *See* ***Knighten***, 212 Wis. 2d at 844. Accordingly, "[c]ourts have generally found brief and inadvertent confrontations between a shackled accused and one or more members of the jury insufficient to show prejudice." ***Id.*** (citation omitted).

Grant suggests that the foregoing analysis is inapplicable here because the jury heard testimony during the trial that Grant was in custody and the sight of him in restraints was therefore cumulative evidence of his dangerousness that "tipped the scale" against him. To the contrary, ***Knighten*** explains that trial testimony establishing that the defendant was in custody "*substantially lessen*[*s*]" any potential for prejudice arising from the jurors seeing a defendant shackled in the hallway, because the jury has "learned from a proper source" that the defendant was in custody. *See* ***id.*** at 845 (emphasis added). That is, the jury is less likely to speculate that restraints were necessitated by a defendant's dangerousness when the testimony has established another reason for those restraints, namely, that the defendant is incarcerated. Moreover, the jury in this case acquitted Grant of recklessly endangering safety. Claims of prejudice grounded on alleged improper contact between jurors and a defendant are undercut when the ultimate verdict includes an acquittal. *See* ***United States v. Zizzo***, 120 F.3d 1338, 1349 (7th Cir. 1997).

Finally, Grant asserts that the jurors' observation of him in restraints violated his right to due process and a fair trial, and in support he cites ***State v. Champlain***, 2008 WI App 5, ¶22, 307 Wis. 2d 232, 744 N.W.2d 889. ***Champlain*** does not support his position. There, we recognized the well-established rule that a defendant "should not be restrained during the trial because such freedom is 'an important component of a fair and impartial trial.'" *See* ***id.***, *citing* ***Sparkman v. State***, 27 Wis. 2d 92, 96-97, 133 N.W.2d 776 (1965). However, our supreme court has limited the ***Sparkman*** rule, distinguishing circumstances where the jury sees a defendant restrained inside the courtroom from those where the jury sees the defendant restrained outside the courtroom. *See* ***State v. Cassell***, 48 Wis. 2d 619, 624-25, 180 N.W.2d 607 (1970). The ***Cassell*** court explained that, while "[p]rejudice is likely to be engendered psychologically" when the jury sees a defendant restrained in the courtroom, "[w]e think that when a jury or members thereof see an accused outside the courtroom in chains or handcuffs the situation is psychologically different." *See* ***id.*** When, as alleged in Grant's case, "the views by some members of the jury were casual, momentary and inadvertent[, t]he dramatics of such a situation is essentially different than a court scene." *See* ***id.*** at 625. Indeed, the ***Cassell*** court recognized that the sight of a restrained defendant outside the courtroom may arouse sympathy rather than prejudice. *See* ***id.*** Because Grant alleged the kind of "casual, momentary and inadvertent" view of a restrained defendant outside the courtroom that was at issue in ***Cassell***, the circuit court "was not obliged as a matter of law to infer that the incident was prejudicial." *See* ***id.***

Here, the circuit court considered the allegation that members of the jury saw Grant handcuffed in the courthouse hallway, but the circuit court concluded that the incident did not prejudice him. In reaching that conclusion, the circuit court examined the trial proceedings as a whole, including the testimony that Grant was incarcerated after his arrest and in jail during the

trial. The circuit court found that the jury knew from proper sources that Grant was in custody, and the circuit court therefore determined that the sight of him in handcuffs did not warrant a mistrial. The circuit court thus examined the facts, applied a proper standard of law, and reached a reasonable conclusion. *See* ***Edmunds***, 308 Wis. 2d 374, ¶8. In light of the great deference that we must afford the circuit court's decision, we will not disturb it.

The State concludes its brief with an argument that any error in denying the motion for mistrial was harmless given the substantial evidence against Grant. Because we conclude that the circuit court did not err, we will not consider either the State's argument or Grant's response that a harmless error analysis is inapplicable to his claim. *See* ***State v. St. Germaine***, 2007 WI App 214, ¶24 n.5, 305 Wis. 2d 511, 748 N.W.2d 148 (explaining that only dispositive issues need be addressed). We affirm.

IT IS ORDERED that the judgments of conviction are summarily affirmed.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals