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May 14, 2013

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

2012AP801-CR State of Wisconsin v. Walter V. Rugar, III (L.C. # 2009CF316)

Before Lundsten, P.J., Higginbotham and Blanchard, JJ.

Walter Rugar, III, appeals a judgment convicting him after a jury trial of first-degree intentional homicide, armed robbery, and false imprisonment, contrary to WIS. STAT. §§ 940.01(1)(a), 943.32(1)(a), and 940.30 (2011-12).¹ Rugar argues on appeal that the circuit court erred in denying his motion for a mistrial. Based upon our review of the briefs and record,

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We summarily affirm.

The issues on appeal relate to a video recording of Rugar's statement to police, which was played in relevant part for the jury at his trial. The video recording depicts Rugar wearing an orange jail uniform and restraints on his hands, legs, and waist. Prior to commencing questioning, a detective is seen removing the restraints from Rugar's hands and waist, leaving only the leg restraints. Later, in response to questioning, Rugar makes reference to his prior involvement with a gang.

After the jury had viewed just under fifteen minutes of the recording, Rugar's counsel moved for a mistrial based on the fact that the recording exposed the jury to images of Rugar in restraints. The court denied the motion, finding that the recording was not unfairly prejudicial. On appeal, Rugar argues that the circuit court erroneously exercised its discretion both by admitting the evidence and by denying the motion for a mistrial.

However, as the State points out in its brief, the circuit court was not called upon to rule on the admissibility of the recording because Rugar did not object at any time before the recording had already been played, such as when the prosecutor proposed to play it. A party must make a specific *and timely* objection to the admission of evidence in order to preserve the issue for appeal. *See* WIS. STAT. RULE 901.03(1)(a). Therefore, we will not review admissibility as a stand-alone issue. So, for example, Rugar has forfeited the argument he now raises on appeal that the court should have considered alternative methods of allowing this evidence to be presented to the jury. However, we will review the prejudicial effect of the admitted video recording, if any, within the context of Rugar's mistrial claim.

Whether to grant a mistrial is a matter for the circuit court's discretion. *State v. Foy*, 206 Wis. 2d 629, 644, 557 N.W.2d 494 (Ct. App. 1996). The circuit court "must determine, in light of the whole proceeding, whether the claimed error is sufficiently prejudicial as to warrant a mistrial." *State v. Hampton*, 217 Wis. 2d 614, 621, 579 N.W.2d 260 (Ct. App. 1998). We will reverse the circuit court's denial of a motion for a mistrial "only on a clear showing of an erroneous exercise of discretion' by the circuit court." *State v. Doss*, 2008 WI 93, ¶69, 312 Wis. 2d 570, 754 N.W.2d 150 (quoted source omitted).

Rupar argues that the fact that the jury saw him in restraints and jail clothing in the video recording prejudiced his defense and deprived him of a fair and impartial trial. He points to authority supporting the proposition that a defendant may be subjected to physical restraint in front of a jury only if the circuit judge has first found the restraint to be "reasonably necessary to maintain order" in the courtroom, *State v. Champlain*, 2008 WI App 5, ¶22, 307 Wis. 2d 232, 744 N.W.2d 889, and argues by analogy that portraying him in restraints in the recording required a finding of a need for order in the courtroom, which could not have been made here. Rupar also asserts that the court based its decision to deny a mistrial on an erroneous belief that WIS. STAT. § 968.073 mandates that custodial interrogations be video recorded when, in fact, the statute states, in relevant part, "It is the policy of this state to make an audio *or* audio and visual recording of a custodial interrogation of a person suspected of committing a felony." Sec. 968.073(2) (emphasis added).

We agree with Rupar that the jail clothing and restraints reveal that Rupar was in custody at the time police interviewed him. However, Rupar does not suggest that at least the audio portion of the recording could not have been played for the jury, and the jury would have understood that he was in custody from the audio portion. The interrogating detective states in

the recording that Rugar was taken from jail and then read his *Miranda*² rights. These facts would have informed the jury, even without accompanying video footage, that Rugar was in custody.

Additionally, the fact that most of Rugar's restraints were removed prior to the commencement of interrogation suggested to the jury that the restraints were used for transporting him from jail to the police station and not, as Rugar suggests, that police believed he was especially threatening or dangerous. In addition, Rugar admits, during the course of the same police interrogation at issue, to the crimes charged. The record also contains evidence of admissions of guilt made by Rugar to several other individuals. Given these facts, we conclude that the potential prejudicial effect of the restraints and jail clothing was low, in light of the whole proceeding. Accordingly, the circuit court did not erroneously exercise its discretion in denying Rugar's motion for a mistrial based upon that issue.³

We turn next to Rugar's argument that the jury should not have been permitted to hear his statement that he had been involved in gang activity. After reviewing his statement, we agree with the State's position on this issue. In the recording, Rugar references his gang involvement in terms of past conduct, not present conduct. He does not state that he continues to be involved in a gang or that he intends to be a gang member for life. To the contrary, Rugar denies that he is

² *Miranda v. Arizona*, 384 U.S. 436 (1966).

³ Because we conclude that the potential prejudicial effect of the recording was low, we need not speculate as to whether, as Rugar suggests, the circuit court based its decision on an erroneous belief that WIS. STAT. § 968.073 mandates a video recording, nor do we need to address the question of whether the court's understanding on this issue could be pertinent to the mistrial issue.

still a gang member. Thus, we are not persuaded that these remarks were unduly prejudicial to Rugar's defense.

Finally, we reject Rugar's argument that his trial counsel rendered ineffective assistance of counsel. The State contends that Rugar did not preserve the ineffective assistance issue for appeal with a postconviction motion in circuit court. Our own review of the record confirms that no motion was made, and thus, because the issue is being raised for the first time on appeal, we need not consider it. See *State v. Caban*, 210 Wis. 2d 597, 604, 563 N.W.2d 501 (1997). We note, however, that having concluded that the potential for prejudice arising from what the jury saw in the video recording was low, Rugar cannot show that he was prejudiced by his defense counsel's handling of that issue. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

IT IS ORDERED that the judgment is summarily affirmed under WIS. STAT. RULE 809.21(1).

Diane M. Fremgen
Clerk of Court of Appeals