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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

573

STATE OF IOWA,)

Plaintiff-Appellant,) Filed April 29, 1980

vs.)

MICHAEL POLSON,) 0-100
64173

Defendant-Appellee.)

Appeal from Polk District Court - James Denato, Judge.

State appeals from a grant of a new trial to a defendant in a criminal proceeding. AFFIRMED.

Thomas J. Miller, Attorney General of Iowa, and Richard L. Cleland, Assistant Attorney General, for plaintiff-appellant.

Martha Shepard, Polk County Offender Advocate Office, Des Moines, Iowa, for defendant-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

CARTER, J.

The State appeals from a grant of a new trial to a defendant in a criminal proceeding. We affirm.

Defendant's trial for the offense of robbery in the first degree commenced on July 18, 1979. On July 19, it was brought to the attention of defendant's counsel by the trial court's law clerk, that at approximately 9:15 that morning, defendant, after being brought into the courthouse in chains, was unchained by a deputy sheriff in the hall immediately outside the courtoom in the presence of the jury members, who were sitting there. The record shows defense counsel informed the trial court of the incident as soon as he found out about it and that the trial court indicated to him he should make a record at a more opportune time and that it would be effective at the time he first heard of the incident. Defendant made a motion for a mistrial on the basis of this incident. At he hearing, the law clerk, who was the only witness to the incident, gave the following testimony:

> THE COURT: Jim, I suppose we had better find out what it is you saw and when you saw it.
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> MR. JAMES PRESCOTT: It was approximately — it was this morning approximately 9:15 when the Defendant arrived and the jurors were sitting on the benches out in front of the Courtroom and he was brought by the Sheriff — or the Deputy Sheriff in front of the jurors in his chains and unchained in the hall right in front of the jurors and then brought into the Courtroom.
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> THE COURT: What do you mean in chains?
>
> MR. JAMES PRESCOTT: Well, his wrists were chained and the chain goes between the legs and from behind he is led in front of the Sheriff by a chain.

The trial court overruled defendant's motion, with the following colloquy occurring thereafter:

> Is there anything that you would like to me to do? I am going to deny your Motion for a Mistrial at this stage, but is there anything that you would like me to do by way of telling the jury before this case is submitted to them? This is primarily the reason I delayed the recess at this time before submission.
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> MR. PIAZZA: Judge, no, I wouldn't, and I would like to [sic] record to reflect why. I feel that any type of cautionary instruction to the jury in regard to this point would only serve to heighten the jury's sensibilities as to the events which occurred this morning, and I feel it would do more harm than good.

Following his conviction, defendant filed a motion alleging inter alia, the same grounds he had urged as a basis for his motion for mistrial. The State resisted and a

hearing on the matter was held on August 27. On August 28, the trial court sustained defendant's motion for a new trial, stating in relevant part as follows:

> The Court finds, on the basis of the record aforesaid, that at 9:15 AM on 7-19-79 the jury was seated or standing immediately before the courtroom door at which point at 9:15 AM the Defendant was brought to the courtroom door manacled in what is called a "lead chain" by which means he is handcuffed to a belt arrangement with a chain going between the legs by which means he is lead or escorted.
>
> From the appearance and conduct of the Defendant, and primarily based on the absence of any contrary information or evidence, the Court concludes that this Defendant, being slight of build, did not constitute any particular danger to others, nor was he an unusual escape risk so as to necessitate the measures described above.
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> * * *
>
> This Court reasons that the nature of the potential prejudicial matter must be balanced against the reasonableness and necessity of the action claimed as the source of the prejudice to the fair trial. This Court concludes that the measures taken for security of this defendant for jury trial purposes were unreasonable and unnecessary under the circumstances and such conclusion is a factor in the exercise of the Court's judicial discretion.

On September 26, the State filed a motion to reopen and motion for reconsideration of the new trial ruling, based upon recently discovered new evidence. The evidence that the State wanted to introduce consisted of testimony from the deputy sheriff who had transfered defendant that the restraints had been removed from defendant before getting to the courtroom door. At the hearing, the attorney for the State said he did not previously look into the facts as to whether or not the jurors actually had seen defendant in chains because he believed the motion for a new trial would be denied based on legal, not factual points. The trial court overruled the State's motions finding them to be "untimely" and stating that there was no excuse shown for the State's failure to previously present its version of what happened. This appeal by the State, pursuant to section 814.5(1)(c), The Code 1979, followed.

I. The State contends defendant failed to preserve his fair trial claim for the trial court's consideration on a motion for a new trial. The State argues defendant's failure to request to voir dire the jurors to see if any of them actually observed the defendant in chains, and refusal of the trial court's offer to make a curative instruction should be taken as a waiver of his rights to raise this issue at a later date. We disagree.

Defendant, upon learning of the incident in question, immediately moved for a mistrial, alleging serious prejudice to his right to a fair trial. Additionally,

defendant made a record as to why he believed a curative instruction would be an inadequate remedy under the circumstances. This is not a situation where a defendant attempted to "sit by and fail to avail himself of legal procedures to secure a fair trial [only to] later raise lack of the same procedures as grounds for a new trial." State v. Curtis, 192 N.W.2d 758, 759 (Iowa 1971), quoted in State v. Johnson, 243 N.W.2d 598, 606 (Iowa 1976).

The State, as authority for its position, cites Wright v. Texas, 533 F.2d 185, 187 (5th Cir. 1976) and urges our adoption of a similar rule. We believe, however, that Wright is inapposite. In that case "there was no demonstration by the state that the trial judge was ever made aware of the handcuffing of the petitioner." Id. at 187. In the case at bar, the trial court was fully apprised of the situation by defendant's prompt motion for a mistrial, and given an opportunity to rule thereon. The same grounds were again raised by defendant in his motion for a new trial. As a result, we find error was preserved.

II. The State next contends the trial court abused its discretion in granting defendant's motion for a new trial.

In ruling upon motions for a new trial, the trial court has broad, although not unlimited, discretion. Iowa R. App. P. 14(f)(3); see State v. Kaufman, 265 N.W.2d 610, 619 (Iowa 1979); State v. Sheffy, 234 N.W.2d 92, 98 (Iowa 1975); see also State v. Cuevas, 281 N.W.2d 627, 632 (Iowa 1979); State v. Jackson, 223 N.W.2d 229, 233 (Iowa 1974). In reviewing the trial court's exercise of discretion, we are slower to interfere with the grant of a new trial than with its denial. Iowa R. App. P. 14(f)(4).

Under ordinary circumstances, defendant's freedom from handcuffs, shackles or manacles is considered to be an important component of a fair and impartial trial. State v. Evans, 169 N.W.2d 200, 210 (Iowa 1969). This rule stems from the desire to prevent prejudice in the minds of the jurors before whom defendant is tried. Id. On the basis of uncontradicted evidence indicating defendant's chains were removed in the immediate presence of his jurors, as they sat outside of the courtroom, the trial court determined defendant's motion for a new trial should be sustained. Additionally, the court determined, on the basis of the absence of any evidence to the contrary, defendant "did not constitute any particular danger to others nor was he an unusual escape risk." We cannot conclude that the trial court abused its discretion by granting defendant's motion.

III. Lastly, the State contends the trial court abused its discretion by denying plaintiff's motion to reopen the record.

Trial courts have broad discretion in allowing a party to reopen the record. State v. Conner, 241 N.W.2d 447, 461 (Iowa 1976); State v. Moreland, 201 N.W.2d 713, 714 (Iowa 1972). In the case at bar, twenty-nine days after defendant was granted a new trial, the State moved to reopen on the basis of "new and additional evidence" that the jury did not see the defendant in chains during the trial. This was the first attempt by the State to present any evidence on this issue. No showing was made that the evidence could not have been discoverable in the exercise of due diligence either before the conclusion of trial or before the ruling on defendant's motion for a mistrial. The State's only attempt to justify its conduct was a belief that the trial court would rule in its favor on legal, not factual points. On the basis of this record, we believe the State failed to make the requisite showing necessary for a "newly discovered evidence" claim. See State v. Overstreet, 243 N.W.2d 880, 886 (Iowa 1976); State v. Farley, 226 N.W.2d 1, 3 (Iowa 1975). Accordingly, we find no abuse of discretion in the trial court's refusal to reopen the record.

AFFIRMED.

All judges concur except Donielson, J., who concurs specially.

DONIELSON, J. (specially concurring)

I agree with Division II of the majority opinion in its affirmance of the trial court's granting of defendant's motion for mistrial. The trial court did not abuse its broad discretion in so doing. Iowa R. App. P. 14(f)(3). However, I consider it appropriate to add a few comments here concerning the issue of prejudice arising from a jury viewing a manacled defendant.

I agree with State v. Evans, 169 N.W.2d 200 (Iowa 1969), that under ordinary circumstances a defendant's freedom from manacles during a criminal trial is a component of a fair and impartial trial. Id. at 210 (quoting Way v. United States, 285 F.2d 253, 254 (10th Cir. 1960)), and such a view of the manacled defendant should be avoided if it can reasonably be done. But, I do not believe that today's intelligent jurors are swayed towards finding against a defendant merely because they have seen the defendant handcuffed. It is naive to think a person living in today's society, particularly in Iowa—the most literate state in the nation, and who is exposed to newspaper, television, and movies, is predisposed to assume a defendant is guilty upon merely viewing the person handcuffed, either in a courtroom, or, even more so, in a courthouse corridor, where one might full well expect to see a handcuffed defendant. Moreover, the minimal prejudicial effect created, if any, can be nullified through proper curative instructions, voir dire, or the court's introductory and cautionary instructions, as well as opening statements that normally cover the presumption of innocence and the State's burden to prove guilt beyond a reasonable doubt explicitly.

It is this trust in and understanding of the abilities of jurors to concentrate on following the court's instructions and the relevant issues, while ignoring extraneous ones, that causes me to state my view that actual proof of prejudice should be shown before a mistrial is granted. To require less may result in needless dismissals, mistrials, or new trials being granted. The burden of proving the existence of any actual prejudice will not be unduly difficult since it would simply require examination of each juror on the issue of prejudice arising from seeing the defendant manacled. The burden of doing this is probably less than for proving other types of jury misconduct. Since I do not believe such a viewing inexorably results in juror prejudice, I propose this means of proceeding as the most reasonable, and efficient method of providing a defendant with a fair trial in such a situation.