

In the
United States Court of Appeals
For the Seventh Circuit

Nos. 20-2614 & 20-2703

DANNY WILBER,

*Petitioner-Appellee,
Cross-Appellant,*

v.

RANDALL HEPP, Warden,

*Respondent-Appellant,
Cross-Appellee.*

Appeals from the United States District Court for the
Eastern District of Wisconsin.
No. 1:10-cv-00179-WCG — **William C. Griesbach**, *Judge*.

ARGUED FEBRUARY 10, 2021 — DECIDED OCTOBER 29, 2021

Before MANION, KANNE, and ROVNER, *Circuit Judges*.

ROVNER, *Circuit Judge*. A jury convicted Danny Wilber of murder in Wisconsin state court, and he was sentenced to a life term in prison. After unsuccessfully challenging his conviction in state court, Wilber sought relief in federal court pursuant to 28 U.S.C. § 2554, arguing among other things that he was deprived of his right to due process under the Fourteenth

Amendment when he was visibly shackled before the jury during closing arguments. The district court issued a writ of habeas corpus on that claim, concluding that the Wisconsin Court of Appeals decision sustaining the shackling order amounted to an unreasonable application of the United States Supreme Court's decision in *Deck v. Missouri*, 544 U.S. 622, 125 S. Ct. 2007 (2005). Because neither the trial judge nor the state appellate court ever articulated a reason why Wilber had to be *visibly* restrained in the jury's presence, we agree with the district court that the shackling decision ran afoul of *Deck*. And because Wilber was visibly restrained at a key phase of the trial, when the State highlighted evidence that, in the moments leading up to the murder, Wilber's behavior was "wild," "crazy," "possessed," and "out of control," we also agree with the district court that Wilber was prejudiced by the shackling error. The restraints would have suggested to the jury that the court itself perceived Wilber to be incapable of self-control and to pose such a danger that he must be manacled in order to protect others in the courtroom, including the jurors. We therefore affirm the district court's decision to grant a writ of habeas corpus.

I.

Wilber was convicted for the murder of David Diaz in Milwaukee Circuit Court, Judge Mary M. Kuhnmuensch presiding. Wilber attended an after-hours house party at Diaz's home in Milwaukee during the night of January 30-31, 2004. According to witness statements made to the police in the days after the incident, Wilber had been acting belligerently at the party; when his belligerence escalated into a physical confrontation with other guests, several men attempted to subdue him and persuade him to leave the party. At that

point, a shot rang out, Diaz fell dead to the floor, and partygoers fled the house. Jeranek Diaz (no relation to the victim) (“Jeranek”) reported that he saw Wilber pointing a gun at Diaz just prior to the shooting. When Jeranek heard the gunshot, he turned in Wilber’s direction and saw Diaz’s body strike the floor and Wilber tucking the gun under his coat. He believed that Wilber fired the shot because the sound came from where Wilber was standing several feet away. A second witness, Richard Torres, told police that he saw Wilber with a gun in his hand immediately after the shooting. Both men also reported that in the aftermath of the shooting, they heard Antonia West, Wilber’s sister, cry out, “[O]h my God. You shot him. Get out of here. You shot him.” Having seen Wilber with a gun, Torres assumed that he was the shooter. When Torres heard West’s exclamation, “[i]t convinced me more that he did.” R. 61-24 at 282–83.

At trial, all of the witnesses called by the State denied seeing who shot the victim, including Jeranek, who disclaimed the statement attributed to him by the police. But the trial testimony nonetheless did point the finger at Wilber as the likely shooter. Our summary of this testimony derives verbatim from the Wisconsin Appellate Court’s decision resolving Wilber’s post-conviction appeal.

* * *

Milwaukee Police Officer Thomas Casper testified that he created a diagram of the crime scene showing the locations of all the physical evidence. Diaz’s body was facedown in the kitchen with his head facing north. Bullet fragments were found behind the stove in the northeast corner of the kitchen. During the investigation, the eyewitnesses from the kitchen explained to detectives where everyone had been standing by

placing “x’s” with people’s names or initials on diagrams of the kitchen.

Investigator William Kohl testified about the layout and dimensions of the kitchen. Kohl testified as to where the appliances were located, which portions of the kitchen were visible from different angles and from other parts of the house, and where Diaz’s body was found in relation to the measurements of the kitchen.

Wilber’s sister, Antonia, testified that she, Wilber, and other family members went to the house party in the early morning hours of the shooting following a night out at a local bar. Antonia denied saying “[y]ou shot him. Get out of here” to Wilber, but told the jury that she had to tell Wilber to “calm down” multiple times because Wilber “got into it” with another party-goer, Oscar Niles. Antonia also testified that Wilber grabbed and choked another man in the kitchen. Antonia said someone tried to grab Wilber from behind to stop the choking. Antonia was also in the kitchen at the time of the choking incident. She said the next thing she remembered was the sound of the gunshot coming from Wilber’s direction.

Wilber’s cousin, Donald Jennings, told the jury that he also attended the house party and was standing in the kitchen when Wilber got into an altercation with Niles. He testified that Wilber got aggressive with Niles and Jeranek intervened. Jennings said the parties “got to tussling and they grabbed each other. And that’s when the shot was fired, hitting the man that was [found] laying on the ground.” Jennings did not say that he saw Wilber shoot Diaz, but stated that he “yelled” at Antonia when they left the party because “she was saying, my brother, my brother, I can’t believe this shit[.]” Jennings

interpreted Antonia's statement to mean that Antonia saw her brother shoot Diaz.

Two other witnesses, Lea Franceschetti and Jaimie Williams, also testified that they heard Antonia say "I can't believe he did that," and "I can't believe he shot him." Franceschetti stated that she interpreted Antonia's statement to mean that Antonia knew the shooter.

Torres testified that he was also in the kitchen at the time Diaz was shot. He stated that immediately after the shooting he saw Wilber with a gun. Torres stated that Wilber, while in the kitchen, was acting aggressively towards other guests. Diaz, who was also in the kitchen, told Jeranek to ask Wilber to leave. Wilber "didn't want to hear that" and started choking Jeranek, who was standing next to Diaz. Torres intervened and got into his own altercation with Wilber. Wilber hit Torres, causing Torres to "black out a little bit" and "lean[] up against the ... sink." Torres said he then heard a gunshot from "the right side of my ... ear," where he said Wilber was standing. Torres said that he saw Wilber with a gun after the shooting "in a crouched position." Torres stated that he heard someone in the kitchen yell "you shot the guy," and then Wilber ran out. Torres stated that he tried to chase Wilber but lost him in the chaos.

Torres also testified that he saw a man named "Ricky" at the party with a gun, but that he did not see Ricky in the kitchen at the time of the shooting. Torres stated that there was no tension between Diaz and Ricky, but that the two exchanged "dirty looks" the week before. Torres stated that there did not appear to be tension between Diaz and Ricky at the party and that Torres was not concerned about Ricky's possession of a gun.

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