IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

BRIAN SCOTT LONG,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

_____/

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

CASE NO. 1D12-4615

Opinion filed October 29, 2014.

An appeal from the Circuit Court for Duval County.
James H. Daniel, Judge.

D. Gray Thomas, Jacksonville, for Appellant.

Pamela Jo Bondi, Attorney General, and Virginia Harris, Assistant Attorney General, Tallahassee, for Appellee.

VAN NORTWICK, J.

Brian Scott Long appeals his convictions of two counts of lewd and lascivious molestation and one count of sexual battery by a person in familial or custodial authority. Because men wearing jackets embroidered with "Bikers Against Child Abuse" were in the presence of jurors prior to the commencement of

the trial, we conclude that inherent prejudice has been established and that there was an unacceptable risk that impermissible factors affected the jury. Accordingly, Long's convictions are reversed, the sentences vacated, and the cause remanded for a new trial.

Long was charged with multiple counts of lewd and lascivious molestation and sexual battery of his former step-daughter. The offenses were alleged to have occurred in Duval County and to have taken place over several years; the victim did not report the offenses until several years after the offenses were alleged to have occurred. Long raises multiple issues on appeal, but it is necessary for us to address only one issue.

He argues that a new trial is required because several persons selected to serve on the jury came into close proximity with men wearing leather jackets emblazoned with the phrase: "Bikers Against Child Abuse." These men were observed sitting in a hallway with the jury on the morning trial was scheduled to commence. Prior to the start of trial, defense counsel brought the jury's encounter with "burly" bikers to the attention of the trial court. Defense counsel asserted that a mistrial was in order, and as authority for such, cited Shootes v. State, 20 So. 3d 434 (Fla. 1st DCA 2009). The prosecutor advised the trial court that these men had befriended the victim and appeared at trial in order to show support for her. The

prosecutor added that she instructed the group not to wear their "paraphernalia" in the courtroom.

The trial court interviewed four of the jurors exposed to the bikers. Each juror stated that there was no conversation with the bikers, and each answered affirmatively when asked if he or she could remain impartial despite seeing the bikers. Yet, one juror was dismissed because her answer as to whether she could be impartial was deemed equivocal by the trial court. Another, Mr. Adams, was asked whether the bikers would cause him to "favor the State against the defendant in any way," and the juror replied:

> No. I would be disappointed if they were in the parking lot when we were going home. But other than that –
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> Court: Why is that, sir?
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> Juror: I am being honest. I don't think that will happen. I don't think it will have any bearing on the case whatsoever, you know, other than what the facts are presented in here.

After the interviews and after excusing a juror, the trial court was confident that the remaining jurors would be impartial. The bikers were instructed by the trial court, outside of the presence of the jury, not to wear their "insignia" in the court room. They were also instructed not to congregate around the jurors during breaks. A mistrial was thus denied.

The jury returned a guilty verdict on all of the charges pending. The defense moved for a new trial on several grounds, including the ground that the trial court erred in denying Long's motion for a mistrial in view of the prejudice caused by the presence of the "Bikers Against Child Abuse" group.[1] In the motion for a new trial, the defense added that the prejudice caused by the presence of the bikers was aggravated by their close proximity to the jury during the trial itself.

A hearing was granted on the motion for a new trial, at which substantial argument was received. The trial court denied a new trial noting that all of the bikers were "properly attired" during the trial and that the court was confident that the jury was not affected by the presence of the bikers in the courtroom. The prosecutor did not take exception to the observation of defense counsel, made for the record immediately upon hearing the trial court's reasons for denying a new trial, that there were eleven or twelve bikers in the courtroom and that the people who sat closest to the jury "were members of the Bikers Against Child Abuse group," although the trial court had the impression that some of the trial observers were members of the victim's family.

[1] Attached to the motion for a new trial was a copy of the press release issued by the Duval County State Attorney following the trial. In the press release, the prosecutor is quoted as saying: "Justice has finally been served for the victim and her family. The victim was able to face her abuser in court today with support from her family as well as Bikers Against Child Abuse."

On appeal, Long argues that actual or inherent prejudice resulted from the presence of the bikers at the trial. We agree that an unacceptable risk was created that the verdict reached was, at least in part, a result of the pre-trial encounter with the insignia-laden bikers. Although the trial court appropriately questioned the jurors, at that point in the proceedings, by which time the jury members had been selected but not sworn, the trial court should have selected a new jury panel. That error was aggravated by the continued presence of the bikers in the courtroom in close proximity of the jury.

The due process clause of the Fourteenth Amendment guarantees the right of state criminal defendants to be tried by an impartial jury. Woods v. Dugger, 923 F.2d 1454, 1456 (11th Cir. 1991). The Fourteenth Amendment incorporates the essence of the Sixth Amendment right to be tried "by a panel of impartial, 'indifferent' jurors . . . [whose] verdict must be based upon the evidence developed at the trial." Irvin v. Dowd, 366 U.S. 717, 722, 81 S. Ct. 1639, 1642, 6 L. Ed. 2d 751 (1961) (citations omitted). As Chief Justice Warren has observed, the constitutional guarantee of due process requires the courts to safeguard against "the intrusion of factors into the trial process that tend to subvert its purpose." Estes v. Texas, 381 U.S. 532, 560, 85 S. Ct. 1628, 1642, 14 L. Ed. 2d 543 (1965) (Warren, C.J., concurring). Specifically, the courts must vigilantly guard against "the atmosphere in and around the courtroom [becoming] so hostile as to interfere with

the trial process, even though . . . all the forms of trial conformed to the requirements of law. . . ." Id. at 561, 85 S. Ct. at 1642.

This court explained in Shootes v. State that "[t]he presence of courtroom observers wearing uniforms, insignia, buttons, or other indicia of support for the accused, the prosecution, or the victim of the crime does not automatically constitute denial of the accused's right to a fair trial." 20 So. 3d 434, 438 (Fla. 1st DCA 2008); see also Holbrook v. Flynn, 475 U.S. 560, 106 S. Ct. 1340, 89 L. Ed. 2d 525 (1986); Carey v. Musladin, 549 U.S. 70, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006). However, there are situations where the atmosphere in the courtroom might infringe on the defendant's right to a fair trial. When such a claim is raised, a case-by-case approach is required to allow courts to consider the "totality of the circumstances." Shootes, 20 So. 3d at 438 (quoting Sheppard v. Maxwell, 384 U.S. 333, 352, 86 S. Ct. 1507, 16 L. Ed. 2d 600 (1966)).

As we further explained in Shootes, a defendant claiming he was denied a fair trial must show "either actual or inherent prejudice." Id.; see also Woods, 923 F.2d at 1457. Actual prejudice requires some indication or articulation by a juror or jurors that they were conscious of some prejudicial effect. See Pozo v. State, 963 So. 2d 831 (Fla. 4th DCA 2007). Inherent prejudice, on the other hand, requires a showing by the defendant that there was an unacceptable risk of

impermissible factors coming into play. Holbrook, 475 U.S. at 570, 106 S. Ct. 1340; Woods, 923 F.2d at 1457.

Inherent prejudice has been shown here. By displaying their insignia, the bikers intended to do more than be present as support for the victim. After all, the victim already knew the bikers. Thus, they could have provided support to her by merely being present without wearing any distinguishing clothing. Instead, in apparent contravention of the prosecutor's instruction, the bikers chose to appear, as the morning trial was set to commence, in clothing which was intended "to communicate a message to the jury." Woods, 923 F.2d at 1459. That message was the appellant was a sexual abuser and that sexual abuse was to be condemned by a guilty verdict. As the trial court stated below, the bikers engaged in "reckless advocacy" – advocacy of a certain outcome to be reached by the jury regardless of what the State proved at trial.

We must not and do not take lightly the solemn obligation to ensure that those whose liberty is at risk are tried by a jury which feels unpressured to reach a certain verdict. A fair trial is, fundamentally, a trial free from "influence or domination by either a hostile or friendly mob. There is no room at any stage of judicial proceedings for such intervention; mob law is the very antithesis of due process." Cox v. Louisiana, 379 U.S. 559, 562, 85 S. Ct. 476, 480, 13 L. Ed. 2d 487 (1965); Frank v. Mangum, 237 U.S. 309, 35 S. Ct. 582, 59 L. Ed. 969 (1915).

While we would not describe the bikers with a perjorative term such as mob, it is nevertheless the case that these individuals appeared at trial with the announced purpose of remonstrating "against child abuse." The bikers, then, sought to send an implied message to the jury that Long should be found guilty. Such a message has no part in a trial.

Norris v. Risley, 918 F.2d 828 (9th Cir. 1990), is instructive. In Norris, a number of women wearing "Women Against Rape" buttons were present in the courthouse before the start of a trial on charges of kidnapping and rape; some buttons were also observed during trial. At least three jurors saw the buttons. In ordering a new trial, the Ninth Circuit observed:

> A courtroom practice or arrangement is inherently prejudicial if "an unacceptable risk is presented of impermissible factors coming into play." [Estelle v. Williams, 425 U.S. 501, 505, 96 S. Ct. 1691, 1693, 48 L. Ed. 2d 126 (1976).] Because the buttons, which were donned before any evidence was introduced, conveyed an implied message encouraging the jury to find Norris guilty, and because the buttons were not subject to the constitutional safeguards of confrontation and cross-examination, they are clearly the sort of "impermissible factors" that courts must ensure receive no weight.
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> Just as the compelled wearing of prison garb during trial can create an impermissible influence on the jury throughout trial, the buttons' message, which implied that Norris raped the complaining witness, constituted a continuing reminder that various spectators believed Norris's guilt before it was proven, eroding the

> presumption of innocence. Moreover, the buttons' message was far more direct than that to be inferred from the wearing of prison attire, which has no communicative purpose. The women who wore buttons obviously intended to convey a message.
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> Thus, though far more subtle than a direct accusation, the buttons' message was all the more dangerous precisely because it was not a formal accusation. Unlike the state's direct evidence, which could have been refuted by any manner of contrary testimony to be judged ultimately on the basis of each declarant's credibility, the buttons' informal accusation was not susceptible to traditional methods of refutation. Instead, the accusation stood unchallenged, lending credibility and weight to the state's case without being subject to the constitutional protections to which such evidence is ordinarily subjected.

918 F.2d at 830-33 (footnotes omitted). There is nothing in Norris which suggests that a certain number of buttons or displays of insignia must be demonstrated before inherent prejudice can be found. As noted, only three jurors appeared to have seen the "Women Against Rape" buttons in Norris.

The dissent argues that the case before us, which involves the conduct of private spectators, should be treated differently than a case where prejudice against the accused is the result of state-sponsored activity. We fail to see a merit in that distinction for the issue before us is whether there was a risk that Long was denied the right to a trial "by a panel of impartial, 'indifferent' jurors . . . [whose] verdict

[was] based upon the evidence developed at the trial" and not upon outside pressures. Irvin, 366 U.S. at 722, 81 S. Ct. at 1642. It matters not whether the impartiality of the jury was adversely affected by a state agent or a private citizen, for the result is the same: a denial of a fair trial.

Further, we do not find the cases cited by the dissent to compel a different result. The dissent cites Carey v. Musladin, 549 U.S. 70, 127 S. Ct. 649, 166 L. Ed. 2d 482 (2006), noting that the question of whether conduct by a private spectator at trial can be found to be inherently prejudicial has been unanswered by the United States Supreme Court. That the U.S. Supreme Court has not drawn a distinction between private and state-sponsored conduct which adversely affects the impartiality of a jury suggests that no distinction should be drawn here.

In Carey, the U.S. Supreme Court considered the question of whether a holding by a state court - that the display of buttons bearing a murder victim's image did not deny the defendant a fair trial – "was contrary to or an unreasonable application of clearly established federal law." 549 U.S. at 72, 127 S. Ct. at 651. Justice Thomas, writing for the majority, held the holding of the state court was not contrary to clearly established federal law because federal law on the question is not clearly established.

The dissent also cites Bell v. State, 965 So. 2d 48, 69 (Fla. 2007), in support of affirmance. Bell is not dispositive. The appellant in Bell, who was under

sentence of death, raised a claim of ineffective assistance of trial counsel in a motion for post-conviction relief. More particularly, the appellant in Bell argued trial counsel was ineffective for failing to get "a conclusive ruling" on his motion to strike the entire jury venire because of the presence during voir dire of a spectator wearing a t-shirt "memorializing and depicting one of the victims." Id. The trial court inquired of the venire panel, and while some saw the t-shirt, none knew who was depicted on it; also, all of them indicated that the t-shirt would not influence their verdict. The Florida Supreme Court denied that trial counsel was ineffective under these circumstances.

Unlike Bell, the case at bar is not a collateral attack, but a direct appeal of his conviction. We therefore are not asked to consider whether trial counsel for Long performed at a level "below an objective standard of reasonableness . . . under prevailing professional norms." Strickland v. Washington, 466 U.S. 668, 688, 104 S. Ct. 2052, 1064-65, 80 L. Ed. 2d 674 (1984). Instead, we are asked to consider whether, given the totality of circumstances, there was an unacceptable risk that the jury was influenced by factors beyond the evidence adduced. See Shootes, 20 So. 3d at 440. These are two very different considerations.

The dissent cites as well Buckner v. State, 714 So. 2d 384 (Fla. 1998). Buckner does not compel a different result here. In Buckner, a juror came forward during a first degree murder trial to say that she saw spectators holding up

photographs. While none of the jurors saw two eight-by-ten photographs, two saw a small collage of photographs. The defendant moved for a mistrial, which was denied. The Florida Supreme Court did not reverse noting that the photographs were nothing more than the victim pictured with others and that none of the jurors who saw the photographs "could identify who was depicted" in them. Id. at 389. Thus, the jury could not have been improperly influenced by them. Unlike the jury in Buckner, the jury in the case at bar certainly could identify what message was being conveyed by the badge: "Bikers Against Child Abuse." As the trial court correctly observed, the wearing clothing with such a message was "advocacy."

It is true, as the State emphasizes on appeal, that the jurors who were in close proximity to the bikers prior to trial and who remained on the panel each stated they would not be influenced by the bikers. However, such disavowals of impartiality are only proof that actual prejudice did not occur. It is by no means certain that the jury was not intimidated and thus not improperly influenced by the bikers. Justice Clark once said, "[n]o doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but psychological impact requiring such a declaration before one's fellows is often its father." Irwin v. Dowd, 366 U.S. at 728, 81 S. Ct. at 1645. The same may be said in the case before us. After all, a juror's assurance of impartiality is not "dispositive." Murphy v. Florida, 421 U.S. 794, 800, 95 S. Ct. 2031, 2036, 44 L. Ed. 2d 589 (1975); see Holbrook, 475

U.S. at 570, 106 S. Ct. at 1346-1347 ("Even though a practice may be inherently prejudicial, jurors will not necessarily be fully conscious of the effect it will have on their attitude toward the accused. This will be especially true when jurors are questioned at the very beginning of proceedings; at that point, they can only speculate on how they will feel after being exposed to a practice daily over the course of a long trial."); see also Overton v. State, 801 So. 2d 877, 892 (Fla. 2001). If there is any basis for reasonable doubt as to a juror's ability to be impartial, the juror should be excused. See Ault v. State, 866 So. 2d 674, 683 (Fla. 2003). As trial had not commenced at the time the jury was exposed to the bikers' insignia, the danger posed could have been easily remedied by the empaneling of a new jury. So, while the dissent argues for affirmance because "there is absolutely no evidence in the record that the jurors in this matter were in any way influenced by the presence of the bikers before or during the trial," the lack of record evidence is not the point. Typically, there is unlikely to be evidence of record that a jury was influenced by factors beyond the evidence adduced because jurors "will not necessarily be fully conscious of the effect" of an inherently prejudicial occurrence or atmosphere at trial. Holbrook, 475 U.S. at 570, 106 S. Ct. at 1346. Thus, "[w]henever a courtroom arrangement is challenged as inherently prejudicial, therefore, the question must be not whether jurors actually articulated a consciousness of some prejudicial effect, but rather whether 'an unacceptable risk

is presented of impermissible factors coming into play.'" Id., 475 U.S. at 570, 106 S. Ct. at 1346-1347 (citing Estelle v. Williams, 425 U.S. at 505, 96 S. Ct. at 1693).

A final point bears mentioning. In denying the motion for a new trial, the trial court indicated that it did not believe it had the authority to exclude "anybody from coming into the courtroom." This view is incorrect. Safeguards may be adopted to ensure that "the administration of justice at all stages is free from outside control and influence" without running afoul of the constitution. Cox, 379 U.S. at 562, 85 S. Ct. at 480. Indeed, the due process clause of the federal constitution obliges the judiciary to guard against the possibility that "the atmosphere in and around the courtroom might [become] so hostile as to interfere with the trial process, even though . . . all the forms of trial conformed to the requirements of law." Estes, 381 U.S. at 561, 85 S. Ct. at 1642 (1965) (Warren, C.J., concurring); see also Mills v. Singletary, 63 F.3d 999 (11th Cir. 1995).

In conclusion, while jurors no doubt endeavor to remain impartial, a theatrical atmosphere permitted in and around a courtroom is likely to have some effect. Indeed, that some effect may result is the very reason why many trial spectators choose to adorn themselves with messages or images which favor one side or another at trial. The principle of American jurisprudence that a conviction may only be premised on the evidence presented at trial remains sacrosanct. Holbrook, 475 U.S. at 566, 106 S. Ct. at 1345; Taylor v. Kentucky, 436 U.S. 478,

485, 98 S. Ct. 1930, 1935, 56 L. Ed. 2d 468 (1978); Estelle v. Williams, 425 U.S. 501, 96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976). Vindication of this principle requires reversal of Long's conviction and a remand for a new trial because there was an unacceptable risk that the bikers' presence affected the jury's impartiality.

REVERSED and REMANDED.

PADOVANO, J., CONCURS, AND ROWE, J., DISSENTS WITH WRITTEN OPINION.

ROWE, J., dissenting,

I respectfully dissent. Long asserts that the trial court erred in denying his motion for new trial because of actual or inherent prejudice arising from the presence of a group of private spectators, "Bikers Against Child Abuse," at trial. Because the record demonstrates that the spectator conduct at issue in this case did not inherently or actually prejudice Long's right to a fair trial, I would affirm the order of the trial court denying the motion for new trial.

Procedural History

On the morning of trial, four of the jurors observed multiple individuals sitting within several feet of them, outside the courtroom in the hallway. The individuals, who were mostly men, were wearing leather vests which read "Bikers against Child Abuse." Defense counsel immediately brought the matter to the attention of the trial court and moved for a mistrial. In response, the trial court questioned the prosecutor, who admitted that she knew some of the bikers, but she asserted that she advised them not to wear their vests or paraphernalia in the courtroom. The trial court then interviewed individually each of the jurors who observed the spectators in the hallway. Each of the jurors admitted that they observed the bikers, but they stated that no one spoke with them. All but one of the jurors admitted to reading the patches on the bikers' vests. Each juror answered affirmatively when asked if they could still be impartial at trial, despite

observing the spectators in the hallway. Finding one of the juror's responses to be equivocal, the trial court dismissed the juror. One of the remaining three jurors, when he was asked whether the spectators would cause him to favor the State against the defendant in any way, responded: "No, I would be disappointed if they were in the parking lot when we were going home." The trial court then asked, "Why is that, sir?" The juror responded, "I am being honest. I don't think that will happen. I don't think it will have any bearing on the case, whatsoever, you know, other than what the facts are presented in here." The trial court offered to have a bailiff escort the juror to and from the courthouse so he would not have further contact with the group. The juror assured the court that he was not intimated by the group.

After excusing the one juror whose response was equivocal, the trial judge stated that he had no reservations about the other three jurors. While the jurors were outside of the courtroom, the trial judge addressed the bikers and informed them that their actions had delayed the proceedings. The judge explained that he had to question the jurors to make sure that no one had been influenced by the group and that he had to strike a juror because of the group's behavior. The trial judge then instructed the bikers not to wear their "insignia" in the courtroom and not to congregate around the jury. He explained that he could not take the chance

of a juror running into a member of the group during recesses. The trial judge then denied the motion for mistrial.

The trial proceeded with several of the bikers present as spectators in the courtroom. Following the jury's return of a guilty verdict as charged on all of the pending charges, the defense moved for a new trial. Counsel argued that Long's right to a fair trial was prejudiced by the presence of the bikers, whom defense counsel described as "burly men." Counsel asserted that twelve or thirteen bikers sat in the courtroom in close proximity to the jury during the trial. The trial court held a hearing on the motion, and substantial argument was presented. The trial court denied the motion, carefully outlining its reasoning and disputing several of the factual assertions defense counsel made regarding the presence of the bikers in the courtroom:

> I made the decision at the time. I looked at the jurors when they came in here. I judged their demeanor. I felt like the three that answered my questions were sincere, and they said, "It's not going to bother us." The one guy did make the offhand comment, "Well, I don't want them to be there in the parking lot afterwards," but that didn't -- it was not -- it did not undermine my confidence in his ability to be fair and impartial, particularly, in the way he addressed my questions.
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> Understanding, I've thought a lot about this, since the trial, because it's not a simple issue. For the record, though, I do want to make it very clear, that there was a reference in the new trial motion that somehow there were like 12 or 13 individuals from this group sitting in the, you know, in the pews -- in the seats closest to the jury, is the way it's been referenced in there.

I'm not sure you can say all those individuals that were in that group of people, were with the Bikers Against Abuse. Some of them were family members that were non-testifying family members, they appeared to me anyway. And I don't -- some were with the biker group. No question about it.

They were properly attired. No one had on leather or chains or anything of that nature or whatever. But it's not -- I don't want the record to somehow go up, and that be accepted as the fact. Because there were plenty of people out there that looked to me like they're just simply family members.

And so I don't know exactly how many were there. There were some that stayed through. They were sitting in the pews that are set aside for people that are, you know, sitting in the audience. And I didn't feel like – it's an open proceeding. And I didn't feel like at this point I could ban anybody from coming in the courtroom. And so that made my decision.

* * *

I have confidence that the people who remained on the trial, were not effected [sic] by it, in the way of their impartiality in the case. One of them, in fact, was kind of offended that they were out there in a way, the tone. I forget the gentleman's name. But he was basically like, "I don't really care that they're out there." And so I feel like it's - - that the motion should be denied on that basis, all right.

Based on the foregoing facts, the trial court denied the motion for new trial. This appeal follows.

Analysis

The issue before this Court is whether Long received a constitutionally fair trial where several individuals appeared briefly outside the courtroom, in the

presence of four jurors, wearing vests adorned with the words "Bikers Against Child Abuse" and then a number of those individuals attended the trial not wearing the vests. I would affirm the trial court, holding that it did not abuse its discretion and that Long received a constitutionally fair trial.

The right to a fair trial by an impartial jury is the cornerstone of our criminal justice system. It is well-settled that certain "courtroom practices are so inimical to the presumption of innocence that they violate defendants' due process rights." U.S. v. Olvera, 30 F.3d 1195, 1196 (9th Cir. 1994). Practices such as requiring the defendant to appear at trial while shackled or wearing prison garb have been universally condemned by state and federal courts as inherently prejudicial based on the unacceptable risk of impermissible factors coming into play. Carey v. Musladin, 549 U.S. 70, 75 (2006); Deck v. Missouri, 544 U.S. 622, 635 (2005); Mood v. Head, 285 F.3d 1301, 1317 (11th Cir. 2002); Olvera, 30 F.3d at 1196; U.S. v. Harris, 703 F.2d 508, 510 (11th Cir. 1983); Knight v. State, 76 So. 3d 879, 886 (Fla. 2011). Courts have also determined that the defendant's right to a fair trial is inherently prejudiced by the presence of a large number of uniformed law enforcement officers attending the trial as spectators. Woods v. Dugger, 923 F.2d 1454 (11th Cir. 1991); Shootes v. State, 20 So. 3d 434 (Fla. 1st DCA 2009). Central to the courts' condemnation of each of these practices - the shackling of defendants, compelling defendants to wear prison garb, or the presence of

uniformed officers as spectators - is the conclusion that government-sponsored conduct in the courtroom runs an unacceptably high risk of influencing the jury in favor of the prosecution.

This case requires us to decide whether the presence of a group of private individuals,[2] members of the group "Bikers Against Child Abuse," who wore vests outside the courtroom in the presence of four jurors before trial, coupled with the presence of unidentified members of the biker's group (not wearing vests or other insignia) inside the courtroom deprived Long of his fundamental right to a fair trial. Long urges this Court to apply the inherent prejudice test to resolve this issue, even though this situation involved conduct by private spectators.[3]

The question of whether conduct by a private spectator at trial can be found inherently prejudicial is a matter of first impression for this Court and has been expressly left unanswered by the United States Supreme Court. Carey, 549 U.S. at 76. In Carey, the Supreme Court addressed the limits of the inherent prejudice

[2] Neither Long nor the majority cites to anything in the record to indicate that the conduct complained about here was state-sponsored. Although the prosecutor had spoken to a group of bikers before the day of trial, she also advised the bikers NOT to wear their insignia in the courtroom. It is also not clear whether the bikers the prosecutor spoke to were the same bikers who were present at trial.

[3] Long and the majority rely heavily on Norris v. Risely, 918 F.2d 828 (9th Cir. 1990), to support their argument. However, Norris was decided sixteen years before the Supreme Court's decision in Carey. Based on the Supreme Court's language in Carey regarding the question of whether private-spectator conduct may result in inherent prejudice, their reliance on Norris is misplaced.

test. In a case involving a petition for habeas corpus, a California state court had decided that the petitioner's right to a fair trial was not denied where members of the murder victim's family wore buttons displaying the victim's image during the petitioner's trial. Id. at 72. The petitioner sought habeas relief, which led the Ninth Circuit to issue an opinion finding that the state court's decision was contrary to a clearly established rule of federal law. Id. at 73. In its opinion, the Supreme Court distinguished its previous decisions in Estelle v. Williams, 425 U.S. 501 (1976), and Holbrook v. Flynn, 475 U.S. 560 (1986), observing that those cases involved government-sponsored conduct by spectators, as opposed to the situation in Carey, which involved buttons worn by private spectators. Id. at 75. The Supreme Court noted that while it had prescribed the test for inherent prejudice applicable to state conduct, "we have never applied that test to spectators' conduct. Indeed, part of the legal test of Williams and Flynn - asking whether the practices furthered an essential *state* interest - suggests that those cases apply only to state-sponsored practices." Id. at 76 (emphasis in original). The Supreme Court concluded that none of its holdings required the California state court to apply the Williams and Flynn tests to conduct by private spectators, and it vacated the grant of the writ of habeas. Id. at 77.

Since Carey was decided, only a handful of federal and state courts have addressed whether conduct by private spectators inside the courtroom, such as the

displaying of buttons, badges, or photographs, may inherently prejudice a defendant's right to a fair trial. The Fourth Circuit Court of Appeals addressed a situation where an alternate juror wore a shirt that said "No Mercy – No Limits." Billings v. Polk, 441 F.3d 238, 247 (4th Cir. 2006). There, the court found no violation and cautioned that a defendant's right to a fair trial is not violated "whenever an article of clothing worn at trial arguably conveys a message about the matter before the jury." Id.

The Supreme Court of Washington held that the defendant was not deprived of a fair trial where private spectators wore buttons depicting the murder victim at trial. State v. Lord, 165 P.3d 1251, 1254 (Wash. 2006) (en banc). In so holding, the court observed that spectators' signs of affiliation "do not automatically present 'an unacceptable risk . . . of impermissible factors coming into play.'" Id at 1254 (citing Holbrook v. Flynn, 475 U.S. 560, 570 (1986)). The Supreme Court of Indiana held that nothing in the record supported a finding that trial counsel was ineffective for failing to object or move the trial court for an order directing spectators not to wear buttons with pictures of the victim. Overstreet v. State, 877 N.E.2d 144, 157-59 (Ind. 2007). The Supreme Court of Kentucky has held that the defendant's right to a fair trial was not violated when members of the victim's family wore shirts containing the words, "In loving memory," and displaying the victim's image. Allen v. Commw., 286 S.W. 3d 221, 227-29 (Ky. 2009).

At issue in this case is whether the wearing of insignia by spectators outside the courtroom in the presence of four jurors, followed by the mere presence of a group of those spectators, not wearing any sign of group affiliation, at trial may deprive a defendant of a fair trial. The Sixth Amendment of the United States Constitution and Article I, section 16(a) of the Florida Constitution guarantee the defendant the right to a fair trial by an impartial jury. At the same time, an important tenet of our criminal justice system is that the criminal trial and courtroom shall be open to the public, including the victims of crime, their next of kin, and their lawful representatives. Art. I, § 16, Fla. Const; Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 611 (1982) (O'Connor, J., concurring) (discussing our "long history of open criminal trials and the special value, for both the public and accused, of that openness"); People v. Cummings, 850 P.2d 1, 43 (Cal. 1993) ("The right to public trial is not that of the defendant alone."). With these principles in mind, trial courts must strike a balance between the defendant's right to a fair and impartial jury and the right to a public trial.[4] A due process violation will not be found "every time a juror has been placed in a potentially compromising situation. Were that the rule, few trials would be constitutionally

[4] In striking this balance, the trial court has several remedies available to minimize the risk of prejudice raised by spectator conduct including, offering a remedial instruction to the jury, requiring spectators to remove buttons or insignia, or excluding spectators. See State v. Atwood, 832 P.2d 593, 633 (Ariz. 1992), overruled on other grounds by State v. Nordstrom, 25 P.3d 717 (Ariz. 2001).

acceptable." Smith v. Phillips, 455 U.S. 209, 217 (1982). Instead, "[c]ourts must presume that jurors we entrust with determining guilt both understand, and have the fortitude to withstand, the potential influence from spectators who show sympathy or affiliation." Lord, 165 P.3d at 1253.

The Florida Supreme Court has never held or implied that a defendant has been deprived of the right to a fair trial by private spectators displaying buttons, pictures, or other insignia inside the courtroom. And, it has certainly never attempted to regulate the conduct of spectators outside the courtroom, in regards to the wearing of buttons, pictures, or other insignia. The supreme court addressed the issue of private-spectator conduct inside the courtroom in Bell v. State, 965 So. 2d 48, 69 (Fla. 2007). Bell claimed that his trial counsel was ineffective for failing to obtain a definitive ruling on a motion to strike the jury panel because a spectator wore a shirt memorializing and depicting one of the murder victims during jury selection. Id. The supreme court noted that the trial court inquired into whether the jury had seen the shirt and found that none of the jurors realized who was depicted on the shirt and that none of the jurors would have let the shirt influence their decision. Id. at 70-71. The supreme court held that there was no reason for the court to strike the panel and that Bell failed to show that any prejudice occurred. Id. at 71.

The supreme court considered another claim involving private-spectator conduct inside the courtroom in Buckner v. State, 714 So. 2d 384 (Fla. 1998). In Buckner, the defendant asserted that spectators holding up photographs during the guilt phase of his trial created undue sympathy that warranted a mistrial. Id. at 389. The trial court determined that two of the jurors saw the photographs. Id. One juror stated that she thought the family's actions were inappropriate and that it would not influence her decision. Id. The second juror stated that she refused to look at the pictures and that the incident would not influence her decision. Id. The trial court denied Buckner's motion for mistrial. Id. The supreme court acknowledged that such displays may deprive a defendant of a fair trial, but it held that "a judge may objectively look to the extrinsic factual matters disclosed to the jury and then determine whether there was a reasonable possibility that the breach was prejudicial to the defendant." Id. As in Bell, the supreme court concluded that there was no reasonable possibility that the jury's brief exposure to the photographs influenced the outcome of the proceeding. Id.

Based on the record, the conduct by private spectators in this case did not deprive Long of his right to a fair trial. After the trial court ruled on Long's motion for mistrial, Long did not object in any way during the trial to the presence of the bikers in the courtroom. Not until all of the evidence had been presented and the jury had rendered its verdict did Long voice his objection to the presence

of the bikers through his motion for a new trial. For this reason, there is no record as to precisely how many bikers were present in the courtroom or precisely where the bikers sat in the courtroom. See Overstreet, 877 N.E.2d at 159 (holding that the defendant failed to show that counsel rendered deficient performance by failing to object to spectators wearing buttons with the victim's picture because there was no record as to the size of the buttons, if the jurors could see the buttons, how many people were wearing the buttons, how many days of the trial the buttons were worn, or whether any juror was affected by the buttons).

The record is undisputed that the bikers did not engage in any conduct inside the courtroom to disrupt the trial. The record reflects that none of the bikers wore vests or other identifying insignia inside the courtroom. The trial court took precautionary measures and questioned the venire regarding the effect, if any, of their brief observation of the bikers in their vests outside the courtroom. The three jurors who remained on the jury after questioning all denied that their observations of the bikers would affect them. Finally, the court instructed the jurors not to permit sympathy or prejudice to affect their verdict. Simply put, there is absolutely no evidence in the record that the jurors in this matter were in any way influenced by the presence of the bikers before and during the trial. Indeed, the trial court, who was in the best position to monitor the atmosphere of the courtroom, found no actual or inherent prejudice as a result of the presence of the bikers in the hallway

before trial or as a result of the presence of the unidentified bikers in the courtroom during the trial. The trial court's examination of the circumstances must be given considerable weight. On this record, I would conclude that the trial court did not abuse its discretion in denying the motion for mistrial and the motion for new trial. There is no reasonable probability that the bikers' conduct, wearing vests outside the courtroom and attending the trial as unidentified spectators, created an unacceptable risk of impermissible factors coming into play during the trial. Accordingly, I dissent, and I would affirm Long's judgments and sentences.