

2013 IL App (2d) 110639-U  
No. 2-11-0639  
Order filed January 18, 2013

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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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THE PEOPLE OF THE STATE	)	Appeal from the Circuit Court
OF ILLINOIS,	)	of Lee County.
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	No. 07-CF-63
	)	
KENDALL U. DAVIS,	)	Honorable
	)	Ronald M. Jacobson,
Defendant-Appellant.	)	Judge, Presiding.

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JUSTICE SCHOSTOK delivered the judgment of the court.  
Presiding Justice Burke and Justice Jorgensen concurred in the judgment.

**ORDER**

¶ 1 *Held:* Admission of docket sheet mentioning prior convictions and police officer's account of circumstances of defendant's arrest that mentioned other crimes were not plain error; nor, in context of all of the evidence heard by jury, did prosecution witness's identification of defendant as wearing a prison uniform result in an unfair trial.

¶ 2 In 2003, during his trial on multiple felony charges, the defendant, Kendall U. Davis, disappeared while the jury was deliberating. After he was arrested in 2007 in Minnesota, he was charged with two counts of violating his bail bond (720 ILCS 5/32-10 (West 2006)). On September 29, 2010, a jury convicted him of those charges, and he was sentenced to eight years' imprisonment.

He appeals, arguing that various errors in his trial prejudiced the jury against him so that he did not receive a fair trial. We affirm.

¶ 3

### BACKGROUND

¶ 4 On July 2, 2001, the defendant was charged in Lee County with multiple felonies including two counts of home invasion, two counts of unlawful possession of a weapon, aggravated battery, possession of a controlled substance with intent to deliver, unlawful criminal drug conspiracy, and possession of cannabis with intent to deliver. The defendant posted bond on September 5, 2001. The defendant was present in court on numerous pretrial occasions and during most of the jury trial on those charges. However, on January 31, 2003, the last day of trial, the defendant disappeared when the jury retired to deliberate, and he was not present when the guilty verdicts were announced. Thereafter, the defendant was sentenced *in absentia* to 20 years' imprisonment on those convictions.

¶ 5 Four years later, in January 2007, the defendant was arrested in Maple Grove, Minnesota. He was returned to Illinois and was charged with two counts of violating his bail bond. His trial on those charges commenced on September 28, 2012. (The trial was delayed while the defendant attempted to overturn his January 2003 convictions and changed attorneys several times.) At trial, the defendant wore a light blue shirt and dark blue pants, without any markings identifying them as a prison uniform. After commenting that it was aware of the requirements of *People v. Boose*, 66 Ill. 2d 261 (1977), to balance the need for security against the minimizing of any prejudice that might flow from visibly restraining the defendant during the trial, the trial court ordered that the defendant be restrained only by an ankle shackle.

¶ 6 During its opening remarks, the State told the jury that the evidence would show that, on January 31, 2003, the defendant had fled the courthouse while he was on trial for “two counts of

home invasion, Class X felonies and other offenses.” The State also told the jury that the evidence would show that the defendant was convicted of those charges and that, on March 24, 2003, the defendant was sentenced to 20 years in prison.

¶ 7 The State’s first witness was Susan Meany, an employee of the Lee County Circuit Court Clerk’s Office. Meany identified several of the State’s proffered exhibits as court records. These included: a certified copy of the January 31, 2003, warrant for the defendant’s arrest on charges of failure to appear, listing all of the charges for which the defendant had been tried in January 2003 (Exhibit 1); the February 2, 2003, notice that was mailed to the defendant’s last known address, advising him that the bail bond he posted was subject to forfeiture if he did not appear and surrender to the court on March 24, 2003 (Exhibit 2); the judgment order listing the defendant’s convictions on two counts of home invasion (the convictions on the other charges were merged into these counts) and sentencing him to 20 years’ imprisonment on each count (Exhibit 3); a handwritten order dated December 11, 2003, stating that the bond posted by the defendant was forfeited “[i]n accordance with a prior oral order” of the trial court (Exhibit 4); and a 41-page docket printout listing the court dates and other occurrences in the two criminal cases that were ultimately tried together in January 2003 (Exhibit 5). In addition, the State moved for the admission of transcripts dated January 31, 2003 (the date on which the jury found the defendant guilty of all of the charges and on which he disappeared), and March 24, 2003 (the sentencing hearing, at which the defendant did not appear). The defendant did not object to the admission of any of these exhibits. On cross-examination, the defendant’s attorney questioned Meany about the docket printout, establishing that the bond forfeiture notice had been mailed via regular mail, and that there was no proof that the defendant had ever actually received the notice.

¶ 8 The next witness was Katy Winkler, a police officer from Maple Grove, Minnesota. She testified that on January 27, 2007, she was on patrol when she saw a vehicle ahead of her that was weaving and changing lanes without signaling. She pulled it over. The defendant was driving. (Winkler identified the defendant in court as the same person she had pulled over.) When asked for his license, the defendant gave her an Indiana driver's license in the name of Marcus Jones. Winkler took him to the police station and booked him, during which his fingerprints were taken. Although Winkler did not testify to this, the parties agree that Winkler ran the fingerprints through the National Crime Information Center computer database, where they were matched to the defendant, thereby notifying Winkler about the warrant for his arrest.

¶ 9 The State's last witness was Lee County Sheriff's Department detective David Glessner. Glessner testified that he had attended the home invasion trial of the defendant in January 2003, and was familiar with the defendant's appearance. When asked if he saw the defendant in the courtroom now, Glessner said, "Yes[,] [h]e's sitting at the defendant's table wearing the Department of Corrections uniform." Glessner testified that the defendant was present at his January 2003 trial until the jury retired to deliberate, at which point the defendant left the courtroom and did not return. The defendant was not present for the jury's reading of its verdict. Glessner next saw the defendant in January 2007, when he and other Illinois law enforcement officers traveled to Minneapolis to pick up the defendant, who was in custody there. Glessner and the others brought the defendant to the Lee County jail.

¶ 10 The State then rested. The defense did not present any witnesses. During the jury instruction conference, the defendant's attorney stated that she had no objection to most of the exhibits being sent in with the jury during deliberations. However, she did object to the jury seeing Exhibit 3 (the

judgment order that recited the sentences imposed) and Exhibit 7 (the transcript for the sentencing hearing). The defense attorney objected to these on the grounds that they would allow the jury to “use the convictions [and the length of the sentences imposed] against the defendant inappropriately” because there was no evidence that the defendant knew the length of the sentences imposed on him. The trial court agreed and, over the State’s objection, did not allow Exhibits 3 or 7 to go back to the jury.

¶ 11 In its closing, the State argued that it was required to prove three things: that the defendant was on bail for appearance in a court case against him; that the bail bond was forfeited; and that the defendant willfully failed to surrender himself within 30 days after the forfeiture of the bail bond. The State argued that the first two elements were proven by the court records that had been admitted into evidence. As to the defendant’s failure to return to court, the State pointed to Exhibit 5, the docket printout, which noted (in the notations for January 31, 2003) that the defendant was not present in court when the verdict was read and that a warrant for his arrest was issued, and there was no listing showing that the defendant had surrendered himself within 30 days after the bond was forfeited on March 24, 2003.

¶ 12 The State then mentioned some of the evidence of other crimes that came in through Winkler’s testimony:

“Whether or not he got a ticket up there is irrelevant really when you think about it because our issue here isn’t whether he got a ticket in Minnesota, it was that he was stopped and here’s our issue. He identified himself by giving the arresting officer a phony forged [*sic*] driver’s license. \* \* \*

\* \* \*

Now, if you're going to be asked well, why should you think that Kendall Davis didn't know [*sic*] that he was in some kind of deep trouble here in Lee County, Illinois, over two home invasion charges, I ask you to consider a phony name, the phony identity, the phony life, the far away state and ask is that reasonable. \* \* \* [A]sk yourself would I as a reasonable person on a jury run away and leave, bail out, whatever you want to call it, be gone four years more or less, devise a new name, buy a stolen or forged driver's license, a new identity and live up in the Minneapolis area and that not be willful?"

¶ 13 In her closing, the defendant's attorney argued that the docket printout did not show that the notice of bond forfeiture that was sent out on February 3, 2003, was received, or that the defense attorney who was present in court for the jury's verdict and the defendant's sentencing ever notified the defendant of those events. The State had not called the defendant's former attorney as a witness. Accordingly, there was no evidence as to why the defendant did not come back, and the State had not proved its case.

¶ 14 The jury found the defendant guilty of both counts of violating his bail bond. The defendant filed a posttrial motion seeking a new trial, in which he argued that his trial counsel was ineffective for allowing the trial to proceed while he was wearing a Department of Corrections uniform and a leg shackle. That motion was later amended to include all of the points raised on appeal here. At a hearing on the posttrial motion, the trial court denied the motion, finding among other things that there were no markings on the uniform identifying it as such, the jury could not see the shackle, and its evidentiary rulings were based on the applicable law and were consistent with the wishes of counsel. The defendant was sentenced to eight years' imprisonment, to run consecutively to his other sentences. He then timely filed this appeal.

¶ 15

ANALYSIS

¶ 16 The defendant argues that three errors stigmatized him in the eyes of the jury and made his trial unfair: the admission of the docket printout, the admission of evidence of other crimes through Winkler’s testimony, and the fact that he was wearing a prison uniform and a leg shackle. He also argues that, even if no one of these errors standing alone would justify reversal, the cumulative effect of all of them was to deny him a fair trial. However, the defendant acknowledges that he did not object to any of these alleged errors at trial, and instead raised them for the first time in his posttrial motion. Thus, he has forfeited all of these errors unless they rise to the level of plain error. *People v. Enoch*, 122 Ill. 2d 176, 188 (1988); Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967).

¶ 17 The plain-error doctrine allows a reviewing court to consider unpreserved error when “(1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant’s trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence.” *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). In this case, the defendant does not argue that the evidence was closely balanced. Rather, he argues that the alleged errors were fundamental in nature and affected the fairness of his trial. For plain error to exist, however, we must first decide that a “clear or obvious error” actually occurred. *People v. Naylor*, 229 Ill. 2d 584, 593 (2008).

¶ 18 The defendant argues that admitting the docket printout was error, because the entries for January 31, 2003, contained a listing of each of the eight offenses with which he was charged along with the notation of the verdict on each charge: “GUILTY.” The docket printout also contained a

notation, in the entries for March 24, 2003, of the 20-year sentence he received. The defendant argues that none of this information was relevant to the charge he was facing in this trial—violation of his bail bond—and thus admitting it was error.

¶ 19 The general rule regarding evidence of other crimes or wrongdoing by the defendant is that it is not admissible if the sole purpose of the evidence is to show the defendant's propensity to commit an offense. *People v. Bobo*, 375 Ill. App. 3d 966, 971 (2007). Moreover, even where the evidence is admissible because it has another purpose, it may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. *People v. Walker*, 211 Ill. 2d 317, 337 (2004). Both the United States Supreme Court and our own supreme court have recognized the inherently prejudicial nature of information about a defendant's prior convictions. See *Old Chief v. United States*, 519 U.S. 172, 180-81 (1997); *Walker*, 211 Ill. 2d at 338. However, prior convictions may be admitted if they are relevant to the charge the defendant is facing and if, under the facts of the case, their probative value substantially outweighs the danger of unfair prejudice. *Walker*, 211 Ill. 2d at 337. Moreover, as our supreme court has noted, the prosecution generally has the right to prove its case with evidence that has "multiple utility," that is, the evidence serves more than one purpose. *Id.* at 334.

¶ 20 The defendant argues that *Walker* demonstrates that the admission of the docket printout was reversible error. In *Walker*, the supreme court considered whether the State should be permitted to offer evidence of a prior conviction when its only reason for doing so was to support an element of the current offense (there, possession of a weapon by a felon), and the defendant had offered to stipulate to the fact of his prior conviction. The court held that, under those circumstances, it was improper for the State to introduce evidence of a defendant's prior conviction because the stipulation

had equal probative value and a substantially lower risk of causing unfair prejudice against the defendant. *Id.* at 341. It cautioned, however, that its holding in *Walker* was “a very narrow one” that was limited to cases in which the *only* evidentiary value of the prior conviction was to prove an element of the crime, and the defendant had offered to stipulate to the prior conviction. *Id.*

¶ 21 *Walker* stands for the proposition that, even where evidence of a prior conviction is admissible because it is relevant to the current charges, if the prior conviction could be replaced by less prejudicial evidence that would be equally probative, it may be error to admit the prior conviction. This is because a trial court may exercise its discretion to exclude relevant evidence if its prejudicial effect substantially outweighs its probative value. *Id.* at 337. Here, however, there was no evidence that was less prejudicial but equally probative.

¶ 22 The elements of the charge were: (1) that the defendant had been admitted to bail; (2) the bail was forfeited; and (3) the defendant willfully failed to surrender within 30 days of the forfeiture. 720 ILCS 5/32-10 (West 2006). The defendant did not stipulate to any of these elements, and thus the State was required to offer evidence proving all of them. The docket printout contained evidence relevant to all three elements. As to the first element, the entries for September 5, 2001, showed that the defendant had been admitted to bail. As to the second element, the entry for November 18, 2003, documented the trial court’s oral order that the bail be forfeited. Although there was other documentary evidence regarding the first element, the docket printout was the sole evidence documenting the date of the oral order that the bond be forfeited—a date that was legally significant in that it started the 30-day period during which the defendant was required to surrender himself to the court. Finally, the printout also provided some of the best evidence that the defendant had not surrendered himself to the court within the 30-day period, as it reflected a gap of more than three

years between the entries showing the application of the bond to the fees and fines imposed as part of the defendant's sentence (in December 2003) and the date on which the defendant next appeared in court (March 2007). The defendant has not pointed to any equally probative evidence that could have been used in place of the docket printout on these last two elements of the offense charged.

¶ 23 Additionally, the nature of the crimes that the defendant was convicted of at the close of the trial from which he fled, and even the sentences that he received for those crimes, were not completely irrelevant to the current charges. The seriousness of those crimes, which was shown both by the nature of the charges and the sentences ultimately imposed, provided circumstantial evidence regarding the defendant's motivation to flee before the jury came back. This in turn was relevant to establishing that the defendant's failure to surrender was a conscious decision, thereby meeting the third element necessary to prove a violation of bail bond. Evidence regarding the prior bad acts of a defendant can be admissible where it assists in showing the defendant's intent. *People v. Gumila*, 2012 IL App (2d) 110716, ¶ 37 (quoting *People v. Millighan*, 265 Ill. App. 3d 967, 972-73 (1994)). Moreover, evidence of flight is relevant "as proof of consciousness of guilt." *People v. Hommerson*, 399 Ill. App. 3d 405, 410 (2010) (citing *People v. Harris*, 225 Ill.2d 1, 23 (2007)).

¶ 24 Finally, the prejudice that can be said to have flowed from the admission of the docket printout is minimal in light of other documentary evidence admitted in this case that was equally prejudicial (in that it contained the same information), yet the defendant has never objected to it. For instance, Exhibit 1 (the warrant for the defendant's arrest) lists all of the charges on which the defendant was tried in January 2003, and Exhibit 6 (the transcript from January 31, 2003) contains a similar listing of each count and the jury's guilty verdict on each. However, the defendant has never argued (either in the posttrial motion or on appeal) that either of these exhibits should not have

been admitted. We also note that the prosecutor, in his opening statement, referred to the fact that the defendant disappeared during his trial on “two counts of home invasion, Class X felonies and other offenses” and the defendant’s 20-year sentence on these convictions, but these remarks similarly have never been the subject of any objection or argument. The fact that the 41-page typewritten docket printout also listed the nature of the defendant’s convictions and the sentence he received does not demonstrate any prejudice that would go beyond that sustained as a result of these other mentions of the same information. See *People v. Hanson*, 238 Ill. 2d 74, 106-07 (2010) (in considering whether evidence should have been excluded as unfairly prejudicial, trial court can consider other evidence heard by the jury). For all of these reasons, the admission of the docket printout was not error.

¶ 25 We next consider the admission of Winkler’s testimony concerning “other crimes” committed by the defendant: specifically, that she observed the defendant committing the traffic offenses of weaving and changing lanes without signaling, and that the defendant gave her a false driver’s license. As to the traffic offenses, the testimony was relevant to show how Winkler came into contact with the defendant. See *Gumila*, 2012 IL App (2d) 110761, ¶ 37 (evidence of other crimes is admissible to prove, among other things, the circumstances or context of the defendant’s arrest). Moreover, any prejudice would have been minimal, as the offenses Winkler mentioned were minor traffic offenses. Indeed, we think the jury would be less likely to become biased against the defendant as a result of knowing that he was pulled over for minor traffic violations than if they were left to guess at the circumstances of how Winkler came to arrest the defendant.

¶ 26 As to the false driver’s license, Winkler’s testimony was probative evidence on one of the elements of the offense charged: whether the defendant knowingly failed to surrender himself within

30 days. The carrying and use of a false identification card suggests that the defendant intended to avoid recapture and took steps to make recapture under his own name less likely. Thus, the evidence was certainly relevant. *Hommerson*, 399 Ill. App. 3d at 410 (“Evidence of flight and the use of an assumed name may be used as proof of consciousness of guilt”). Moreover, the prejudice that likely flowed from the knowledge of this offense was slight when viewed in the context of the jury’s knowledge that the defendant had committed several far more serious crimes, including home invasion and aggravated battery. *Hanson*, 238 Ill. 2d at 106-07.

¶ 27 Thus, we find that the trial court did not err in admitting the docket printout and Winkler’s testimony. Accordingly, neither of these constitutes plain error. *Naylor*, 229 Ill. 2d at 593.

¶ 28 We next consider the possible prejudice that may have flowed from the defendant’s wearing of a leg shackle and Glessner’s identification of the defendant as wearing a prison uniform, again in the context of whether that prejudice existed and was serious enough to rise to the level of plain error, that is, a serious error that affected the fundamental fairness of the trial. *Piatkowski*, 225 Ill. 2d at 565.

¶ 29 As to the leg shackle, the defendant notes that the United States Supreme Court has held that the use of visible shackles or other physical restraints may violate due process. *Deck v. Missouri*, 544 U.S. 622, 633 (2005). The State responds that, in this case, the defendant’s leg shackle cannot have violated due process because there is no evidence that the leg shackle was visible to the jury. Indeed, when rejecting this argument in the defendant’s posttrial motion, the trial court noted that it had been careful to balance the need to prevent the defendant from fleeing again with the need to avoid unfair prejudice that might arise if the jury saw him handcuffed or otherwise restrained, and found that there was no evidence “that any person on the jury saw any leg irons, shackles, or

anything else restricting” the defendant. Our own review of the record confirms that the trial court carefully considered the *Boose* factors and reached an appropriate determination that an ankle shackle would best serve the twin interests of security and justice. In light of the trial court’s finding that the jury could not see the ankle shackle—a finding that is uncontradicted by the record—we defer to the trial court’s superior opportunity to observe the courtroom and hold that there was no error presented by the shackling of the defendant. *Cf. id.* (courts cannot routinely place defendants in shackles or other restraints which are visible to the jury).

¶ 30 The defendant’s appearance before the jury in a Department of Corrections uniform of a light blue shirt and dark blue pants presents a more substantial issue. We begin by addressing whether the defendant’s clothing should be considered “prison attire.” We are aware that the trial court found that the jury would not have known that the defendant’s clothing was a prison uniform due to its ordinary appearance and the lack of any distinguishing marks. While we have no reason to doubt that, ordinarily, the trial court would have been correct in this regard, the record discloses that a State witness, Glessner, expressly described the defendant’s clothing as a “Department of Corrections uniform” in his testimony. Thus, we must treat the defendant’s clothing as a known prison uniform. For this reason, we find inapposite the cases cited by the State, *People v. Partee*, 157 Ill. App. 3d 231, 254 (1987), and *People v. Medley*, 111 Ill. App. 3d 444, 448 (1983), in which the reviewing court held that the clothing at issue was not “identifiable prison garb.” In this case, even if the clothing ordinarily would not have been identifiable as a prison uniform, it was expressly identified as such by Glessner. Therefore, neither *Partee* nor *Medley* controls here.

¶ 31 Both the United States Supreme Court and Illinois courts have recognized that, because the wearing of a prison uniform may prejudice the defendant in the eyes of the jury, the State may not

compel the defendant to attend trial in identifiable prison attire. *Estelle v. Williams*, 425 U.S. 501, 505-06 (1976); *People v. Steinmetz*, 287 Ill. App. 3d 1, 6 (1997). However, a defendant may forfeit any claim of error in this regard by failing to make a timely objection to appearing in prison clothing; in that case, there is no due process violation. *Estelle*, 325 U.S. at 512-13. Moreover, “the right not to be tried in jail clothing is, like many other rights of criminal defendants, subject to harmless-error analysis.” *Steinmetz*, 287 Ill. App. 3d at 6-7 (citing *Estelle*, 425 U.S. at 506).

¶ 32 The circumstances in this case are somewhat unusual in that, if Glessner had not identified the defendant as wearing a prison uniform, the issue probably would not have arisen. It is possible that the defendant made a conscious decision not to raise the issue of his clothing before trial out of a belief that the jury would not recognize his prison uniform as such, a belief that might have proven correct were it not for Glessner’s testimony. Moreover, the defendant could not have known beforehand that Glessner would reveal that the defendant’s clothing was prison attire.<sup>1</sup> Under these circumstances, we do not find the issue of the defendant’s prison clothing forfeited, despite the fact that he did not object, prior to trial, to wearing prison clothing. *Cf. Estelle*, 425 U.S. at 510 (noting that the defendant there clearly understood the potential issue relating to his wearing of jail clothing); *People v. Minnish*, 19 Ill. App. 3d 603, 607 (1974) (“[a] defendant may not remain silent and willingly go to trial in prison garb and thereafter claim error”).

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<sup>1</sup>We deplore Glessner’s decision to describe the defendant as wearing a “Department of Corrections uniform” instead of simply referring to the color of the defendant’s clothing, the defendant’s location in the courtroom, or some other neutral descriptor. This decision to use a pejorative description unnecessarily injected the issue of the defendant’s prison clothing into this appeal. We strongly urge the State to prepare its witnesses so as to avoid this issue in the future.

¶ 33 Nevertheless, we conclude that any error created by Glessner's reference to the defendant's clothing as a prison uniform was harmless in light of the overwhelming evidence against the defendant. See *Steinmetz*, 287 Ill. App. 3d at 6-7 (right not to be tried in identifiable prison clothing is subject to harmless-error analysis). Here, the testimony of Winkler and Glessner and the documentary evidence clearly established that the defendant fled while on bail during his trial on various felony charges and that he willfully failed to surrender within 30 days, instead attempting to evade recapture by using an alias and moving to a different state. In addition, we note that the clothing at issue appeared ordinary and would not provide a constant reminder of the defendant's status as an inmate. Finally, given the fact that the defendant fled from trial on serious charges, a reasonable juror might assume that he was in fact currently incarcerated even if he were not wearing a prison uniform. Given the overwhelming evidence of his guilt on the present charge and the presence of these other factors as well, we find that the defendant's appearance at trial in clothing that was identified by a witness as jail attire did not affect the outcome of the trial and was harmless beyond a reasonable doubt. *People v. Bowman*, 2012 IL App (1st) 102010, ¶¶ 63-70.

¶ 34 The defendant's final contention on appeal is that, even if none of these defects in the trial is sufficient to warrant reversal standing alone, their combined effect requires the reversal of his conviction. Generally, if the "alleged errors do not amount to reversible error on any individual issue, \*\*\* there is no cumulative error." *People v. Howell*, 358 Ill. App. 3d 512, 526 (2005). However, a new trial may be granted in rare cases where multiple errors exist that "are not individually considered sufficiently egregious" to warrant reversal, but those errors nonetheless "create a pervasive pattern of unfair prejudice to the defendant's case." *Id.*

¶ 35 In this case, we have held that most of the “errors” that the defendant raised were not errors at all, including the admission of the docket sheet and Winkler’s testimony, and the use of the leg shackle. Thus, Glessner’s identification of the defendant as wearing a prison uniform was the only actual error that occurred here, and as we have already held, that error was harmless beyond a reasonable doubt. Accordingly, there is no basis for a claim of cumulative reversible error.

¶ 36 CONCLUSION

¶ 37 For the reasons stated, we affirm.

¶ 38 Affirmed.