

**MISSOURI COURT OF APPEALS  
WESTERN DISTRICT**

**STATE OF MISSOURI**

**v.  
JOVELL L. SWOPES**

**RESPONDENT,**

**APPELLANT.**

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DOCKET NUMBER WD71713

DATE: June 28, 2011

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Appeal From:

Jackson County Circuit Court  
The Honorable Peggy S. McGraw, Judge

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Appellate Judges:

Division One: Gary D. Witt, Presiding Judge, James E. Welsh, Judge and Alok Ahuja, Judge

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Attorneys:

Shaun J. Mackelprang and Richard A. Starnes, Jefferson City, MO, for respondent.

S. Kate Webber, Kansas City, MO, for appellant.

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**MISSOURI APPELLATE COURT OPINION SUMMARY**

**MISSOURI COURT OF APPEALS  
WESTERN DISTRICT**

**STATE OF MISSOURI,**

**RESPONDENT,**

**v.**

**JOVELL L. SWOPES,**

**APPELLANT.**

No. WD71713

Jackson County

Before Division One: Gary D. Witt, Presiding Judge, James E. Welsh, Judge and Alok Ahuja, Judge

Jovell Swopes (“Swopes”) was convicted after a jury trial of one count of assault in the second degree, Section 565.060, and one count of armed criminal action, Section 571.015. On appeal, Swopes contends the circuit court plainly erred in refusing to grant Swopes’s request for a mistrial after some members of the jury allegedly saw Swopes being restrained by police officers during a break in Swopes’s jury trial.

This matter was tried before a jury on September 24-27, 2009. At the conclusion of the trial, the jury found Swopes guilty of the lesser included offense of assault in the second degree and armed criminal action. The trial court sentenced Swopes as a prior and persistent offender to ten years incarceration for the assault conviction and five years for the armed criminal action conviction. Swopes now appeals his judgment and sentence.

**AFFIRMED.**

In his sole Point on appeal, Swopes argues that the trial court “plainly erred in denying Mr. Swopes’ motion for a mistrial because Mr. Swopes’ appearance in custody before jurors, without good cause, violated his rights to the presumption of innocence, to due process of law, and to trial before a fair and impartial jury.” On appeal, Swopes concedes that we may review his claim only for plain error because he failed to include this claim in his motion for new trial. The plain error rule is to be used sparingly. It must be invoked on a case by case basis, and there must be a sound, substantial manifestation, a strong, clear showing, that injustice or a miscarriage of justice resulted.

Swopes’s claim on appeal fails. To begin, Swopes presumes on appeal that one or more members of the jury *in fact* saw him “in restraint,” but a careful reading of the trial transcript reveals no such objective proof. More problematic for Swopes is that he has failed to demonstrate that the trial court’s ruling constituted plain error *even when assuming that one or more jurors in fact saw him briefly while in handcuffs/shackles*. A brief, inadvertent exposure of the jury to a handcuffed defendant while the defendant is being escorted from one place to another does not deprive the defendant of a fair trial. Here, at worst some of the members of the jury saw Swopes shackled for a brief moment in time while he was being taken from the

courtroom to the restroom. Swopes's failure to demonstrate prejudice in this regard is particularly problematic in light of the fact that his claim is subject to plain error review. For all of the aforementioned reasons, we cannot conclude that a miscarriage of justice or manifest injustice resulted below from the trial court's denial of Swopes's motion for a mistrial.

The judgment of the circuit court is hereby affirmed.

Opinion by Gary D. Witt, Judge

June 28, 2011

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