

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellee,

UNPUBLISHED  
October 23, 2012

v

MARK ANTHONY PORTER,  
Defendant-Appellant.

No. 298474  
Washtenaw Circuit Court  
LC No. 09-000365-FC

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Before: SERVITTO, P.J., and FITZGERALD and TALBOT, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions for first-degree premeditated murder MCL 750.316(1)(a); conspiracy to commit murder, MCL 750.157a; felony murder, MCL 750.316(1)(b); first-degree home invasion, MCL 750.110a(2); larceny in a building, MCL 750.360; possession of a firearm by a felon, MCL 750.224f; and possession of a firearm during the commission of a felony (felony firearm), MCL 750.227b. He was sentenced to concurrent terms of life imprisonment for each of his premeditated murder, conspiracy to commit murder, and felony murder convictions, 160 months to 20 years for his first degree home invasion conviction, 32 months to 4 years for his larceny in a building conviction, and 40 months to 5 years for his possession of a firearm by a felon conviction, all to be served consecutive to a two year term of imprisonment for his felony firearm conviction. We affirm in part, but remand for amendment of the judgment of sentence.

Defendant first contends that he was denied his right to a fair trial because he was shackled during trial. We disagree.

This Court ordinarily reviews the trial court's decision to shackle a defendant for an abuse of discretion, under the totality of the circumstances. *People v Dixon*, 217 Mich App 400, 404-405; 552 NW2d 663 (1996). Here, however, defendant failed to preserve the issue because he did not object to the trial court's decision to shackle him at trial. Therefore, our review is for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). As such, defendant has the burden to demonstrate that the error, if any, affected the outcome at trial. *Id.*

Freedom from shackling during trial has long been recognized as an important component of a fair and impartial trial "because having a defendant appear before a jury handcuffed or shackled negatively affects the defendant's constitutionally guaranteed

presumption of innocence . . . ” *People v Banks*, 249 Mich App 247, 256; 642 NW2d 351 (2002). Nevertheless, while a defendant’s right to appear before the jury is considered an important part of a fair trial, the right is not absolute. *People v Payne*, 285 Mich App 181, 186; 774 NW2d 714 (2009). The trial court may order a defendant to attend trial in shackles, but “only on a finding supported by record evidence that this is necessary to prevent escape, injury to persons in the courtroom or to maintain order.” *Id.* (quotation omitted).

Here, defendant wore leg shackles at trial, but his legs were covered by the desk at which he sat. He was brought into the courtroom before the jury was seated in order to prevent jurors from inadvertently seeing his shackles. Nevertheless, one of the jurors in the case testified at an evidentiary hearing that he observed defendant’s shackles a “couple times” during the trial. At the evidentiary hearing, the trial court judge sat in the seat where the juror sat during trial and looked at defendant, who was seated where he had been seated at trial, and noted on the record that it could not see defendant’s shackles. The trial court concluded that the juror likely did not see defendant’s shackles, and that the juror’s recollection of shackles was likely influenced by being asked whether he remembered seeing shackles at trial. The trial court also concluded that because defendant’s shackles were not visible, it did not need to provide a justification for shackling defendant.

Though one juror testified at the evidentiary hearing that he saw defendant’s shackles during trial, the trial court clearly did not find the juror’s testimony credible. It is well settled that at an evidentiary hearing, this Court “defer[s] to the trial court’s superior ability to view the evidence and witnesses . . . ” *People v Peerenboom*, 224 Mich App 195, 198; 568 NW2d 153 (1997). However, because a trial court may *only* order a defendant shackled upon particularized reasons, *Payne*, 285 Mich App at 186, the trial court’s statement that it need not justify shackling where the shackles were not visible is an incorrect statement of law. A trial court, by definition, “abuses its discretion when it makes an error of law . . . ” *People v Giovannini*, 271 Mich App 409, 417; 722 NW2d 237 (2006)(quotation omitted). The trial court thus abused its discretion in having defendant shackled during trial without record evidence that the same was necessary. Nonetheless, defendant is not entitled to relief under plain error review because there is no evidence that defendant suffered any prejudice.

Even where a trial court abuses its discretion in shackling a defendant, he must show prejudice from the presence of the restraints in order to be entitled to relief. *Payne*, 285 Mich App at 187. A defendant does not automatically establish prejudice upon a finding that the jury inadvertently saw his shackles. *People v Horn*, 279 Mich App 31, 36; 755 NW2d 212 (2008).

Here, the record does not contain evidence that the juror who allegedly saw defendant’s shackles was at all influenced by seeing the shackles. Moreover, defendant cannot demonstrate prejudice because the evidence against him was compelling. Defendant’s accomplice, JoAnn Caldwell, testified that the night before the victim was murdered, she and defendant talked about how she wished the victim was dead. Caldwell testified that she and the victim were former lovers and current business partners, selling marijuana together. Caldwell had brought defendant into the business to help her sales and had become intimate with him. Apparently, the victim did not approve of defendant’s involvement in the business or with Caldwell, but Caldwell would not get rid of defendant. Caldwell then began hearing rumors, started by the victim, about her having a large stash of money and marijuana at her house, which she believed put her in danger

and at risk. Defendant told her he would take care of the victim, and Caldwell and defendant both understood that to mean that they would be killing the victim. Caldwell testified that the next night she and defendant drove to the victim's home with the intent to murder the victim. According to Caldwell, defendant shot the victim. Given the unequivocal testimony, defendant has not shown prejudice is not entitled to relief. *Id.*

In his Standard 4 Brief, defendant raises numerous additional allegations of error. First, he argues that the prosecution violated the rule announced in *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963), by failing to disclose evidence that Caldwell testified against him pursuant to an agreement. Defendant did not raise this issue at trial; therefore, our review is for plain error affecting substantial rights. *Carines*, 460 Mich at 763-764.

Under the rule announced in *Brady*, “[a] criminal defendant has a due process right to obtain exculpatory evidence possessed by the prosecutor if it would raise a reasonable doubt about the defendant’s guilt.” *People v Cox*, 268 Mich App 440, 448; 709 NW2d 152 (2005). “Impeachment evidence as well as exculpatory evidence falls within the *Brady* rule because, if disclosed and used effectively, such evidence may make the difference between conviction and acquittal.” *People v Lester*, 232 Mich App 262, 280-281; 591 NW2d 267 (1998) (quotation omitted). Therefore, “the prosecutor must disclose any information that would materially affect the credibility of his witnesses.” *People v McMullan*, 284 Mich App 149, 157; 771 NW2d 810 (2009).

In order to establish a *Brady* violation, a defendant must prove four things:

(1) that the state possessed evidence favorable to the defendant; (2) that he did not possess the evidence nor could he have obtained it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. [*Lester*, 232 Mich App at 281.]

Defendant cannot establish a *Brady* violation in this matter because there is no evidence that Caldwell testified pursuant to an agreement. Caldwell expressly denied being promised anything in exchange for her testimony. She also testified that she did not expect to receive a benefit. The police officer to whom Caldwell first revealed defendant’s role in the murder also testified that Caldwell was not promised anything in exchange for her testimony. Because there is no support in the record for defendant’s claim, defendant fails to establish a *Brady* violation, much less plain error affecting his substantial rights. See *Cox*, 268 Mich App at 448-449. Further, because defendant fails to establish any factual support for his claim, this Court need not grant his request for a remand for an evidentiary hearing. See MCR 7.211(C)(1)(a)(ii).

Next, defendant alleges that his trial counsel was ineffective. Because no evidentiary hearing was held on the issues defendant now raises, our review is limited to mistakes that are apparent on the record. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007).

A defendant is denied effective assistance of counsel if “counsel’s performance fell below an objective standard of reasonableness . . . [and] the representation so prejudiced the

defendant as to deprive him of a fair trial.” *People v Pickens*, 446 Mich 298, 309; 521 NW2d 797 (1994). This Court presumes that trial counsel was effective, and in order to show that counsel’s performance fell below an objective standard of reasonableness, a defendant must overcome the strong presumption that his counsel’s conduct constituted reasonable trial strategy. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

Defendant first contends that his trial counsel was ineffective for admitting during opening statement that defendant was at the scene of the victim’s murder. We disagree.

Generally, this Court defers to trial counsel’s admissions at trial so long as trial counsel does not offer a complete admission of guilt. *People v Emerson (After Remand)*, 203 Mich App 345, 349; 512 NW2d 3 (1994). Here, defendant’s trial counsel began opening statement by noting that there was no physical evidence that connected defendant to the crime, and that Caldwell was the only witness who could testify that defendant was at the scene of the murder. Trial counsel then argued that although defendant was at the scene, he was unwittingly brought there by Caldwell. Defendant’s theory of the case was that Caldwell perpetrated the murder while defendant unsuspectingly waited in Caldwell’s car. We find that trial counsel’s decision to admit that defendant was at the scene of the crime did not render trial counsel’s performance below an objective standard of reasonableness. The record reveals that the prosecution, in its opening statement, told the jury that the evidence would demonstrate that defendant was at the scene of the murder and that defendant shot the victim. Defendant’s trial counsel, meanwhile, agreed that defendant was at the scene, but offered an alternative version of events, i.e., that defendant was merely an unwitting bystander. We defer to this strategic decision by trial counsel. *Id.* Moreover, we note that defendant’s presence at the scene of the victim’s murder was undisputed because defendant confirmed as much during his own testimony. Thus, defendant is not entitled to relief.

Defendant also contends that his trial counsel was ineffective for forcing him to testify. While defendant argues that his trial counsel made him testify, the record does not support this claim. And, it is axiomatic that the right of a criminal defendant to testify on his own behalf is personal--it belongs to the defendant alone. *People v Solomon*, 220 Mich App 527, 533-534; 560 NW2d 651 (1996); *People v Simmons*, 140 Mich App 681, 685; 364 NW2d 783 (1985). We decline to find that trial counsel was ineffective when defendant alone had the authority to determine whether he would testify.

Defendant next contends that his trial counsel was ineffective for asking him at the outset of his testimony whether he used drugs or was a drug dealer. Defendant cannot overcome the presumption that his trial counsel’s conduct constituted reasonable trial strategy because we defer to trial counsel’s decision whether to reveal damaging information. *People v Hunter*, 141 Mich App 225, 230-231; 367 NW2d 70 (1985). Moreover, Caldwell had already testified that defendant used drugs and was a drug dealer. Thus, the jury was already exposed to this information, and we defer to trial counsel’s decision to confront this damaging evidence. See *id.*

Defendant also alleges that his trial counsel was ineffective for asking him whether he previously pleaded guilty to several drug and weapons offenses, as well as offenses for resisting and obstructing and fleeing and eluding. Defendant responded to trial counsel’s questions about the offenses in the affirmative, and stated that he “[o]wned up” to his previous offenses by

pleading guilty to all of them. Counsel may have had strategic reasons for doing so, because if defendant “owned up” to his prior offenses, the jury could have inferred, based on the fact that he did not “own up” to the charges for which he was on trial, that he was innocent. Again, we find that defendant fails to overcome the strong presumption that trial counsel’s tactics were the product of reasonable trial strategy. Defendant is not entitled to relief merely because this strategy proved unsuccessful. *People v Petri*, 279 Mich App 407, 412; 760 NW2d 882 (2008). Further, defendant stipulated that he was a convicted felon before his testimony began; thus, the jury was already exposed to the fact that defendant had at least one prior conviction. Evidence of defendant’s prior convictions was thus cumulative, at least to some extent. And, even if trial counsel’s performance fell below an objective standard of reasonableness, in light of the fact that the evidence against him was compelling, defendant is not entitled to relief because he cannot demonstrate prejudice. See *Carbin*, 463 Mich at 600.

Next, in his Standard 4 Brief, defendant contends that the evidence produced at trial was insufficient to support his convictions for first-degree premeditated murder, conspiracy to commit murder, and felony murder. We disagree.

We review de novo a challenge to the sufficiency of the evidence. *People v Ericksen*, 288 Mich App 192, 195; 793 NW2d 120 (2010). “We examine the evidence in a light most favorable to the prosecution, resolving all evidentiary conflicts in its favor, and determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond reasonable doubt.” *Id.* at 196. Initially, we note that for each of his challenges, defendant alleges that Caldwell’s testimony was not credible. However, it is the jury’s role to weigh the credibility of witnesses, and we will not disturb the jury’s credibility determinations. *People v Lemmon*, 456 Mich 625, 637; 576 NW2d 129 (1998).

Defendant first contends that the evidence presented at trial was insufficient for a rational jury to find him guilty of first-degree premeditated murder beyond a reasonable doubt. “The elements of premeditated murder are (1) an intentional killing of a human being (2) with premeditation and deliberation.” *People v Gayheart*, 285 Mich App 202, 210; 776 NW2d 330 (2009). As to the first element, Caldwell testified that defendant intended to kill the victim. The Washtenaw County medical examiner also testified that the victim was shot at close range in the head and that the manner of death was a homicide.

As to premeditation, this Court has explained:

To premeditate is to think about beforehand; to deliberate is to measure and evaluate the major facets of a choice or problem. As a number of courts have pointed out, premeditation and deliberation characterize a thought process undisturbed by hot blood. While the minimum time necessary to exercise this process is incapable of exact determination, the interval between initial thought and ultimate action should be long enough to afford a reasonable man time to subject the nature of his response to a “second look.” [*Plummer*, 229 Mich App at 300 (internal citation omitted)].

Here, Caldwell testified that she and defendant discussed killing the victim before the victim’s murder with defendant stating that he would “take care of” the victim. Additionally, on the night

of the victim's murder, defendant declared that he was "going in blazing." Caldwell testified that this statement meant defendant was going to shoot the victim. These facts demonstrate premeditation and deliberation because they show that defendant pondered killing the victim before the shooting and had sufficient time to take a second look before actually carrying out the murder. We find that the evidence was sufficient to support defendant's conviction for first-degree premeditated murder.

Next, defendant contends that the evidence produced at trial was insufficient for a rational jury to find that he conspired with Caldwell to kill the victim. In order to establish a conspiracy, the prosecution must demonstrate that "two or more individuals [] have voluntarily agreed to effectuate the commission of a criminal offense." *People v Justice (After Remand)*, 454 Mich 334, 345; 562 NW2d 652 (1997). The prosecution in this matter presented sufficient evidence, through the testimony of Caldwell, to establish that defendant and she discussed killing the victim, and that they agreed that they were going to kill the victim when they drove to the victim's home on the night of the murder.

Defendant also alleges that the prosecution failed to present sufficient evidence to support his felony murder conviction. In *Gayheart*, 285 Mich App at 210, this Court explained that

[t]he elements of felony murder are (1) the killing of a human being, (2) with the intent to kill, to do great bodily harm, or to create a very high risk of death or great bodily harm with knowledge that death or great bodily harm was the probable result, (3) while committing, attempting to commit, or assisting in the commission of any of the felonies specifically enumerated in MCL 750.316(1)(b).

First-degree home invasion, one of the felonies of which defendant was convicted, is one of the felonies enumerated in MCL 750.316(1)(b). First-degree home invasion consists of three elements. *People v Wilder*, 485 Mich 35, 43; 780 NW2d 265 (2010). The first element is satisfied by either: (i) breaking and entering a dwelling; or (ii) entering a dwelling without permission. *Id.* The second element is satisfied by: (i) entering with the intent to commit a felony, larceny, or assault; or (ii) actually committing a felony, larceny, or assault while present in, or while entering or exiting the dwelling. *Id.* Finally, the third element is satisfied if: (i) the defendant is armed with a dangerous weapon; or (ii) another person is lawfully present in the dwelling. *Id.*

As discussed previously, the prosecution presented sufficient evidence to prove the first two elements of felony murder beyond a reasonable doubt because it presented evidence that defendant intentionally killed the victim. The prosecution also presented sufficient evidence of the third element, i.e., that defendant murdered the victim while committing the offense of first-degree home invasion.

Caldwell testified that she saw defendant exit the home behind the victim and shoot him in the head. Defendant was thus inside the trailer at some point. Based on circumstantial evidence of defendant's prior statement of an intent to go "in blazing" and he and the victim's acrimonious prior contacts, a rational jury could infer that defendant's entry into the home was without permission, thereby satisfying the first element of the offense. See *People v Allen*, 201 Mich App 98, 100; 505 NW2d 869 (1993) (the jury may draw all reasonable inferences from

circumstantial evidence). Caldwell testified that defendant entered the victim's trailer with the intent to commit a felony (murder), and defendant actually committed a felony (murder) while entering or exiting the trailer. The second element of home invasion is thus satisfied. Evidence was also presented that defendant entered the victim's trailer with a firearm, which is a dangerous weapon as defined by MCL 750.110a(1)(b)(i). The third element of home invasion was thus satisfied. Accordingly, the evidence was sufficient for a rational jury to find, beyond a reasonable doubt, that defendant committed the offense of felony murder.

Finally, defendant's Standard 4 Brief raises two double jeopardy issues, the first of which the prosecution concedes. First, defendant contends that his convictions for first-degree premeditated murder and felony murder arising out of a single homicide offense violates double jeopardy. We agree. Where a defendant is convicted and sentenced twice under separate theories of murder for a single homicide offense, the defendant's convictions and sentences violate double jeopardy. *People v Williams*, 475 Mich 101, 103; 715 NW2d 24 (2006). The appropriate remedy in this situation is to remand to the trial court with instructions to correct defendant's presentence report and to amend defendant's judgment of sentence such that defendant has one conviction for first-degree murder, and that this conviction is supported by two theories, felony murder and premeditation. *Id.*

Second, defendant contends that his first-degree murder conviction and his conspiracy to commit murder conviction violate double jeopardy because he alleges that the conspiracy conviction merges with the completed offense of first-degree murder. We disagree.

In *People v Burgess*, 153 Mich App 715, 731; 396 NW2d 814 (1986), we noted that "the intent of the Legislature is to punish as separate crimes the completed offense of murder and the conspiracy to commit the murder." *Id.* Our Supreme Court has repeatedly held that conspiracy is a crime that is separate and distinct from the substantive crime that is its object. See *People v Denio*, 454 Mich 691, 712; 564 NW2d 13 (1997). Accordingly, defendant's convictions for conspiracy to commit murder and first-degree murder do not violate double jeopardy.

Affirmed in part, but remanded for modification of defendant's presentence report and judgment of sentence in accordance with this opinion. We do not retain jurisdiction.

/s/ Deborah A. Servitto  
/s/ E. Thomas Fitzgerald