

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,  
  
Plaintiff-Appellee,

UNPUBLISHED  
May 27, 2014

v

USAMAH CARSWELL,  
  
Defendant-Appellant.

No. 308573  
Marquette Circuit Court  
LC No. 10-048653-FH

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Before: BECKERING, P.J., and RONAYNE KRAUSE and BOONSTRA, JJ.

PER CURIAM.

Defendant appeals as of right his conviction following a jury trial of being a prisoner in possession of a weapon, MCL 800.283(4). The trial court sentenced defendant to a term of two to ten years' imprisonment. We affirm.

**I. PERTINENT FACTS AND PROCEDURAL HISTORY**

On September 12, 2010, defendant was an inmate at the Marquette Branch Prison under the control of the Michigan Department of Corrections (MDOC). A corrections sergeant testified that he became aware of defendant on that day while he was monitoring the prisoners in the "chow hall." The sergeant testified that his attention was drawn to defendant when he "noticed something, what looked to me, like, pointing in the front of his pants, an object or something there . . . ." He then summoned two other corrections officers to take control of defendant. Defendant was escorted to the "Brooks Center"—an area of the prison where there is a quarantine unit. The sergeant testified that he asked another officer to pull defendant's pants down, after which the sergeant removed an object from defendant's pants that he described as a "spork" that had been "sharpened to a point." The sergeant testified that the object could have been used to cause serious injury or death or to assist someone in escaping from prison.

Prior to trial, the court ordered a psychological evaluation to determine if defendant was competent to stand trial. On May 2, 2011, Dr. Jean L. Kanitz prepared a report and found defendant competent to stand trial. She also found that defendant was not legally insane at the time of the offense. A competency hearing was scheduled for May 25, 2011, but it was adjourned and rescheduled three separate times because defendant did not receive a copy of Dr. Kanitz's report. At the fourth scheduled competency hearing, which took place in October 2011, Dr. Kanitz testified that after examining defendant, she concluded that he was competent to stand trial. Defense counsel disagreed, and, citing defendant's mental health records, some of which

Dr. Kanitz did not review, defense counsel requested that the trial court order another psychiatric evaluation to determine whether defendant was competent to stand trial. The trial court found that the issues of defendant's mental health raised by defense counsel were not relevant to the question of competency and denied defendant's request.

Less than one week before trial was set to begin, defense counsel moved for an adjournment and renewed his motion for an independent psychiatric evaluation as to competency. Trial counsel also filed a motion to adjourn to allow defendant to secure an independent examination on the issue of whether he was legally insane at the time of the offense. The trial court denied these motions. Defense counsel also moved to adjourn and to amend his witness list. Defendant intended to call prison medical personnel who allegedly examined him after he came forward with an allegation of sexual assault against the sergeant who allegedly discovered the weapon. He asserted that medical records would indicate "rectal bleeding . . . which . . . would be consistent with the allegations . . . as to the sexual assault by the guard." Defense counsel recognized that the motion was untimely, but stated that he had no choice but to bring the motion late because he had only obtained the records he needed in the past week. The trial court doubted the relevancy of the proposed testimony stating, "Now I don't—frankly I'm hard pressed to understand how that—how an alleged sexual assault, if that occurred, would serve as a defense to that charge." Defense counsel responded, "The defense theory is: I was assaulted. I never possessed a weapon. The—the guards are lying about this in retaliation for my complaint of the assault." The trial court then asked, "So you're saying the proffered evidence or potential testimony of sexual assault on [defendant] by the guards would be admissible because it would go to their veracity or credibility?" Defense counsel responded by arguing that the proposed witnesses would support defendant's trial testimony<sup>1</sup> that he was sexually assaulted. The trial court denied the motion to amend the witness list because it found that any credibility issues were to be resolved by the jury, and that evidence of an alleged sexual assault was not relevant to the issue of whether defendant possessed a weapon.

After ruling on defendant's motion to amend the witness list, the trial court went on to the question of what type of restraints defendant would be required to wear during trial. Citing defendant's record of assaultive behavior, the prosecutor argued that defendant should be "subjected to the maximum restraints the Court feels it can allow in the course of these proceedings." Defense counsel stated that defendant wished to appear in civilian clothes, but took "no position" on the issue of restraints. The trial court found that it could only subject defendant to restraints upon a showing of manifest need to prevent injury to defendant or others in the courtroom, to frustrate escape, or to maintain judicial order. The trial court concluded that the requisite manifest need existed in this case, explaining:

I find in this case that based on the proffer from the [P]eople that [defendant] does have a history of assaultive crime including assaultive conduct towards corrections officers while in custody. Apparently, there have been

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<sup>1</sup> Defendant did not ultimately testify at trial.

recent—or, at least, description in the records of attempted suicide or cutting himself or cutting his arm or sustaining lacerations.

The underlying charge, here, involves [defendant] being a prisoner in possession of a weapon.

Based on those factors I do find manifest necessity for [defendant] to be in a level of restraints.

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I'll also, on request of counsel, provide the jury with a cautionary instruction, as I have frequently on prisoner cases in the past, that they are not to consider the fact that [defendant] is in custody or under control of the Department of Corrections as any evidence of his guilt of this crime.

On the first day of trial, defendant's hands were free so he could take notes, but his legs were shackled. Defendant did not request a cautionary instruction on the issue of restraints. It is apparent from a video recording that defendant's leg shackles were not concealed from the jury while defendant was seated at the defense table.

During a recess on the first morning of trial, the trial judge discovered that defendant had sent him a letter. The letter accused the trial court of bias and stated, "I do not believe I'll receive a fair trial in your courtroom." The letter also stated, "I also have a right to be presented to the court's jury trial not in restraints—to the jury." The trial court briefly addressed defendant's accusations of bias and noted that if defendant wished to pursue disqualification, he could file a motion. The trial court offered defendant an opportunity to explain the concerns he raised in the letter and defendant stated, "When I wrote that letter, I was extremely upset and I wrote it because I felt like that was true. Now it's obvious the restraints is [sic] not on, but I was, kind of like, in the air when we first had the hearing." Defendant did not address the issue of his shackles any further, and the trial court did not thereafter address the matter.

## II. DEFENDANT'S SHACKLES AT TRIAL

Defendant first argues that he was denied his constitutional right to a fair trial and to be presumed innocent when he was required to wear leg shackles in front of the jury. He also argues that his counsel's failure to object to use of shackles denied him effective assistance of counsel. We disagree.

Ordinarily, we review a trial court's shackling decision for an abuse of discretion. *People v Payne*, 285 Mich App 181, 186; 774 NW2d 714 (2009). Here, because defendant did not object to the use of shackles, the issue was not preserved for appeal.<sup>2</sup> *People v Solomon*, 220

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<sup>2</sup> Defendant contends that his letter to the trial judge constitutes an objection to his shackles. In the letter, defendant stated, "I also have a right to be presented to the court's jury trial not in restraints—to the jury." Where neither defendant nor his trial counsel pursued this matter on the

Mich App 527, 532; 560 NW2d 651 (1996). Therefore, this Court’s review is for plain error. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). The question of ineffective assistance of counsel is a mixed question of fact and constitutional law. We review the trial court’s findings of fact for clear error and consider de novo whether the defendant was deprived of his constitutional right to effective assistance of counsel. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

The Due Process Clauses of the Fifth and Fourteenth Amendments of the United States Constitution forbid the routine use of visible shackles to restrain a criminal defendant at trial. *Deck v Missouri*, 544 US 622, 626; 125 S Ct 2007; 161 L Ed 2d 953 (2005). The Court in *Deck* makes clear, however, that the requirement that a criminal defendant be free from restraint “is not absolute,” and that trial courts must be allowed to “take account of special circumstances, including security concerns, that may call for shackling.” *Id.* at 633. Further, the Michigan Supreme Court has explained that “[t]he rule is well-established in this and other jurisdictions that a defendant may be shackled 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.” *People v Dunn*, 446 Mich 409, 425; 521 NW2d 255 (1994). This Court has held that a trial court abuses its discretion when it requires a criminal defendant to be shackled without citing record evidence of specific safety concerns or flight risks. See, e.g., *Payne*, 285 Mich App at 186-187. By contrast, this Court has held that a trial court does not abuse its discretion when its decision to shackle a defendant is based on specific risks or safety concerns. *People v Dixon*, 217 Mich App 400, 405; 552 NW2d 663 (1996); *People v Julian*, 171 Mich App 153, 160-161; 429 NW2d 615 (1988).

In this case, there was ample evidence in the record to support the trial court’s decision to require defendant to wear leg shackles. The record reveals that defendant had a history of assaultive behavior that included assaults on corrections officers, had attempted suicide and other forms of self-harm, and was on trial for being a prisoner in possession of a weapon. The trial court only required defendant’s legs to be shackled, leaving his hands free so he could write and communicate with his attorney. The trial court advised defendant that if he wished to testify, the court would excuse the jury while defendant walked to the witness stand so the shackles would not be apparent. Under these circumstances, the trial court did not abuse its discretion, much less plainly err, by requiring defendant to wear leg shackles during trial. See *Dixon*, 217 Mich App at 405.<sup>3</sup> Moreover, defense counsel’s failure to object to the use of restraints did not deprive defendant of his constitutional right to effective assistance of counsel. “Trial counsel is not

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record after the trial court read the letter into the record, we do not find this to be an objection to the trial court’s shackling decision. Moreover, regardless of whether the letter constituted an objection to the trial court’s shackling decision, defendant is, as discussed *infra*, not entitled to relief because the trial court did not err when it ordered defendant to appear in shackles.

<sup>3</sup> While we conclude that the trial court did not err when it ordered defendant to wear leg shackles, we question why no effort was made to minimize the potential for prejudice, such as through the use of a table skirt.

required to advocate a meritless position.” *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).<sup>4</sup>

### III. MOTION TO ADJOURN FOR INDEPENDENT PSYCHIATRIC EVALUATION

Next, defendant argues that the trial court erred by refusing to grant his motion to adjourn for an independent psychiatric evaluation as to both his competency to stand trial and his proposed insanity defense. We review a trial court’s decision on a motion to adjourn for an abuse of discretion. *People v Steele*, 283 Mich App 472, 484; 769 NW2d 256 (2009). “A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes.” *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008). In the case at bar, the trial court ordered, and defendant underwent, a psychiatric evaluation as to his competency to stand trial and as to his criminal responsibility. The trial court has discretion whether to order a second independent examination as to competency to stand trial and criminal responsibility. See *People v Smith*, 103 Mich App 209, 211; 303 NW2d 9 (1981); MCR 6.125(D) (emphasis added) (“On a showing of good cause by either party, the court *may order* an independent examination of the defendant relating to the issue of competence to stand trial.”).

“A motion for adjournment must be based on good cause.” *People v Coy*, 258 Mich App 1, 18; 669 NW2d 831 (2003). “‘Good cause’ factors include whether defendant (1) asserted a constitutional right, (2) had a legitimate reason for asserting the right, (3) had been negligent, and (4) had requested previous adjournments.” *Id.* (quotation omitted). In order to be entitled to reversal, the defendant must demonstrate that he was prejudiced by the trial court’s abuse of discretion in denying his request for an adjournment. *Id.* at 18-19. In addition, in order to demonstrate that he is entitled to an independent competency evaluation, a defendant must demonstrate good cause. MCR 6.125(D).

#### A. COMPETENCY TO STAND TRIAL

Dr. Kanitz performed a competency evaluation on defendant on May 2, 2011, and determined that he was competent to stand trial. At an October 21, 2011 competency hearing, the trial court found defendant competent to stand trial. At that hearing, defendant’s trial counsel requested an independent competency evaluation. The trial court denied the request, finding that defendant failed to demonstrate good cause for delaying the proceedings. On December 14, 2011, less than one week before trial, defendant’s trial counsel again requested an independent competency evaluation. Counsel noted that he had recently received defendant’s mental health records from the MDOC, and that the records revealed a history of mental illness that should have been taken into account by Dr. Kanitz. Defense counsel offered to prove that defendant had

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<sup>4</sup> In reaching this conclusion, we deny defendant’s alternative request to remand for an evidentiary hearing on this matter. We already rejected his request, *People v Carswell*, unpublished order of the Court of Appeals, entered May 31, 2013 (Docket No. 308573), and see no reason to revisit our decision at this time.

been medicated for significant mental health disorders at the time of the May 2, 2011 evaluation and during the time leading up to trial. According to defense counsel's representations, defendant's mental health records showed that defendant had attempted suicide on a number of occasions and suffered from auditory and visual hallucinations.

The trial court's decision to deny defendant's request for an adjournment on the eve of trial was not "outside the range of reasonable and principled outcomes." *Yost*, 278 Mich App at 379. Initially, although Dr. Kanitz admitted she did not review all of defendant's mental health history at the time she evaluated him, she testified at the competency hearing that she did not need to review his records because defendant did not display any objective signs of psychosis or mental illness that would prevent him from being able to participate in his defense. Further, although defense counsel raised new concerns that had arisen after defendant's original competency evaluation, counsel waited until the eve of trial to raise his concerns.

Defendant argues that his trial counsel did not possess the mental health records until shortly before trial, but the record reveals that the mental health records were made available, in some form, to trial counsel in October of 2011, approximately two months before trial was scheduled to begin. Counsel's lack of diligence in obtaining the records weighs against a finding that the trial court abused its discretion. See *Coy*, 258 Mich App at 19. Moreover, regardless of when defense counsel received the records, his request for an independent competency evaluation was based on nothing more than his assertions, based on his review of the mental health records, that defendant was incompetent to stand trial. Defendant offers no support for his interpretation of the mental health records, nor does he provide the records on appeal. In addition, although not considered by the trial court, we find no error where, in defendant's letter to the trial court that was read into the record on the first day of trial, defendant demonstrated an understanding of the proceedings. The letter referred to the case number and identified defendant's trial counsel. The letter addressed defendant's right to present a defense and to have his case heard by an impartial judge and jury. This letter suggests that defendant understood that he was on trial for a crime and that he had the right to certain processes and procedures. Further, the record reveals that defendant appeared at several pretrial proceedings by video conference and was capable of addressing the trial court and his attorney. Accordingly, the trial court did not abuse its discretion when it denied defendant's request for an adjournment for an independent competency evaluation.

## B. INDEPENDENT EVALUATION FOR INSANITY DEFENSE

At the time of the May 2011 competency evaluation, Dr. Kanitz concluded that defendant was not legally insane at the time of the offense. MCL 768.21a provides an affirmative defense where the defendant was legally insane at the time of the offense. A defendant is legally insane at the time of the offense if, as a result of "mental illness" or "intellectual disability," the defendant "lack[ed] substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law." MCL 768.21a(1). MCL 768.20a(2) requires the trial court to order a psychiatric evaluation upon receipt of defendant's notice of intent to raise an insanity defense. MCL 768.20a(3) provides that a defendant may secure a subsequent, independent psychiatric evaluation, at the trial court's discretion.

Defendant argues that the trial court abused its discretion by denying his request for an independent psychiatric evaluation. In the case at bar, despite learning of Dr. Kanitz's evaluation well in advance of trial, defendant did not request an independent examination until December of 2011, less than one week before trial. In seeking an independent psychiatric evaluation as to insanity, defendant's trial counsel represented that defendant's MDOC mental health records, which Dr. Kanitz did not review, indicated that around the time of the alleged incident defendant had "a number of clinical assessments . . . including impulse control disorder, polysubstance dependence, antisocial personality disorder."

The trial court did not abuse its discretion when it denied defendant's request to adjourn for an independent psychiatric examination. Despite knowing well in advance of trial about Dr. Kanitz's conclusion, that he was not legally insane at the time of the offense, defendant waited until the eve of trial to request an independent evaluation. Defendant's lack of diligence in this matter weighs in favor of finding that the trial court did not abuse its discretion. *Coy*, 258 Mich App at 19; *Smith*, 103 Mich App at 211. Further, although defendant argues on appeal that his trial counsel was not aware of defendant's mental health issues until shortly before trial because of the delay in obtaining the mental health records from the MDOC, as noted above, the record reveals that counsel lacked diligence in obtaining the records. Moreover, many of the mental health conditions defendant cites as reasons supporting his claim for adjournment occurred *after* Dr. Kanitz's evaluation. Such subsequent mental health conditions are not pertinent to an insanity defense, as MCL 768.21a(1) is only available as an affirmative defense if the defendant "was legally insane *when he or she committed the acts constituting the offense.*" (Emphasis added). In addition, defendant presents no indication, other than his bald assertions, that his mental health records indicated that he lacked the substantial capacity to appreciate the nature and quality or the wrongfulness of his conduct, or that he lacked the substantial capacity to conform his conduct to the requirements of the law. Consequently, we find that the trial court did not abuse its discretion when it denied defendant's motion to adjourn to secure an independent psychiatric evaluation. MCL 768.20a(3); *Smith*, 103 Mich App at 211.

#### IV. AMENDMENT OF THE WITNESS LIST

Next, defendant argues that the trial court erred by denying his motion for leave to amend his witness list and for an adjournment. "A trial court's decision to permit or deny the late endorsement of a witness is reviewed for an abuse of discretion." *Yost*, 278 Mich App at 379. Although the trial court has discretion to permit or deny the late endorsement of a witness, preclusion of a witness is an extreme sanction "and should be limited to only the most egregious cases." *Id.*

In the case at bar, defendant's theory of defense was that the MDOC sergeant who allegedly discovered the weapon had sexually assaulted him, and that MDOC staff fabricated the weapons charge against him after he filed a complaint against the sergeant. At the December 14, 2011 motion hearing, which was less than one week before trial, defendant's trial counsel argued that defendant's medical records, which he had recently obtained from the MDOC, supported defendant's sexual assault claim. Defendant's trial counsel sought leave to amend his witness list to add the authors of the reports. Defense counsel also intended to introduce a medical record dated October 15, 2010, describing blood in defendant's stool and rectal bleeding, as well as additional medical records supporting the same. Defendant argued that this evidence

supported his theory that he had been sexually assaulted by the sergeant. The trial court denied defendant's motion to amend the witness list, finding that the proffered testimony and medical records were not relevant.

We conclude that the trial court erred by determining that the proffered testimony was not relevant. Defendant contends that on September 12, 2010, he did not possess a weapon; rather, he was pulled aside and sexually assaulted by the corrections sergeant. Any evidence to support defendant's theory that he was sexually assaulted calls into question the corrections sergeant's testimony about what happened on the day of the incident.<sup>5</sup> A witness's credibility or bias is "almost always relevant . . . ." *People v Layher*, 464 Mich 756, 765; 631 NW2d 281 (2001).

Nevertheless, we find that defendant is not entitled to reversal. In order to be entitled to reversal on this preserved, nonconstitutional error, defendant must show that "it is more probable than not that the error was outcome determinative." *People v Lukity*, 460 Mich 484, 496; 596 NW2d 607 (1999). Defendant cannot demonstrate that it was more probable than not that the error was outcome determinative because the trial court record is void of the alleged medical records or affidavits from the witnesses, and defendant has made no effort to provide this Court with such records or affidavits on appeal. *People v Elston*, 462 Mich 751, 762; 614 NW2d 595 (2000) ("As the appellant [ ], defendant bore the burden of furnishing the reviewing court with a record to verify the factual basis of any argument upon which reversal was predicated."). Moreover, even accepting as true the representations of defendant's trial counsel at the December 14, 2011 hearing, we find that defendant is not entitled to relief. Defendant's trial counsel represented that there were several medical records allegedly confirming that defendant suffered from rectal bleeding and that these records would support the claim that the sergeant sexually assaulted defendant on September 12, 2010. However, defendant's trial counsel failed to indicate the dates on which most of these medical examinations occurred. Further, the only date counsel provided for a medical examination at which defendant complained of rectal bleeding was a medical examination performed on October 15, 2011, more than a month after the alleged assault. The remoteness in time of this medical examination to defendant's claim of sexual assault makes the alleged report marginally probative, at best, and does not support a finding of prejudice. See *People v Rockwell*, 188 Mich App 405, 410-411; 470 NW2d 673 (1991).

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<sup>5</sup> It is worth noting that defendant did not file his sexual assault complaint until October 6, 2010, three weeks after he had been accused of possessing a weapon. Thus, any argument that the corrections sergeant fabricated the possession of a weapon accusation in retaliation for defendant filing a sexual assault complaint is not logical. However, evidence that defendant was sexually assaulted is relevant to calling into question what actually happened on September 12, 2010. The fact that the MDOC did not refer the weapons incident to the Michigan State Police for investigation until October 8, 2010, two days after defendant filed his sexual assault complaint, could also be relevant to challenging the credibility of the prosecution's witnesses.

## V. RIGHT TO PRESENT A DEFENSE

Lastly, defendant argues that the trial court denied him his right to present a defense when it denied his motion to adjourn for the independent psychiatric evaluations and when it denied his motion to amend the witness list. Defendant did not raise this constitutional claim below; thus, our review is for plain error affecting substantial rights. *Carines*, 460 Mich at 764. “A defendant has a constitutionally guaranteed right to present a defense . . . . But this right is not absolute: the accused must still comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.” *Yost*, 278 Mich App at 379 (citations and quotations omitted). Here, defendant was not denied his right to present a defense when the trial court denied his motion for independent psychiatric evaluations as to competency and criminal responsibility because, as discussed above, defendant failed to establish that the trial court erred by denying his requests. See *id.* See also *People v Unger*, 278 Mich App 210, 250-251; 749 NW2d 272 (2008). Further, although the trial court erred in determining that defendant’s proffered evidence regarding a sexual assault by the sergeant was not relevant, defendant cannot prevail on his claim that he was denied his right to present a defense because, as discussed *supra*, he cannot demonstrate prejudice. See *Carines*, 460 Mich at 763-764.

Affirmed.

/s/ Jane M. Beckering  
/s/ Amy Ronayne Krause  
/s/ Mark T. Boonstra