

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

REGINALD WILLIE PENNINGTON,

Defendant-Appellant.

UNPUBLISHED

October 14, 2010

No. 292835

Macomb Circuit Court

LC No. 2009-000242-FC

Before: FORT HOOD, P.J., and JANSEN and WHITBECK, JJ.

PER CURIAM.

Defendant appeals by right his jury-trial conviction of armed robbery, MCL 750.529, for which he was sentenced to 17 to 30 years in prison. We affirm.

Defendant first argues that the prosecutor committed misconduct during his closing argument by commenting on his personal belief in defendant's guilt. We disagree. Unpreserved claims of prosecutorial misconduct are reviewed for plain error affecting the defendant's substantial rights. To avoid forfeiture of the issue under the plain error rule, a defendant must show that (1) an error occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected the defendant's substantial rights. *People v McLaughlin*, 258 Mich App 635, 645; 672 NW2d 860 (2003); see also *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). To show plain error affecting substantial rights, the defendant must prove that prejudice occurred, meaning that the error must have affected the outcome of the lower court proceedings. *Id.* If the defendant satisfies all three factors, "this Court must then exercise discretion in deciding whether to reverse. Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant, or when an error seriously affected the fairness, integrity, or public reputation of the judicial proceedings." *Id.*

In reviewing a claim of prosecutorial misconduct, this Court must examine the pertinent portion of the record and evaluate the prosecution's remarks in context. *People v Callon*, 256 Mich App 312, 330; 662 NW2d 501 (2003). The propriety of the prosecution's comments depends on the specific facts of each case because "a prosecutor's comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial." *Id.* Prosecutors are allowed to argue all reasonable inferences that arise from the evidence and need not confine the argument to "the 'blandest of all possible terms.'" *People v Aldrich*, 246 Mich App 101, 112; 631 NW2d 67 (2001), quoting *People v Marji*, 180 Mich App 525, 538; 447 NW2d 835 (1989). And while prosecutors may not express their personal

opinion regarding a defendant's guilt, *People v Bahoda*, 448 Mich 261, 282-283; 531 NW2d 659 (1995), prosecutors may tie their beliefs concerning a defendant's guilt to the evidence presented at trial, *People v Page*, 63 Mich App 177, 179-180; 234 NW2d 440 (1975).

During his closing argument, the prosecutor began by stating:

Now, after listening to the evidence yesterday and this morning there is no doubt in my mind that the Defendant committed that armed robbery. If there is any doubt in your mind, any reasonable doubt at this time, now is my chance to convince you otherwise.

Thereafter, the prosecutor argued that the evidence supported each element of the offense of armed robbery, and then commented:

Now, let's suspend our disbelief for a minute and think of what is the possibility. . . . I'd like to go back for a minute from the time of the Defendant's arrest. What possibility is there that the Defendant, if he is not the perpetrator of the armed robbery, decides at 5:30 in the morning to hide in, under a car at 7059 Paige. What are the possibilities? Why would somebody do that?

I can't think of anything. Nothing comes to my mind. Would you go out at five . . . in the morning and decide to, first of all, go through a hole in a fence, jump over several fences and other backyards and then hide under a car at five a.m. in the morning? 5:30 am in the morning? I think the only reasonable conclusion is you would do that if you perpetrated an armed robbery 40 minutes earlier at the 7-Eleven. That is the only reasonable conclusion I can draw from that that.

* * *

Now, do foot prints travel to a location, a person disappears and then another person reappears under the car or attempting to crawl under a car? Unless you have like a transporter from Star Trek, no, that doesn't happen. Unless Scottie beams you up from that location where the foot print ended, that doesn't happen, at least not yet not in our world.

So I think beyond a reasonable doubt the foot prints going down Memphis, parallel to Paige and ending up where the Defendant is arrested, those are the Defendant's foot prints. There's no reasonable possibility, reasonable probability that those foot prints belong to anybody else.

* * *

Now if you think there is any reasonable possibility of [the tracks found on the east and west side of Van Dyke being made by different people], consider this: It is 5:00 to 5:30 in the morning, there is nobody else out, and there is no other foot prints.

So really in order to come up with a reasonable doubt in your mind that it was not the Defendant that committed the armed robbery, you are really have to go through some contortions. You kind of have to engage in unreasonable doubt to find any reasonable doubt that it was not the Defendant that perpetrated the armed robbery.

The prosecutor properly commented on his belief regarding defendant's guilt because he tied his statements to the evidence presented at trial. The goal of the prosecutor's argument was to persuade the jury that the evidence presented at trial proved beyond a reasonable doubt that defendant committed the armed robbery. Viewed in context, the prosecutor was arguing reasonable inferences arising from the evidence and was not required to use the blandest of all possible terms.

Furthermore, curative instructions are generally sufficient to eliminate any possible prejudicial effect resulting from inappropriate prosecutorial remarks. *People v Nantelle*, 215 Mich App 77, 87; 544 NW2d 667 (1996). In this case, the trial court properly instructed the jury that defendant was to be presumed innocent until proven guilty, that the prosecution bears the burden of proving each element of the charged crime beyond a reasonable doubt, that defendant had an absolute right not to testify, and that the attorneys' statements and arguments were not evidence. Thus, any potential prejudice arising from the prosecution's allegedly improper comments was dispelled. See *Bahoda*, 448 Mich at 281. After reviewing the record and evaluating the prosecutor's comments in context, we find no plain error affecting defendant's substantial rights.

Defendant argues that the trial court erred by keeping him restrained in leg shackles on the first day of trial. We agree, but find the error harmless. The decision to shackle a defendant is within the sound discretion of the trial court, and this Court reviews the decision for an abuse of discretion under the totality of the circumstances. *People v Payne*, 285 Mich App 181, 186; 774 NW2d 714 (2009). A fair and impartial trial includes the right to be free from shackling during 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). Although this right is not absolute, a defendant may be shackled only to prevent the defendant's escape, to prevent the defendant from injuring others in the courtroom, or to maintain an orderly trial. *Payne*, 285 Mich App at 186. Thus, the shackling of a defendant during trial is permitted only in extraordinary circumstances. *People v Dixon*, 217 Mich App 400, 404; 552 NW2d 663 (1996). The record must support the existence of such circumstances. *Payne*, 285 Mich App at 186.

Even if a trial court abuses its discretion by allowing the shackling of a defendant during trial, reversal is not required unless the defendant shows he suffered actual prejudice as a result of the restraints. *Payne*, 285 Mich App at 186; see also *People v Horn*, 279 Mich App 31, 36; 755 NW2d 212 (2008). Specifically, "a defendant is not prejudiced if the jury was unable to see the shackles on the defendant." *Id.* at 36.

In this case, it appears that the trial court abused its discretion by allowing defendant to be shackled for part of the first day of trial. There is simply no evidence on the record to support the trial court's decision to keep defendant in shackles. The record does not suggest that defendant was a flight risk, that defendant was a danger to others in the courtroom, or that

shackling defendant would help maintain order. However, defendant has failed to show that actual prejudice resulted from the improper shackling. The record reflects that defense counsel's table had a full cloth bunting around it to prevent the jurors from observing the ankle shackles. Moreover, the position of the jurors in the jury box relative to the position of defendant's table prevented the jurors from observing defendant's legs. Indeed, the trial court noted that the jury had never seen defendant shackled and defense counsel stipulated on the record that the jury had never observed defendant in shackles. Under the totality of circumstances, we cannot conclude that defendant has demonstrated any actual prejudice.

Defendant next argues the trial court improperly denied him the right to self-representation. We disagree. A criminal defendant's right to represent himself is implicitly guaranteed by the United States Constitution, US Const, Am VI, and explicitly guaranteed by the Michigan Constitution and Michigan statutory law, Const 1963, art 1, § 13; MCL 763.1. However, the right is not absolute. *Indiana v Edwards*, 554 US 164, ___; 128 S Ct 2379, 2384; 171 L Ed 2d 345 (2008). There are several requirements that must be met before a defendant may proceed in propria persona. *People v Russell*, 471 Mich 182, 190-191; 684 NW2d 745 (2004).

First, the defendant must unequivocally ask to represent himself. *People v Williams*, 470 Mich 634, 642; 683 NW2d 597 (2004); *People v Odom*, 276 Mich App 407, 419; 740 NW2d 557 (2007). Second, the trial court must determine that the defendant's assertion of his right is knowing, intelligent, and voluntary. *Williams*, 470 Mich at 642. The court must make the defendant aware of the dangers and disadvantages of self-representation. *Iowa v Tovar*, 541 US 77, 89; 124 S Ct 1379; 158 L Ed 2d 209 (2004). Every reasonable presumption should be made against waiver. *Russell*, 471 Mich at 188. However, "[a] waiver is sufficient if the defendant 'knows what he is doing and his choice is made with eyes open.'" *Williams*, 470 Mich at 642, quoting *Adams v United States*, 317 US 269, 279; 63 S Ct 236; 87 L Ed 2d 268 (1942).

Third, the trial court must determine that the defendant's self-representation will not disrupt, unduly inconvenience, or burden the court. *Williams*, 470 Mich at 642. Lastly, the trial court must comply with the requirements of MCR 6.005, which provides:

The court may not permit the defendant to make an initial waiver of the right to be represented by a lawyer without first (1) advising the defendant of the charge, the maximum possible prison sentence for the offense, any mandatory minimum sentence required by law, and the risk involved in self-representation, and (2) offering the defendant the opportunity to consult with a retained lawyer or, if the defendant is indigent, the opportunity to consult with an appointed lawyer.

Thus, a trial court may not permit an initial waiver of counsel (1) without advising the defendant of the charge, the maximum possible prison sentence, and any mandatory minimum sentence; (2) without advising the defendant of the risks of self-representation; and (3) without offering the defendant the opportunity to consult with a lawyer. MCR 6.005(D); *Russell*, 471 Mich at 190-191; *Williams*, 470 Mich at 642-643.

A careful review of the record reveals that defendant never unequivocally asked to represent himself in this case. Instead, it appears that defendant preferred to continue with the

representation of counsel, provided that his counsel agreed to ask the 31 specific questions written by defendant. Thus, defendant's request to represent himself was conditional and dependent on whether defense counsel would agree to ask the 31 specific questions. Defendant stated that he either wanted to represent himself with defense counsel as an advisor to ensure the questions were asked, or that he wished the trial court to be given a copy of the written questions to ensure they were asked. It strikes us from the record that defendant was not as interested in self-representation as he was in ensuring that his written questions were asked of the witnesses. Once defense counsel agreed to ask the specific written questions, defendant formally withdrew his request for self-representation. Accordingly, we simply cannot say that his request for self-representation was in any way unequivocal. The trial court did not err by accepting defendant's withdrawal of his request for self-representation.

Defendant also argues that defense counsel was ineffective because he failed to object to the prosecution's closing argument and stipulated that the jury had not seen defendant in ankle shackles. We disagree. The determination of whether a defendant has been deprived the effective assistance of counsel presents a mixed question of fact and law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

To establish ineffective assistance of counsel, a defendant must show (1) that counsel's assistance fell below an objective standard of professional reasonableness, and (2) that but for counsel's ineffective assistance, the result of the proceedings would have been different. *Strickland v Washington*, 466 US 668, 687-88, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Effective assistance of counsel is presumed, and the defendant bears a heavy burden to prove otherwise. *LeBlanc*, 465 Mich at 578. The defendant "must overcome a strong presumption that counsel's performance constituted sound trial strategy." *People v Riley (After Remand)*, 468 Mich 135, 140; 659 NW2d 611 (2003). Counsel's decision regarding whether to raise objections during closing arguments is usually a matter of trial strategy. *People v Unger*, 278 Mich App 210, 242; 749 NW2d 272 (2008).

Defendant has not proven that defense counsel performed deficiently by failing to object to the prosecution's comments during his closing argument. As previously discussed, the prosecution's comments were not improper. Defense counsel is not ineffective for failing to make a frivolous objection. *People v Milstead*, 250 Mich App 391, 401; 648 NW2d 648 (2002). Furthermore, given the overwhelming evidence against defendant, including the testimony of the 7-Eleven clerk and of several police officers who followed defendant's footprints in the snow, we simply cannot say that any deficiency in counsel's performance resulted in prejudice to defendant. We perceive no ineffective assistance of counsel in this regard.

Likewise, defendant has not shown that counsel's stipulation that the jury did not see defendant in shackles—or counsel's failure to request an evidentiary hearing on this matter—constituted ineffective assistance of counsel. It is not reasonably probable that the outcome of trial would have been different had defendant's attorney objected to the leg shackles or requested an evidentiary hearing because, as previously discussed, the jury was unable to see the shackles. Consequently, defendant cannot demonstrate that he suffered any prejudice from counsel's performance. See *People v Pickens*, 446 Mich 298, 314; 521 NW2d 797 (1994).

In a supplemental brief filed *in propria persona*, defendant argues that there was insufficient evidence to identify him as the armed robber. We disagree. We review the record in

a light most favorable to the prosecution to determine whether a rational trier of fact could have found that all essential elements of the crime were proven beyond a reasonable doubt. *People v Roper*, 286 Mich App 77, 83; 777 NW2d 483 (2009). In reviewing the sufficiency of the evidence, this Court “must not interfere with the jury’s role as the sole judge of the facts.” *People v Meshell*, 265 Mich App 616, 619; 696 NW2d 754 (2005).

The elements of armed robbery are (1) an assault, (2) a felonious taking of property from the victim’s presence or person, (3) while the defendant is armed with a dangerous weapon. *Carines*, 460 Mich at 757. Identity is an essential element of every crime. *People v Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2008). The prosecution must present sufficient evidence to prove beyond a reasonable doubt that the defendant committed the crimes alleged. *People v Kern*, 6 Mich App 406, 409; 149 NW2d 216 (1967). “The credibility of identification testimony is a question for the trier of fact that we do not resolve anew.” *People v Davis*, 241 Mich App 697, 700; 617 NW2d 381 (2000).

The 7-Eleven clerk testified that she recognized defendant as the man who robbed her at knifepoint. The testimony of a victim alone is sufficient evidence to establish a defendant’s guilt. *People v Taylor*, 185 Mich App 1, 8; 460 NW2d 582 (1990). Additionally, the recent snowfall allowed the police officers to follow defendant’s footprints to the location where he was hiding underneath a car. All the police officers testified that they observed one set of distinctive triangular-shaped or diamond-shaped, waffle-patterned shoe prints exiting the 7-Eleven store and heading south on Van Dyke. Two officers followed the footprints from the area of the 7-Eleven store until the tracks ended on Paige, where other officers had already apprehended defendant. Importantly, snow continued to fall and very few people were walking in the area of the 7-Eleven store immediately following the robbery. Thus, a rational juror could have inferred that only the robber would have left these footprints in the snow. “It is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences.” *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002). Viewing the evidence in a light most favorable to the prosecution, we conclude that there was sufficient evidence presented at trial to allow a rational jury to find defendant guilty beyond a reasonable doubt.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Kathleen Jansen
/s/ William C. Whitbeck