

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
August 21, 2012

v

JASEN ALLEN THOMAS,

Defendant-Appellant.

No. 301683
Washtenaw Circuit Court
LC No. 04-001767-FC

Before: OWENS, P.J., and TALBOT and METER, JJ.

PER CURIAM.

Defendant appeals by delayed leave granted from his convictions by a jury of voluntary manslaughter, MCL 750.321; assault with intent to do great bodily harm less than murder, MCL 750.84; assault with a dangerous weapon (felonious assault), MCL 750.82; and three counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. We affirm.

Defendant's convictions stemmed from the shooting of Keith Wright and Terrence Bradley and the hitting of Charnina Wright with a handgun. On October 24, 2004, Keith, Terrence, and Charnina attended a party located across the street from defendant's apartment. Charnina testified that as she was getting ready to leave she heard Keith and defendant arguing. The argument escalated, and defendant walked across the street and went inside his apartment. Defendant returned and he and Keith resumed the argument. Defendant pulled out a handgun and shot Keith in the leg and chest. Defendant hit Charnina in the face with the handgun when she tried to grab him. Charnina then saw Terrance struggling with defendant. Defendant shot Terrance twice in the leg and ran from the scene. Keith Wright died from his injuries and Terrance Bradley and Charnina Wright survived. Defendant claimed that he acted in self-defense because he was reasonably in fear of great bodily harm from Keith and some of Keith's family members.

Defendant was charged with open murder, MCL 750.316; assault with intent to murder, MCL 750.83; felonious assault; felon in possession of a firearm, MCL 750.224f; and three counts of felony-firearm. On June 6, 2005, defendant pleaded guilty to being a felon in possession of a firearm. The case proceeded to trial on the remaining charges, but a mistrial was declared after the jury was unable to reach a unanimous verdict on any of the charges.

Following a five-day jury trial beginning January 9, 2006, defendant was convicted of voluntary manslaughter; assault with intent to do great bodily harm less than murder; felonious assault; and three counts of felony-firearm. On March 29, 2006, defendant was sentenced to concurrent prison terms of 10 to 15 years for voluntary manslaughter; six to 10 years for assault with intent to do great bodily harm less than murder; and two to four years for felonious assault.¹ He also received the mandatory two-year term for each felony-firearm conviction.

On appeal, defendant first argues that he is entitled to a new trial because he was required to appear before the jury visibly shackled. We disagree.

The record reveals that on January 9, 2009, before jury selection began, defense counsel asked the trial court if defendant could change into his civilian clothes, which had just arrived at the courthouse. The trial court agreed, but told defense counsel that “[y]ou should do it now since the jurors are on their way down.” Defendant left the courtroom. Defense counsel then asked if defendant was going to be brought back into the courtroom in shackles, and the trial court answered in the affirmative. When defense counsel objected, the trial court devised a plan whereby defendant would be flanked by defense counsel and several other individuals as he entered the courtroom in an effort to hide the shackles from the jury panel.

The decision to shackle a defendant is within the sound discretion of the trial court, and we review 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). Freedom from shackling during trial is an important component of a fair trial. *People v Banks*, 249 Mich App 247, 256; 642 NW2d 351 (2002). “[H]aving a defendant appear before a jury handcuffed or shackled negatively affects the defendant’s constitutionally guaranteed presumption of innocence[.]” *Id.* “[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.’” *Payne*, 285 Mich App at 186, quoting *People v Dunn*, 446 Mich 409, 425; 521 NW2d 255 (1994).

There is no evidence in the record that defendant presented any of the risks that shackling is intended to prevent. Therefore, the trial court abused its discretion by ordering defendant to enter the courtroom shackled. No relief is warranted, however, because there is no evidence that defendant suffered any prejudice. *Payne*, 285 Mich App at 186. Defendant alleges that the jury saw him in shackles when he entered the courtroom, but he is unable to support these allegations because he “chose not to question any jurors about what they may have seen.” *People v Horn*, 279 Mich App 31, 37; 755 NW2d 212 (2008). Instead, defendant argues that the visibility of his shackles can be established by the mere fact that he had to walk in front of the jury panel. We disagree. Defendant did not walk openly in court. Rather, he was flanked by other persons to try to hide the shackles. Thus, it is not obvious that the shackles were visible to the jury panel.

Additionally, even if we assume that some members of the jury panel saw defendant in shackles, prejudice would require that those who saw defendant in shackles actually have served

¹ Defendant also received a sentence of three to five years’ imprisonment in conjunction with his plea to being a felon in possession of a firearm.

on his jury. Defendant did not walk in front of the selected jury. Rather, defendant walked in front of a jury panel consisting of approximately 60 people. The distinction is significant. The presumption of innocence could not be undermined if those who saw defendant in shackles were not selected to be on his jury.

The situation here is somewhat analogous to that in *People v Herndon*, 98 Mich App 668; 296 NW2d 333 (1980). The *Herndon* Court stated:

Although evidence in the record indicates that defendant may have been in the presence of the jury while in handcuffs, there is no evidence that would indicate that any member of the jury ever saw handcuffs on defendant. Further, defense counsel did not request an evidentiary hearing to inquire as to whether members of the jury saw shackles on defendant and, if they did, whether they were thereby prejudiced. See, *People v Panko*, [34 Mich App 297; 191 NW2d 75 (1971)] In the absence of such an evidentiary record we are unable to hold that defendant was denied his right to a fair and impartial jury. [*Herndon*, 98 Mich App at 673.]

Similarly, in this case, there is no evidence in the record that a juror who actually deliberated on defendant's case saw him in shackles. Defendant did not question any jurors about what they might have seen, and it is not obvious from the record that any jurors who deliberated on defendant's case saw him in shackles. In the absence of such an evidentiary record, defendant cannot show that he was prejudiced.

We cannot agree with defendant's argument that *People v Davenport*, 488 Mich 1054; 794 NW2d 616 (2011), requires a remand in the present case. In *Davenport*, the Supreme Court stated, "The defendant should have been permitted to develop the record on the issue of whether his shackling during trial prejudiced his defense." *Id.* The defendant had videotape evidence potentially demonstrating the visibility of his restraints to jurors. *People v Davenport*, unpublished opinion per curiam of the Court of Appeals, decided August 5, 2010 (Docket No 287767), slip op at 2. The instant case is not analogous. There is no evidence of the visibility of the shackles and no indication that defendant attempted to ascertain whether the persons ultimately seated on the jury saw the shackles and that the court prevented him from doing so.

Next, defendant argues that the trial court erred when it allowed a prosecution witness to testify about threats he received. The prosecution called James Williams to testify regarding a conversation he overheard while he was lodged in a holding cell with defendant. After questioning Williams about the conversation, the prosecutor asked if there came a time after he reported the conversation that someone approached or threatened him. Williams explained that he was at a car wash talking with another customer when a man approached Williams and the other customer. Williams said that the man was talking to the other customer but was actually looking at Williams and said that "[h]e was gonna start killing folks who were snitching and talking to the police." Williams stated that two days before his testimony in this trial he called the police because someone cut his telephone lines while he was at home.

Defendant argues that Williams's testimony that he was threatened was inadmissible because the prosecutor did not connect defendant to the threat. Because defendant failed to

object to Williams's testimony, the issue is reviewed under the standard for unpreserved, nonconstitutional error. *People v Jones*, 468 Mich 345, 355; 662 NW2d 376 (2003).

To avoid forfeiture of an unpreserved, nonconstitutional plain error, the defendant bears the burden of establishing that: (1) error occurred, (2) the error was plain, i.e., clear or obvious, and (3) the plain error affected substantial rights. Once the defendant establishes these three elements, the appellate court must still exercise its discretion in deciding whether to reverse. Reversal is warranted only when the plain, unpreserved 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 independent of the defendant's innocence. [*Id.* (internal citations omitted).]

"A defendant's threat against a witness is generally admissible [because] [i]t is conduct that can demonstrate consciousness of guilt." *People v Sholl*, 453 Mich 730, 740; 556 NW2d 851 (1996). However, for evidence of threats to be admissible, a connection to the defendant must be shown. *People v Lytal*, 119 Mich App 562, 576-577; 326 NW2d 559 (1982).

Defendant correctly asserts that the prosecutor did not establish a connection between defendant and the threatening behavior during Williams's testimony. However, the connection was supplied by defendant. Defendant called Carlos Thomas, the man who threatened Williams. Defense counsel asked, "What's your connection with [defendant], if any?" Carlos conceded that he and defendant were friends. On cross-examination, Carlos stated that he knew an individual identified as "Griff," whose real name was Toby. Carlos further conceded that he, Toby, and defendant had spent time together. When defendant took the stand, the prosecutor cross-examined defendant regarding a letter he sent to Tobias Griffin that contained Williams's full name, date of birth, and city of residence. The letter further implied that Williams was going to testify against defendant. Defendant admitted writing the letter. Therefore, although the connection between defendant and the threat was not initially established, it was after Carlos and defendant testified. No clear or obvious error is apparent. *Jones*, 468 Mich at 355.

Finally, defendant argues that the trial court abused its discretion when it departed from the sentencing guidelines range by six months. We disagree.

A court may depart from the sentencing guidelines range if it has a substantial and compelling reason to do so and it states on the record the reasons for departure. MCL 769.34(3); *People v Buehler*, 477 Mich 18, 24; 727 NW2d 127 (2007). In reviewing a departure from the guidelines range, the existence of a particular factor is a factual determination subject to review for clear error, the determination that the factor is objective and verifiable is reviewed de novo as a matter of law, the determination that the factors constituted substantial and compelling reasons for departure is reviewed for an abuse of discretion, and the extent of the departure is reviewed for an abuse of discretion. *People v Uphaus (On Remand)*, 278 Mich App 174, 178-179; 748 NW2d 899 (2008); *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). The sentencing guidelines range for defendant's conviction of voluntary manslaughter was 58 to 114 months. During sentencing, the prosecutor argued for a six-month departure on the basis that defendant was on probation for an assaultive crime when he committed the present offense and because there were allegations of jury tampering. According to the prosecutor, after defendant

was convicted, it became known that one of the jurors was friends with a defense witness and defendant. The prosecutor stated:

It's no secret that there have been people charged as a result of this case, with tampering with the jury; that one of the defense witnesses was charged and both have been bound over now to—to Circuit Court. The juror in this particular case was—received payment in the form of cocaine in order to either hang the jury or to procure a voluntary manslaughter conviction.

* * *

We have information now that—that tells us that the defendant was aware and—and was friends with the juror who was seated, that he was aware of the fact that during this entire process he had a friend on that jury, and that the outcome was more likely than not going to be swayed in his favor, because he sat there in this courtroom when that juror lied to Your Honor, and said that he didn't know anyone involved in this process.

The trial court indicated its concern that the actions of the juror and of the witness undermined our system of justice “such that there were not in fact 12 jurors who deliberated impartially and independently.” The trial court then said that it found substantial and compelling reasons to exceed the guidelines:

First of all, you were on probation when you committed this offense. That in and of itself is sufficient, as the Court is only required to find one—at least one substantial and compelling reason to exceed the guidelines. Further, the Court believes that there was some involvement in the issue of jury tampering. But, independent of that, certainly you were on probation and were not supposed to be in possession of a firearm nor engage in any assaultive behavior, which you did both.

Defendant argues that his sentence must be vacated because the trial court did not state a proper basis for departing from the sentencing guidelines. Defendant asserts that the trial court improperly considered his probationary status when it departed from the guidelines because it was already taken into account by Prior Record Variable (PRV) 6, dealing with an offender's relationship to the criminal justice system. This variable is to be scored at 10 points if “[t]he offender is on parole, probation, or delayed sentence status or on bond awaiting adjudication or sentencing for a felony.” MCL 777.56(1)(c). Defendant was assessed 10 points under PRV 6; therefore, defendant is correct that his probationary status was taken into account under the guidelines. The trial court, however, did not simply consider defendant's probationary status. It considered the fact that defendant was in possession of a handgun and engaged in assaultive behavior while on probation. “[A] defendant's conduct while on probation can be considered as a substantial and compelling reason for departure from the legislative sentencing guidelines.” *People v Hendrick*, 472 Mich 555, 565; 697 NW2d 511 (2005). Because the trial court

considered defendant's conduct while on probation, not just his probationary status, the trial court did not improperly depart based on conduct already considered in the scoring of PRV 6.²

Defendant next argues that the trial court improperly departed from the guidelines on the basis that he tampered with the jury. Defendant argues that the trial court should have formally determined whether the allegation of jury tampering could be established by a preponderance of the evidence. We find no basis for reversal.

“A trial court may consider facts concerning uncharged offenses, pending charges, and even acquittals, provided that the defendant is afforded the opportunity to challenge the information and, if challenged, it is substantiated by a preponderance of the evidence.” *People v Golba*, 273 Mich App 603, 614; 729 NW2d 916 (2007). Defendant had an opportunity to challenge the allegations that he was involved in jury tampering. The prosecutor submitted a sentencing memorandum outlining the jury tampering allegations and repeated those allegations at the sentencing hearing when she requested a departure. Defendant never challenged the accuracy of any of the allegations. He did not dispute that a juror and defense witnesses were charged with jury tampering, that he had a friend on the jury, and that he failed to disclose his relationship with the juror. Also, he did not dispute that he knew that the juror lied when he said he knew no one involved in the case. The *unchallenged* facts established that defendant had some involvement in the jury tampering; therefore, the tampering was properly considered by the trial court when it departed from the guidelines.

Affirmed.

/s/ Donald S. Owens
/s/ Michael J. Talbot
/s/ Patrick M. Meter

² Moreover, we note that a court is empowered, in certain circumstances, to consider characteristics already taken into account by the sentencing guidelines. See MCL 769.34(3)(b) (“[t]he court shall not base a departure on an offense characteristic or offender characteristic already taken into account in determining the appropriate sentence range unless the court finds from the facts contained in the court record, including the presentence investigation report, that the characteristic has been given inadequate or disproportionate weight”).