

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
October 25, 2012

v

JEROME POWELL, JR.,

No. 305542
Washtenaw Circuit Court
LC No. 09-001585-FC

Defendant-Appellant.

Before: RONAYNE KRAUSE, P.J., and BORRELLO and RIORDAN, JJ.

RONAYNE KRAUSE, P.J. (*concurring in part and dissenting in part*)

I concur with the majority's conclusions regarding defendant's claims of ineffective assistance of counsel and due process violations of the trial court denying defense counsel's motion for adjournment. However, on the issue of whether defendant was prejudiced by being shackled during his trial, I respectfully dissent. I do not believe that the trial record is adequate to determine whether the jury was able to see defendant's shackles. Accordingly, I would remand for further evidentiary proceedings on the issue.

Although we previously denied a motion to remand for such a hearing, *People v Jerome Powell, Jr.*, unpublished order of the Court of Appeals, entered July 3, 2012 (Docket No. 305542), upon full review of the trial court record, I do not believe that we can adequately address the issue of defendant wearing shackles at trial without further evidentiary proceedings. Our order only denied the motion "for failure to demonstrate a need for a remand at this time." The order does not address the merits of the case, and therefore the law of the case doctrine does not apply. *Grievance Administrator v Lopatin*, 462 Mich 235, 260; 462 NW2d 120 (2000).

I would permit defendant to develop a record on the issue of whether his shackling prejudiced the result of the trial. See *People v Davenport*, 488 Mich 1054; 794 NW2d 616 (2011); see also *Rhoden v Rowland*, 10 F3d 1457, 1459-1460 (9th Cir. 1993). My decision is further influenced by the record-intensive approach reflected in our analysis of prejudice created

by shackles. See, e.g., *People v Dunn*, 446 Mich 409; 521 NW2d 255 (1994); *People v Payne*, 285 Mich App 181; 774 NW2d 714 (2009); *People v Horn*, 279 Mich App 31; 755 NW2d 212 (2008); *People v Dixon*, 217 Mich App 400; 552 NW2d 663 (1996).

Without more evidence, I cannot determine whether defendant's shackles prejudiced him. Therefore, I would remand for an evidentiary hearing on that issue only.

/s/ Amy Ronayne Krause