

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
November 19, 2013

v

LORENZO DONNELL RELERFORD, JR.,

Defendant-Appellant.

No. 310488
Genesee Circuit Court
LC No. 11-028558-FC

AFTER REMAND

Before: SAWYER, P.J., and O'CONNELL and K.F. KELLY, JJ.

PER CURIAM.

This appeal returns to the Court after our remand for an evidentiary hearing regarding the use of visible shackles on defendant. On remand, the trial court denied defendant's motion for a new trial. Because the record demonstrates that the trial court's routine shackling policy lacked any specific finding that defendant presented a security risk, we conclude that the use of visible shackles violated defendant's due process rights. We further conclude that the prosecution has not demonstrated on appeal that the due process violation was harmless beyond a reasonable doubt. Accordingly, we must reverse defendant's convictions.

Defendant's convictions arose from the murder of Jeanne Hank, who was an acquaintance of defendant. The evidence indicated that defendant and another man, Dantoine Brown, were in Hank's home at the time she was murdered. The prosecutor charged both men with felony murder, MCL 750.316(b); armed robbery, MCL 750.529; and unlawful driving away a motor vehicle, MCL 750.413. At trial, both defendant and Brown testified. Both men both acknowledged that they were in Hank's home and that they took some of her personal possessions. Each man, however, testified that the other man had murdered Hank.

When Brown testified during the prosecution's case-in-chief, he was wearing visible physical restraints. He confirmed that he was testifying in keeping with a plea agreement that reduced the potential sentences for his offenses. Defendant was wearing shackles during the prosecution's case-in-chief, but the shackles were not visible to the jury at that time. However, when defendant's trial counsel called defendant as a witness, his shackles became visible to the jury as he walked to the witness stand. Defendant's trial counsel moved for a mistrial, which the trial court denied. The jury ultimately found defendant guilty on all charges.

On appeal, defendant moved to remand for an evidentiary hearing on the shackles issue. Two witnesses testified at the hearing on remand: defendant's trial counsel Donald Shaw and courtroom security officer Robert Heath. Shaw testified that he knew defendant's legs were shackled, and that he would have requested a recess to allow defendant to move to the witness stand outside the jury's presence but defendant started walking to the stand before Shaw could request the recess. Shaw further testified that prior to trial he did not object to having defendant shackled, because he was concerned that the alternative to shackles was that deputies would stand directly behind defendant at the counsel table, which he believed would send a "bad message" to the jury.

Heath, who was in charge of courtroom security, testified that he knew of no specific security concerns regarding defendant. Rather, defendant was shackled in keeping with routine security policy. According to Heath, the shackling policy required that inmates be shackled whenever they were taken out of a secure area. The policy did not involve prior approval by a judge, nor did the policy require that a judge be informed if an inmate was shackled. Instead, inmates remained shackled unless a judge ordered the shackles removed.

The trial court indicated that it did not know defendant was shackled until he walked to the witness stand. The court took judicial notice that the shackles would have been visible to the jurors. The court then ruled that the evidence against defendant was so strong that the shackling error was harmless beyond a reasonable doubt. The court rejected defendant's claim that his trial counsel was ineffective with regard to the shackling issue.

Returning to this Court after remand, defendant first argues the trial court erred by denying defendant's motion for mistrial. We review for abuse of discretion the trial court's ruling on the motion for mistrial. *People v Coy*, 258 Mich App 1, 17; 669 NW2d 831 (2003). A mistrial is appropriate when an irregularity occurred at trial that prejudiced the defendant's rights and that impaired the defendant's ability to obtain a fair trial. *People v Ortiz-Kehoe*, 237 Mich App 508, 515; 603 NW2d 802 (1999).

The controlling United States Supreme Court precedent and the corollary Michigan precedent mandate that a mistrial be granted when a defendant is subjected to unjustified visible shackling. The use of visible physical restraints on a defendant is constitutionally valid only if the trial court has made a specific determination that the restraints are necessary for the individual defendant being tried. *Deck v Missouri*, 544 US 622, 624; 125 S Ct 2007; 161 L Ed 2d 953 (2005); *People v Dunn*, 446 Mich 409, 425; 521 NW2d 255 (1994). As the United States Supreme Court explained, "[T]he Fifth and Fourteenth Amendments prohibit the use of physical restraints visible to the jury absent a trial court determination, in the exercise of its discretion, that they are justified by a state interest specific to a particular trial." *Deck*, 544 US at 629. Our Supreme Court correspondingly explained: "The 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." *Dunn*, 446 Mich at 425; see also 3 ABA Standards of Criminal Justice (3rd ed), Standard 15-3.2. Similarly, this Court has stated, "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).

The record establishes that defendant in this case was subjected to unjustified visible shackling. The trial court made no finding that defendant should be shackled at trial, and the parties agree that the shackles were visible to the jury as defendant approached the witness stand. In denying defendant's motion for a mistrial in this case, the trial court apparently concluded that defendant's shackles were indicative only of the fact that defendant was housed in jail. The court reasoned that the visibility of defendant's shackles was not prejudicial because the jury already knew that defendant was jailed. This reasoning is inconsistent with the Supreme Court's decision in *Deck*, 544 US at 635. Given that the court made no determination that shackles were necessary, the use of visible shackles was inherently prejudicial. The *Deck* Court unequivocally stated, "where a court, without adequate justification, orders the defendant to wear shackles that will be seen by the jury, the defendant need not demonstrate actual prejudice to make out a due process violation." *Id.*

Not only did the trial court engage in a mistaken assumption that the appearance of shackles was not prejudicial, the court also mistakenly assumed that a cautionary instruction would cure any prejudice. This Court has indicated that a cautionary instruction will not cure the prejudice that arises when a jury views a defendant who has been shackled without cause. *People v Baskin*, 145 Mich App 526, 546; 378 NW2d 535 (1985) (superseded by statute on other grounds).

Defendant's mistrial motion thus established an inherently prejudicial irregularity at trial: he was shackled as he approached the witness stand in the jury's presence. Under *Deck*, 544 US at 631, and the corresponding Michigan case law, visible shackles are a due process violation absent a specific determination that the shackles were justified for trial. The visible shackles in this case thereby prejudiced defendant's due process right. Accordingly, the trial court abused its discretion in denying defendant's motion for a mistrial. See generally *Ortiz-Kehoe*, 237 Mich App at 515.

The trial court's error requires reversal unless the prosecution can establish on appeal that the error was harmless beyond a reasonable doubt. *Deck*, 544 US at 624. On remand, the trial court ruled that the visibility of defendant's shackles was harmless error because of the strength of the evidence against defendant. We disagree.

The trial court's ruling that the error was harmless conflicted with its finding that the trial evidence primarily involved a credibility contest. The trial court on remand recognized that the two main witnesses in this case were Brown and defendant. The court further recognized that "the evidence was overwhelming with respect to *both* Mr. Relerford's and Mr. Brown's guilt." The court found, however, that Brown's testimony was "more believable because he didn't say he had no role in this." The court also determined that defendant's testimony was "very unbelievable."

We recognized that we must defer to a factfinder's determination of witness credibility, and that the Court will not overturn factual findings on a motion for a new trial absent clear error. *People v Eisen*, 296 Mich App 326, 331; 820 NW2d 229 (2012); *Gratsch*, 299 Mich App at 618 (clear error). In this appeal, however, the ultimate issue is not whether the trial court correctly assessed defendant's credibility versus Brown's credibility. Instead, the ultimate issue

is whether the trial court correctly determined that defendant's shackles had no reasonably prejudicial effect on *the jury's* assessment of defendant's credibility versus Brown's credibility.

The prosecutor has the stringent burden of establishing that the shackling error was harmless beyond a reasonable doubt. This Court has reversed a conviction for a shackling error in a case that involved applying a less stringent standard. *Banks*, 249 Mich App at 261. The factual issue in *Banks* turned largely on witness credibility. The defendant in *Banks* was convicted of armed robbery on the basis of the prosecution's witnesses, including an accomplice and the victim's testimony. *Id.* at 249-251. Defendant presented a witness to contradict the prosecution's witnesses; this defense witness appeared in handcuffs, over defendant's objection. *Id.* at 251. On appeal, one of the issues was whether the visible handcuffs on the defense witness required reversal of defendant's conviction. *Id.* at 255-256.

The *Banks* Court first noted that improperly requiring a *defendant* to wear visible restraints is a constitutional error. *Id.* at 259. The Court went on to determine that improperly requiring a *witness* to wear visible restraints was error, but that the error is nonconstitutional. *Id.* The Court accordingly analyzed the handcuff error using the standard for nonconstitutional errors, i.e., whether it was more probable than not that the error was outcome-determinative. *Id.* The *Banks* Court concluded that the trial court's error in requiring the witness to wear handcuffs warranted reversal of defendant's conviction, because the primary issue at trial was witness credibility:

[W]e conclude that it is more probable than not that the erroneous shackling of [the witness] during his testimony was outcome determinative. We are mindful that as an appellate court, we must not engage in a weighing of the credibility of the witnesses appearing at trial. Accordingly, when confronted with two conflicting stories regarding defendant's possible involvement in the crime, particularly stories presented by witnesses with apparent credibility concerns, we must be careful not to favor one account over the other. Absent compelling physical evidence or testimony by uncompromised witnesses, we cannot conclude that this error was harmless. [*Banks*, 249 Mich App at 261.]

In this case, as in *Banks*, the primary factual issue turned on witness credibility. In *Banks*, the credibility contest required the jury to assess the testimony of an accomplice and the victim against the testimony of the handcuffed defense witness. Here, the credibility contest is perhaps an even closer question: the jury had to assess the credibility of Brown, who testified in jail garb wearing handcuffs, against the testimony of defendant, who wore shackles that were at one point visible to the jury.¹ The constitutional presumption of innocence protects criminal defendants; the presumption does not apply to witnesses. See *Banks*, 249 Mich App at 259-261. Consequently, defendant's appearance in restraints presents a more serious impact on defendant's credibility than Brown's appearance in restraints.

¹ Defendant does not challenge the use of handcuffs on Brown.

The prosecution on appeal argues that the testimony of other witnesses renders the shackling error harmless beyond a reasonable doubt. The argument fails, for two reasons. First, the argument ignores the trial court's finding on remand that although the trial lasted nine days, the two main witnesses were Brown and defendant. Given that the most significant trial evidence came from the testimony of Brown and defendant, the impact of defendant's shackles on his credibility was a critical error.

Second, the prosecution's argument lacks substantive support. According to the prosecution, the following evidence was sufficient to convict defendant: (1) the testimony of one of defendant's jailmates who stated that he overheard defendant say defendant choked a woman with a bathrobe belt; (2) defendant's DNA was found on the bathrobe belt and could not be excluded from Hank's fingernail clippings; and (3) defendant frowned when he [defendant] asked a deputy about DNA evidence. This evidence, even if persuasive, would not be sufficient to establish defendant's guilt beyond a reasonable doubt. Defendant impeached the jailmate's testimony with the testimony of another jailmate. The DNA evidence from the bathrobe belt indicated that DNA from at least two other individuals was on the belt. Moreover, defendant's "frown" at the deputy could not, standing alone, support a conviction.

We conclude that the prosecution has not established on appeal that the shackling error was harmless beyond a reasonable doubt. Accordingly, defendant's conviction must be reversed. Given this conclusion, we need not address defendant's other allegations of error on appeal. We note, however, that if on retrial the prosecution seeks to introduce defendant's prior conviction as impeachment evidence under MRE 609, the trial court must articulate its analysis on the record pursuant to MRE 609, rather than MRE 403.

Reversed.

/s/ David H. Sawyer
/s/ Peter D. O'Connell
/s/ Kirsten Frank Kelly