

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JERRY DOWELL BAILEY,

Defendant-Appellant.

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UNPUBLISHED

August 6, 2009

No. 283854

Ionia Circuit Court

LC No. 07-013548-FH

Before: Zahra, P.J., and Whitbeck and M. J. Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his conviction by a jury of being an inmate in possession of a weapon in violation of MCL 800.283(4). The trial court sentenced defendant as a habitual offender to 60 to 180 months in prison. Because we conclude that the trial court erred when it ordered defendant to be shackled and this error prejudiced defendant's trial, we reverse and remand for a new trial.

Generally, a trial court's decision to shackle a defendant is reviewed for an abuse of discretion under the totality of the circumstances. *People v Banks*, 249 Mich App 247, 256; 642 NW2d 351 (2002). A trial court abuses its discretion when it selects an outcome that is not within the range of reasonable and principled outcomes. *People v Yost*, 278 Mich App 341, 353; 749 NW2d 753 (2008). To warrant reversal, the defendant must show that his appearance in shackles prejudiced his trial. *People v Robinson*, 172 Mich App 650, 654; 432 NW2d 390 (1988).

"The Sixth Amendment guarantee of the right to a fair trial means that 'one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial.'" *Banks*, 249 Mich App at 256, quoting *Taylor v Kentucky*, 436 US 478, 485; 98 S Ct 1930; 56 L Ed 2d 468 (1978). Freedom from shackling during trial has long been recognized as an important component of a fair and impartial trial. *Id.* The shackling of a defendant during a trial is permitted only in extraordinary circumstances, *People v Dixon*, 217 Mich App 400, 404; 552 NW2d 663 (1996), because a defendant appearing before a jury handcuffed or shackled negatively effects the presumption of innocence. *Banks*, 249 Mich App at 256. However, a defendant's right to appear at trial free of physical restraint is not absolute. *Id.* A trial court may order a defendant to be handcuffed or shackled to prevent

escape, to prevent the defendant from harming others in the courtroom, or to ensure an orderly trial. *Id.* at 257.

In this case, the prosecutor asked the trial court to shackle defendant based on his long and violent criminal history. Rather than object to the prosecutor's request, defendant's trial counsel merely noted that his "rapport" with defendant had improved, but that he still had some concern. Based on these brief statements, the trial court determined that defendant should be shackled.

Defendant's trial counsel's statement presumably was a reference to an incident that defendant's counsel had earlier described at a hearing on his motion to withdraw. At the hearing, defendant's trial counsel related to the trial court that defendant was unhappy with his representation. Defendant's trial counsel also described an incident at a meeting with defendant in a holding cell. Defendant's trial counsel stated that defendant told him that he wanted to fire him and approached him in a way that trial counsel described as intimidating or threatening.

The trial court cited two rationales in support of its decision. First, the trial court noted that, because being a prisoner was an element of the crime charged, it was no secret that defendant was a prisoner and it would not prejudice him to be shackled. Second, the trial court reasoned that defendant's apparent prior attempt to intimidate his attorney warranted it.

Although the decision to shackle a defendant is within the court's discretion, the decision made must be supported by evidence in the record. *People v Dunn*, 446 Mich 409, 425; 521 NW2d 255 (1994); see also *Banks*, 249 Mich App at 257. In *Banks*, a panel of this Court reversed the defendant's conviction because it found that the trial court abused its discretion when it required the defendant's witness, a prison inmate, to be shackled while testifying. *Banks*, 249 Mich App at 251, 257-258, 261. This Court held that the same analysis applicable to a decision to shackle a defendant applies to the decision to shackle a testifying witness. *Id.* at 257. And, absent a showing that the witness either threatened to escape, posed a danger to others in the courtroom, or threatened to disrupt the trial, he or she should not be shackled. *Id.* at 256-257. A mere statement of preference that the witness—or, in this case, the defendant—be shackled is insufficient. *Id.* at 258.

Similarly, in *People v Baskin*, 145 Mich App 526, 545-546; 378 NW2d 535 (1985), this Court held that the trial court abused its discretion when it ordered that the defendant be shackled during his trial. In *Baskin*, the defendant, a prison inmate, was convicted of two counts of assault on a prison employee. *Id.* at 529. Out of concern for the safety of others in the courtroom, the trial court ordered that Baskin be shackled during the trial. *Id.* at 545. In holding that this was an abuse of discretion, this Court reasoned that because there was no evidence that the defendant would not cooperate with the proceedings, attempt to escape, or presented a security risk to others, the trial court's decision was in error. *Id.* at 545-546. The *Baskin* Court also held that the trial court's error was not harmless and could not have been cured by an instruction to the jury. *Id.* at 546. The *Baskin* Court stated that "[t]his is a situation where actions speak louder than words. The mere shackling of the defendant in this case impinged upon defendant's credibility by indicating that defendant could not be trusted and prejudiced his right to a fair trial." *Id.*

Here, like in *Banks* and *Baskin*, the trial court erred when it held that defendant should be shackled during the trial. Other than defendant's status as a prisoner, there was no indication in

the record that defendant's behavior during his appearances in court justified a finding that he should be shackled. On appeal, the prosecutor argues that, when defendant's previous conduct is coupled with the reason for the request—that is, defendant's criminal history—and the fact that defendant's counsel expressed reservations, the trial court had an adequate basis for granting the request. This argument is unconvincing. As with the case in *Banks*, the prosecutor and defense counsel's statements were nothing more than statements of personal preference. Neither the prosecutor nor defense counsel brought to the court's attention a single incident during the court proceedings where defendant disrupted the proceeding, threatened the safety of others in the courtroom, or threatened to escape. Therefore, the trial court abused its discretion when it ordered defendant shackled without an adequate basis for doing so. Further, we conclude that this error prejudiced defendant's trial.<sup>1</sup>

The primary evidence at trial was a videotape of defendant in the prison yard. The video purportedly showed defendant handling a shank and then dropping it in the yard when approached by a guard. However, the video was not particularly clear and was apparently open to some interpretation. And defendant's theory was that a nearby prisoner had the weapon and tossed it in his vicinity just prior to the guard's approach and that the item shown in his hands on the video was not the shank at issue, but a different form of contraband. Thus, the evidence against defendant was not overwhelming and the case to a significant degree turned on the jury's understanding of the video evidence, which in turn depended on defendant's testimony. For that reason, defendant's credibility was a key factor in the weighing of the evidence.

“The presumption of innocence requires the garb of innocence, and regardless of the ultimate outcome, or of the evidence awaiting presentation, every defendant is entitled to be brought before the court with the appearance, dignity, and self-respect of a free and innocent man . . . .” *People v Shaw*, 381 Mich 467, 472-473; 164 NW2d 7 (1969), quoting *Eddy v People*, 115 Colo 488, 491-492; 174 P2d 717 (1946). By ordering defendant to be shackled before the jury, the trial court undermined the presumption of innocence and adversely affected defendant's credibility. See *Banks*, 249 Mich app at 256. And defendant's credibility was essential to his defense. Further, we do not agree that the nature of the offense and the fact that the jury knew that defendant was already incarcerated minimized the prejudice. Defendant's appearance in shackles suggested that defendant was particularly dangerous, even for a prisoner.

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<sup>1</sup> As noted, defendant's trial counsel did not object to the prosecutor's request to have defendant shackled and arguably might have approved the request. However, after the close of proofs, defendant asked to place an objection on the record to “being presented in front of the jury in leg irons and belly chains.” Because we conclude that defendant would be entitled to a new trial even if this error were unpreserved, see *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999), we decline to address whether the error was unpreserved or preserved constitutional error. We also decline to consider whether defendant's trial counsel could and did waive any claim of error with regard to defendant's appearance in shackles. Under the facts of this case, even if we were to conclude that defendant's trial counsel waived this issue, we would nevertheless conclude that that decision to agree to the shackling fell below an objective standard of reasonableness under prevailing professional norms and prejudiced defendant's trial. *Yost*, 278 Mich App at 387. Therefore, defendant would still be entitled to a new trial for ineffective assistance of counsel.

Presumably, a prisoner who is so dangerous that he must be shackled during trial is a prisoner who is more likely than the average prisoner to gain possession of a dangerous weapon while incarcerated. See *Ruimveld v Birkett*, 404 F3d 1006, 1016 (CA 6, 2005) (concluding that the Michigan Court of Appeals made an unreasonable application of the harmless error test and explaining that the fact that the prisoner-defendant “had to be shackled . . . might have further prejudiced his case in the eyes of the jurors who might have believed him to be a particularly dangerous or violent person, even among inmates.”). Hence, contrary to the prosecutor’s argument, we conclude that the particular nature of the charged offense made defendant’s appearance in the “garb of innocence” even more essential to a fair trial. Therefore, we cannot conclude that this error was harmless.

The trial court’s decision to shackle defendant without proper evidence to support that decision fell outside the range of reasonable and principled outcomes. *Yost*, 278 Mich App at 353. Because that error was not harmless, we reverse defendant’s conviction and remand for a new trial.

Given our resolution of this issue, we decline to address defendant’s claim that the trial court erred when it denied his request for a new attorney. We also decline to address defendant’s claim that the trial court improperly scored offense variable 19; if defendant is again convicted, he may present that argument in the first instance to the trial court. However, because defendant’s claims of error with regard to the habitual offender charge and the destruction of evidence are pertinent to the proceedings on remand, we shall address them.

Defendant argues that the trial court abused its discretion when it denied his motion to dismiss the habitual offender charge for lack of service. Service of process is complete upon mailing of a properly addressed letter that contains sufficient postage. MCR 2.107(C)(3). There is a rebuttable presumption that a properly addressed item reaches its desired destination. *Crawford v Michigan*, 208 Mich App 117, 121; 527 NW2d 30 (1994). Whether a party has produced sufficient evidence to rebut this presumption is a question of fact. *Stacey v Sankovich*, 19 Mich App 688, 694; 173 NW2d 225 (1969). A bare denial of service is insufficient to overcome the presumption of receipt. *Ins Co of North America v Issett*, 84 Mich App 45, 49; 269 NW2d 301 (1978).

In the present case, the trial court found that defendant had not overcome this presumption. And this Court affords great deference to a trial court’s factual findings. See, e.g., *Delph v Smith*, 354 Mich 12, 18; 91 NW2d 854 (1958). On appeal, defendant has failed to establish that the trial court’s finding was clearly erroneous.

In the alternative, defendant argues that if defense counsel received notice of the prosecutor’s intent to charge him as a habitual offender, then defense counsel’s failure to notify him of that fact until trial deprived him of effective assistance of counsel. “To establish ineffective assistance of counsel, the defendant must first show: (1) that counsel’s performance fell below an objective standard of reasonableness under prevailing professional norms, and (2) that there is a reasonable probability that, but for counsel’s error, the result of the proceedings would have been different.” *Yost*, 278 Mich App at 387. The effective counsel is presumed, and a defendant who challenges his counsel’s assistance bears a heavy burden of overcoming that presumption. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002).

It is undisputed that defense counsel had an obligation to inform defendant about the prosecutor's intent to charge defendant as a habitual offender. Defense counsel failed to do so until shortly before trial. Consequently, defendant was under the mistaken assumption that the prosecutor did not intend to charge him as a habitual offender; and, against his trial counsel's advice, defendant declined to accept a favorable plea agreement based on that assumption. At sentencing, defendant received a much greater sentence than he would have had he accepted the plea agreement. At a brief hearing before the trial court regarding his counsel's purported ineffective assistance, defendant stated that had he known that the prosecutor intended to charge him as a habitual offender, he would have accepted the plea agreement. However, the trial court was not required to accept the plea agreement, MCR 6.302(C)(3), and there is no evidence that the trial court would have accepted the deal and sentenced defendant accordingly. Consequently, defendant has not shown that more likely than not his trial counsel's failure to advise him about the habitual offender notice warrants relief. *Yost*, 278 Mich App at 387.

In a supplemental brief, defendant argues that he was also deprived of a fair trial when the trial court denied his motion to dismiss the case due to destruction of evidence. There is no general constitutional right to discovery, *People v Elston*, 462 Mich 751, 765; 614 NW2d 595 (2000), but disclosure of exculpatory material is mandated by due process principles. *People v Cox*, 268 Mich App 440, 448; 709 NW2d 152 (2005). Due process requires disclosure of evidence in the prosecutor's possession that is exculpatory and material, regardless of whether the defendant requests the disclosure. *People v Stanaway*, 446 Mich 643, 666; 521 NW2d 557 (1994). To establish a due process violation, a defendant must show: (1) that the state possessed evidence favorable to the defendant; (2) that the defendant did not possess the evidence and could not have obtained it with reasonable diligence; (3) that the prosecutor willfully or inadvertently suppressed the evidence; and (4) that if the evidence had been disclosed to the defendant, it is reasonably probable that the result of the proceedings would have been different. *Cox*, 268 Mich App at 448, citing *People v Lester*, 232 Mich App 262, 281; 591 NW2d 267 (1998). The loss of evidence with unknown probative value, which is thus only potentially exculpatory, denies due process only when the police act in bad faith. *Arizona v Youngblood*, 488 US 51, 57-58; 109 S Ct 333; 102 L Ed 2d 281 (1988).

Prior to trial, the prosecutor sought to introduce as evidence of defendant's guilt a video recording made of the incident from the prison recording system. Defendant challenged the admissibility of the video recording, claiming that the videotape was inaccurate and incomplete because it did not contain footage from the entire time he was in the prison yard. Defendant argued that it was important to his defense that the prosecutor provide him with the entire footage. Part of defendant's defense was that another inmate threw the weapon defendant was charged with possessing. Initially, the trial court ruled that the prosecutor must provide defendant with a video that contained footage from 10 minutes before and 10 minutes after defendant entered the prison yard, which the prosecutor agreed to do. However, the prosecutor later learned that it was the Department of Corrections' policy to record over videotapes within 10 days of being made. Consequently, the additional footage defendant requested had been recorded over 10 days after the date of the incident, which was three months before defendant requested the material and five months before the trial court ordered the prosecutor to provide defendant with the additional footage. Defendant then filed a motion to dismiss the charge against him claiming that the prosecutor, in bad faith, destroyed potentially exculpatory evidence.

Defendant bears the burden of showing that the evidence was exculpatory and that the police acted in bad faith. *People v Johnson*, 197 Mich App 362, 365; 494 NW2d 873 (1992). Defendant has failed to meet either burden. The videotape evidence provided to defendant contained all of the footage from the moment defendant was suspected of having a weapon until he left the prison yard. Thus, the video footage provided showed defendant walking through the prison yard toward the inmate who defendant claims was really in possession of the weapon and who threw the weapon at him. Because the videotape contained the footage necessary to either dispel or confirm defendant's defense, it cannot be said that the trial court abused its discretion when it held that the remaining video footage would not provide exculpatory evidence.

Even if we were to accept defendant's argument that the additional footage contained potentially exculpatory evidence, his claim must nevertheless fail. The failure to preserve evidence that may potentially have exculpatory value only violates due process when it was destroyed in bad faith. *Youngblood*, 488 US at 57-58. The routine destruction of evidence pursuant to departmental policy where the purpose is not to destroy evidence a defendant needs to prove his or her defense is not bad faith. *People v Petrella*, 124 Mich App 745, 753; 336 NW2d 761 (1983). Hence, the trial court did not err when it denied his motion to dismiss based on the destruction of evidence.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Brian K. Zahra  
/s/ William C. Whitbeck  
/s/ Michael J. Kelly