

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DOUGLAS CARL HARMON,

Defendant-Appellant.

UNPUBLISHED

October 23, 2003

No. 236786

Muskegon Circuit Court

LC No. 99-043830-FH

Before: Cooper, P.J., and Fitzgerald and Kelly, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of absconding or forfeiting bond in a criminal proceeding, MCL 750.199a. He was sentenced as a habitual offender, second offense, MCL 769.10, to twenty-eight to seventy-two months' imprisonment for his conviction. Defendant appeals as of right. We affirm.

Defendant was arrested and charged with creating child sexually abusive material in July 1999.¹ He was subsequently arraigned on July 27, 1999, and bond was set at \$25,000, with conditions. As one of the conditions, defendant was required to personally appear for any examinations, arraignments, trial, or sentencing. Defendant posted bond through a bondsman and was released on bond on July 28, 1999. He was informed, verbally and in writing, that his preliminary examination was scheduled for August 9, 1999. At trial, defendant conceded that he was aware of the date and time set for the preliminary examination.

Defendant testified that after he was released on bond, he received threatening telephone calls and several people appeared on his property without permission. This caused him to feel threatened and afraid for his life. On August 2, 1999, defendant went home from work early, packed his vehicle, and left the state. He was gone for several weeks and failed to appear for his preliminary examination. A bench warrant was issued and three officers went to defendant's property and searched for him without success. Defendant's release was revoked and his bond was forfeited.

¹ See *People v Harmon*, 248 Mich App 522; 640 NW2d 314 (2001).

Defendant's son, Chris Harmon, testified that defendant quitclaimed his property to him after defendant's arrest. According to Chris, defendant indicated that he was going "down" and spoke about leaving. Defendant subsequently departed and contacted Chris two weeks later by telephone. Chris stated that defendant never mentioned his court date or indicated that he planned to return. Defendant never asked Chris about further threats being made against him, nor did he indicate that he fled because he felt threatened. Chris denied receiving any threats after moving onto the property.

In September 1999, defendant returned to this state having altered his appearance. He contacted Chris and asked to stay on the premises for a few days. Chris testified that defendant never indicated that he was planning to turn himself over to the police. Chris' wife telephoned the police and defendant was later arrested on the property. Defendant was tried and convicted on the underlying felony charges.

I. Evidentiary Hearing

Defendant initially argues that the trial court erred by failing to conduct an evidentiary hearing on his claims of ineffective assistance of counsel, which were raised in his motion for a new trial. Notably, however, defendant never moved for a *Ginther*² hearing.

In *Ginther*, the Court stated:

A defendant who wishes to advance claims that depend on matters not of the record can properly be required to seek at the trial court level an evidentiary hearing for the purpose of establishing his claims with evidence as a precondition to invoking the processes of the appellate courts except in the rare case where the record manifestly shows that the judge would refuse a hearing^[3]

A trial court is not required to sua sponte order an evidentiary hearing.⁴ Here, not only did defendant fail to request an evidentiary hearing, but his new trial motion failed to adequately raise viable claims of ineffective assistance of counsel. To prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for defense counsel's errors, there was a reasonable probability that the result of the proceedings would have been different.⁵ In his motion and supporting brief, defendant did not argue or show that, but for counsel's alleged errors, there was a reasonable probability of acquittal. Accordingly, we find no error. We likewise decline defendant's request to remand this case for an evidentiary hearing. This Court previously denied defendant's motion to remand for such a hearing and the current request is untimely.⁶

² 390 Mich 436; 212 NW2d 922 (1973).

³ *Id.* at 443-444.

⁴ MCR 2.119(E)(2).

⁵ *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001).

⁶ See MCR 7.211(C)(1).

II. Jury Instructions

Defendant next challenges the trial court's decision to deny his request to instruct the jury on a lesser-included misdemeanor offense. Specifically, he argues that the offense of breaking or escaping from lawful custody while at large on bail, MCL 750.197a, is a lesser included offense of absconding on bond, MCL 750.199a. We decline to consider this issue because defendant failed to provide any authority or analysis in support of his position that the requested misdemeanor is a lesser-included offense of the charged felony.⁷ We also note that the case cited by defendant with regard to when a trial court must instruct on a lesser included misdemeanor, *People v Stephens*,⁸ was overruled in *People v Cornell*.⁹

III. Prosecutorial Misconduct

Defendant further contends that he is entitled to a new trial because the prosecutor improperly elicited evidence that defendant was convicted of the charges underlying the arrest for which he was on bond when he absconded. Prosecutorial misconduct claims are reviewed case by case, examining any remarks in context, to determine if the defendant received a fair and impartial trial.¹⁰ Because defendant failed to object to this alleged misconduct, our review is limited to plain error affecting his substantial rights.¹¹

Defendant argues that evidence of his conviction was inadmissible under MRE 609 and, therefore, could not be used for impeachment purposes. But such evidence may be admissible for purposes other than impeaching the credibility of a witness, such as to rebut a defendant's claims or statements.¹² Defendant's theory was that he fled because he was under duress, caused by the county prosecutor's false portrayal of him and his criminal charges. He claimed that the prosecutor's television comments led to public harassment. And he professed innocence with respect to the underlying charges. In response, and without specifying the nature of the charges, the prosecutor elicited on redirect that defendant was actually convicted of those charges. It was defendant, not the prosecutor, who later brought to light the nature of the underlying charges.

Because this evidence was not used to impeach or attack the credibility of a witness, defendant has failed to show plain error under MRE 609. The evidence of defendant's conviction was raised to rebut the inference that defendant was not guilty of the underlying charges, was improperly portrayed in the media, and fled under duress because of a false

⁷ See *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998).

⁸ 416 Mich 252; 330 NW2d 675 (1982).

⁹ 466 Mich 335, 357-358; 646 NW2d 127 (2002).

¹⁰ *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001).

¹¹ *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

¹² *People v Taylor*, 422 Mich 407, 414; 373 NW2d 579 (1985).

portrayal. Evidence that is admissible for one purpose is not inadmissible simply because its use for a different purpose would have been precluded.¹³

IV. Mistrial

Next, defendant alleges that he was prejudiced when two jurors observed him outside the courtroom wearing handcuffs, leg irons, and a prison jacket. We disagree. We review the trial court's decision to deny a mistrial for an abuse of discretion.¹⁴

A mistrial should be granted only if an irregularity is prejudicial to a defendant's rights and impairs his ability to receive a fair trial.¹⁵

In general, freedom from shackling of a defendant during trial has long been recognized as an important component of a fair and impartial trial. However, this rule does not extend to circumstances in which a defendant may be shackled outside a courtroom to prevent escape. In addition, where a jury inadvertently sees a shackled defendant, there must be some showing that prejudice resulted.¹⁶

Here, two jurors inadvertently observed defendant being escorted to the courtroom on the second day of trial. The trial court independently questioned them and both stated that their neutrality was not affected. The two jurors were then instructed not to share their observations with the other jurors and were given further cautionary instructions. Under the circumstances, the inadvertent observations by the jurors were insufficient to establish prejudice. The trial court did not abuse its discretion in denying defendant's motion for a mistrial.

V. Sentencing Guidelines

Defendant also asserts that the trial court erroneously scored ten points for offense variable nineteen (OV 19).¹⁷ We are required to affirm a sentence that falls within the guidelines range absent an error in the scoring of the sentencing guidelines or reliance upon inaccurate information.¹⁸ A scoring error that does not change the guidelines calculation or the sentence constitutes harmless error.¹⁹ Here, defendant concedes that even if ten points are deducted for OV 19, his twenty-eight month minimum sentence would still fall within the applicable

¹³ *People v Rice (On Remand)*, 235 Mich App 429, 441; 597 NW2d 843 (1999).

¹⁴ *People v Alter*, 255 Mich App 194, 205; 659 NW2d 667 (2003).

¹⁵ *Id.*

¹⁶ *People v Oscar Moore*, 164 Mich App 378, 384-385; 417 NW2d 508 (1987) (citations omitted).

¹⁷ MCL 777.49.

¹⁸ *People v Libbett*, 251 Mich App 353, 363-364; 650 NW2d 407 (2002).

¹⁹ Cf. *People v Johnson*, 202 Mich App 281, 290; 508 NW2d 509 (1993).

guidelines range.²⁰ Because any error in the scoring of OV 19 would be harmless, we need not determine whether OV 19 was improperly scored. The issue is moot.²¹

VI. Ineffective Assistance of Counsel

Defendant, in propria persona, claims that his trial counsel rendered ineffective assistance. Because no *Ginther* hearing was held below, our review is limited to the existing record.²² An unpreserved constitutional error warrants reversal only when it is plain and affects a defendant's substantial rights.²³ Effective assistance of counsel is presumed and defendant bears a heavy burden to prove otherwise.²⁴ To establish ineffective assistance of counsel, defendant must prove: (1) that his counsel's performance was so deficient that he was denied his Sixth Amendment right to counsel; and (2) that this deficient performance prejudiced him to the extent there is a reasonable probability that but for counsel's error, the result of the proceedings would have been different.²⁵ Defendant must also overcome the strong presumption that his counsel's performance was sound trial strategy.²⁶

Defendant initially claims that his counsel was ineffective for failing to provide meaningful, confidential, and private communications. The alleged deficiencies in this regard are not apparent from the record presented to this Court. Indeed, defendant has presented only his version of the facts, unsubstantiated by affidavit. Defendant has further failed to demonstrate that, but for the alleged deficiencies by counsel, the result would have been different.²⁷

Defendant also cites counsel's failure to present copies of the television broadcasts and newspaper articles about his case to support his duress defense. But defendant has not overcome the strong presumption that the decision to refrain from presenting clearly prejudicial evidence concerning the nature of the underlying offenses was a matter of trial strategy.²⁸ To the extent defendant contends that counsel was ineffective for failing to introduce a copy of the police report on his stolen motorcycle, we again disagree. Police reports are generally hearsay and are inadmissible if used to prove the truth of their contents.²⁹ In any event, we note that defendant testified at trial that a motorcycle was stolen from his property. Defendant cannot establish that

²⁰ MCL 777.67.

²¹ *People v Briseno*, 211 Mich App 11, 17; 535 NW2d 559 (1995).

²² *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

²³ *Carines*, *supra* at 763-764.

²⁴ *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

²⁵ *Carbin*, *supra* at 599-600.

²⁶ *Id.* at 600.

²⁷ *Id.*

²⁸ *Id.*

²⁹ See *People v Herndon*, 246 Mich App 371, 410-411; 633 NW2d 376 (2001).

counsel's conduct in failing to offer inadmissible hearsay evidence was objectively unreasonable, or that, but for counsel's conduct, the result at trial would have been different.³⁰

Defendant further alleges that defense counsel improperly failed to elicit evidence that several of the alleged victims of the underlying crimes came to his property and tried to extort money from him. The record does not support defendant's claim that any of the alleged victims attempted to extort money from him. Defendant testified that he could not identify any of the people who came on his property and caused him to feel threatened. Further, when defendant was asked on direct examination whether anything disturbing occurred after his release on bond, he never mentioned any alleged extortion attempts. Because the record does not substantiate defendant's argument, this claim must fail.

Defendant next argues that counsel was ineffective for failing to call several "res gestae" and other witnesses. Specifically, defendant cites the following individuals: the county prosecutor, some of the minor victims of the underlying charges, and a retired deputy who participated in defendant's arrest. Defendant, however, fails to set forth any relevant authority in support of his claim that these witnesses were res gestae witnesses or were otherwise necessary to present his case.³¹ More importantly, trial counsel's decisions with respect to which witnesses to call or question are presumed to be matters of trial strategy.³² Because defendant has not shown that defense counsel's failure to call these identified witnesses deprived him of a substantial defense, this claim is without merit.³³

Defendant also opines that counsel was ineffective for failing to move to preclude evidence of his convictions for the underlying crimes. As previously discussed, this evidence was relevant to rebut defendant's theory that he was innocent of those charges, was wrongly portrayed in the media, and was operating under duress when he fled.³⁴ Defense counsel is not required to make frivolous or meritless motions.³⁵ Similarly, we do not find that counsel was deficient for failing to move to preclude the jury from hearing a tape of his arraignment on the underlying charges. This tape was played so the jury could hear defendant being instructed on the date and time of his preliminary examination. Contrary to defendant's claims, the record does not show that the jury heard the portion of the tape wherein the trial court read the charges or explained the possible penalties. While the tape may have been cumulative, we are not persuaded that counsel's failure to object affected the outcome of trial.³⁶

³⁰ *Carbin, supra* at 600.

³¹ See *Kelly, supra* at 640-641.

³² *Rockey, supra* at 76-77.

³³ *People v Daniel*, 207 Mich App 47, 58; 523 NW2d 830 (1994).

³⁴ *Taylor, supra* at 414.

³⁵ *People v Riley, (After Remand)* 468 Mich 135, 142; 659 NW2d 611 (2003).

³⁶ *Carbin, supra* at 600.

Because defense counsel committed no errors of consequence, which combined to deprive defendant of a fair trial, the cumulative error doctrine is inapplicable in this case.³⁷

Affirmed.

/s/ Jessica R. Cooper
/s/ E. Thomas Fitzgerald
/s/ Kirsten Frank Kelly

³⁷ *People v Cooper*, 236 Mich App 643, 659-660; 601 NW2d 409 (1999).