

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JOSE TORREZ, a/k/a JAIME GONZALES,

Defendant-Appellant.

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UNPUBLISHED

December 26, 2000

No. 211440

Ingham Circuit Court

LC No. 97-072899 FC

Before: Doctoroff, P.J., and O'Connell and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions by a jury of assault with intent to murder, MCL 750.83; MSA 28.278, assault with intent to do great bodily harm less than murder, MCL 750.84; MSA 28.279, and possession of a firearm in the commission of a felony, MCL 750.227b; MSA 28.424(2). The trial court sentenced defendant as a third habitual offender under MCL 769.11; MSA 28.1083 to concurrent terms of twenty to forty-five years' imprisonment for the assault with intent to murder conviction, and 160 months to twenty years' imprisonment for the assault with intent to do great bodily harm conviction, consecutive to the mandatory two-year sentence for the felony-firearm conviction. We affirm defendant's convictions, but vacate his assault with intent to do great bodily harm sentence, remand for resentencing, and dismiss the supplemental information charging defendant as an habitual offender.

Defendant first argues that the trial court abused its discretion in excluding evidence regarding a prior, unrelated incident where a friend of defendant's died after being forcibly removed from a bar by bouncers. Defendant claims that evidence of the prior incident would help the jury assess and understand defendant's state of mind and thought process at the time of this incident. Defendant further claims that the trial court abused its discretion in denying his motion for new trial on the same basis. We disagree.

This Court reviews a trial court's decision to deny a motion for new trial, and its ruling to admit or exclude evidence, for an abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998); *People v Torres (On Remand)*, 222 Mich App 411, 415; 564 NW2d 149 (1997). An abuse of discretion exists when an unprejudiced person, considering the facts upon which the trial court acted, would say that there was no justification or excuse for the ruling. *People v Reigle*, 223 Mich App 34, 37; 566 NW2d 21 (1997).

Generally, relevant evidence is admissible and irrelevant evidence is inadmissible. MRE 402. “Relevant evidence” is “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” MRE 401; *People v Mills*, 450 Mich 61, 66-67; 537 NW2d 909, modified on other grounds 450 Mich 1212 (1995). However, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. MRE 403. “Unfair prejudice” exists when relevant evidence might be given undue or preemptive weight by the jury or when it would be inequitable to allow use of such evidence. *People v Harvey*, 167 Mich App 734, 745-746; 423 NW2d 335 (1988).

Upon review of the record, we agree with the trial court’s conclusion that the proffered evidence had only marginal probative value in establishing defendant’s state of mind at the time he shot the bouncers, and any probative value was substantially outweighed by the danger of unfair prejudice and confusion of the issues. While defendant’s state of mind at the time of the assault was a relevant issue at trial, evidence that defendant had a friend who died after being ejected from a different bar by different security personnel did not tend to prove or disprove that defendant was so gravely concerned for his brother’s welfare that the use of deadly force was necessary. Moreover, defendant introduced other testimony relating to defendant’s state of mind at the time of the incident from which the jurors could infer that defendant believed his brother was in danger. See *Haberkorn v Chrysler Corp*, 210 Mich App 354, 361-362; 533 NW2d 373 (1995) (whether fact in issue can be proven in another way with fewer harmful collateral effects should be considered when balancing the probative value against the prejudicial effect of evidence.)

Further, even if the evidence had some probative value, the potential for prejudice and jury confusion was great. Injecting evidence about the death of another individual several years before the instant offense, at a different location, involving different security personnel, invited the jury to consider unrelated, collateral issues that would detract from their focus on the facts and evidence in the instant case. General considerations of how patrons are treated at bars and whether the conduct of security personnel is appropriate were not issues before the jury. Accordingly, the trial court did not abuse its discretion in excluding the challenged evidence.<sup>1</sup>

Defendant next asserts that the trial court abused its discretion by denying his request to remove defense witness Gonzales’ handcuffs while testifying. We agree, but find that such error was harmless and does not warrant reversal.

A trial court has broad discretion regarding matters of trial procedure, such as the shackling of witnesses, and the trial court’s decision to restrain a witness is reviewed for an abuse of discretion under the totality of the circumstances. *People v Dixon*, 217 Mich App 400, 404-405; 552 NW2d 663 (1996). Here, however, both parties agree that the trial court was unaware of its discretion to remove Gonzales’ handcuffs, and that the trial court’s failure to exercise its discretion was improper.<sup>2</sup> The prosecution concedes that there was no showing that Gonzales was a safety risk or that he might attempt to escape, and that the presence of a deputy should have been sufficient to allow the witness to testify without handcuffs. Given these facts, we

assume without deciding that the trial court's refusal to remove Gonzales' handcuffs while he was testifying, or at least hold a hearing to determine whether the danger of escape or safety concerns warranted removal of the handcuffs, was an abuse of discretion.<sup>3</sup> Accordingly, our review consists of determining whether the trial court's error was harmless beyond a reasonable doubt. *People v Graves*, 458 Mich 476, 482; 581 NW2d 229 (1998).

We conclude that the trial court's refusal to remove Gonzales' handcuffs while testifying at trial was harmless error. *Graves, supra*. This case involved a defense witness in restraints, not a defendant, and thus, the prejudice to defendant was reduced. See *Kennedy v Cardwell*, 487 F2d 101, 105, n 5 (CA 6, 1973) (prejudice to defendant is much less when defense witness is shackled than when defendant is shackled because defense witnesses do not directly affect the presumption of innocence). In addition, the trial court instructed the jury that it was not to consider the fact that Gonzales was wearing jail clothing and handcuffs when assessing his credibility. Jurors are presumed to follow the instructions of the court. *Torres, supra* at 423. Finally, as the trial court noted, Gonzales' testimony was insignificant and could not have affected the jury's verdict. Gonzales testified that he was forcibly ejected from the bar, he passed out as he was being carried out, he was intoxicated and did not remember most of what happened, and he was unconscious during the shooting so he did not hear any gunshots or see any fighting. Moreover, another defense witness who was unrestrained and in plain clothing corroborated the pertinent testimony offered by Gonzales regarding the incident, thus, Gonzales' testimony was largely cumulative. See *People v Simon*, 174 Mich App 649, 657-658; 436 NW2d 695 (1989); *People v Taylor*, 159 Mich App 468, 490-491; 406 NW2d 859 (1987). In light of the relative insignificance of Gonzales' testimony, the other evidence in support of defendant's guilt, and the trial court's instruction for the jury to disregard the handcuffs, we conclude that the trial court's refusal to remove the handcuffs while Gonzales was testifying was harmless error. *Graves, supra*. See also *United States v Esquer*, 459 F2d 431, 433 (CA 7, 1972) (in the absence of a showing of actual prejudice resulting from the use of handcuffs on a witness testifying in court, the defendant's conviction must stand).<sup>4</sup>

In a related argument, defendant claims that his counsel was ineffective for failing to object to Gonzales' jail clothing and shackles. Defendant failed to request an evidentiary hearing regarding his trial counsel's performance and thus failed to establish a factual record to support his allegations. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). Therefore, this Court's review of defendant's ineffective assistance of counsel claim is limited to any mistakes apparent from the existing record. *People v Price*, 214 Mich App 538, 547; 543 NW2d 49 (1995). Defendant must show that trial counsel's performance fell below an objective standard of reasonableness, and that his representation so prejudiced defendant that he was denied his right to a fair trial. *People v Pickens*, 446 Mich 298, 338; 521 NW2d 797 (1994). Defendant must also overcome the strong presumption that counsel provided effective assistance and that the challenged actions constituted sound trial strategy. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995).

In light of our conclusion that the trial court's failure to remove Gonzales' handcuffs while testifying was harmless error, we find no prejudice to defendant resulting from counsel's failure to object to the situation. *Strickland v Washington*, 466 US 668, 697; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *Pickens, supra* at 303; *People v Crawford*, 232 Mich App 608, 615; 591

NW2d 669 (1998). Moreover, defendant himself objected to the matter at trial effectively preserving the issue for appellate review. Finally, defendant has failed to show a reasonable probability that, but for counsel's failure to object, the verdict would have been different. *People v Pubrat*, 451 Mich 589, 596; 548 NW2d 595 (1996). Accordingly, defendant's claim must fail.

Next, defendant contends that the jury was improperly subjected to extraneous influences and coercion by the jury foreman during deliberations and that such impropriety denied him a fair trial. We disagree.

Generally, jurors may not impeach their own verdict by subsequent affidavits showing misconduct in the jury room. *People v Budzyn*, 456 Mich 77, 91; 566 NW2d 229 (1997). Once a jury has been polled and discharged, its members may not challenge mistakes or misconduct inherent in the verdict. *Id.* Rather, oral testimony or affidavits may only be received on extraneous or outside errors, such as undue influence by outside parties. *Id.* “[Juror] [m]isconduct can be demonstrated with evidence pertaining to outside or extraneous influences, but cannot be demonstrated with evidence indicating matters that inhere in the verdict, such as juror thought processes and interjuror inducements.” *People v Messenger*, 221 Mich App 171, 175; 561 NW2d 463 (1997).

Upon review of the record, we do not find that the allegations brought to the trial court's attention constituted impermissible extraneous influences. Rather, we conclude, as did the trial court, that the concerns raised by the juror represented the normal expressions of personal opinion that undoubtedly occur during the deliberations of almost any jury. While the juror's statement that because defendant had a tattoo he probably participated in a gang may have been an inappropriate expression of the juror's personal opinion, reversal of a jury verdict on the basis that a juror offered damaging personal opinions during the course of deliberations would result in virtually every jury verdict – civil or criminal – being open to challenge. See *Hoffman v Spartan Stores, Inc.*, 197 Mich App 289, 291; 494 NW2d 811 (1992) (“We will not reward counsel's postdischarge inquiries regarding the internal thought processes of the jurors. The havoc and potential for abuse would be immense if we were to allow counsel to open the jury room door after the jury has been discharged and examine, analyze, and impeach the internal thought processes of the jury”); *People v Smith*, 106 Mich App 203, 211-212; 307 NW2d 441 (1981). In any event, even if the juror's tattoo remark was improper, defendant failed to establish that there was a real and substantial possibility that the isolated comment affected the jury's verdict. See *Bydzyń*, *supra* at 92.

Defendant next argues that the trial court abused its discretion by denying defendant's request for appointment of a new attorney or for an adjournment to retain substitute counsel. We disagree. A trial court's decision regarding substitution of counsel or a motion for adjournment is within the sound discretion of the trial court and will not be disturbed on appeal absent an abuse of that discretion. *People v Peña*, 224 Mich App 650, 660; 569 NW2d 871 (1997), modified on other grounds 457 Mich 885 (1998).

An indigent defendant is guaranteed the right to counsel; however, he is not entitled to have an attorney of his choice simply by requesting that his appointed attorney be replaced. *People v Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991). Appointment of substitute counsel

is warranted only upon a showing of good cause and where substitution will not unreasonably disrupt the judicial process. *People v Ginther*, 390 Mich 436, 441; 212 NW2d 922 (1973); *Mack, supra* at 14; *People v Jones*, 168 Mich App 191, 194; 423 NW2d 614 (1988). Good cause exists where a legitimate difference of opinion develops between a defendant and his appointed counsel with regard to a fundamental trial tactic. *People v Williams*, 386 Mich 565, 573; 194 NW2d 337 (1972); *Mack, supra*.

Our thorough review of the record demonstrates that defendant did not establish good cause to support his request for substitute appointed counsel. While the record reflects defendant's dissatisfaction with the general manner in which defense counsel was handling his case, defendant failed to make any showing that there was a legitimate disagreement with his counsel over fundamental trial tactics. *Mack, supra* at 14; *Williams, supra* at 565. Instead, defendant merely asserted his belief that counsel was not interested in his case. Contrary to defendant's contention, the record shows that counsel presented two defense witnesses, effectively cross-examined prosecution witnesses, and presented a cogent and vigorous defense. We are not convinced that the trial court's refusal to appoint new counsel was an abuse of discretion.

We also find no merit to defendant's claim that the trial court abused its discretion in denying defendant's request for an adjournment of trial to retain substitute counsel. Defendant's request came at a very late stage in the trial when only one witness and closing arguments remained. The trial court properly concluded that to adjourn trial at that time would be "an absolutely appalling waste of resources and there's no good cause at all shown for it." Furthermore, when asked the name of substitute counsel defendant intended to retain, defendant initially refused to disclose the attorney's name and then inaccurately stated the attorney's name only to be corrected by appointed counsel. In addition, when asked by the trial court when substitute counsel would be available to appear, defendant first stated "[s]oon as whenever," but when pressed by the trial court, defendant finally indicated that he would need to adjourn the case over the weekend without any further indication as to when substitute counsel could appear. On this record, the trial court did not abuse its discretion in denying defendant's request for an adjournment to obtain substitute counsel.

Defendant raises three additional issues in his supplemental brief filed in propria persona. Defendant first argues that his convictions should be reversed because the prosecution presented insufficient evidence to sustain his assault with intent to murder and assault with intent to do great bodily harm convictions. Specifically, defendant contends that the prosecution failed to present sufficient evidence that defendant possessed the requisite intent to kill or intent to do great bodily harm. We disagree.

This Court reviews a sufficiency of the evidence challenge by viewing the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748, amended on other grounds 441 Mich 1201 (1992); *People v Hutner*, 209 Mich App 280, 282; 530 NW2d 174 (1995). This Court should not interfere with the trier of fact's role of determining the weight of the evidence or the credibility of witnesses. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). Circumstantial evidence and

reasonable inferences which arise from the evidence can constitute satisfactory proof of the elements of the crime. *People v Truong (After Remand)*, 218 Mich App 325, 337; 553 NW2d 692 (1996). Because of the difficulty in proving an actor's state of mind, minimal circumstantial evidence and the reasonable inferences that can be derived therefrom constitute sufficient evidence of intent to kill. *People v McRunels*, 237 Mich App 168, 181; 603 NW2d 95 (1999).

The elements of assault with intent to commit murder are: (1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder. *McRunels, supra* at 181; *People v Barclay*, 208 Mich App 670, 674; 528 NW2d 842 (1995). The elements of assault with intent to do great bodily harm less than murder are: "(1) an attempt or offer with force or violence to do corporal hurt to another (an assault), (2) coupled with an intent to do great bodily harm less than murder." *People v Pena*, 224 Mich App 650, 659; 569 NW2d 871 (1997), modified and remanded on other grounds 457 Mich 885; 586 NW2d 925 (1998).

Viewed in a light most favorable to the prosecution, we find there was sufficient evidence to sustain defendant's convictions of assault with intent to murder and assault with intent to cause great bodily harm less than murder. The testimony at trial revealed that defendant exited the bar after his brother was forcibly ejected, walked directly toward Byrd, one of the bouncers, and pushed him backwards so that he lost his balance. Byrd and Cryblsky, another bouncer, both testified that they saw defendant move his hand toward his waistband and they tried unsuccessfully to pin down defendant's arms. Defendant then fired two gunshots striking Byrd in the left knee. Cryblsky testified that he was afraid he would be shot so he ran around the corner of the building. Witzke, another bouncer, saw defendant chase Cryblsky and point a gun at Cryblsky's head. Witzke followed defendant and tried to grab his hand, but defendant pushed the gun toward Witzke's midsection and fired the gun twice. As Witzke again tried to grab the gun away, defendant fired several more shots striking Witzke's left arm at point blank range. Defendant continued to struggle with the bouncers even after they had been shot, and further resisted the state troopers who took him into custody. The evidence additionally established that defendant's semi-automatic gun (which required defendant to squeeze the trigger each time he wanted to fire or hold the trigger back in which case the gun would repeatedly fire) held between seven and twelve rounds and the clip was entirely empty when the police retrieved the gun from defendant. Finally, testimony from the treating physician established that although neither bullet-wound was immediately life-threatening, Byrd's wound could have caused lead poisoning and Witzke's wound could have cut off blood flow and resulted in the loss of his arm had the bullets not been immediately removed. On this record, we find there was ample evidence to permit a rational trier of fact to find that the requisite intent for assault with intent to murder Witzke and assault with intent to do great bodily harm to Byrd was proven beyond a reasonable doubt. *Wolfe, supra*.

Defendant next argues that his habitual sentences should be vacated because the prosecution failed to file a timely supplemental information charging defendant as an habitual offender. The prosecutor does not dispute that the habitual offender notice was untimely; however, the prosecutor contends that resentencing is unnecessary because defendant's assault with intent to commit murder sentence was within the sentencing guidelines range and not affected by the habitual offender notice, and defendant's assault with intent to cause great bodily harm sentence, although invalid, was subsumed by the concurrent assault with intent to commit

murder sentence which was longer. We dismiss the supplemental information, vacate defendant's assault with intent to do great bodily harm sentence, and remand for resentencing.

As already noted, the parties do not dispute that the supplemental information charging defendant as an habitual offender was untimely because it was filed more than twenty-one days after the filing of the original information. 769.13(1); MSA 28.1085(1)<sup>5</sup>; *People v Bollinger*, 224 Mich App 491, 492-493; 569 NW2d 646 (1997). A trial court does not have authority to sentence a defendant pursuant to an habitual supplementation that is not filed within the twenty-one-day time limit. See *People v Ellis*, 224 Mich App 752, 757; 569 NW2d 917 (1997). A sentence enhanced pursuant to an untimely habitual offender charge may be deemed invalid and set aside. See MCR 6.429(1); *People v Miles*, 454 Mich 90; 559 NW2d 299 (1997); *In re Jenkins*, 438 Mich 364, 368; 475 NW2d 279 (1991).

However, because defendant's assault with intent to commit murder sentence of twenty to forty-five years was within the sentencing guidelines range and enjoys a presumption of proportionality, *People v Hogan*, 225 Mich App 431, 437; 571 NW2d 737 (1997), we agree with the prosecution that the supplemental information did not affect the trial court's sentencing decision, and we find no basis to vacate this sentence or remand for resentencing.<sup>6</sup> On the other hand, defendant's assault with intent to do great bodily harm sentence of 160 months to twenty years was clearly enhanced pursuant to the habitual offender charge and, thus, we vacate this sentence as invalid and remand for resentencing. *Miles*, *supra*. Finally, we order that the supplemental information be dismissed.<sup>7</sup> *Bollinger*, *supra*.

Lastly, defendant contends that he received ineffective assistance of trial counsel by counsel's failure to investigate and assert a viable duress defense, failure to file a motion for discovery, failure to properly advise defendant of his right to testify, and failure to object to improper remarks by the prosecutor. We disagree.

As noted above, because defendant failed to move for a *Ginther* hearing below on the issue of ineffective assistance of counsel, our review is limited to mistakes apparent on the existing record. *People v Darden*, 230 Mich App 597, 604; 585 NW2d 27 (1998). After a thorough review of the record, we find that defendant has failed to demonstrate that trial counsel's performance was deficient or that counsel's representation deprived him of a fair trial.

First, we find no merit to defendant's claim that counsel was ineffective for failing to investigate and assert a duress defense. Trial counsel's choice of what defenses to present at trial was a matter of trial strategy and this Court will not second-guess counsel's decision. *People v Steward (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996). Defendant's theory of the case at trial was that he was defending his brother and he was too intoxicated to form the requisite intent to kill or do great bodily harm. Trial counsel represented defendant consistent with those theories and the trial court instructed the jury in accordance with those theories and defenses. That trial counsel's strategy proved unsuccessful does not render his performance deficient. *Id.* Furthermore, the defense of duress was inapplicable where the evidence in this case did not reasonably establish that defendant was forced or coerced into assaulting the bouncers in order to prevent death or serious bodily harm to himself or his brother. See *People v*

*Terry*, 224 Mich App 447, 453; 569 NW2d 641 (1997). Counsel was not ineffective for failing to assert the defense of duress.

Defendant also claims that trial counsel was ineffective for failing to move for discovery. However, defendant has failed to articulate what additional materials his counsel should have obtained, or what information he sought to discover in those materials. Instead, defendant advances unsupported and conclusory assertions that additional discovery *could* have assisted counsel in conducting a better cross-examination of the witnesses. Defendant has inadequately presented this claim by failing to support his argument with particular facts and legal authority in support of his claim, and has therefore abandoned this issue on appeal. *People v Jones (On Rehearing)*, 201 Mich App 449, 457; 506 NW2d 542 (1993). In any event, the existing record demonstrates that defense counsel diligently pursued discovery.

Next, we reject defendant's claim that he was not advised of his "absolute right to testify" at trial. Our review of the record reveals that defendant was fully informed by trial counsel of his "absolute" right to testify, defendant acknowledged his right but chose not to exercise it, and defendant agreed that he was not pressured into his decision. After a lengthy exchange between defendant, counsel, and the trial court concerning defendant's right to testify, the trial court explicitly found that defendant voluntarily chose not to exercise his right to testify in his own defense. Trial counsel was not ineffective in this regard.

Finally, we find defendant's claim that counsel was ineffective for failing to object to allegedly improper remarks by the prosecutor to be without merit. We have reviewed the challenged remarks and are satisfied that counsel's failure to object did not constitute ineffective representation because either an objection was not warranted under the circumstances, see *People v Armstrong*, 175 Mich App 181, 186; 437 NW2d 343 (1989) (counsel is not ineffective for failing to make a futile or meritless objection), or counsel's decision constituted sound trial strategy with which we decline to interfere. *Stanaway*, *supra* at 688. Moreover, defendant has failed to demonstrate how he was prejudiced by the prosecutor's remarks or that the result of the trial would have been different had trial counsel objected. *Pickens*, *supra*; *People v Crawford*, 232 Mich App 608, 615; 591 NW2d 669 (1998).<sup>8</sup>

Defendant's convictions are affirmed, his assault with intent to cause great bodily harm sentence is vacated, we remand for resentencing on that conviction, and the supplemental information charging defendant as an habitual offender is dismissed. We do not retain jurisdiction.

/s/ Martin M. Doctoroff

/s/ Peter D. O'Connell

/s/ Kurtis T. Wilder

<sup>1</sup> To the extent that defendant argues that evidence of his friend's death was admissible to show that, armed with that information, any reasonable person would have acted like defendant, we note that this basis for admission of the evidence was neither raised nor argued before the trial court. Defendant's sole argument at trial was that the evidence was admissible to show his subjective state of mind at the time of the assault, that in light of his friend's death, he believed



his brother was in grave danger warranting the use of deadly force. Therefore, because defendant's alternative grounds for admission of the evidence is raised for the first time on appeal, this issue is not preserved and we decline to review the claim. See *People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993); *People v Wyngaard*, 151 Mich App 107, 112; 390 NW2d 694 (1986) (argument raised for first time on appeal is not preserved for appellate review).

<sup>2</sup> In response to defendant's inquiry into why Gonzales was handcuffed, the trial court simply responded that "[i]t's because he's in custody." At page 12 of the prosecution's brief on appeal, the prosecution states that "it is not clear that the trial court was aware he had discretion to exercise." In footnote 2, the prosecution admits that "[t]he court did not consider whether he had any other option than instructing the jury to ignore the handcuffs and to judge his testimony the same as any other witness."

<sup>3</sup> Michigan courts have long held that restraints should only be permitted to prevent escape of the prisoner, to prevent the prisoner from injuring others in the courtroom, or to maintain an orderly trial. *People v Dunn*, 446 Mich 409, 426; 521 NW2d 255 (1994); *People v Dixon*, 217 Mich App 400, 404; 552 NW2d 663 (1996); *People v Williams*, 173 Mich App 312, 314; 433 NW2d 356 (1988); *People v Jankowski*, 130 Mich App 143, 146; 342 NW2d 911 (1983). While these cases all involve the shackling of a defendant, rather than a defense witness, we see no reason why the same analysis should not be applied to witnesses. See *Kennedy v Cardwell*, 487 F2d 101, 105, n 5 (CA 6, 1973); *United States v Esquer*, 459 F2d 431 (CA 7, 1972).

<sup>4</sup> Our conclusion, however, should not be interpreted as an approval of the practice of shackling witnesses. On the contrary, we believe that such a practice is inconsistent with the basic concepts of justice and should be resorted to only in exceptional situations, such as outlined above in n 3, *supra*.

<sup>5</sup> MCL 769.13(1); MSA 28.1085(1) provides:

In a criminal action, the prosecuting attorney may seek to enhance the sentence of the defendant as provided under section 10, 11, or 12 of this chapter, by filing a written notice of his or her intent to do so within 21 days after the defendant's arraignment on the information charging the underlying offense or, if arraignment is waived, within 21 days after the filing of the information charging the underlying offenses.

<sup>6</sup> When imposing sentence on defendant for his assault with intent to commit murder conviction, the trial court stated that although it was not bound by the sentencing guidelines, it found it unnecessary and inappropriate under the circumstances to sentence defendant to the maximum minimum sentence or to exceed the guidelines.

<sup>7</sup> Our dismissal of the supplemental information charging defendant as an habitual offender will eliminate the possibility that defendant will suffer "collateral consequences" such as not being eligible for disciplinary credits.

<sup>8</sup> We further reject defendant's argument that trial counsel was ineffective for failing to object to several "unethical" comments by the prosecutor outside the presence of the jury. While the challenged comments may have been inappropriate and even unprofessional, they occurred outside the presence of the jury and could not have caused any prejudice to defendant or affected the verdict. *Pickens, supra*; *Crawford, supra*.