STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 20, 2001
v	No. 222549 Ogemaw Circuit Court
ANTONIO MENDOZA, JR., Defendant-Appellant.	LC No. 99-001456-FC

Before: Neff, P.J., and O'Connell and R. J. Danhof*, JJ.

PER CURIAM.

Following a jury trial, defendant was found guilty but mentally ill of two counts of assault with intent to commit murder, MCL 750.83. The jury also found defendant guilty of malicious destruction of property over $100, MCL 750.377a, carrying a concealed weapon, MCL 750.227, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to concurrent terms of thirty to fifty years' imprisonment for each of the assault convictions, with these sentences to be served concurrently to the thirty-two to forty-eight month sentence for the destruction of property conviction. These sentences were to be served consecutively to the mandatory two-year term for the felony-firearm conviction, which was to be served concurrently with the forty to sixty month sentence for the CCW conviction. Defendant now appeals as of right. We affirm.

On appeal, defendant contends that his felony-firearm, malicious destruction of property and CCW convictions should be modified or reversed because they are inconsistent with the accompanying guilty but mentally ill verdicts for assault with intent to commit murder. We disagree. Inconsistent jury verdicts are permissible in Michigan and therefore do not provide a basis for reversal. *People v Vaughn*, 409 Mich 463, 466; 295 NW2d 354 (1980); *People v Lewis*, 415 Mich 443, 449-450; 330 NW2d 16 (1982). As our Supreme Court observed in *People v Garcia*, 448 Mich 442, 464; 531 NW2d 683 (1995) (Riley J.)., "[t]here is no reason to vacate [a]

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

conviction merely because the verdicts cannot rationally be reconciled." *Id*., quoting *United States v Powell*, 469 US 57; 105 S Ct 471; 83 L Ed 2d 461 (1984).[1]

Defendant also contends that reversal of his convictions is required because four members of the jury observed defendant wearing leg irons outside of the courtroom. A trial court's decision to restrain a defendant is reviewed by this Court "for an abuse of discretion under the totality of the circumstances." *People v Dixon*, 217 Mich App 400, 405; 552 NW2d 663 (1996). We recognize that freedom from shackles during trial is an important element of a fair and impartial trial. See *People v Dunn*, 446 Mich 409, 426; 521 NW2d 255 (1994). Thus, the shackling of a defendant during trial is allowed only in "extraordinary circumstances" to the extent that it may (1) prevent the defendant's escape, (2) prevent the defendant from injuring other individuals in the courtroom, or (3) to foster an orderly trial. *Dixon, supra* at 404. A trial court must clearly set forth its finding of necessity on the record. *Dunn, supra* at 426.

Before voir dire, the prosecutor argued that defendant should be shackled because the sheriff's department had deemed him a flight and security risk based on a series of incidents during defendant's incarceration. When defense counsel objected to the shackling of defendant, the trial court explained its decision in the following terms:

> Well, I was contacted by the Ogemaw County clerk's office yesterday. There was [a] request by the sheriff for to [sic] security reasons to have your defendant shackled. I indicated – they wanted wrist and leg manacles. And I indicated that I felt that leg manacles were appropriate. I thought that the skirting[2] would be the best way to go and I note that the skirting is on both the prosecution table and the defense table.

The trial court went on to note that every effort would be made to ensure that the jury did not observe defendant in manacles en route to the courtroom. On this record, we find no abuse of discretion. See *People v Johnson*, 160 Mich App 490, 494; 408 NW2d 485 (1987).

Likewise, we reject defendant's claim that reversal is required because members of the jury inadvertently viewed defendant in shackles as he was being brought into the courtroom. Defense counsel subsequently moved for a mistrial on this basis, which the trial court denied. In our view, reversal of defendant's convictions is not warranted because the rule prohibiting the manacling of a defendant absent extraordinary circumstances does not extend to safety precautions taken by court security when a defendant is not in the courtroom. *People v Panko*, 34 Mich App 297, 299-300; 191 NW2d 75 (1971); see also *People v Robinson*, 172 Mich App 650, 654; 432 NW2d 390 (1988) (holding that the defendant did not suffer prejudice requiring

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[1] Defendant erroneously relies on *People v Philpot*, 98 Mich App 257; 296 NW2d 229 (1980) for the proposition that inconsistent verdicts warrant reversal. The Court's holding in *Philpot* was issued before our Supreme Court's decision in *Vaughn, supra*, and is inapposite. Therefore it is of limited guidance in the instant case. *See Lewis, supra* at 461 n 26.

[2] A review of the record demonstrates that both the defense table and the prosecutor's table were skirted in brown paper to hide defendant's shackles.

reversal where "there was reason to believe [the] defendant was a flight risk and the leg restraints were unobtrusive.").

In his supplemental brief, defendant argues that the trial court erred in denying his motion for a change of venue. We review a trial court's decision on a motion for a change of venue for an abuse of discretion. *People v Jendrzejewski*, 455 Mich 495, 500; 566 NW2d 530 (1997); *People v Lee*, 212 Mich App 228, 252; 537 NW2d 233 (1995). Our Supreme Court considered the issue of pretrial publicity as it relates to a defendant's right to a fair trial in *Jendrzejewski, supra*:

> Juror exposure to . . . newspaper accounts of the crime for which [the defendant] has been charged does not in itself establish a presumption that a defendant has been deprived of a fair trial by pretrial publicity. "To resolve [such a] case," a reviewing court "must turn . . . to any indications in the totality of the circumstances that [the defendant's] trial was not fundamentally fair." [*Id.* at 502, quoting *Murphy v Florida*, 421 US 794, 799; 95 S Ct 2031; 44 L Ed 2d 589 (1975).]

In the instant case, the lower court record contains four articles published in the local community newspaper that relate to this case. Having reviewed these articles, we are not persuaded that "the content of the pretrial publicity . . . reflect[s] . . . a barrage of inflammatory publicity leading to a pattern of deep and bitter prejudice against [ ] defendant, or a carnival-like atmosphere surrounding the proceedings." *Id.* at 506-507 (internal quotation marks and citations omitted) (footnote omitted). For the most part, the articles contained factual accounts of the court proceedings leading to defendant's trial, and there is no "suggestion of appeal to a lynch mob mentality." *Id.* at 504 (internal quotation marks omitted).

Moreover, our independent review of the voir dire does not yield any indication that defendant was denied a fair trial. See *Jendrzejewski, supra* at 517 ("The reviewing court must also closely examine the entire voir dire to determine if an impartial jury was impaneled."). The potential jurors in this case were thoroughly questioned to allow challenges for cause and peremptory challenges to be exercised intelligently. *Id.* at 509. Although some of the impaneled jurors admitted having previously heard about the case through the media, each stated that they could discard any preexisting knowledge and opinions, and decide the case solely on the evidence at trial. The reasoning of the *Jendrzejewski* Court is therefore instructive.

> In this state, as in the United States Supreme Court, the general rule holds that if a potential juror, under oath, can lay aside preexisting knowledge and opinions about the case, neither will be a ground for reversal of a denial of a motion for a change of venue. [*Id.* at 517, citing *People v DeLisle,* 202 Mich App 658, 662; 509 NW2d 885 (1993).]

In our opinion, a review of the record does not yield any indication that defendant's trial was "not fundamentally fair." *Id.* at 502. Consequently, the trial court did not abuse its discretion in denying defendant's motion for a change of venue.

Defendant also complains that the trial court erred in failing to suppress the evidence seized from his home on the day of his arrest. The police discovered pieces of a gun in defendant's well house when they searched the premises. Because defendant did not move to suppress this evidence or object to its admission at trial, this issue is not preserved. *People v Grant*, 454 Mich 535, 546; 520 NW2d 123 (1994). Accordingly, we review defendant's claim for plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 765; 597 NW2d 130 (1999). A review of the record does not support defendant's claim that the challenged evidence was seized pursuant to a warrantless search. Rather, evidence presented at trial demonstrates that the gun parts were seized from defendant's well house after defendant was arrested and the police entered his premises pursuant to a search warrant. Because defendant has not demonstrated plain error affecting his substantial rights, he has forfeited this issue on appeal.

Defendant also raises several allegations of prosecutorial misconduct. Defendant failed to properly preserve these claims by timely objecting at trial, therefore we review defendant's claims of prosecutorial misconduct for plain error. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000). A review of the record does not support defendant's claims. Specifically, other than defendant's conclusory allegations, there is nothing in the record to indicate that the prosecutor, by presenting the testimony of an Ogemaw County deputy sheriff, placed perjured evidence before the jury. Similarly, there is nothing in the record to support defendant's allegations that (1) the prosecutor used informants to spy on defendant while incarcerated, or (2) that the prosecutor tried to "blackmail" defendant, or (3) that the prosecutor improperly attempted to garner the jury's sympathy by having the victim's family sit in the front row of the courtroom during closing arguments.

Likewise, there is nothing to suggest that the prosecutor abused his discretion in bringing multiple charges against defendant arising out of his assault of the victim. See *People v Conat*, 238 Mich App 134, 149; 605 NW2d 49 (1999) (decisions regarding what charges to lay against a defendant are reserved to the prosecutor's discretion); see also *People v Herndon*, ___ Mich App ___; ___ NW2d ___ (Docket No. 216239, issued 6/15/01), slip op 9. Further, our review of the record does not reveal that the prosecutor proffered rebuttal evidence in bad faith. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999) ("prosecutorial misconduct cannot be predicated on good-faith efforts to admit evidence.").

Defendant also asserts that his convictions should be reversed because the trial court was biased against him. This issue is not properly before this Court because defendant did not move for disqualification of the trial court pursuant to MCR 2.003(C). *Meagher v Wayne State Univ*, 222 Mich App 700, 725; 565 NW2d 401 (1997). In any event, defendant has failed to demonstrate that the trial court exhibited "personal bias" against defendant. *People v Wells*, 238 Mich App 383, 391; 605 NW2d 374 (1999).[3] After reviewing the record, we are not persuaded

[3] "This requirement has been interpreted to mean that disqualification is not warranted unless the bias or prejudice is both personal and extrajudicial. Thus, the challenged bias must have its origin in events or sources of information gleaned outside the judicial proceeding." *Cain v Dep't of Corrections*, 451 Mich 470, 495 n 29; 548 NW2d 210 (1996).

that the trial court was actually biased against defendant. MCR 2.003(B)(1); *Cain v Dep't of Corrections*, 451 Mich 470, 495; 548 NW2d 210 (1996).[4]

Defendant also argues that he received ineffective assistance of counsel. A review of the record reveals that defendant properly preserved this issue by raising it in a post-trial motion in the lower court. However, because an evidentiary hearing was not held, our review is limited to errors apparent from the record. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000). To succeed in a claim alleging ineffective assistance of counsel, a defendant must show that his counsel's representation fell below an objective standard of reasonableness and that defendant's right to a fair trial was prejudiced. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). "As for deficient performance, a defendant must overcome the strong presumption that his counsel's actions constituted sound trial strategy under the circumstances." *Id.* We will not second-guess matters of trial strategy with the benefit of hindsight. *People v Rice (After Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999); *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999).

After a review of the record, we conclude that defendant's claims regarding ineffective assistance of counsel are meritless. In our view, each claimed error alleged by defendant was the product of reasonable trial strategy that we will not second-guess with the benefit of hindsight. *Rice, supra*. For example, defendant contends that trial counsel was ineffective for failing to request that the trial court instruct the jury on lesser included offenses. It is well-settled that the decision whether to request instructions on lesser included offenses is a matter of trial strategy. *People v Sardy*, 216 Mich App 111, 116; 549 NW2d 23 (1996); *People v Robinson*, 154 Mich App 92, 94; 397 NW2d 229 (1986). Moreover, counsel's decisions concerning challenges to the jury as impaneled are also matters of trial strategy. *People v Johnson*, 245 Mich App 243, 259; ___ NW2d ___ (2001). The remaining errors alleged by defendant are not apparent from the existing record, therefore defendant has failed to rebut the presumption that he received effective assistance of counsel. *Rockey, supra* at 76.

Defendant also maintains that his two convictions for assault with intent to commit murder[5] violate double jeopardy protections. We disagree.

Defendant's double jeopardy challenge presents a question of law that we review de novo. *People v Mackle*, 241 Mich App 583, 592; 617 NW2d 339 (2000). Both the Michigan and federal constitutions prohibit multiple punishments for the same offense. *People v Denio*, 454

[4] We similarly reject defendant's claim that the trial court erred by not instructing the jury on any lesser included offense where none were requested. "[A] court generally has no duty to instruct the jury sua sponte regarding all lesser included offenses." *People v Reese*, 242 Mich App 626, 629 n 2; 548 NW2d 210 (2000), citing *People v Henry*, 395 Mich 367, 374; 236 NW2d 489 (1975).

[5] Defendant was originally charged with one count of assault with intent to commit murder and one count of attempted murder, MCL 750.91. However, after defense counsel moved to quash the district court's bindover of the attempted murder charge, the prosecutor amended the information to substitute a second count of assault with intent to commit murder for the attempted murder charge.

Mich 691, 706; 564 NW2d 13 (1997); *Mackle, supra* at 601; US Const, Am V; Const 1963, art 1, § 15. In our view, defendant's two convictions for assault with intent to commit murder do not implicate double jeopardy concerns because they did not arise out of the "same transaction." See *People v White*, 212 Mich App 298, 305-306; 536 NW2d 876 (1995). "The same transaction test requires that prosecutors join at one trial all the charges against a defendant arising out of a single criminal act, occurrence, episode or transaction." *Id.* at 306 (citation omitted). Because defendant's assault convictions arose out of two "distinct occurrences or episodes" we conclude that these convictions do not violate his double jeopardy rights. *Id.*

Evidence at trial revealed that defendant used his own vehicle to force the victim's vehicle off of the road and into a ditch. Defendant then got out of his car and chased the victim with a gun when she attempted to flee. When defendant caught up with the victim, he shot her three times. Because the act resulting in the first assault with intent to commit murder conviction was complete before the act leading to the second assault with intent to commit murder conviction occurred, defendant's double jeopardy rights have not been violated. *People v Lugo*, 214 Mich App 699, 708-709; 542 NW2d 921 (1995) ("There is no violation of double jeopardy protections if one crime is complete before the other takes place, even if the offenses share common elements or one constitutes a lesser offense of the other.") (citation omitted).

As a final matter, we conclude that the trial court did not abuse its discretion[6] in sentencing defendant to a term in excess of the sentencing guidelines' recommended range.[7] A trial court's sentence is an abuse of discretion if it violates the principle of proportionality, which requires that a sentence be proportionate to the seriousness of the circumstances surrounding the offense and the offender. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). Where a trial court departs from the recommended guidelines' range, it must set forth its reasons on the record. *People v Fleming*, 428 Mich 408, 411; 410 NW2d 266 (1987). A review of the record reveals that the trial court properly did so in the present case.

Specifically, the trial court reasoned that departure from the guidelines' recommended range was necessary because of defendant's history of stalking and harassing the victim. The trial court noted that this "pattern of behavior" began as early as July 1996 and continued up until August 15, 1998, when the victim was assaulted. The court also observed that defendant had violated a personal protection order the victim had entered against him, and continued to stalk the victim in spite of intervention by the police and the courts. In our view, the trial court properly considered defendant's history of stalking the victim as an aggravating circumstance when fashioning defendant's sentence. *Milbourn, supra* at 660.

Further, the trial court properly considered "the severity and nature of the crime and the circumstances surrounding the criminal behavior, which are proper criteria for imposing sentence." *Rice, supra* at 446. Evidence at trial revealed that after defendant forced the victim's

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[6] A trial court's imposition of sentence is reviewed for an abuse of discretion. *People v Fetterley*, 229 Mich App 511, 525; 583 NW2d 199 (1998).

[7] The sentencing guidelines' recommended a sentence in the range of ten to twenty-five years' imprisonment.

car off of the road and into a ditch, he chased her and shot her in the face, arm and thigh. Moreover, the trial court also noted defendant's patent lack of remorse for his actions, and his persistence in blaming the victim for the incident. See *People v Houston*, 448 Mich 312, 323; 532 NW2d 508 (1995). The trial court also expressed its concern regarding defendant's low potential for rehabilitation. *Id.* Under these circumstances, the trial court did not abuse its discretion in imposing sentence.

Affirmed.

/s/ Janet T. Neff
/s/ Peter D. O'Connell
/s/ Robert J. Danhof