STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 26, 2008
v	No. 277621 Macomb Circuit Court
ANDREW PAUL COLBERT, Defendant-Appellant.	LC No. 2006-000775-FC

Before: Zahra, P.J., and Cavanagh and Jansen, JJ.

PER CURIAM.

Defendant appeals by right his jury-trial conviction of first-degree premeditated murder, MCL 750.316(1)(a), for which he was sentenced to life imprisonment. We affirm in part and remand for further proceedings consistent with this opinion.

I

Defendant was convicted of murdering his former girlfriend (the victim). The victim's body was discovered in her bedroom, which was in the basement of her mother's house. She had abrasions and contusions on the front of her neck, a large bruise on her scalp from an impact with a "broad surface," and other injuries to her body. The cause of death was determined to be manual strangulation. Material that was consistent with defendant's DNA profile was found underneath the victim's fingernails. When the police spoke to defendant on the day of the offense, he had scratches on his face. Defendant later admitted that he had been in the victim's bedroom. He claimed that he fell asleep and awoke to find the victim on top of him, choking and hitting him. He explained that he reacted by grabbing her neck and knocking her off the bed, causing her to strike her head on the nightstand, before he "slammed" her to the floor, leaving her unconscious. Defendant stated that he was unable to revive the victim and then left the house because he was scared.

The defense argued that the killing was not the product of premeditation and deliberation. The jury was accordingly instructed that it could consider the lesser offenses of second-degree murder and voluntary manslaughter. Nonetheless, as noted above, the jury convicted defendant of first-degree premeditated murder.

II

Defendant argues that the trial court improperly admitted the victim's hearsay statements, in which the victim stated that she was afraid of defendant, that defendant had been acting strangely, and that defendant had been stalking her. The trial court admitted the statements under MRE 803(3), as statements of the victim's then existing state of mind.

The trial court's decision to admit evidence is reviewed for an abuse of discretion. *People v Jones*, 240 Mich App 704, 706; 613 NW2d 411 (2000).

MRE 803 provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> * * *
>
> A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

The hearsay statements in question were made to the victim's new boyfriend and to two social friends. According to the victim's boyfriend, the victim told him on at least one occasion that she was afraid of defendant and that defendant was stalking her. The victim's friend, Janelle Thomas, similarly testified that during dinner a few weeks before the victim's death, the victim had told her that defendant was acting strangely and was stalking her. The victim also told Thomas's mother a few weeks before her death that defendant was stalking her.

The victim's statement that she was afraid of defendant clearly qualified as a statement of her then existing state of mind or emotion. It was, therefore, admissible under MRE 803(3). The trial court did not abuse its discretion by allowing the statement. See *People v Bauder*, 269 Mich App 174, 188-189; 712 NW2d 506 (2005).

In contrast, the victim's statements that defendant was acting strangely and that defendant was stalking her were not statements of the victim's state of mind or emotion. They were accordingly not admissible under the provisions of MRE 803. To the extent that the admission of these statements was improper, however, we conclude that the error was harmless.

A preserved, nonconstitutional error does not require reversal unless it is more probable than not that the error was outcome determinative. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). In this case, there was ample independent evidence of defendant's stalking behavior apart from the victim's hearsay statements. Independent, admissible evidence established that defendant repeatedly called the victim's house and then hung up. Witnesses also observed defendant outside the victim's workplace at the end of her shift. In addition, the victim's mother testified that on the night of the offense, defendant knocked on her window at 11:45 p.m., inquired whether the victim had a new boyfriend, and stated that he had seen the

victim bring someone into the house. In short, the victim's statements that defendant was stalking her were cumulative of other properly admitted evidence, all of which showed that defendant had acted strangely and had stalked the victim. We cannot conclude that it is more probable than not that the improperly admitted hearsay statements affected the outcome of defendant's trial. *Id*.

III

Defendant also argues that admission of the victim's hearsay statements violated his constitutional right to confront the witnesses against him. We disagree.

The Confrontation Clause guarantees an accused the right to confront the witnesses against him. US Const, Am VI. In *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004), the United States Supreme Court held that testimonial statements of witnesses who are absent from trial may not be admitted against a criminal defendant unless the declarant is unavailable and the defendant has had a prior opportunity to cross-examine the declarant.

On appeal, defendant relies on *Lilly v Virginia*, 527 US 116, 136; 119 S Ct 1887; 144 L Ed 2d 117 (1999), for the proposition that hearsay evidence is not admissible under the Confrontation Clause unless it possesses "indicia of reliability by virtue of its inherent trustworthiness." Defendant's reliance on *Lilly* is misplaced, however, because the United States Supreme Court has now abandoned the "indicia of reliability" test, describing it as "inherently, and therefore permanently, unpredictable." *Crawford*, *supra* at 68 n 10.

Although the *Crawford* Court declined to spell out a comprehensive definition of testimonial hearsay for purposes of the Confrontation Clause, the Supreme Court later provided the following formulation of "testimonial" in *Davis v Washington*, 547 US 813, 822; 126 S Ct 2266; 165 L Ed 2d 224 (2006):

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

In this case, the victim's statements that she feared defendant and that she believed that defendant was stalking her were made to a boyfriend and to other social friends. The statements were made to describe the victim's perception of defendant's conduct and how she felt about defendant. None of the statements was made to law enforcement officers or under circumstances that objectively indicated a primary purpose of establishing past events for later use in a criminal prosecution. *Id*. Therefore, the statements were not testimonial in nature, and admission of the statements did not violate defendant's rights under the Confrontation Clause.

IV

Defendant argues that he was denied a fair trial because he was required to wear leg irons during trial. Defendant suggests that the jury may have seen him in shackles and may have consequently been disinclined to convict him of a lesser offense.

"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.'" *People v Banks*, 249 Mich App 247, 256; 642 NW2d 351 (2002) (citation omitted). "[H]aving a defendant handcuffed or shackled negatively affects the defendant's constitutionally guaranteed presumption of innocence." *Id.*

As an initial matter, we note that the decision whether to shackle a defendant during trial is within the trial court's authority. *Id*. A trial court must not shackle a defendant on the basis of the mere preference of law enforcement officers. *Id*. at 258. In the case at bar, the trial judge clearly stated on the record that the decision whether to shackle defendant rested with the sheriff's department and not with the court. In this respect, the trial judge clearly misstated the law. *Id*. at 256. Irrespective of the wishes or policies of the Macomb County sheriff's department, the trial judge was himself solely responsible for deciding whether defendant should stand trial in leg irons.

We also note that a defendant must not be required to stand trial in shackles or handcuffs absent a compelling reason that justifies the restraints. *People v Baskin*, 145 Mich App 526, 545; 378 NW2d 535 (1985). Indeed, the use of visible shackles in the courtroom must be "'justified by an essential state interest . . . .'" *Deck v Missouri*, 544 US 622, 624; 125 S Ct 2007; 161 L Ed 2d 953 (2005), quoting *Holbrook v Flynn*, 475 US 560, 568-569; 106 S Ct 1340; 89 L Ed 2d 525 (1986). This is because shackling a criminal defendant is "inherently prejudicial," *Deck*, *supra* at 635, and is an action that "speak[s] louder than words," *Baskin*, *supra* at 546. "[M]ere shackling" "impinge[s] upon defendant's credibility by indicating that defendant was not to be trusted," and can consequently prejudice a defendant's right to a fair trial. *Id*. Therefore, to the extent that Macomb County may have a general policy of shackling all inmates during their criminal trials, such a policy is clearly overbroad.

Of course, a defendant's right to be free of shackles is not absolute. Shackling is permitted when necessary to prevent escape, to prevent injury to persons in the courtroom, or to maintain order. *People v Dunn*, 446 Mich 409, 425; 521 NW2d 255 (1994). However, the record establishes no justification for the shackling of defendant. As noted previously, the trial court stated that it was the policy of the sheriff's department to shackle inmates during trial. But the court did not identify, nor does the record disclose, any other reason for shackling defendant in this case. Nor does the record before us suggest any specific concerns about safety or courtroom security. Absent specific concerns on the record related to security, courtroom safety, or defendant in particular, we are simply unable to conclude whether there was a legitimate justification for requiring the instant defendant to stand trial in shackles.

The prosecution points out that the prohibition on the use of shackles in the courtroom applies only to *visible* shackles, and suggests that defendant's shackles were not visible to the jury in this case. We acknowledge that the trial judge stated on the record that he would take

steps to ensure that the jury could not see defendant's shackles. However, we equally acknowledge defense counsel's objection and concern that the jury would nevertheless be able to see defendant's shackles upon entering and exiting the courtroom. Indeed, defense counsel stated on the record that a person standing in the courtroom might well have been able to perceive defendant's shackles. The trial judge did not disagree with defense counsel's concern, but nevertheless overruled the objection, noting that the jurors would be sitting rather than standing.

As the prosecution correctly asserts, it is only the use of *visible* shackles that implicates a defendant's right to a fair trial.[1] See *Deck*, *supra* at 626. But as discussed earlier, it is unclear whether the jurors in this case were actually able to see defendant's leg irons at any point during trial. Accordingly, we are unprepared at this time to conclude that defendant was not prejudiced by the use of leg irons. However, we are equally unprepared to conclude that defendant was prejudiced, as we do not even know whether the jurors perceived his restraints.

Quite simply, we cannot meaningfully decide this issue on appeal without knowing (1) whether there was adequate justification for requiring defendant to wear leg irons during trial, and (2) whether the jury was able to see defendant's shackles. Nor can we decide the remaining issue raised by defendant on appeal without first acquiring an adequate record with respect to these questions.

We remand for an evidentiary hearing concerning whether there was adequate justification for requiring defendant to wear shackles at trial and whether the jurors were able to see defendant's shackles. See *People v Herndon*, 98 Mich App 668, 673; 296 NW2d 333 (1980). The individual jurors shall be questioned, the trial court shall allow defendant to participate in the hearing through counsel, and the court shall make findings of fact. The court shall specifically find on the record whether there was adequate justification for requiring defendant to stand trial in shackles and whether the jurors were able to see defendant's restraints. Consistent with the order issued concurrently with this opinion, the trial court shall provide this Court with a transcript of the evidentiary hearing, including all findings of fact.

V

We affirm with respect to defendant's claims of evidentiary error and Confrontation Clause error. But we remand for an evidentiary hearing concerning whether there was adequate justification for requiring defendant to wear shackles and whether the jurors were able to see defendant's shackles at trial.

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[1] "[W]here 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. The State must prove 'beyond a reasonable doubt that the shackling error complained of did not contribute to the verdict obtained.'" *Deck*, *supra* at 635 (citation omitted). In contrast, when a defendant is erroneously required to stand trial in shackles but the shackles are *not visible* to the members of the jury, it is the defendant's burden to prove that the restraints resulted in actual prejudice by affecting the outcome of the proceedings. See, e.g., *People v Robinson*, 172 Mich App 650, 654; 432 NW2d 390 (1988).

Affirmed in part and remanded for further proceedings consistent with this opinion. Jurisdiction is retained. The trial court shall have 42 days to conduct the required evidentiary hearing on remand.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen

Court of Appeals, State of Michigan

ORDER

People of MI v Andrew Paul Colbert

Docket No. 277621

LC No. 2006-000775 FC

Brian K. Zahra
Presiding Judge

Mark J. Cavanagh

Kathleen Jansen
Judges

Pursuant to the opinion issued concurrently with this order, this case is REMANDED for further proceedings consistent with the opinion of this Court. We retain jurisdiction.

Proceedings on remand in this matter shall commence within 42 days of the Clerk's certification of this order and they shall be given priority on remand until they are concluded. As stated in the accompanying opinion, the circuit court shall hold an evidentiary hearing and shall specifically find on the record whether there was adequate justification for requiring defendant to stand trial in shackles and whether the jurors were able to see defendant's restraints.

The parties shall promptly file with this Court a copy of all papers filed on remand. Within seven days after entry, appellant shall file with this Court copies of all orders entered on remand.

The transcript of all proceedings on remand shall be prepared and filed within 21 days after completion of the proceedings.

COURT OF APPEALS OF THE STATE OF MICHIGAN
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A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

JUN 26 2008
Date

Sandra Schultz Mengel
Chief Clerk