

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANDREW PAUL COLBERT,

Defendant-Appellant.

UNPUBLISHED

June 26, 2008

No. 277621

Macomb Circuit Court

LC No. 2006-000775-FC

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

ZAHRA, P.J., (*concurring in part and dissenting in part*).

I concur in sections I, II and III of the majority opinion. I also concur in the majority's conclusion that the trial judge clearly misstated the law by concluding that the decision whether to shackle defendant rested with the sheriff and not the court. However, I respectfully dissent from the majority's conclusion that remand is necessary to determine, among other things, whether the jury was able to observe defendant while shackled. I would affirm defendant's conviction, without remanding for further proceedings.

I. The Trial Court Should Not Be Required To Interrogate The Jurors

I strongly oppose the majority's mandate on remand that "[t]he individual jurors shall be questioned" about their observations of defendant during trial. This is, in my opinion, unnecessary and a dangerous practice. As more fully explained below, it is unnecessary to interview the individual jurors because the record does not establish that the jurors observed defendant in shackles and nothing presented by defendant on appeal contradicts this conclusion. Post trial interrogation of jurors by the trial court is a dangerous practice because once discharged, jurors should be free to return to their daily routine without interruption from the court or counsel to pierce into their deliberations, practices, thoughts and observations during trial. Should such post-trial contact become routine, it will place a chilling effect on the deliberative process, operating to the detriment of the jury system. Moreover, it is possible, perhaps even probable, that one or more of these jurors is unavailable due to death, disability or relocation. What is the trial court to do in such instance? To the extent a remand is appropriate I would defer to the trial court to determine what proofs are needed. I would not mandate that the jurors be questioned.

II. Further Proceedings Are Not Necessary

The record in this case discloses that when defendant objected to the use of leg irons before trial, the trial court stated on the record that the leg irons were not visible from the jury box because a screen surrounded the bench where defendant would be seated. When defense counsel remarked that the leg irons would be noticeable when defendant entered or left the courtroom, the court indicated that defendant would be permitted to be brought in and leave only when the jury was not present. Defense counsel also suggested that it *might* be possible for someone in the back row of the jury box to see defendant's leg irons if they were of counsel's height and in a standing position, but the trial court concluded otherwise. Additionally, the trial court observed that the jurors would be seated in any event.

On this record, there is no basis for concluding that the use of leg irons denied defendant his right to a fair trial. The record indicates that the leg irons were not visible to the jury and the trial court took precautions to ensure that they would not be exposed. Defendant has failed to demonstrate actual prejudice. *People v Robinson*, 172 Mich App 650, 654; 432 NW2d 390 (1988); *People v Horn*, ___ Mich App ___, ___ NW2d ___ (Docket No. 274130, issued May 15, 2008), slip op p 3. In light of the trial court's finding that the leg irons were not visible from the jury box, and the absence of any indication in the record that defendant's use of leg irons was exposed to the jury at some point during trial, I am convinced that the use of leg irons did not contribute to the jury's verdict. *Deck, supra* at 635.

I would affirm defendant's conviction.

/s/ Brian K. Zahra