STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 25, 2008
v	No. 282806 Chippewa Circuit Court
THOMAS WESLEY POE, Defendant-Appellant.	LC No. 07-008509-FH

Before: Saad, C.J., and Sawyer and Beckering, JJ.

PER CURIAM.

Defendant was convicted of conspiracy to knowingly conduct or participate in a criminal enterprise through a pattern of racketeering activity involving the delivery of cocaine, MCL 750.157a and MCL 750.159i(1), knowingly conducting or participating in a criminal enterprise through a pattern of racketeering activity involving the delivery of cocaine, MCL 750.159i(1), delivery of less than 50 grams of cocaine, MCL 333.7401(2)(a)(iv), and conspiracy to deliver less than 50 grams of cocaine, MCL 750.157a and MCL 333.7401(2)(a)(iv). He was sentenced as a fourth habitual offender, MCL 769.12, to concurrent prison terms of 20 to 50 years each for the racketeering and conspiracy to participate in racketeering convictions, and consecutive prison terms of 10 to 50 years each for the delivery of cocaine and conspiracy to deliver cocaine convictions. He appeals as of right. We affirm.

The prosecution's theory of the case was that between November 2005 and January 11, 2007, defendant was involved in a cocaine trafficking ring with Derek Parks, Melissa Beaudry, Brian McDonald, Mike Causley, and Jamie Verwiebe, during which defendant and others regularly reserved hotel rooms for Parks in Sault Ste. Marie, Michigan and assisted Parks in selling cocaine. The evidence at trial indicated that defendant went to Toledo, Ohio to recruit his nephew, Derek Parks, to sell cocaine in Sault Ste. Marie. A police investigation was conducted during which several controlled purchases of cocaine were made, and the police set up surveillance of a Comfort Inn hotel room at which defendant and Parks were arrested on January 11, 2007.

At trial, representatives of the various hotels where defendant and Parks stayed offered testimony about who rented the rooms in question. Defendant was arrested on January 11, 2007, inside a Comfort Inn hotel room. Before the general manager of the Comfort Inn testified, the prosecutor advised the court that the general manager had just provided additional hotel records reflecting defendant's rental of that room for approximately the week preceding and up to the

date of his arrest. At trial, defendant objected to the admission of this evidence on the ground that it was not timely provided pursuant to a pretrial discovery order. The trial court initially ruled that the evidence was newly discovered and could be admitted, but after hearing further testimony, refused to admit any of the late-produced records, although the witness was allowed to refer to the records while testifying.

On appeal, defendant argues that the prosecution's failure to timely produce the hotel records violated his right to due process under *Brady v Maryland,* 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963), and also deprived him of his right to present an alibi defense or a defense based on mistaken identity. Specifically, defendant argues that because the evidence was not timely produced, he was unable to properly present either of these defenses. Because these arguments were not presented to the trial court, they are unpreserved and our review is limited to plain error affecting defendant's substantial rights. *People v Carines,* 460 Mich 750, 761-767; 597 NW2d 130 (1999).

A defendant has a due process right to discovery of information in the prosecution's possession under *Brady, supra*. This right requires the prosecution to disclose evidence that might lead a jury to entertain a reasonable doubt about the defendant's guilt, regardless whether the evidence is requested. *People v Stanaway,* 446 Mich 643, 666; 521 NW2d 557 (1994); *People v Lester,* 232 Mich App 262, 281; 591 NW2d 267 (1998).

> In order to establish a *Brady* violation, a defendant must prove: (1) that the state possessed evidence favorable to the defendant; (2) that he did not possess the evidence nor could he have obtained it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. [*Lester, supra* at 281-282.]

Here, there is no basis for concluding that the hotel records were either exculpatory or favorable to defendant. Rather, the records are further evidence that defendant was the person who rented the Comfort Inn hotel room. Defendant, who now has possession of the records, does not explain why this evidence could be considered favorable, or how it would support either a defense of alibi or mistaken identity, particularly considering that defendant was arrested inside the hotel room and admitted after his arrest that he had rented the room. Defendant explained to the police that he frequently rented hotel rooms in order to spend time with his girlfriend, who was from Canada. Because the records were consistent with this other evidence, there is no reasonable probability that the outcome of trial would have been different had the evidence been provided sooner.

Further, there is no merit to defendant's argument that the failure to produce this evidence sooner deprived him of his right to present a defense. Although defendant contends that he could have presented possible defenses of alibi or mistaken identity, he fails to explain, and it is not apparent, how the evidence could have supported either defense. On the contrary, the hotel records were further evidence that it was defendant who rented the Comfort Inn hotel room.

Defendant also argues that his right to due process was violated because the trial court prevented him from inspecting the newly produced records during trial. The record does not support defendant's claim. Rather, the record discloses that defense counsel asked if she could copy the records. The court informed her that she could copy the records at the end of the day, to which she responded, "Thank you, your Honor." Nothing in the record suggests that counsel was not permitted to review the records during trial. Indeed, the record discloses that defense counsel was able to voir dire the witness regarding the records without any problems. Accordingly, we find no merit to this issue.

Defendant lastly argues that he is entitled to a new trial because the jurors observed him in prison garb and shackles as he was being brought into the courtroom under guard before trial began.

A defendant's freedom from shackling is an important part of the right to a fair trial and shackling is permitted only under extraordinary circumstances. *People v Dixon*, 217 Mich App 400, 404; 552 NW2d 663 (1996).

> [H]aving a defendant appear before a jury handcuffed or shackled negatively affects the defendant's constitutionally guaranteed presumption of innocence, [*People v Dunn*, 446 Mich 409, 425 n 26; 521 NW2d 255 (1994)] (observing that "'[t]he presumption of innocence requires the garb of innocence'" [quoting *Eaddy v People*, 115 Colo 488, 492; 174 P2d 717 (1946)]). 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." *Taylor v Kentucky*, 436 US 478, 485; 98 S Ct 1930; 56 L Ed 2d 468 (1978). [*People v Banks*, 249 Mich App 247, 256; 642 NW2d 351 (2002).]

As this Court recently explained, however, the prohibition against shackling a defendant does not apply to safety precautions taken by law enforcement officers when transporting a defendant to and from the courtroom. *People v Horn*, 279 Mich App 31, 37; ___ NW2d ___ (2008), lv pending. Further, when jurors inadvertently see a defendant in shackles, there must be some showing that the defendant was prejudiced. *Id*.

The record here indicates that defendant was being transported into the courtroom under guard and in restraints while the jurors were still walking into the courtroom. Contrary to what defendant asserts, the record indicates that this occurred before a jury was selected and that the parties were permitted to explore this issue with the jurors during voir dire to determine whether it would affect their ability to be fair and impartial. One juror who was affected by the viewing was dismissed for cause, but none of the other jurors indicated that they could not be fair and

impartial. Therefore, we are unable to conclude that defendant was prejudiced and he is not entitled to a new trial on this basis.

Affirmed.

/s/ Henry William Saad
/s/ David H. Sawyer
/s/ Jane M. Beckering