

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

SAMUEL MAXWELL,

Defendant-Appellant.

UNPUBLISHED

February 3, 2009

No. 281909

Washtenaw Circuit Court

LC No. 06-001674-FH

Before: Zahra, P.J., and O’Connell and Fort Hood, JJ.

PER CURIAM.

Defendant was convicted by a jury of four counts of criminal sexual conduct in the third degree (CSC III) involving force or coercion, MCL 750.520d(1)(b), and one count of assault with intent to commit sexual penetration, MCL 750.520g(1). Defendant was sentenced to concurrent terms of 217 months to 30 years for CSC III, and ten to 20 years for assault with intent to commit sexual penetration. Defendant appeals as of right. We reverse and remand for a new trial. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Complainant alleged that defendant accompanied him to a park under the guise of helping complainant search for his son. Complainant asserted that defendant led him to a secluded area and assaulted him in an attempt to penetrate his anus. According to complainant, defendant digitally penetrated his anus, and subsequently forced him to perform fellatio at least three times. Defendant alleged that the encounter was consensual, but gave three different descriptions of what transpired at three different times. At trial, he maintained that the first two versions described earlier sexual encounters with complainant. One witness partially supported the second version, testifying that defendant had had prior contact with the victim.

Defendant argues that his due process rights were violated because, despite his request, his shackles were not removed before he proceeded to the witness stand to testify. He claims that his rights were also violated by the denied request to have the jury leave the courtroom while he walked to the witness stand. We agree. Based on the current record, we conclude that the trial court abused its discretion, and also conclude that defendant suffered prejudice. See *People v Horn*, 279 Mich App 31, 36; 755 NW2d 212 (2008).

In *Deck v Missouri*, 544 US 622, 630-631; 125 S Ct 2007; 161 L Ed 2d 953 (2005), quoting *Illinois v Allen*, 397 US 337, 343-344; 25 L Ed 2d 353; 90 S Ct 1057 (1970), the

Supreme Court identified the perils of shackling as follows: (1) “[v]isible shackling undermines the presumption of innocence and the related fairness of the factfinding process”; (2) “[s]hackles can interfere with the accused’s ‘ability to communicate’ with his lawyer. . . . Indeed, they can interfere with a defendant’s ability to participate in his own defense, say by freely choosing whether to take the witness stand on his own behalf”; and (3) “the use of shackles at trial ‘affronts’ the ‘dignity and decorum of judicial proceedings that the judge is seeking to uphold.’” The *Deck* Court further stated: “Trial courts may not shackle defendants routinely, but only if there is a particular reason to do so.” *Id.* at 627. More particularly, the *Deck* Court stated that the right to concealed shackles or removal of shackles could “be overcome in a particular instance by essential state interests such as physical security, escape prevention, or courtroom decorum.” *Id.* at 628.

In *United States v Miller*, 531 F3d 340, 348 (CA 6, 2008), the Court concluded that an evidentiary hearing would be the best way to discern whether there is a state interest in shackling “specific to a particular trial”. It noted that a formal hearing with sworn testimony would allow for factual disputes to be resolved and for a meaningful record to facilitate review. *Id.* The *Miller* Court concluded that the district court’s “cursory approval of the use of a stun belt fell far below the individualized determination required by *Deck*.”¹

In the instant case, the trial court dismissed the deleterious effects of shackling, equating them with awareness that defendant was in custody. Although the court implied that defendant posed “security concerns,” there is absolutely no record support for this conclusion. There is a reference to a comment made by a witness, but no information about the substance of the comment or why it may have been indicative of a security concern appears on the record. Our review of this witness’s testimony did not disclose a comment that would give rise to such a concern. The “security concern” in this case does not appear to be “specific to [this] particular trial”. There is no evidence that the concern was any greater than it would be with any defendant accused of a violent crime. Accordingly, we conclude that the trial court abused its discretion in denying the request to remove defendant’s shackles or, at a minimum, to take steps to conceal them from the jury.

Regarding prejudice, we note that shackling is “inherently prejudicial.” That statement is rooted in [the] belief that the practice will often have negative effects, but--like “the consequences of compelling a defendant to wear prison clothing” or of forcing him to stand trial while medicated--those effects “cannot be shown from a trial transcript.” Thus, where 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.]

¹ The Court determined that the defendant, who bore the burden of showing prejudice since there had been no objection below, had failed to show prejudice. This conclusion was in part based on the absence of any indication that the stun belt was visible.

The verdict in this case necessarily required the jurors to believe complainant and to disbelieve defendant. The jury's assessment of defendant's credibility may have been affected by the implicit suggestion that defendant posed such a problem that shackles were needed. The trial court did not cure this prejudice by indicating that the shackles were merely consistent with being in custody. Shackles inherently connote a need to restrain someone. Such an implication is more prejudicial than a mere understanding that someone is in jail pending a trial. Thus, defendant is entitled to have his convictions reversed and to receive a new trial.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Brian K. Zahra
/s/ Peter D. O'Connell
/s/ Karen M. Fort Hood