STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 21, 2010
v	No. 291554 Jackson Circuit Court
ANDREW LYNN BREEDING, Defendant-Appellant.	LC No. 08-004100-FH

Before: MURPHY, P.J., and METER and GLEICHER, JJ.

PER CURIAM.

Andrew Lynn Breeding appeals as of right his jury trial convictions for malicious destruction of police property, MCL 750.377b, and two counts of resisting and obstructing police officers, MCL 750.81d(1). Breeding was sentenced as an habitual offender, second offense, MCL 769.10, to 7 months to 15 years' imprisonment for each of his convictions. We affirm.

Breeding initially asserts that the trial court committed reversible error by shackling him and permitting the jury to observe him in shackles. "[T]he Fifth and Fourteenth Amendments prohibit the use of physical restraints visible to the jury absent a trial court determination, in the exercise of its discretion, that they are justified by a state interest specific to a particular trial." *Deck v Missouri*, 544 US 622, 629; 125 S Ct 2007; 161 L Ed 2d 953 (2005). Breeding was shackled during the course of the two-day trial, and the jury observed the removal of his manacles in the courtroom. The trial court provided no explanation for the shackling. Because the trial court failed to provide any justification for maintaining Breeding in visible shackles, Breeding "need not demonstrate actual prejudice to make out a due process violation." *Id.* at 635. Rather, the prosecution bears the burden of demonstrating beyond a reasonable doubt that the shackling error did not contribute to the verdict obtained. *Id.* (quotation omitted); *People v Anderson (After Remand)*, 446 Mich 392, 404-406; 521 NW2d 538 (1994).

The trial court's unexplained basis for shackling Breeding placed in serious jeopardy Breeding's right to a fair trial. The United States Supreme Court explained in *Deck* that visible shackling without cause impugns the integrity of a criminal trial, because it "undermines the presumption of innocence and the related fairness of the factfinding process," diminishes the accused's right to counsel, and "affronts … the dignity and decorum of judicial proceedings that the judge is seeking to uphold." *Id.* at 630-631 (internal quotation omitted). Nevertheless, in light of the overwhelming evidence of Breeding's guilt, we conclude that the unjustified

shacking did not contribute to the verdict obtained. The testifying officers established that Breeding resisted arrest and that the efforts of four of them were required to place Breeding into custody. Breeding's mother corroborated the testifying officers' recitation of the events leading to the arrest, characterizing her son as "just out of control" during his scuffle with the police. One police officer observed that Breeding struck the rear passenger window of the patrol car with his head, and then leaned back and kicked out the window with his feet. A videorecording admitted at trial corroborated this testimony. Given this overwhelming evidence of Breeding's guilt, no reasonable probability exists that the jury's ability to observe the shackling contributed to Breeding's convictions. *Anderson*, 446 Mich at 405-406; see also *People v Shepherd*, 472 Mich 343, 348-351; 697 NW2d 144 (2005).

Breeding next asserts that the trial court erred by failing to permit him to be evaluated by a clinician of his choice to prepare an insanity defense. However, Breeding never filed a notice of his intent to assert an insanity defense, as required by MCL 768.20a(1), and only requested an independent psychiatric evaluation on the second day of trial, after both sides had rested. Consequently, we consider this unpreserved claim for plain-error. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Breeding's failure to timely file a notice of intention to offer an insanity defense precludes his belated effort to assert this defense during the trial. MCL 768.20a(1); *People v Wilkins*, 184 Mich App 443, 446-447, 450; 459 NW2d 57 (1990). Even had Breeding timely filed a request for an independent psychiatric evaluation, we discern no indication that he could satisfy the good cause requirement for such evaluation. MCL 768.20a(3). Breeding has provided no documentation suggesting that at the time he committed the charged offenses, he "lack[ed] substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct[.]" MCL 768.21a. Significantly, the psychiatric evaluation conducted to assess Breeding's competency to stand trial related that Breeding was mentally ill, but not legally insane. The examiner concluded, "it is this examiner's opinion that he did not lack substantial capacity to appreciate the nature, quality or wrongfulness of his behavior or to conform his behavior to the requirements of the law." Because Breeding neglected to timely assert an insanity defense and has produced no evidence of legal insanity at the time he committed the charged offenses, he has failed to establish plain error affecting his substantial rights. *Carines*, 460 Mich at 763-764.

Breeding next contends that defense counsel rendered ineffective assistance by: (1) failing to raise an insanity defense; (2) stipulating to his guilt on the offense of malicious destruction of police property; (3) failing to compel discovery; (4) failing to object to hearsay testimony and bad-acts evidence; (5) failing to present an adequate defense, and (6) failing to endorse or subpoena any witnesses. Because Breeding did not move for a *Ginther*[1] hearing or a new trial, his claims of ineffective assistance of counsel are not preserved, *People v Snider*, 239

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Mich App 393, 423; 608 NW2d 502 (2000) and our review is limited to errors apparent on the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

In *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984), the United States Supreme Court held that a convicted defendant's claim of ineffective assistance of counsel includes two components: "First, the defendant must show that counsel's performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense." To establish the first component, a defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms. *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). With respect to the prejudice aspect of the test for ineffective assistance, the defendant must demonstrate a reasonable probability that but for counsel's errors, the result of the proceedings would have differed. *Id*. at 663-664. The defendant must overcome the strong presumptions that his "counsel's conduct falls within the wide range of professional assistance," and that his counsel's actions represented sound trial strategy. *Strickland*, 466 US at 689.

We find no merit in any of Breeding's ineffective assistance of counsel claims. Breeding has failed to describe any evidence potentially available to his counsel that would have supported an insanity defense. The record contains no substantiation from a psychologist, psychiatrist or other mental health expert tending to support Breeding's insanity assertion. *People v Hoag*, 460 Mich 1, 8; 594 NW2d 57 (1999) (rejecting ineffective assistance of counsel contentions for which the defendant failed to satisfy his burden to "establish the evidentiary support which excludes hypotheses consistent with the view that his trial lawyer represented him adequately") (internal quotation omitted); see also *People v Hill*, 257 Mich App 126, 139; 667 NW2d 78 (2003) (observing that the "defendant necessarily bears the burden of establishing the factual predicate for [a] claim" of ineffective assistance) (internal quotation omitted). Because no evidence indicates that Breeding was insane, "[c]ounsel [wa]s not ineffective for failing to advocate a meritless position." *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005) (internal quotation omitted).

Next, Breeding has not demonstrated that counsel's concession of his guilt on the charge of malicious destruction of police property qualifies as objectively unreasonable, given the ample evidence that he committed this offense, including Breeding's admissions during trial. "[W]here the evidence obviously points to defendant's guilt, it can be better tactically to admit guilt and assert a defense or to admit guilt on some charges but maintain innocence on others." *Matuszak*, 263 Mich App at 60 (citation omitted). On this record, we conclude that defense counsel reasonably determined that admitting Breeding's culpability for malicious destruction of police property strategically benefitted the defense.

Breeding has effectively abandoned his allegations pertaining to ineffective assistance premised on defense counsel's failure to compel discovery and to object to hearsay testimony or bad-acts evidence, because he has failed to establish a factual basis to support these claims. See *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001). Nor do we detect any basis for Breeding's claim that his counsel failed to present an adequate defense. Defense counsel must prepare, investigate, and present all substantial defenses. *People v Chapo*, 283 Mich App 360, 371; 770 NW2d 68 (2009). "A substantial defense is one that might have made a difference in the outcome of the trial." *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). At

trial, defense counsel argued that Breeding did not realize that he was resisting police officers acting "in the lawful performance of their duties." Further, defense counsel portrayed Breeding as a credible witness, by pointing to Breeding's admissions to parole violation and to kicking out the rear passenger window in the patrol car. Under the circumstances, we find that defense counsel presented an adequate defense.

Finally, counsel's performance did not fall below an objective standard of reasonableness under prevailing professional norms in failing to call every witness identified by Breeding in an ex parte communication to the trial court. This Court will not second-guess defense counsel's decision to call or question a witness with the benefit of hindsight. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). The failure to call a supporting witness does not inherently constitute ineffective assistance of counsel, where there is no "unconditional obligation to call or interview every possible witness suggested by a defendant." *People v Beard*, 459 Mich 918, 919; 589 NW2d 774 (1998).

Breeding next asserts that the prosecutor failed to comply with the trial court's discovery order. We deem this contention of error abandoned, as Breeding has not identified any evidence allegedly withheld by the prosecutor. See *Watson*, 245 Mich App at 587. Even had Breeding provided specific information regarding the allegedly withheld evidence, our review of the record demonstrates that he is not entitled to relief. Breeding moved to compel discovery, seeking the police patrol cars' videorecordings, dispatch information, handwritten notes authored by the police officers, his mug shot, and his hooded sweatshirt. There were no videorecordings of the arrest, the post-arrest photograph did not reveal any injuries, and the hooded sweatshirt was available at trial. The record shows that Breeding and his counsel received the relevant police reports. To establish a due process violation under *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963), Breeding must prove: "(1) that the state possessed evidence favorable to the defendant; (2) that the defendant did not possess the evidence nor could the defendant have obtained it 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," *People v Cox*, 268 Mich App 440, 448; 709 NW2d 152 (2005). Because Breeding has failed to demonstrate that the prosecution possessed or withheld evidence favorable to him, Breeding is not entitled to relief on *Brady* grounds.

Breeding next alleges that the prosecutor engaged in misconduct. We review claims "of prosecutorial misconduct on a case-by-case basis by examining the record and evaluating the remarks in context." *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). Because Breeding failed to object to any of the alleged instances of prosecutorial misconduct, our review is subject to the plain-error rule. *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008).

Breeding primarily objects to the prosecutor's opening statement, in which the prosecutor asserted that Breeding was a parole absconder, resulting in his parole officer obtaining an arrest warrant. The purpose of an opening statement is to explain what the party making that statement intends to show at trial. *People v Moss*, 70 Mich App 18, 32; 245 NW2d 389 (1976), aff'd sub nom *People v Tilley*, 405 Mich 38 (1979). See also *People v Stimage*, 202 Mich App 28, 31; 507 NW2d 778 (1993). The prosecution's opening statement set forth an outline of the case, and

advised the jury of the importance of the evidence to be presented. *Moss*, 70 Mich App at 32. Breeding stood trial for a violation of MCL 750.81d(1), which punishes "an individual who assaults, batters, wounds, resists, obstructs, opposes, or endangers a person who the individual knows or has reason to know is performing his or her duties . . . ." Consistent with this statutory language, the prosecutor had to establish that Breeding knew or had reason to know that when they attempted to execute the arrest warrant, the police officers were performing their official duties. Viewed in context, the prosecutor's opening statement explained that the police sought to arrest Breeding for an outstanding parole violation warrant. Evidence of Breeding's parole status served to demonstrate one of the required elements of this crime. Furthermore, evidence later admitted without objection substantiated the challenged remarks. Breeding's parole officer testified that Breeding was a parolee under her supervision, and that an arrest warrant was issued. Defense counsel posed questions regarding the conditions of Breeding's parole, the date he absconded, and whether he had contacted the parole officer after he absconded. We find no misconduct arising from the prosecutor's opening statement.

Breeding provides a litany of other incoherent and unsupported assertions of prosecutorial misconduct, which we deem abandoned. See *Watson*, 245 Mich App at 587. We note that even were we to review these allegations, we would deem them lacking in merit. Although Breeding complains that the prosecutor's statements "constituted unsupported, unsubstantiated, unobjected, extremely self-serving hearsay," he fails to provide any specific examples of the complained behavior. Breeding also objects to the sufficiency of the evidence regarding the arrest warrant, but his parole officer testified specifically and in adequate detail to the circumstances surrounding the warrant's issuance. Breeding also attempts to argue that evidence of his parole status amounted to the improper introduction of bad-acts evidence. Bad-acts evidence may be admissible under MRE 404(b)(1) if offered for a proper purpose, such as "proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident." *People v Dobek*, 274 Mich App 58, 85; 732 NW2d 546 (2007). Contrary to Breeding's implication, evidence of his parole status and the warrant was offered for a proper purpose, because it tended to prove that Breeding's actions in resisting arrest were intentional. Although Breeding asserts that the prosecutor's "error of hearsay, vouching, admittance of other 'bad acts' as well as omission of evidence . . . is akin to manifest error," he has failed to support any of these claims with examples from the record.

Breeding further contends that the trial court erred by precluding defense counsel from interviewing the arresting officers, not compelling discovery, and not permitting additional defense witnesses. These contentions merely recycle the other claims raised by Breeding, discussed below, under the guise of judicial bias. Because Breeding did not seek disqualification of the trial judge, *People v Ensign*, 112 Mich App 286, 290; 315 NW2d 570 (1982), we review these unpreserved allegations of error under the plain-error rule. *Carines*, 460 Mich at 763-764.

We reject Breeding's allegations of judicial bias premised on his assertions that he was not able to have all of the arresting officers testify at the preliminary examination, or permitted to take depositions of the arresting officers. Breeding cannot demonstrate error as he waived any objection to the preliminary examination, see *People v Willis*, 1 Mich App 428, 430; 136 NW2d 723 (1965), had no right to take depositions of the arresting officers, see *People v Elston*, 462 Mich 751, 765; 614 NW2d 595 (2000), and the trial court permitted defense counsel to interview the arresting officers. Although Breeding asserts that the trial court did not compel discovery, he

fails to identify what discoverable evidence "still [has] not been produced," and a review of the record does not support his claim that he was denied discovery. Because Breeding has failed to set forth a factual basis to support this allegation of judicial bias, we deem it abandoned. *Watson*, 245 Mich App at 587.

We also reject Breeding's allegation that the trial court precluded defense witnesses from testifying. The record demonstrates that Breeding sent an ex parte witness list to the trial court, but failed to serve the prosecutor with the list as required MCR 6.201(A)(1). The list was composed primarily of character witnesses and experts who would testify regarding Breeding's purported mental illness. The trial court found the expert witnesses "were either legally irrelevant, redundant or really not dealing with the material issues in the cases," and that character witnesses would not be particularly helpful given Breeding's criminal record. A trial court has the discretion to permit or deny the late endorsement of a witness. MCR 6.201(J); *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008). Contrary to his argument, the trial court permitted Breeding to reopen proofs to call his mother and sister as witnesses, even though they were not listed and endorsed. The trial court did not abuse its discretion by disallowing Breeding's request to call numerous witnesses, particularly in light of Breeding's failure to elucidate the subject matter of their proposed testimony. Breeding has failed to demonstrate plain error affecting his substantial rights regarding his allegations of judicial bias. *Carines*, 460 Mich at 763-764.

Finally, Breeding suggests that reversal is warranted based on cumulative error. As "[t]here were no errors that can aggregate to deny defendant a fair trial," *Ackerman*, 257 Mich App at 454, there exists no basis for reversal of the convictions.

Affirmed.

/s/ William B. Murphy
/s/ Patrick M. Meter
/s/ Elizabeth L. Gleicher