

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
October 3, 2013

v

MARK ANTHONY PORTER,

Defendant-Appellant.

No. 298474
Washtenaw Circuit Court
LC No. 09-000365-FC

ON REMAND

Before: SERVITTO, P.J., and FITZGERALD and TALBOT, JJ.

PER CURIAM.

This case returns to this Court on remand from the Michigan Supreme Court for consideration of whether defendant was denied the effective assistance of counsel because his trial counsel failed to object to the trial court's unjustified shackling of defendant during trial.¹ Defendant was convicted by a jury of first-degree premeditated murder, MCL 750.316(1)(a); conspiracy to commit murder, MCL 750.157a; felony murder, MCL 750.316(1)(b); first-degree home invasion, MCL 750.110a(2); larceny in a building, MCL 750.360; possession of a firearm by a felon, MCL 750.224f; and possession of a firearm during the commission of a felony (felony firearm), MCL 750.227b. Because we conclude that counsel's failure to object to the shackling did not prejudice defendant such that he was deprived of his right to a fair trial, we find that he was not denied the effective assistance of counsel and we thus again affirm in part but remand for amendment of the judgment of sentence.

"A claim of ineffective assistance of counsel presents a mixed question of law and fact. This Court reviews a trial court's findings of fact, if any, for clear error, and reviews de novo the ultimate constitutional issue arising from an ineffective assistance of counsel claim." *People v Brown*, 294 Mich App 377, 387; 811 NW2d 531 (2011) (citations omitted). "In reviewing a defendant's claim of ineffective assistance of counsel, the reviewing court is to determine (1) whether counsel's performance was objectively unreasonable and (2) whether the defendant was prejudiced by counsel's defective performance." *People v Rockey*, 237 Mich App 74, 76; 601

¹ *People v Porter*, 493 Mich 972; 829 NW2d 866 (2013).

NW2d 887 (1999). Regarding the latter, the defendant must show that the result of the proceeding was fundamentally unfair or unreliable, *and* that but for counsel's poor performance the result would have been different. *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997).

In this case, we previously concluded that the trial court erred in ordering shackles with no particularized reason placed on the record to justify doing so.² And, our Supreme Court signaled its agreement, having spoken of how "trial counsel failed to object to the circuit court's unjustified shackling of the defendant during trial." *Porter*, 493 Mich at 972.

Under the law of the case doctrine, an appellate court ruling on a particular issue binds the appellate court and all lower tribunals with regard to that issue. The law of the case mandates that a court may not decide a legal question differently where the facts remain materially the same. The doctrine applies to questions specifically decided in an earlier decision and to questions necessarily determined to arrive at that decision. [*Webb v Smith*, 224 Mich App 203, 209; 568 NW2d 378 (1997) (citations omitted).]

Law of the case, then, as put forward by the pronouncements of both this Court and the Supreme Court, compels the conclusion that defense counsel's failure to object constituted deficient, objectively unreasonable, performance. See *Rockey*, 237 Mich App at 76. The questions that remain to be answered, then, are whether the error renders the trial fundamentally unfair or unreliable, and whether the result would have been different but for counsel's poor performance. See *Messenger*, 221 Mich App at 181. We hold that it does not and would not.

Defendant's leg shackles were covered by the desk at which he sat during trial, and he was transported to the courtroom prior to the jury being present to prevent their inadvertent view of the shackles. While one juror nevertheless testified at an evidentiary hearing that he observed defendant's shackles a couple of times during trial, we previously concluded that the trial court discounted the credibility of that juror and, alternatively, that there was no evidence that the juror had been influenced by any such observation. *Porter*, *unpub op p 2*. We additionally concluded that "compelling" evidence of defendant's guilt further militated against the conclusion that the shackling affected the result. *Id.* at p 3. The Supreme Court did not disturb these conclusions on remand, leaving them as the law of the case not subject to further review. *Webb*, 224 Mich App at 209. Given our undisturbed prior conclusions, the shackling of defendant did not render his trial fundamentally unfair or unreliable, or otherwise affect the outcome.

Moreover, appellate counsel's supplemental brief neither suggests that defendant was other than minimally inconvenienced by his shackles, nor proposes any basis for concluding that the shackling interfered with defendant's ability to assist in his own defense. The concurrence provides further basis for concluding that the shackling of defendant did not render his trial fundamentally unfair or unreliable, or otherwise affect the outcome. Thus, defendant did not

² *People v Porter*, unpublished opinion per curiam of the Court of Appeals, issued October 23, 2012 (Docket No. 298474).

suffer ineffective assistance of counsel as a consequence of counsel's failure to object to his being shackled at trial.

As noted in our earlier opinion, defendant in his Standard 4 Brief contends that his convictions for first-degree premeditated murder and felony murder, arising out of a single homicide offense, violates double jeopardy. We agreed. See *People v Williams*, 475 Mich 101, 103; 715 NW2d 24 (2006). The appropriate remedy is to remand to the trial court with instructions to correct defendant's presentence report and to amend defendant's judgment of sentence such that defendant has one conviction for first-degree murder, and that this conviction is supported by two theories; felony murder and premeditation. *Id.*

Affirmed in part, but remanded for modification of defendant's presentence report and judgment of sentence. We do not retain jurisdiction.

/s/ Deborah A. Servitto

/s/ E. Thomas Fitzgerald