STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee, v NAN LU, Defendant-Appellant.	UNPUBLISHED February 7, 2012 No. 300854 Oakland Circuit Court LC No. 2009-227194-FH

Before: SHAPIRO, P.J., and WHITBECK and GLEICHER, JJ.

PER CURIAM.

A jury convicted defendant, a masseur, of committing a sexual assault against the complainant during a professional session. The principal issue presented is whether defendant sustained prejudice when several jurors observed him being shackled in preparation for transportation from the courtroom. Instead of conducting an evidentiary hearing to investigate possible prejudice occasioned by the shackling, the trial court engaged in an *ex parte*, off-the-record discussion of the subject with the jury. Based on that discussion, the trial court concluded that the shackling had not influenced the jury's deliberations. Because we are unable to assess whether defendant endured prejudice as a result of the jurors' observation of the shackling, we reverse his conviction and remand for a new trial.

The complainant accused defendant of rubbing her vagina during a two-hour "deep-tissue" massage. According to the complainant, defendant pressed his arm against her windpipe while inappropriately touching her. Defendant highlighted multiple inconsistencies in the complainant's several written statements about the incident. During their deliberations, the jurors asked to review the complainant's videotaped trial testimony. Defense counsel and the prosecutor agreed to this request, and both signed the following statement drafted by the trial court:

> Dear Jury:
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> If you wish to watch the tape, please identify the witness, and you must watch the entire testimony of the witness, with a clerk queuing up the tape and watching it – you cannot rewind, advance, etc the tape, and you may not deliberate in the clerk's presence; once the tape is completed, the clerk will remove the tape and

> leave, and you may continue deliberations. Please let us know if you would like to watch the testimony of any witness.

The jury again requested to review the complainant's video testimony and the court followed the agreed-upon procedures. Ultimately the jury convicted defendant of fourth-degree criminal sexual conduct, MCL 750.520e(1)(b) (sexual contact through use of force or coercion).

After the jury rendered its verdict, the trial court requested that the jurors return to the jury room, explaining: "I'm going to come in and talk with you for a few minutes[.]" The record reveals that the judge spent approximately 14 minutes in the jury room. When the judge returned, he placed into the record several notes that had been received during deliberations, which the parties had previously discussed while off the record. The court then stated:

> [O]ne of the notes asked for – to watch the video. The – someone from my chambers watched the – queued it up and watched the video with the jurors to insure that they did not stop, rewind, fast forward or otherwise manipulate the video for the purpose of allowing for the completeness of the testimony to come in so it was to be played from the beginning to end of the witness's testimony.
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> In the middle of the testimony there was a break, the court called another case, the deputies were here, they put the defendant in chains and left with the defendant. Apparently in the video it is in the background. I did ask the jurors about this, some of them saw it and some of them didn't. They all told me it didn't make a difference, but I do think it's important for this record to reveal that they were exposed to the defendant being placed in custody with chains on the background of the video.

Defense counsel advised, "[o]bviously I'll have to file a motion for mistrial because the case law is overwhelming that that would be . . . prejudice to the defendant during their deliberations." Defense counsel did not request an evidentiary hearing, or that the jurors submit to questioning on the record. Counsel did file a motion for new trial, which the court denied.

Defendant first contends that the trial court denied him a fair trial by requiring a court clerk to remain in the jury room during the jury's review of the complainant's videotaped testimony. We need not address this issue because defendant waived it by signing the statement prepared by the trial court. A waiver is an "intentional relinquishment of a known right[,]" usually accomplished "by acts which indicate an intent to relinquish it." *The Cadle Co v City of Kentwood*, 285 Mich App 240, 254; 776 NW2d 145 (2009) (internal quotation and emphasis omitted). Because defense counsel stipulated to the procedure utilized by the trial court, defendant has waived any claim that court personnel invaded the privacy of the jury deliberations. *People v White*, 144 Mich App 698, 705; 376 NW2d 184 (1985). Even absent defendant's waiver, we would conclude that defendant suffered no prejudice. Defendant has

brought forth no evidence that the clerk communicated with the jury or that the stipulated conditions for replaying the testimony were violated.[1]

Next, defendant asserts that the shackling revealed during the complainant's video testimony presumptively prejudiced his right to a fair trial. Due process principles prohibit the routine use of observable shackles during courtroom proceedings. "[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). More than a decade before the United States Supreme Court decided *Deck*, the Michigan Supreme Court declared, "The rule is well-established in this and other jurisdictions that a defendant may be shackled only on a finding supported by record evidence that this is necessary to prevent escape, injury to persons in the courtroom or to maintain order." *People v Dunn*, 446 Mich 409, 425; 521 NW2d 255 (1994). In *Deck*, the United States Supreme Court set forth three "fundamental legal principles" counseling against routine courtroom shackling: (1) "Visible shackling undermines the presumption of innocence and the related fairness of the factfinding process"; (2) the use of shackles diminishes an accused's right to counsel by interfering with his ability to communicate with his lawyer, and (3) routine shackling undermines "[t]he courtroom's formal dignity, which includes the respectful treatment of defendants." *Deck*, 544 US at 630-631.

The facts of this case implicate one of these principles. Defendant remained free of shackles throughout the formal courtroom proceedings, and has not claimed any interference with his ability to consult with counsel. However, defendant's visible shackling following a courtroom session, while defendant remained inside the courtroom, placed at risk the jurors' presumption of his innocence and thereby established a potential for prejudice.[2]

This trial presented a pure and simple credibility contest. The defense focused on discrepancies in the complainant's five written versions of the massage, and contrasted them with the complainant's testimony at the trial. Defense counsel highlighted that the complainant's two initial statements did not mention defendant's forcible placement of his arm across her throat, or describe any other forcible acts. Defendant did not testify.

The jury deliberated for approximately one hour on September 28, 2009, and throughout the day on September 29. During the afternoon of September 29, a juror's note prompted the

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[1] To the extent that defendant preserved an argument that he and his counsel should have been present during the jury's viewing of the videotape, his counsel's stipulation to the procedure used by the trial court has extinguished any possible error.

[2] Because no record was created concerning the jurors' view of defendant being shackled, the duration of defendant's appearance in shackles remains unknown. The trial court described only that the video displayed "the deputies were here, they put the defendant in chains and left with the defendant," and that "some" of the jurors observed the shackling.

court to read CJI2d 3:1:18A, the deadlocked jury instruction: "You have returned from deliberations indicating that you believe you cannot reach a verdict. I'm going to ask you to please return to the jury room and resume your deliberations in the hope that after further discussion you will be able to reach a verdict." The jury continued deliberating and, on October 1, asked to review the complainant's videotaped testimony. The record does not reveal the time at which the jury watched the video. At 4:22 p.m., the trial court announced that the jury had reached a verdict.

The jury was exposed to an image of the shackled defendant at a consequential moment in closely-drawn proceedings: prolonged, contentious deliberations. Although the shackling may have constituted a routine security precaution, the jury received no cautionary instruction explaining this purpose or directing against drawing any negative inferences from seeing defendant placed in chains. Without guidance from the court, a juror could perceive that defendant required shackles because he posed a particular risk of violent behavior. In the context of this case, where the use of force constituted an essential element of the charged offense, defendant's sudden appearance in shackles potentially prejudiced the presumption of his innocence.

> "Basic to American jurisprudence is the principle that an accused, despite his previous record or the nature of the pending charges, is presumed innocent until his guilt is established beyond a reasonable doubt by competent evidence. It follows that he is also entitled to the indicia of innocence. In the presence of the jury, he is ordinarily entitled to be relieved of handcuffs, or other unusual restraints, so as not to mark him as an obviously bad man or to suggest that the fact of his guilt is a foregone conclusion." [*Ruimveld v Birkett*, 404 F3d 1006, 1015 (CA 6, 2005), quoting *Hamilton v Vasquez*, 882 F2d 1469, 1471 (CA 9, 1989).]

We acknowledge that "a jury's brief or inadvertent glimpse of a defendant in physical restraints is not *inherently* or *presumptively* prejudicial to a defendant." *United States v Olano*, 62 F3d 1180, 1190 (CA 9, 1995) (emphases added). In *People v Moore*, 164 Mich App 378, 384-385; 417 NW2d 508 (1987), this Court rejected the defendant's claim that the jurors' brief, inadvertent view of him in shackles required a mistrial, reasoning:

> In general, freedom from shackling of a defendant during trial has long been recognized as an important component of a fair and impartial trial. However, this rule does not extend to circumstances in which a defendant may be shackled outside a courtroom to prevent escape. In addition, where a jury inadvertently sees a shackled defendant, there must be some showing that prejudice resulted. It was incumbent upon defendant here to establish prejudice. He failed to do so, and there is no error requiring reversal. [*Id.* (internal citations omitted).]

Nevertheless, "it must be recognized that some prejudice flows to the defendant in this situation." *Kennedy v Cardwell*, 487 F2d 101, 109 (CA 6, 1973). The Supreme Court observed in *Deck* that shackling "inevitably undermines the jury's ability to weigh accurately all relevant considerations – considerations that are often unquantifiable and elusive[.]" *Deck*, 544 US at 633. Shackling constitutes an "unmistakable indication[] of the need to separate a defendant

from the community at large[.]" *Holbrook v Flynn*, 475 US 560, 569; 106 S Ct 1340; 89 L Ed 2d 525 (1986). Defendant's unexplained shackling could well have marked him as a dangerous man or a repeat offender in the eyes of the jury. But guilt or innocence must be determined based on evidence rather than suspicion, during proceedings closely governed to prevent the intrusion of collateral, irrelevant influences. "[F]aithfulness to the rationale of the Supreme Court's decisions requires that a criminal defendant's right to be free from unreasonable prejudice during his trial must apply to all trial proceedings, including those . . . that take place outside of the courtroom." *Lopez v Thurmer*, 573 F3d 484, 492 (CA 7, 2009) (emphasis omitted). Here, the trial court indisputably recognized the potentially prejudicial nature of the jury's inadvertent observation of the shackling; the judge entered the jury room immediately after the verdict had been announced to investigate that very question.

The exposure of defendant clothed in the garb of guilt occurred at a most inopportune moment – while the jurors vigorously debated his innocence. Whether their view of defendant's shackling denied him a fair trial depended on what the jury saw, and how those that viewed the shackling interpreted it. Any prejudice likely could have been dispelled by a curative instruction. But by the time the facts surrounding the shackling were first placed on the record, the verdict had been announced. The time for a curative instruction had passed. Shortly after the verdict had been announced, the trial court had entered the jury room, engaged in an *ex parte*, unrecorded discussion with the jurors concerning the shackling, and declared it non-prejudicial. With this event, the window of opportunity for a meaningful evidentiary hearing closed.

The case law instructs that when jurors inadvertently observe a defendant in shackles, appropriate remedial measures include an evidentiary hearing elucidating potential prejudice, and provision of a cautionary instruction. See *Olano*, 62 F3d at 1190 ("The district court held an evidentiary hearing because of this alleged incident. It concluded that no jurors had witnessed Olano in handcuffs, and decided that there was no need to issue a cautionary instruction."); *United States v Moreno*, 933 F2d 362, 368 (CA 6, 1991) ("Courts have expressed a 'preference for remedial action after an accidental observation of a defendant in custody.'"); *United States v Williams*, 809 F2d 75, 84 (CA 1, 1986) ("We have previously stated our preferences for remedial action after an accidental observation of a defendant in custody."). At no point did defendant's jury receive a cautionary instruction. Nor does the record reveal with any precision what the jurors saw, rendering us unable to meaningfully review whether the shackling likely "affect[ed] adversely the jury's perception of the character of the defendant." *Deck*, 544 US at 633.[3]

While defendant ordinarily bears the burden of demonstrating prejudice, the trial court's *ex parte*, unrecorded meeting with the jurors compromised his ability to do so. See *Rhoden v Rowland*, 10 F3d 1457, 1460 (CA 9, 1993) ("The problem before us is that while both the state

[3] The record establishes that at least some of the jurors observed defendant being placed in chains and taken out of the courtroom, but does not indicate how many saw it, how much of the shackling process they observed before the judge's law clerk turned off the tape, or whether any of the jurors mentioned the shackling during the deliberations.

appellate court and the district court placed the burden on Rhoden to show prejudice, they never gave him an adequate opportunity to demonstrate whether or not the jurors saw the shackles."). The questions asked of the jurors, and their answers, remain unknown. Once the judge questioned the jurors without counsel or a court reporter present and concluded that defendant had sustained no prejudice, the opportunity for a subsequent, meaningful evidentiary hearing concerning prejudice was lost.[4] It is impossible at this stage to assess the duration of the jury's view of the shackling, or whether the subject of the shackling arose during the deliberations. Under these circumstances, we are hard pressed to place on defendant the burden of affirmatively demonstrating prejudice. But we do not rest our decision on this ground alone.

Defendant maintains that by informally speaking with the jurors after they had rendered their verdict, the trial court violated his Sixth Amendment right to be present during all critical stages of his trial. A criminal defendant enjoys a due process right to be present at a proceeding "whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." *Snyder v Massachusetts*, 291 US 97, 105-106; 54 S Ct 330; 78 L Ed 674 (1934), overruled in part on other grounds in *Malloy v Hogan*, 378 US 1; 84 S Ct 1489; 12 L Ed 2d 653 (1964). Although a defendant need not be present during every interaction between a judge and juror, "the right to personal presence at all critical stages of the trial and the right to counsel are fundamental rights of each criminal defendant." *Rushen v Spain*, 464 US 114, 117; 104 S Ct 453; 78 L Ed 2d 267 (1983). Citing *Snyder*, the Michigan Supreme Court observed in *People v Mallory*, 421 Mich 229, 247; 365 NW2d 673 (1984):

> A defendant has a right to be present during the voir dire, selection of and subsequent challenges to the jury, presentation of evidence, summation of counsel, instructions to the jury, rendition of the verdict, imposition of sentence, and any other stage of trial where the defendant's substantial rights might be adversely affected.

Preliminarily, we note that when the trial judge announced his intention to speak with the jurors, neither counsel offered any objection. Accordingly, we review this constitutional claim for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). "Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence." *Id.* (internal quotation marks and citations omitted).

This case demonstrates the grave risks that may attend *ex parte* communications between a judge and jury, even after a verdict has been rendered. In *Harris v United States*, 738 A2d 269 (DC, 1999), a trial judge met with a jury after its verdict had been announced. At the defendant's sentencing, the judge "informed counsel that he had been told that, from the

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[4] "Called upon to perform unaccustomed duties in strange surroundings, the average juror is very sensitive to any hint or suggestion by the judge -- however proper the judge's conduct." *State v Mims*, 306 Minn 159, 168; 235 NW2d 381 (1975).

beginning of deliberations, one juror had declared to the others that under no circumstances would he ever return a verdict of first-degree murder, which effectively had left the jury with the choice of being hung or returning some other type of verdict." *Id.* at 276-277. The judge "then opined to counsel that he had not been surprised that a number of jurors favored conviction for first-degree murder" based on the evidence presented. *Id.* at 277. The defendant moved for the judge's recusal, contending that the court's conversation with the jury influenced its sentencing decision. *Id.* The District of Columbia Court of Appeals concluded that although the judge had not intended to solicit substantive information from the jury, he nevertheless "inadvertently initiated and subsequently engaged in prohibited *ex parte* communications about" the pending case. *Id.* at 278.

While condoning the trial judge's effort to afford jurors an opportunity to talk off-the-record about trial events, the *Harris* Court warned that unexpected disclosures during these dialogues may threaten the defendant's rights:

> We do not mean to imply that trial court judges should cease their efforts to provide an opportunity for jurors to talk to the court about matters which might have arisen during the course of trial. That opportunity could be a welcome one to jurors at the conclusion of what might have been a stressful experience and, equally important, it may provide useful and appropriate information about ways to improve the jury service experience. . . . Judicial efforts to solicit jurors' views are salutary and are to be commended—provided they are made subject to certain procedural safeguards to avoid and, if necessary, mitigate, unanticipated disclosures such as the one that occurred in this case. [*Id.* at 278-279.]

The *Harris* Court concluded that although the trial court should not have conducted the post-verdict session with the jury, the defendant sustained no prejudice. *Id.* at 279-280. Similarly, in *State v Walkings*, 388 NJ Super 149, 158-159; 906 A2d 505 (2006), the Superior Court of New Jersey expressed reservations about post-verdict, *ex parte*, unrecorded discussions between judges and juries: "Although the controversies discussed in the existing case law in this State relate to communications occurring during the course of deliberations, . . . we see no principled reason for permitting ex parte communications concerning the jury's deliberations once a verdict has been rendered and the jury discharged."[5]

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[5] The Supreme Court of Idaho has firmly condemned the post-verdict practice of judge-jury interaction:

> To the extent there is a practice of trial judges engaging jurors in a dialogue of questions and answers following a verdict, but before post trial matters, including sentencing, are heard and decided, it is improper. It is no different than any other ex parte contact that may influence the outcome of a proceeding. After a verdict is taken the judge may thank the jury members for their service and address those issues of accommodating the jury members' convenience. Otherwise, the door between the bench and the jury is closed so

Although no published Michigan cases squarely address this issue, MCR 6.414(B) instructs, in relevant part, that when a judge intends to meet with the jury "pertaining to the case," the parties must be invited to attend:

> The court may not communicate with the jury or any juror pertaining to the case without notifying the parties and permitting them to be present. The court must ensure that all communications pertaining to the case between the court and the jury or any juror are made part of the record.

The record in this case indicates that even before speaking with the jury, the trial court knew of the jury's exposure to defendant's shackling. At oral argument the prosecutor admitted as much. The trial court's discussion with the jury concerning possible prejudice flowing from their observation of the shackling "pertain[ed] to the case" despite that the verdict had been rendered. Under these circumstances, the trial court's *ex parte*, unrecorded inquiry of the jurors concerning the shackling constituted plain error. We further conclude that the *ex parte*, unrecorded conversation regarding defendant's shackling seriously affected the fairness and integrity of the judicial proceedings.

In *People v Medcoff,* 344 Mich 108, 116; 73 NW2d 537 (1955), our Supreme Court declared, "nothing in the nature of evidence should be taken in the absence of the accused." Based on the "mere fact" of the defendants' absence from the trial court's recorded conversation with the jury concerning jury contamination, the Supreme Court "conclusively presumed" prejudice and reversed the defendants' convictions. *Id.* at 117-118. Subsequently, in *People v Morgan,* 400 Mich 527, 535; 255 NW2d 603 (1977), the Supreme Court limited *Medcoff:*

> Although we believe the *Medcoff* result was correct on its facts, it is no longer the law that injury is conclusively presumed from defendant's every absence during the course of a trial. No less an authority than the United States Supreme Court has recognized that even violations of constitutional rights can amount to harmless error in the circumstances of a particular case, and in cases involving a defendant's absence from a part of a trial, that Court has indicated that automatic reversal is not the rule.

Morgan instructs that "the proper test for determining whether a defendant's absence from a part of a trial requires reversal of his or her conviction" is whether any reasonable possibility of prejudice arises from defendant's nonattendance. *Id.* at 536. The test adopted in *Morgan* was initially set forth by the United States Court of Appeals for the District of Columbia Circuit in *Wade v United States,* 142 US App DC 356; 441 F2d 1046, 1050 (1971). *Wade* provides the following guidance in applying the "reasonable possibility of prejudice" test:

> In considering whether this standard is met, we must keep in mind the importance of a defendant's presence at all stages of his trial. Indeed, this aspect of a trial has

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> long as the case is pending, only to be opened in a proper proceeding. [*Gillingham Constr, Inc v Newby-Wiggins Constr, Inc,* 142 Idaho 15, 25-26; 121 P3d 946 (2005).]

> constitutional prestige in the Sixth Amendment guarantee of the right to confront adverse witnesses- in good part a constitutional recognition of a psychological influence. Though perhaps to a less degree, the same influence pertains to the right of confrontation of defendant and jury, aside from the usefulness the accused may be to his counsel. This is especially so when as here a deadlocked jury is reinstructed at some length, is later given an *Allen* charge, and subsequently renders its verdicts. Moreover, there is the reasonable possibility that the jury speculated adversely to the defendant about his absence from the courtroom. [*Id.* at 1050.]

The trial court harbored sufficient concern that the jury's observation of defendant's shackling may have caused prejudice that it substantively addressed this issue with the jurors before excusing them. During the unrecorded meeting with the jury, the trial court presumably obtained evidence relevant to its determination of whether the jurors saw defendant being shackled, including the length of time the shackling appeared in the video. Given these unique circumstances in an obviously close case, defendant's presence at an evidentiary hearing may have yielded information directly bearing on whether the shackling influenced the verdict. Accordingly, we discern a reasonable possibility of prejudice arising from defendant's absence when his jury was questioned about its view of his shackling.

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ Douglas B. Shapiro
/s/ Elizabeth L. Gleicher