

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
May 24, 2012

v

ERIC JUSTON MCCANTS,

Defendant-Appellant.

No. 303454
Macomb Circuit Court
LC No. 2010-004142-FC

Before: RONAYNE KRAUSE, P.J., and SAAD and BORRELLO, JJ.

PER CURIAM.

A jury convicted defendant of three counts of armed robbery, MCL 750.529, and one count of resisting arrest, MCL 750.81d(1). The trial court sentenced defendant to three terms of 180 months to 281 months for the armed robbery convictions, to be served concurrently with a sentence of 12 months to 36 months for the resisting arrest conviction. For the reasons set forth below, we affirm.

I. FACTS

On the evening of September 10, 2010, three men approached four twelve-year-old girls who were walking down the street. One of the girls was able to escape, but a man in a burgundy hooded sweatshirt pulled out a gun, ordered the other girls to the ground, and took their book bags.

Minutes later, a deputy alerted nearby officers to look for a man in a burgundy hooded sweatshirt accompanied by two other men. A plain-clothes officer near the scene of the crime spotted the three men. He approached the men and identified himself as a police officer, but they fled. Shortly thereafter, the police officer apprehended defendant who, at that time, had no shirt on even though the temperature outside was around 50 degrees. Officers found a burgundy sweatshirt, a starter pistol, and several book bags near the area. One of the girls identified defendant at the scene and told the officers that he had worn the discarded sweatshirt during the armed robbery.

II. ANALYSIS

A. SHACKLES

Defendant argues that he is entitled to a new trial because the trial court forced him to appear before the jury in shackles. Defendant did not place any objection on the record, and we review this unpreserved issue for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 139 (1990). Reversal is warranted only if plain error resulted in the conviction of an actually innocent defendant or when the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings independent of the defendant's innocence. *Id.*

The Constitution forbids the use of visible shackles during the guilt phase of a trial absent a specific finding by the trial court that the use of shackles is justified by an essential state interest specific to the defendant. *Deck v Missouri*, 544 US 622, 626; 125 S Ct 2007; 161 L Ed 2d 953 (2005). The failure to make a defendant-specific finding justifying the use of visible restraints is a violation of a defendant's due process rights. *Id.* at 629. However, a violation does not require the reversal of a defendant's conviction if the state shows that the due process violation did not contribute to the guilty verdict. *Id.* at 635.

Here, the record only discloses one reference to defendant's shackles, when the trial judge stated that he wanted to sit in a location where his "leg irons" would not be visible to the jury. Because the shackles were not visible to the jury, they could not have contributed to the verdict or seriously affected the fairness, integrity, or public reputation of the judicial proceedings.

Defendant is not entitled to an evidentiary hearing to determine whether he was forced to wear visible shackles during trial because, if true, the evidence of defendant's guilt was overwhelming and any error would be harmless beyond a reasonable doubt. Police spotted defendant near the crime scene minutes after he committed the crime. At that time, defendant was wearing the burgundy sweatshirt and was with two men matching the general description of the accomplices. Defendant fled and was apprehended minutes later, shirtless on a cold day, while the sweatshirt and starter pistol were recovered nearby. Moreover, one of the victims positively identified defendant at that time and he was also identified in court.

B. VIEW OF CRIME SCENE

Defendant claims that the trial court erred by refusing to allow the jury to view the crime scene. We review this issue for an abuse of discretion. *People v Unger*, 278 Mich App 210, 255; 749 NW2d 272 (2008). A trial court abuses its discretion when its determination falls outside of the range of principled outcomes. *People v Feezel*, 486 Mich 184, 192; 783 NW2d 67 (2010).

Pursuant to MCR 6.414(F), "[t]he court may order a jury view of property or of a place where a material event occurred." Similarly, under MCL 768.28, "[t]he court may order a view by any jury empaneled to try a criminal case, whenever such court shall deem such view necessary."

At one point, a juror expressed an interest in viewing the site. The trial judge stated that a viewing would not be necessary because the parties planned to introduce more maps into evidence. Defense counsel later asked the court to allow the jury to view the scene, but the trial

judge again declined because the maps were “more than adequate” and nothing would be gained from “driving the streets.” Defense counsel did not assert that the maps were incorrect or misleading, and provided no reason why an in-person viewing of the scene would give the jury a clearer understanding of the events at issue. The trial court’s decision to deny a viewing of the crime scene was within the range of principled outcomes.

C. ASSISTANCE OF COUNSEL

Defendant contends that he received ineffective assistance of counsel. We limit our review of an unpreserved claim of ineffective assistance to mistakes apparent on the record. *People v Cox*, 268 Mich App 440, 453; 709 NW2d 152 (2005). In order to prevail on a claim of ineffective assistance of counsel, a defendant must show both that counsel’s performance was deficient, i.e., that it fell below an objective standard of reasonableness, and that defendant was prejudiced thereby, i.e., that there was a reasonable probability that the outcome of the trial would have been different if not for counsel’s deficiency. *People v Ackerman*, 257 Mich App 434, 455; 669 NW2d 818 (2003).

Defendant complains that defense counsel should have asked the trial court to state its reasoning on the record for shackling defendant’s legs during the trial. This argument is without merit. As noted, there is no evidence that defendant wore visible shackles during trial, and the evidence against defendant was overwhelming. Defendant cannot show a reasonable probability that counsel’s failure to request a statement from the trial court affected the outcome of the trial.

Defendant asserts that defense counsel should have objected to the identification of defendant by one of the victims who had also identified him near the scene of the robbery shortly after the crime. If a witness is exposed to an impermissibly suggestive pretrial identification procedure, the witness’s in-court identification is not allowed unless the prosecution shows by clear and convincing evidence that the in-court identification is based on a sufficiently independent basis to purge the taint of the illegal identification. *People v Kurylczyk*, 443 Mich 289, 303, 318; 505 NW2d 528 (1993). A procedure is impermissibly suggestive if, when looking at the totality of the circumstances, it leads to a substantial likelihood of misidentification. *Id.* at 302, 306, 318. When examining the totality of the circumstances, the relevant factors include: the opportunity for the witness to view the criminal at the time of the crime, the witness’s degree of attention, the accuracy of a prior description, the witness’s level of certainty at the pretrial identification procedure, and the length of time between the crime and the confrontation. *Id.* at 306.

Defendant argues that the pretrial identification procedure was impermissibly suggestive because defendant was the only individual presented for identification. Improper suggestion may occur when “the witness when called by the police or prosecution either is told or believes that the police have apprehended the right person.” *People v Anderson*, 389 Mich 155, 178; 205 NW2d 461 (1973), overruled in part on other grounds, *People v Hickman*, 470 Mich 602, 604; 684 NW2d 267 (2004). Moreover, when “the witness is shown only one person or a group in which one person is singled out in some way, he is tempted to presume that he is the person.” *Anderson*, 389 Mich at 178. Nonetheless, application of the independent basis factors establishes that there was clearly an independent basis for the identification. The victim testified that she was able to clearly see defendant while she was lying on her back during the robbery, and that,

while it was dark, defendant was standing very close to her throughout the robbery. She originally described the man who robbed her as a black male in a burgundy hooded sweatshirt accompanied by two men. Defendant fit this description when he was initially spotted by the police near the scene, minutes after the crime. The record reflects that the victim “really remembered” defendant when she first saw him and no evidence suggests she was hesitant or uncertain. Moreover, the victim reported the crime minutes after it happened, defendant was apprehended minutes after this report, and the on-scene identification was made minutes after the apprehension. And, again, if error occurred, the weight of the other evidence against defendant was overwhelming. Therefore, because defendant cannot show with reasonable probability that defense counsel’s failure to object was outcome determinative, defendant cannot establish a claim of ineffective assistance of counsel.

D. PRIOR FELONY

Defendant argues that the trial court violated his right to present a defense by allowing the prosecutor to impeach him with his prior felony conviction. This Court reviews a decision to allow impeachment by evidence of a prior conviction for an abuse of discretion. *People v Coleman*, 210 Mich App 1, 6; 532 NW2d 885 (1995).

MRE 609 provides:

(a) **General rule.** For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime shall not be admitted unless the evidence has been elicited from the witness or established by public record during cross-examination, and

(1) the crime contained an element of dishonesty or false statement, or

(2) the crime contained an element of theft, and

(A) the crime was punishable by imprisonment in excess of one year or death under the law under which the witness was convicted, and

(B) the court determines that the evidence has significant probative value on the issue of credibility and, if the witness is the defendant in a criminal trial, the court further determines that the probative value of the evidence outweighs its prejudicial effect.

(b) **Determining probative value and prejudicial effect.** For purposes of the probative value determination required by subrule (a)(2)(B), the court shall consider only the age of the conviction and the degree to which a conviction of the crime is indicative of veracity. If a determination of prejudicial effect is required, the court shall consider only the conviction’s similarity to the charged offense and the possible effects on the decisional process if admitting the evidence causes the defendant to elect not to testify. The court must articulate, on the record, the analysis of each factor.

Here, defendant's prior conviction was for home invasion with intent to commit a theft. Because that crime contains an element of theft and is punishable by a prison sentence of greater than one year, the requirements of MRE 609(a)(2) and (a)(2)(A) are met. Further, the trial court made a finding on the record that the evidence had significant probative value on the issue of credibility and that the probative value of the evidence outweighed its prejudicial effect. Accordingly, the requirements of MRE 609(a)(2)(B) were also met. Moreover, the trial court articulated all of the required findings with regard to prejudice and probative value as required by MRE 609(b). None of these findings fell outside the range of principled outcomes. The conviction involved theft, the crime occurred only six months before the crime at issue here, and there was little chance that the admission of the evidence of the conviction for impeachment purposes would deter defendant from testifying; defendant had already informed the court he did not intend to testify. Because the trial court's decision to admit defendant's prior conviction for impeachment purposes fully conformed with the requirements of MRE 609, the trial court did not abuse its discretion.

Affirmed.

/s/ Amy Ronayne Krause
/s/ Henry William Saad
/s/ Stephen L. Borrello