STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 3, 2002
v	No. 231217 Kent Circuit Court
LARRY ALLEN JERRILS, Defendant-Appellant.	LC No. 99-009533-FH

Before: Whitbeck, C.J., and Bandstra and Talbot, JJ.

PER CURIAM.

A jury convicted defendant Larry Allen Jerrils of first-degree home invasion[1] and assault with intent to commit criminal sexual conduct (CSC).[2] The trial court sentenced Jerrils, a fourth habitual offender,[3] to ten to thirty years in prison for the home invasion conviction, to be served concurrently with his five to fifteen year prison sentence for the CSC offense. The trial court, however, ordered Jerrils to serve these sentences consecutively to the sentence for the offense for which he was on parole when he committed these crimes. He appeals as of right. We affirm.

I. Basic Facts And Procedural History

On September 13, 1999, Jerrils and his new acquaintance, Wendy Rienks, had dinner and drinks. Following their evening with each other, Jerrils drove Rienks to her home in the van he used for his job as an electrician. Jerrils parked the van in front of Rienks' home and went inside with her. Jerrils left Rienks' home about fifteen minutes later, which was around 2:00 a.m. the morning of September 14, 1999. As he was driving away from her home, he later claimed, he quickly realized that he had left his cellular telephone in Rienks' home, so he immediately stopped the van, walked the short distance to her door, and knocked. Because he noticed that her lights were out, he did not wait long at the door when she did not answer, assuming that she had already gone to bed. According to Jerrils, he recognized that he was drunk, and rather than risk

[1] MCL 750.110a(2).

[2] MCL 750.520g(1).

[3] MCL 769.12.

driving home in that condition, he walked to a nearby field to sleep until morning. The fact that he had no excuse to give his wife for staying out so late also influenced his decision to sleep in the neighborhood.

At 3:00 a.m., another neighborhood resident, Kathleen Felty, awoke to the sound of someone trying to break into her home. She looked out the window and saw a white man, about six feet tall, wearing light colored clothes. She also thought that she saw a second man, so when she called 911, she reported that two men had tried to break into her home, though she later believed that she may have only seen one person. Police investigating the attempted break-in found a screwdriver wedged in the area around Felty's window. One officer investigating the incident believed that he may have seen a man in the neighborhood matching the description Felty gave; the man the officer saw in light colored clothing was very young, probably around twenty years old. Notably, the officer was able to clarify at trial, this person did not appear to be Jerrils, who is in his mid-forties.

While the police were searching the neighborhood in relation to the incident at Felty's home, they encountered the complainant walking and informed her of the attempted break-in. Though it was the very early morning hours of September 14, 1999, walking was a part of the complainant's normal routine of awakening early to exercise before going to work. When the complainant returned to her home, she turned on her stereo and opened a window because it was hot. She then took a shower, donned a shirt and pantyhose, while continuing to prepare for work. As she was getting dressed, she saw a person standing in the doorway. She could not see the man's face because he was removing his shirt by pulling it over his head. She thought that he looked familiar, perhaps one of her male relatives who lived nearby, but when the complainant saw the intruder's face, she did not recognize him. Though the complainant shouted at the man to leave, they began to struggle. He unfastened, but did not remove, his pants and threw her on her bed. The two continued to struggle. Finally, the complainant pointed to a photograph of her deceased husband and begged the intruder to desist. At that point, he told her that he would leave if she would be quiet. Obeying the intruder, the complainant was quiet as he put on his clothes and left the home. After he left, the complainant locked the door. Noticing that the screen was missing from her window, she closed the window as well, and then called 911.

The police returned to the neighborhood for the second time that September morning. The complainant told the police that her attacker was in his thirties and dressed in blue jeans and a t-shirt. She believed that he had a screwdriver in his pants pocket, though he did not threaten her with it. Though the police combed her bedroom, they were unable to collect any physical evidence, such as fingerprints or body fluids, that would identify the intruder. As officers searched the area for the complainant's attacker, another resident informed the police of a van parked in the neighborhood where it did not belong. The resident had seen the van in the neighborhood the previous day, and described the driver as a man with dark hair and a mustache in his forties. The police determined that it was Jerrils' van and an officer and his tracking dog, who were helping to establish a perimeter around the neighborhood, discovered Jerrils, who had returned to the van. Jerrils was clearly intoxicated, he smelled of alcohol and had bloodshot eyes. His clothing was dirty, the zipper on his pants was not fastened, and he did not have any tools in his pockets. Jerrils denied committing any offense, explaining that he had been sleeping in a field until a dog licked his face.

The police handcuffed Jerrils and put him in the back seat of a police cruiser. About a half-hour later, which was about 2 ½ hours after the intruder attacked the complainant, a police officer put the complainant in a car and drove to where at least six officers were detaining Jerrils, who was either still seated in the backseat of the cruiser or was standing next to it. The complainant identified Jerrils as her attacker as she slowly drove past him one time.

The prosecutor did not charge Jerrils with attempting to break into Felty's home. Rather, the prosecutor charged Jerrils with the offenses against the complainant. At trial, the sole disputed issue was whether Jerrils was the man who broke into the complainant's home and attacked her. According to the complainant, the man she saw in the courtroom, Jerrils, was the man who had attacked her.

The defense, however, attempted to reveal not only the inconsistencies in the complainant's recollection of the attack and her description of her attacker, but her opportunities to make meaningful observations. For instance, the defense pressed the complainant on whether the lighting in her home was adequate for her to see her attacker and whether she needed glasses to see his face, as well as how the stress of the attack affected her at the time. She responded that she had a number of good opportunities to see her attacker, especially during the struggle on the bed, the lighting in her bedroom was adequate even if there were no lights on in the room, and she needed glasses only for reading. She added that the only difference between Jerrils on the day he attacked her and how appeared at trial was that he no longer had a mustache and his hair was not as "wild."

There was also a significant amount of conflicting evidence at trial. For instance, the complainant conceded that she could not recall how she described her attacker to the police, but thought that she might have said that he was five feet, seven inches tall, about 140 pounds, and in his thirties, perhaps his late thirties, wearing blue jeans. She also admitted that she had been "frantic" during and after the attack. The complainant added that her attacker's breath smelled stale, but the officers testified that Jerrils plainly smelled of alcohol. Though the complainant stated that she did not notice any distinctive markings on the intruder, the defense had Jerrils reveal his abdomen to the jury; the jury apparently saw that Jerrils had an eight-inch red scar running horizontally across the middle of his abdomen, as well as a green tattoo of a scorpion on the lower right quadrant of his abdomen. The trial court described this tattoo as between 1 ½ and 2 inches in size. In contrast to the complainant's testimony that her attacker had a mustache, Rienks suggested that Jerrils might not have had facial hair in September 1999, though her testimony was not crystal clear on this point. Further, Jerrils' police record indicates that he was about forty-five years old at the time of the offense, about five feet, ten inches tall, and weighed approximately 165 pounds. This made him three inches taller, as much as a decade older, and twenty-five pounds heavier than the complainant had described her attacker.

Jerrils, who testified in his own defense, admitted that he had not told the police about the dog awakening him and had said that he had stayed the whole night with Rienks, which was not correct, but adamantly denied committing the attack. He could not substantiate his whereabouts from the time he left Rienks to the time the police arrested him because, he said, he was either asleep or had passed out from the alcohol. In fact, he had been so drunk he was still intoxicated the next morning when the dog, which he later recognized as the police dog an officer used to search the neighborhood, found him.

At the close of the prosecutor's proofs, the defense moved for a directed verdict of acquittal. The trial court acknowledged that this was a "troubling eyewitness identification" case that "hinge[d] almost entirely on the identification of one witness who [was] extremely upset at the time, very understandably upset and [was] then shown a suspect under circumstances which are suggestive[.]" Nevertheless, the trial court concluded that the applicable legal standard required it to give the prosecutor the benefit of the doubt. Consequently, the trial court denied the motion. The jury deliberated for less than an hour before convicting Jerrils.

Following his conviction, Jerrils moved for a new trial, challenging the identification process the police used as "unfair and suggestive." The trial court, though it noted the Michigan Supreme Court's extensive commentary on the inaccuracies of many eyewitness identifications,[4] rejected this argument. The trial court also summarized and analyzed one of Jerrils' numerous other arguments, saying:

> Mr. Jerrils['] first ground is as follows: The jury deliberation room is in close proximity of the holding cell where the defendant was detained during breaks [in the proceedings]. The defendant was escorted by two police officers past the jury room. On the first day, they made sure the jury room was closed prior to escorting the defendant past. After that several times daily for the next three days, the defendant was escorted past the jury room with the door was open. The jury observed defendant's passage and that he was obviously in police custody.
>
> Part of this statement is undoubtedly true. The holding cell is in very close proximity to the jury room, it's only about 20 feet away and around a corner, and defendants are escorted from there to the courtroom by police officers during trials. Frequently, the officers do close the jury room door. It's entirely possible that this occurred. On the other hand, because Mr. Jerrils is in custody, when he was seated in the courtroom, there were two police officers sitting [on] either side of him or one side – pardon me, sitting behind him or one behind and one slightly to the side of him. I don't think it was probably any major mystery to the jurors whether they saw him escorted or not that he was in custody on a major crime involving breaking and entering an occupied dwelling, which would be home invasion first degree, and an assault with intent to commit CSC first. So while probably it's not the best procedure, I don't think it's shockingly prejudicial.

Consequently, the trial court denied the motion for a new trial on this ground as well.

II. On-The-Scene Identification

A. Standard Of Review

Jerrils makes several arguments challenging the complainant's on-scene identification, the circumstances surrounding that identification, and the related evidence introduced at trial.

[4] See *People v Anderson*, 389 Mich 155; 205 NW2d 461 (1973).

Because he failed to make a timely objection to any of these matters, he is entitled to review only for plain error affecting his substantial rights.[5]

B. Right To Counsel

Jerrils first argues that the he was entitled to counsel at the on-the-scene identification and that he was deprived of this right. Jerrils acknowledges that, under *People v Anderson*,[6] the right to counsel does not exist for every on-the-scene identification. Yet, he contends that in *People v Taylor*[7] this Court placed limitations on when police can conduct an on-the-scene identification without counsel. In *Taylor*, this Court held that the police may

> conduct an on-the-scene identification without the presence of counsel any time promptly after the crime, except in certain situations. First, we require counsel to be present where the police have *very strong evidence* that the person stopped is the culprit. Strong evidence exists where the suspect has himself decreased any exculpatory motive, *i.e.* where he has confessed or presented the police with either highly distinctive evidence of the crime or a highly distinctive personal appearance.[8]

The *Taylor* Court went on to note that other "strong evidence" that the defendant was the "culprit" exists when the defendant is found in "close proximity in place and time to the scene of the crime."[9] *Taylor* thus rejected this Court's interpretation of *Anderson* in *People v Dixon*,[10] which stated a plain rule that "an attorney is not required if the police apprehend a suspect within minutes after the crime and return him to the scene of the crime for identification."[11]

Jerrils also cites *People v Raybon*[12] and *People v Wilki (On Remand)*[13] for the "very strong evidence" limitation on identifications without counsel. While *Raybon* did adopt *Turner's* limitation,[14] in actuality, *Wilki* did not wholly endorse the *Taylor* standard. Rather, the *Wilki* panel thought that *Turner* was difficult to apply, and therefore interpreted the "very strong evidence" language in *Taylor* "to mean evidence such that the police, acting in good faith, have

---

[5] *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

[6] *People v Anderson*, *supra* at 187.

[7] *People v Taylor*, 120 Mich App 23; 328 NW2d 5 (1982), overruled on other grounds by *People v Randolph*, 466 Mich 532; 648 NW2d 164 (2002).

[8] *Taylor*, *supra* at 36.

[9] *Id*. at 37.

[10] *People v Dixon*, 85 Mich App 271 ; 271 NW2d 196 (1978).

[11] *Id*. at 279.

[12] *People v Raybon*, 125 Mich App 295; 336 NW2d 478 (1983).

[13] *People v Wilki (On Remand)*, 132 Mich App 140; 347 NW2d 735 (1984).

[14] *Raybon*, *supra* at 307.

no reasonable necessity for confirming that the suspect they have apprehended is in fact the perpetrator."[15]

In sum, for almost twenty years, *Dixon*, *Taylor*, and *Wilki* provided a three-way split in authority governing whether or when a defendant has the right to an attorney for an on-scene identification. This Court, however, resolved that split in authority in *People v Winters*.[16] Considering the convoluted evolution of the three rules for on-scene identifications, the *Winters* panel concluded that

> *Dixon* and *Turner* fail to provide a simple, practical standard consistent with *Anderson* for use by police officers in the field. Therefore, we hold that it is proper and does not offend the *Anderson* requirements for the police to promptly conduct an on-the-scene identification. Such on-the-scene confrontations are reasonable, indeed indispensable, police practices because they permit the police to immediately decide whether there is a reasonable likelihood that the suspect is connected with the crime and subject to arrest, or merely an unfortunate victim of circumstance. Whatever the perceived problems of on-the-scene confrontations, it appears to us that prompt confrontations will, if anything, promote fairness by assuring greater reliability.[17]

In short, the *Winters* panel rejected *Taylor's* "very strong evidence" standard and its subsequent interpretation in *Wilki* in favor of a bright-line rule *allowing* a prompt on-the-scene identification without counsel. The identification in this case was both on-the-scene and prompt.[18] Accordingly, Jerrils is not entitled to relief on this basis.

C. Suggestive Identification

In rejecting the unworkable attempt to use counsel at an on-the-scene identification as a safeguard that *Taylor* imposed, the *Winters* panel noted that "due process provides sufficient protection against unreliable pretrial identifications obtained through unnecessarily suggestive procedures." Jerrils argues that he was denied this right to due process, in the identification itself and later at trial when the prosecutor introduced the identification evidence, because the identification was unreliable. Jerrils says that this case "hinged" on the complainant's eyewitness identification, and suggests that only the manner in which the police conducted the identification process, not the complainant's experience, led her to identify him as the attacker. In support for his argument that the identification was unduly suggestive, Jerrils points to the trial court's remarks criticizing the identification.

"The fairness of an identification procedure is evaluated in light of the total circumstances to determine whether the procedure was so impermissibly suggestive that it led to

---

[15] *Wilki*, *supra* at 144.

[16] *People v Winters*, 225 Mich App 718; 571 NW2d 764 (1997).

[17] *Id*. at 728 (citations and footnotes omitted).

[18] See, generally, *People v Libbett*, 251 Mich App 353, 361; 650 NW2d 407 (2002).

a substantial likelihood of misidentification."[19] If "the procedure was impermissibly suggestive, evidence concerning the identification is inadmissible at trial unless an independent basis for in-court identification can be established 'that is untainted by the suggestive pretrial procedure.'"[20] In this case, however, we need not reach whether there was an independent basis for the complainant's identification because, under the totality of the circumstances, the identification process itself was not impermissibly suggestive. The complainant had a significant opportunity to observe and interact with her attacker at an extremely close proximity for some time. She said that the lighting in the room was adequate and she did not need corrective lenses to see her attacker. Though under stress, she apparently was still able to think logically, which is how she persuaded her attacker to leave her home without harming her further. Jerrils was in custody at the time the police took the complainant to identify him, but nothing in the record indicates that the complainant was told that the person in custody was her attacker. The identification took place quickly and the complainant never wavered in her decision that Jerrils was her attacker. This only indicates that the complainant knew what her attacker looked like, and did not surmise that Jerrils was her attacker solely because of his detention. Any discrepancies in the complainant's description or recollection of Jerrils on the day of the attack and his actual appearance was relevant to the complainant's credibility, not the admissibility of the evidence.[21]

D. Ineffective Assistance

Jerrils argues that his trial attorney was ineffective in handling this identification issue because his attorney was given funds to hire an expert witness who would have undermined the perception that the complainant had accurately identified him, but failed to call this expert to testify at trial. In a related argument, Jerrils contends that his trial attorney was ineffective for failing to move to suppress the complainant's identification.

As this Court explained in *People v Knapp*,[22]

> To establish a claim of ineffective assistance of counsel, a defendant must show that counsel's performance fell below an objective standard of reasonableness and that, but for defense counsel's errors, there was a reasonable probability that the result of the proceeding would have been different. *People v Stanaway*, 446 Mich 643, 687-688; 521 NW2d 557 (1994). A defendant must affirmatively demonstrate that counsel's performance was objectively unreasonable and so prejudicial as to deprive him of a fair trial. *People v Pickens*, 446 Mich 298, 303; 521 NW2d 797 (1994). The defendant must also overcome the presumption that the challenged action might be considered sound trial strategy. *People v Tommolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991),

---

[19] *People v Hornsby*, 251 Mich 462, 466; 650 NW2d 700 (2002).

[20] *People v Williams*, 244 Mich App 533, 542-543; 624 NW2d 575 (2001), quoting *People v Kurylczyk*, 443 Mich 289, 303; 505 NW2d 528 (1993).

[21] See *Kurylczyk*, *supra* at 309.

[22] *People v Knapp*, 244 Mich App 361, 385-386; 624 NW2d 227 (2001).

citing *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

The record leads us to believe that Jerrils' trial attorney was acting according to a strategy when he did not call an expert to testify regarding the limitations on eyewitness identification testimony. Whether to call a witness to testify is usually a matter of strategy not subject to criticism on the basis of hindsight.[23] Further, defense counsel thoroughly challenged the complainant's ability to see her attacker in her home and later describe him accurately to the police. The defense attorney also orchestrated a powerful moment at the end of trial when Jerrils revealed to the jury the distinctive markings on his abdomen, including a large scar and tattoo, neither of which the complainant had recalled seeing. This strategy had a good chance of winning an acquittal for Jerrils without alienating the jury by having an expert treat the complainant aggressively. That this strategy failed does not mean that the defense attorney was ineffective.[24] Accordingly, we will not second-guess Jerrils' attorney on this issue.

As for the suppression matter, there were no grounds for suppression for defense counsel to raise because the identification did not require counsel and was not improperly suggestive. Attorneys are not required to raise meritless motions.[25] As a result, Jerrils has not established that his attorney acted below an objective standard of reasonableness in failing to move to suppress this evidence.

III. Directed Verdict

A. Standard Of Review

Jerrils argues that because the identification evidence in this case was so weak, the trial court erred when it denied his motion for a directed verdict of acquittal. Review de novo applies to this issue.[26]

B. Analysis

"When reviewing a trial court's decision on a motion for a directed verdict," we must "determine whether the evidence presented by the prosecutor, viewed in the light most favorable to the prosecutor, could persuade a rational trier of fact that the essential elements of the crime charged were proved beyond a reasonable doubt."[27] It should go without saying that the prosecutor in this case had an obligation to prove not only that there was a home invasion and assault with intent to commit CSC, but that Jerrils committed both crimes. Though Jerrils suggests that the eyewitness identification was the only evidence of his guilt, that is not strictly true. There was undisputed evidence showing that Jerrils was in the neighborhood around the

---

[23] See *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002).

[24] See *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

[25] See *Knapp*, *supra* at 386.

[26] See *People v Aldrich*, 246 Mich App 101, 122; 631 NW2d 67 (2001).

[27] *Id*.

time of the crime against the complainant. He gave an explanation to the jury for his presence in the neighborhood that the jury was free to believe or disbelieve. The jury might have also taken note of the fact that Jerrils originally lied to the police in reporting his whereabouts on the night in question, which could have cast doubt on his testimony denying that he committed the crimes. While the conflicting identification evidence was important in this prosecution, the complainant was also able to identify Jerrils at the time of trial, which would have had fewer stressing circumstances than at the time of the crime. Viewed in the light most favorable to the prosecutor, the evidence was sufficient to submit to the jury.

IV. The Garb Of Innocence

A. Standard Of Review

Jerrils contends that he was denied a fair trial when the jury saw him in shackles and escorted by police officers during trial. He did not raise this constitutional issue[28] at all during trial, which means that he failed to preserve this issue for our review.[29] Consequently, he is entitled to relief only if he demonstrates plain error affecting his substantial rights.[30] This is a particularly heavy burden that defendants rarely satisfy.

B. Shackling

Of the many unique or unusual features of the American judicial system, there is no principle more fundamental to our notion of justice than the presumption of innocence,[31] which due process protects.[32] The law mandates that a jury presume that a defendant is innocent until the prosecutor proves him guilty beyond a reasonable doubt.[33] Requiring a defendant to wear shackles in front of a jury provides a powerful image of guilt, subtly but swiftly destroying the presumption of innocence.[34] Appellate courts are, nevertheless, sensitive to the realities of

[28] See *People v Banks*, 249 Mich App 247, 259; 642 NW2d 351 (2002).

[29] See *Carines*, *supra* at 761.

[30] See *id*. at 763-764.

[31] See *In re Winship*, 397 US 358, 363; 90 S Ct 1068; 25 L Ed 2d 368 (1970), quoting *Coffin v United States*, 156 US 432, 453; 15 S Ct 394; 39 L Ed 481 (1895) (The presumption of innocence is a "bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.'"); see also *People v Fields*, 450 Mich 94, 108, n 19; 538 NW2d 356 (1995), quoting 2 McCormick, Evidence (4th ed), § 342, p 453 ("The 'presumption of innocence,' however, is actually not a presumption at all, but '[a]lthough the phrase is technically inaccurate and perhaps even misleading in the sense that it suggests that there is some inherent probability that the defendant is innocent, it is a basic component of a fair trial.'").

[32] US Const, Am XIV; Const 1963, art 1, § 17.

[33] See *People v Allen*, 466 Mich 86, 90; 643 NW2d 227 (2002).

[34] See *Illinois v Allen*, 397 US 337, 344; 90 S Ct 1057; 25 L Ed 2d 353 (1970) ("Not only is it possible that the sight of shackles . . . might have a significant effect on the jury's feelings about the defendant, but the use of this technique is itself something of an affront to the very dignity and decorum of judicial proceedings that the judge is seeking to uphold.").

allowing people who have demonstrated that they pose special risks of physical danger to others or escape into contact with trial court personnel, jurors, and the public.[35] Consequently, over the years, courts have balanced the presumption of innocence with the need for safety by saying that restraints are an "extreme" measure that should be used only under limited circumstances.[36] Those extraordinary circumstances are the need "to prevent escape, injury to persons in the courtroom or to maintain order."[37] Even then, courts must take care to prevent the jury from seeing the defendant in restraints or risk committing error requiring reversal.[38]

As an unpreserved issue, the record of the trial itself does not reflect that the jury saw Jerrils in shackles before it rendered the verdict in this case. In his motion for a new trial, Jerrils only contended that the jury room is located near the holding cell where he was detained during breaks, and that two police officers escorted him past the jury room to the holding cell. According to Jerrils, on the first day of trial, the police officers ensured that the jury room door was closed before they escorted him to the holding cell. However, Jerrils contends, the police escorted him past the jury room while the door was open several times over the next three days, which allowed several jury members to observe that he was "obviously in police custody."

We have read this motion carefully. Jerrils did *not* assert that the police escorted him past the jury room in shackles. Nothing in the trial court's ruling on Jerrils' motion for new trial indicates that the trial court believed that Jerrils had been shackled when the police officers escorted him past the jury room. Nor did the trial court make a finding to this effect.[39] However, on appeal, Jerrils contends that he was "waltzed before the jury while shackled," that "[o]nce jurors saw Mr. Jerrils in shackles and closely guarded, his presumption of innocence vanished," and that "[t]o try Mr. Jerrils before jurors who saw him shackled, and flanked by two guards was a travesty of justice." The record is simply bereft of any evidence – indeed, of any assertion – that Jerrils was actually shackled when the police officers escorted him past the jury room. Jerrils did not assert in his motion for new trial that he was shackled and the trial court did not find, or imply, that he had been shackled. In the absence of evidence that the jury saw Jerrils in shackles, he is not entitled to reversal and a new trial.[40]

---

[35] See *People v Julian*, 171 Mich App 153, 160-162; 429 NW2d 615 (1988); *People v Jankowski*, 130 Mich App 143, 146-147; 342 NW2d 911 (1983).

[36] See *Holbrook v Flynn*, 475 US 560, 568; 106 S Ct 1340; 89 L Ed 2d 525 (1986), discussing *Illinois v Allen*, *supra* at 344; *People v Dunn*, 446 Mich 409, 425, n 26; 521 NW2d 255 (1994), quoting *State v Hartzog*, 96 Wash 2d 383, 398; 635 P2d 694 (1981).

[37] *Dunn*, *supra* at 425.

[38] See, generally, *People v Johnson*, 160 Mich App 490, 493; 408 NW2d 485 (1987) ("While we do not believe that the trial court justified the use of leg restraints during trial since there was no indication on the record before us that defendant was an escape risk or a safety risk, we also believe that the trial court's finding that the jury was unable to see those restraints rendered any error by the trial court harmless.").

[39] The prosecution's brief suggests that Jerrils contended in his motion for new trial that "he had been led by the jury room in shackles, several time with the door open." This statement is incorrect. Nothing in the record, including Jerrils' motion, refers to him being in shackles.

[40] *People v LaBelle*, 231 Mich App 37, 38; 585 NW2d 756 (1998).

Affirmed.

/s/ William C. Whitbeck
/s/ Richard A. Bandstra
/s/ Michael J. Talbot