

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TAVARE DEWAYNE RONEY,

Defendant-Appellant.

UNPUBLISHED

April 15, 2004

No. 247145

Jackson Circuit Court

LC No. 02-006638-FH

Before: O’Connell, P.J., and Jansen and Murray, JJ

PER CURIAM.

Defendant appeals as of right his convictions of possession with intent to deliver a controlled substance, less than 50 grams, MCL 333.7401(2)(a)(iv), and possession of a firearm during the commission of a felony, MCL 750.227b.

Defendant first argues that the trial court invaded the role of the prosecutor and violated his right to a fair trial when it questioned him about inconsistencies in his trial testimony. “The trial court may question witnesses in order to clarify testimony or elicit additional relevant information.” *People v Conyers*, 194 Mich App 395, 404; 487 NW2d 787 (1992). “The principal limitation on a court’s discretion over matters of trial conduct is that its actions not pierce the veil of judicial impartiality.” *People v Davis*, 216 Mich App 47, 50; 549 NW2d 1 (1996). “As long as the questions would be appropriate if asked by either party and, further, do not give the appearance of partiality, we believe that a trial court is free to ask questions of witnesses that assist in the search for truth.” *Id.* at 52.

In the instant case, the trial court questioned defendant in an effort to clarify his inconsistent accounts of events surrounding the shooting of his girlfriend and the discovery of a safe containing the gun used in the shooting, \$2,400 in cash, and 118 individually wrapped rocks of crack cocaine. The trial court’s questions “assisted the factfinder in getting to the truth about relevant issues.” *Id.* As in *Davis*, “the court’s questions were relevant and appropriate and did not abandon its mantle of impartiality.” *Id.* Therefore, defendant failed to demonstrate that any conduct by the trial court deprived him of a fair trial.

Defendant next argues that the trial court denied him a fair trial when it denied his request to be unshackled from his leg irons outside the presence of the jury before he took the witness stand. We disagree. We review for an abuse of discretion a trial court’s decision whether a criminal defendant should remain shackled during trial. *People v Jankowski*, 130 Mich App 143,

146-147; 342 NW2d 911 (1983). “Freedom from shackling and manacling of a defendant during the trial of a criminal case has long been recognized as an important component of a fair and impartial trial.” *People v Duplissey*, 380 Mich 100, 103; 155 NW2d 850 (1968), quoting *Odell v Hudspeth*, 189 F2d 300, 302 (CA 10, 1951), citing 14 Am Jur, Criminal Law, § 132 (1938). Ordinarily, such restraints “should be permitted only to prevent the escape of the defendant or to prevent him from injuring those in the courtroom or to secure a quiet and peaceable trial.” *People v Baskin*, 145 Mich App 526, 545; 378 NW2d 535 (1985).

In the instant case, however, defendant did not request that the leg irons be removed for the entire trial, but rather he only requested their removal before he took the stand. On several occasions, defense counsel discussed with defendant the option of obtaining civilian clothing, but defendant “decided that he would rather just go to trial in his jail oranges.” The trial court also indicated some concern that defendant might escape through one of the courtroom’s four exits. At the time defendant made the request, the trial court determined that excusing the jury to remove defendant’s leg irons and then bringing the jury back into the courtroom for defendant to testify would have been futile. We agree. The jury was already aware that defendant was incarcerated in the county jail and was wearing the garb and shackles of a convict. Defendant waived any prejudice this caused by willingly wearing the orange jumpsuit and shackles in the courtroom. Removing his leg irons in the presence of the jury did not significantly add to that prejudice. Considering the trial court’s safety concerns and defendant’s waiver, we do not find that the trial court abused its discretion or deprived defendant of a fair trial by denying his request.

Defendant next argues that the trial court erroneously scored ten points for OV-14, because he was not a leader in a multiple offender situation. We disagree. Defendant did not object to the scoring of this variable below. “A party may not raise on appeal an issue challenging . . . the scoring of the sentencing guidelines unless the party has raised the issue at or before sentencing or demonstrates that the challenge was brought as soon as the inaccuracy could reasonably have been discovered.” MCR 6.429(C). Because defendant failed to justify his failure to object, we decline his invitation to review this unpreserved issue.

Defendant also argues that his trial counsel was ineffective for failing to challenge the trial court’s score of 10 points for OV-14. We disagree. Defendant’s girlfriend admitted that she knew defendant sold drugs, and testified that she counted money for defendant on the night the police found the drugs and gun. Therefore, the trial court correctly scored ten points for OV-14, and trial counsel was not ineffective for failing to raise the futile objection. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

Defendant next argues that the trial court abused its discretion in upwardly departing from the sentencing guidelines. We disagree. Defendant failed to object to the sentence imposed by the trial court, so this issue is unpreserved. *People v Sexton*, 250 Mich App 211, 227-228; 646 NW2d 875 (2002). We review his claim of unpreserved sentencing error for plain error that affected his substantial rights. *Id.*

Defendant argues that the trial court improperly departed from the 5 to 23-month sentencing guidelines range by sentencing him to a five-year minimum. Specifically, defendant argues that the trial court failed to articulate substantial and compelling reasons based on objective and verifiable factors that would justify the departure.

MCL 769.34(11) provides that

if, upon a review of the record, the court of appeals finds the trial court did not have a substantial and compelling reason for departing from the appropriate sentence range, the court shall remand the matter to the sentencing judge or another trial judge for resentencing under this chapter.

Defendant's extensive and violent criminal history included a dozen misdemeanors and several parole violations, only a fraction of which were calculated into his PRV scores. His extensive juvenile history contained two drug-related offenses that were nearly identical to the instant offense. The trial court determined that defendant's history of committing similar drug offenses was given inadequate weight, and it objectively and verifiably indicated his repeated reliance on the sale of illicit drugs to earn a living. These reasons constituted substantial and compelling reasons to depart from the statutory minimum of 5 to 23 months' imprisonment. The trial court's articulated conclusions do not constitute plain error.

Defendant next argues that his sentence is disproportionately high. We disagree. We review disproportionality claims for abuse of discretion. *People v Alexander*, 234 Mich App 665, 679; 599 NW2d 749 (1999). A defendant's sentence must be "proportionate to the seriousness of the circumstances surrounding the offense and the offender." *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990).

In the instant case, the extent of the departure does not violate the principle of proportionality, considering defendant's extensive criminal record. His record reflects a life immersed in violence, guns, and drugs. Moreover, the events leading to the discovery of the drugs and gun demonstrated defendant's willingness to use the weapon. The police were responding to a gunshot that defendant fired at his girlfriend. The bullet hit the woman in the chest and traveled, at a downward angle, through her torso where it came to rest in her lower back. Police found the gun locked in a safe with the drugs. While we are puzzled at the prosecutor's selection of charges, these circumstances certainly demonstrate that the trial court's sentencing departure was proportionate to the "seriousness . . . of the offender." *Id.* Therefore, the trial court did not abuse its discretion when it upwardly departed from the guidelines range.

Affirmed.

/s/ Peter D. O'Connell
/s/ Kathleen Jansen
/s/ Christopher M. Murray