STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 18, 2004
v	No. 244054 St. Clair Circuit Court
STEPHEN JOSEPH ANDREWS, Defendant-Appellant.	LC No. 02-001007-FC

Before: Wilder, P.J., and Hoekstra and Kelly, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to cause great bodily harm less than murder, MCL 750.84, armed robbery, MCL 750.529, and two counts of conspiracy in connection with those two offenses, MCL 750.157a. He was sentenced to serve concurrent terms of imprisonment of 67 to 120 months each for the assault and conspiracy to commit assault convictions, and 240 to 720 months each for the armed robbery and conspiracy to commit armed robbery convictions. He appeals as of right. We affirm.

This case arises from an incident at Baker's Field in Port Huron Township, during the early morning hours of March 24, 2002. The principals are defendant, codefendant Katie Crawford, who was sixteen years old at the time of trial, and the victim, who is a former boyfriend of Crawford and was nineteen years old at the time of trial. The trial court summarized the facts at sentencing:

> Crawford hid the Defendant in the trunk of the Defendant's late model Lincoln automobile while she drove the car to the victim's house in the early morning hours and persuaded him to get into the car with her on the pretense of talking out their problems, referring to a former relationship.
>
> The Defendant, who was hiding in the trunk of the car, had a baseball bat with him, quote, just in case. The conspirators, with Crawford driving, and the unsuspecting victim riding in the passenger seat drove at about four o'clock in the morning, in the dark of night, to a secluded area called Baker's Field. It's a well-known secluded area in the Port Huron area.

> On a ruse she popped the trunk . . . and with a baseball bat in his hands the Defendant got out. And without any warning to this victim proceeded to brutally beat the victim with a baseball bat, dragging him out of the car, kicking him, stomping on his head, all the while threatening that he was going to kill him.
>
> The victim . . . was defenseless. In a further attempt to humiliate the victim he forced the victim to remove all of his clothing, including his under shorts from the waist down, threw his clothes out into the field and the nearby river, and then forced the victim to kiss the co-defendant's feet and to apologize to her for what, he didn't know.
>
> These two criminals then proceeded to rob [the victim] of his wrist watch, his cell phone, and his ring. . . .
>
> When they finished, they left the scene leaving the victim naked on the ground, where he regrouped and crawled his way to two houses before he finally found help. . . . This victim, who incidentally is handicapped by cerebral palsy, suffered very severe injuries, including lacerations to his eyes and his scalp. He's required several surgeries and several more surgeries will be required in the nature of reconstruction. The only explanation given by the Defendants for this vicious attack was that the victim, who was a former boyfriend of the co-defendant, kept calling the co-defendant on the telephone in an attempt to win her back and just by happenstance the victim called her residence while the Defendant was there. He . . . overheard the conversation and then volunteered to, quote, kick his ass. So they proceeded . . . to . . . plan to assault this victim.

Codefendant Crawford faced the same four charges as defendant, but appeared in court pursuant to a plea agreement whereby the charges in connection with the armed robbery would be dismissed and Crawford would testify truthfully at defendant's trial.

I. Evidentiary Support for the Conspiracy Convictions

Defendant challenges his two conspiracy convictions, on the grounds that the evidence was not sufficient to support them, or, alternatively, that they were against the great weight of the evidence. Neither challenge has merit.

A. Sufficiency of the Evidence

When reviewing the sufficiency of evidence in a criminal case, a reviewing court must view the evidence of record in the light most favorable to the prosecution to determine whether a rational trier of fact could have found that each element of the crime was proved beyond a reasonable doubt. *People v Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994); *People v Fetterley*, 229 Mich App 511, 515; 583 NW2d 199 (1998).

Defendant argues that the evidence was not sufficient to prove that he conspired with Crawford to effect an armed assault, or any assault that included great bodily harm, on the grounds that the evidence could not lead a reasonable trier of fact to conclude that Crawford had ever intended that defendant use a baseball bat to batter the victim severely. We disagree.

Defendant emphasizes testimony from Crawford where she stated that she and defendant did not initially discuss the bat, but that defendant took the initiative to grab it on their way out the door to execute their plan. According to Crawford, "I asked him what he was going to use it for and he had said just in case," adding, "I did not know he was going to use the bat. I thought he was just going to beat him up. But then we got out there and it all started, he used the bat."

However, the jury was not obliged to believe Crawford's protestations concerning her ostensibly innocent sense of why defendant chose to arm himself with a bat, but was free to place great weight on her admission that defendant explained that he wanted the bat "just in case." Crawford described the bat initially as a weapon that she and her mother chose to keep in their home, thus indicating that she was fully cognizant of its violent potential. Crawford further admitted that she was aware that the victim suffered from cerebral palsy, and presumably she knew from her earlier relationship with the victim that he was of slight build. The evidence that Crawford used a friendly ruse to get the victim into a car with her suggests that Crawford had no reason to suspect that the victim would be armed, or otherwise himself disposed toward any aggression. The contingency implied by the words "just in case," then, was whether defendant would choose to resort to such blunt weaponry while executing the plan to administer physical punishment to the victim, not whether the bat would otherwise be "needed." Thus, the evidence suggests that Crawford understood that the bat became part of the plan, at the moment defendant seized it, whether or not it had been part of their discussions.

Crawford's knowledge that defendant kept a bat at hand for the assault, and that she even retrieved the bat at defendant's command during the course of the latter's use of it to batter the victim, well support a conclusion that Crawford was indeed defendant's co-conspirator in planning and executing both an assault with intent to cause great bodily harm and an armed robbery.

Further, Crawford admitted that she was "on board for the beating up," knew robbing the victim would be involved, and added specifically that she had the intent to have the victim hurt, and that defendant declared that he was "[g]oing [to] beat the living shit out of him." Moreover, Crawford testified that when the bat slipped from defendant's hands in the course of the beating, she retrieved it at his request, and brought it back to the car, where defendant readily reclaimed it and continued to impose great bodily harm with it. We further note that Crawford did not indicate that she had expressed any disapproval of what defendant was doing until after he had struck the victim repeatedly with the bat. Crawford's testimony that she thus was party to, and a participant in, defendant's plan to carry out an act of extreme aggression, while armed with a bat, was sufficient to convince a reasonable juror that Crawford understood that the bat was part of the plan to assault and rob the victim.

B. Great Weight of the Evidence

The trial court denied defendant's motion for a new trial on the ground that the verdict was contrary to the great weight of the evidence. A trial court's decision whether to grant a motion for a new trial on the ground that the verdict was contrary to the great weight of the evidence is reviewed for an abuse of discretion. *People v Lemmon*, 456 Mich 625, 648 n 27; 576 NW2d 129 (1998).

"A trial judge does not sit as the thirteenth juror in ruling on motions for a new trial and may grant a new trial only if the evidence preponderates heavily against the verdict so that it would be a miscarriage of justice to allow the verdict to stand." *Id.* at 627. Accordingly, a trial court might disturb a jury verdict only where testimony upon which it depended is "patently incredible or defies physical realities," or where "the witness' testimony has been seriously impeached and the case marked by uncertainties and discrepancies." *Id.* at 643-644 (internal quotation marks and citations omitted).

In presenting this alternative argument, defendant merely refers to his sufficiency challenge. Pointing to selected passages of testimony and arguing for an interpretation more favorable to the defense does not make the case for a new trial predicated on the great weight of the evidence. Defendant points to nothing in Crawford's testimony that was "patently incredible," that defied "physical realities," or that was "seriously impeached" in relation to a case "marked by uncertainties and discrepancies." *Id.* The trial court thus properly declined to overrule the jury's verdict.

II. Evidence that Defendant Invoked His Right to Remain Silent

Defendant argues that the trial court erred in denying his motion for a mistrial on the ground that the jury heard evidence that he chose not to speak to the police. We disagree. This Court reviews a trial court's decision on a motion for a mistrial for an abuse of discretion. *People v Haywood*, 209 Mich App 217, 228; 530 NW2d 497 (1995). "A mistrial should be granted only for an irregularity that is prejudicial to the rights of the defendant, and impairs his ability to get a fair trial." *Id.* (citations omitted).

At issue is defendant's right not to incriminate himself, US Const, Am V, Const 1963, art 1, § 17, and to due process, US Const, Am XIV, Const 1963, art 1, § 20. A criminal accused has the right to remain silent when arrested and faced with accusation, and the arrestee's exercise of that right may not be used as evidence against the arrestee. *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966). A defendant's assertion of the right to remain silent may not ordinarily be used as substantive evidence of guilt. *People v Bobo*, 390 Mich 355, 361; 212 NW2d 190 (1973).

Defendant predicates this issue on the following exchange, on cross-examination, between defense counsel and a police witness, where defense counsel was asking about the nature of the phone conversations that triggered the plan to assault and rob the victim:

> Q. Did you conduct an investigation to see if there was an argument over the phone?
>
> A. Yes.
>
> Q. Okay. And did you conclude in your investigation that there was?
>
> A. I concluded that there was phone calls. Couldn't conclude whether they were arguing or not, but there were phone calls.
>
> Q. And why couldn't you conclude that?

A. I couldn't speak to him. He said his mom was getting him a attorney. And—

Defense Counsel: Objection, your Honor. That's a mistrial right there.

To the extent that the officer's answer was responsive to defense counsel's question, defendant may not now claim error from the exchange. A "[d]efendant should not be allowed to assign error on appeal to something which his own counsel deemed proper at trial. To do so would allow defendant to harbor error as an appellate parachute." *People v Roberson*, 167 Mich App 501, 517; 423 NW2d 245 (1988). To the extent that the witness' answer was unresponsive, a harmless error analysis is appropriate. "[A]n unresponsive, volunteered answer to a proper question is not grounds for the granting of a mistrial." *Haywood*, *supra*.

We regard the testimony in question as substantially responsive to defense counsel's questioning. Counsel had shortly before explained to the court, in connection with this witness, "he's been professed to be a top-notch investigator . . . , and I want to see if he followed up and did a total investigation." Counsel was calling on the witness to explain the extent of his investigation, thus inviting the response that defendant had declined to speak to him. Because the defense elicited that answer, defendant was not entitled to a mistrial in response. *Roberson, supra*.

Further, such familiar *Miranda* warnings as "you have the right to remain silent" are so well embedded in the popular consciousness that one could hardly expect the jurors to fail to recognize a simple and routine exercise of that right in this instance. See Larsen, *Constitutionalism Without Courts?*, 94 NW U L Rev 983, 983 (1999) (book review) ("The Supreme Court . . . issued a ruling that gave rise to the now-famous *Miranda* warnings, which are standard in every police department across the country, and which have become so ingrained in our popular culture through the medium of television that every schoolchild in America could probably recite them verbatim.") See also *Dickerson v United States*, 530 US 428, 430; 120 S Ct 2326; 147 L Ed 2d 405 (2000) ("*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture.").

For these reasons, we reject this claim of error.

III. Prosecutorial Misconduct

Defendant argues that the prosecutor in several instances engaged in misconduct, the effect of which was to deny him a fair trial. We disagree.

Concerning preserved issues of prosecutorial misconduct, this Court evaluates the prosecutor's comments in context to determine if the defendant was denied a fair and impartial trial. *People v Truong (After Remand)*, 218 Mich App 325, 336; 553 NW2d 692 (1996). However, a defendant pressing an unpreserved claim of error must show a plain error that affected substantial rights. The reviewing court should reverse only when the defendant is actually innocent or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Comporting with this standard is this Court's pronouncement in *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996), that "[a]bsent an objection or a request for a curative instruction, this Court will not review alleged prosecutorial misconduct unless the misconduct is

sufficiently egregious that no curative instruction would counteract the prejudice to defendant or unless manifest injustice would result from failure to review the alleged misconduct."

Defendant asserts that the prosecutor improperly used the prestige of her office to influence the jury, disparaged the defense, argued facts not in evidence, and urged the jury to consider codefendant Crawford's guilty plea as substantive evidence that a conspiracy existed. We will address each allegation in turn.

A. Vouching

"A prosecutor may not vouch for the evidence or place the weight of his office behind the prosecution; but, . . . he may argue regarding the credibility of witnesses where the testimony conflicts and the result depends on which of the witnesses is to be believed." *People v Foster*, 77 Mich App 604, 612-613; 259 NW2d 153 (1977). The critical inquiry is whether the prosecutor urged the jury to suspend its own judgment powers out of deference to the prosecutor or the police. *People v Whitfield*, 214 Mich App 348, 352; 543 NW2d 347 (1995).

Defendant derives this issue from an exchange between the prosecutor and a prospective juror during jury selection:

> [*The prosecutor*]: . . . [W]hen it comes time to make a decision or determination as to the facts of this case and ultimately whether or not I've done my job, are you willing to set aside any empathy or sympathy you may have for either the victim or the Defendant and make this decision based on the facts of this case?
>
> *JUROR THIRTEEN*: Yes. I have a problem with you keep saying that you've done your job.
>
> [*The prosecutor*]: Okay.
>
> *JUROR THIRTEEN*: It's your job to prove that this person is guilty, what if he's not guilty?
>
> [*The prosecutor*]: Then that—
>
> *JUROR THIRTEEN*: It's your job to prove what the facts are, is what I understand?
>
> [*The prosecutor*]: Well, as the prosecuting attorney the burden is on me to go forward with only cases we believe we can prove…. [W]e're duty-bound to proceed with cases only in the eyes of justice.
>
> *JUROR THIRTEEN*: So you, you—
>
> [*The prosecutor*]: So I'm an advocate. Once I get—
>
> *JUROR THIRTEEN*: You've already determined that he's guilty?

[*The prosecutor*]: The determination is made—we don't, we're not allowed to file cases willy-nilly.

THE COURT: These are really great questions and I appreciate these questions.

[*The prosecutor*]: So we're not allowed to walk in and say, today is Monday, we're going to pick somebody at random to charge with a crime. We have an obligation to carefully consider all the facts and circumstances in this case, and then make a determination as to whether or not we should proceed. Paperwork is then filed, it goes to a lower court before it comes here. Then the case is bound over to Circuit Court by another Judge that makes a determination. You, as a trier of fact, will ultimately get to be the person to make that decision because the law requires you to serve in that capacity, if both the People and the Defendant want a trial.

JUROR THIRTEEN: Okay.

[*The prosecutor*]: So my job, the law requires me to produce evidence, and I have to prove beyond a reasonable doubt certain elements of that crime.

Defense counsel objected that "we've gone, I think, a little bit far afield here. . . . I think it's prejudicial." The trial court replied that the question was a good one, and that the prosecutor's response was proper.

We agree with the trial court. Because the prosecutor's statement was in response to a prospective juror's question, was an accurate statement of the law, and acknowledged both that the prosecutor had a duty to act only in good faith but that the jurors would decide the facts, this incident brings no misconduct to light.

Further, had any jurors misapprehended what the prosecutor was trying to say, the trial court cured any prejudice when it instructed the jurors that they alone would decide the facts, that they were to do so solely on the basis of the evidence, and that the statements of the attorneys were not evidence.

B. Disparaging Defense Counsel

It is misconduct for a prosecutor to denigrate a defendant, or defense counsel, with prejudicial remarks; the focus must remain on the evidence, not on the personalities involved. See *People v Bahoda*, 448 Mich 261, 283; 531 NW2d 659 (1995); *People v Phillips*, 217 Mich App 489, 497-498; 552 NW2d 487 (1996).

Defendant asserts that the prosecutor improperly disparaged defense counsel in several instances. Defendant first points to an exchange in which the prosecutor suggested that defense counsel was "coming off trying to inflame the jury." However, this assertion, which drew no objection, involved a cynical view of a perceived defensive tactic, not a personal attack on defense counsel.

Defendant next takes issue with the prosecutor's explanation of why Crawford's testimony at trial might not completely agree with her testimony at an earlier proceeding: "we're allowing her to testify as to the complete facts and circumstances as the co-defendant in this case. . . . The fact that she is being more complete today than she was at the plea statement is not unusual." Defendant further objects that the prosecutor stated that defense counsel "knew that the prosecution could not compel Crawford to testify at the preliminary examination and thus it [is] improper for him to claim the prosecution had done anything improper." Considering that these remarks, which drew no objection, came in the course of a vigorous adversarial proceeding, we regard them as decidedly tepid. They fall far short of the kind of personal attack on an opponent that would constitute misconduct.

Likewise, we find no misconduct in the prosecutor's unobjected-to statement, while objecting to defense counsel's excessive reading from a police report while cross-examining a police witness, that "I'm never allowed to admit a police report into the record. . . . And if you're standing and reading word-for-word out of a police report you're admitting the information from the police report that I can't bring in. I would love to have all the pages of the police report put into evidence and let the jury view them." At worst, the prosecutor was accusing defense counsel of looking for ways to put before the jury evidence that would normally be inadmissible. The prosecutor's blunt characterization was not misconduct. A prosecutor need not confine argument to the blandest of terms. See *People v Marji*, 180 Mich App 525, 538; 447 NW2d 835 (1989).

Defendant next characterizes as misconduct the prosecutor's statement, upon asking to have the transcript of Crawford's plea proceeding admitted, "because I think . . . the jury's left with something that's not true." Arguing over the truth of matters before the judge and jury is the bread and butter of advocacy. It is difficult to think of a milder way in which the prosecutor might have expressed her concern.

Defendant next suggests that the prosecutor, in responding to a motion for a mistrial, accused defense counsel of goading a police witness on cross-examination into offering inappropriate information, in contravention of the rules of evidence. The incident in question is the one where a police witness stated that defendant had declined to speak to him, discussed in part II, *supra*. Because we concluded there that defense counsel was indeed substantially responsible for the answer he received, we conclude here that the prosecutor's statement to that effect was not misconduct.

Defendant argues that the prosecutor both denigrated defense counsel and vouched for a prosecution witness in objecting again to defense counsel's excessive reliance on a police report:

> [Defense counsel is] trying to create the appearance that he is somehow evasive or not being truthful by use of this police report, then would lead the jury to believe an incorrect fact. There's nothing in this police report that contradicts the testimony of this witness, and so refreshing his recollection is going to do nothing more than what he's already testified about, other than trying to leave the jury with the impression that there's something in this secret document that they don't get to read that's incorrect, and that's just not a fair representation of this witness's testimony.

However, what defendant here characterizes as misconduct we see as cogent objection. Accusing an adversary of pressing the limits of evidentiary propriety is not the same as launching a personal attack. This statement did not shift the focus from the evidence to the personalities involved. *Bahoda, supra* at 283; *Phillips, supra* at 497-498.

Defendant finally makes issue of the following remarks from the prosecutor's rebuttal argument:

> So they want you to find him less responsible than Katie Crawford. That's the big concession. I'm such a good guy, I'm such a non-exaggerator, I'm such a wonderful person and my client's such an honest guy, even though he's got a theft and dishonesty conviction on his record, believe us. Don't believe the bad Prosecutor. Don't believe the co-defendant. Don't believe the victim. They're bad, we're good. So do I get upset about that? Yeah. I guess I should relax. But I'm not merely a presenter here, ladies and gentlemen. I'm not the co-host of some little talk show where I just shuttle people in and out and let them go along in their conversation and take everything they say at face value. Because I'm not doing my job unless I ask them the tough questions to make you listen to the evidence and then you make a decision.

There was no objection. Although the prosecutor did finally appear to touch on the personalities involved, as we read the statement, it was less an entreaty to decide the case on the basis of personalities instead of evidence than an admonishment against that mistake. Because the focus remained on the evidence, and how it should be interpreted, these remarks did not cross the line into prosecutorial misconduct.

C. Arguing Facts Not in Evidence

"Prosecutors may not make a statement of fact to the jury that is unsupported by the evidence in the case." *People v Fisher*, 193 Mich App 284, 291; 483 NW2d 452 (1992).

Defendant premises his argument that the prosecutor engaged in such misconduct by pointing to her brief reference to the existence of some photographs not presented to the jury, which "involve other parts of the body," and adding "I believe there might have been injuries on other parts of the body that have not necessarily been admitted here." This passing, general mention of other photographs, illustrating perhaps additional injuries, drew no objection from the defense. Our review, then, is for plain error affecting substantial rights. *Carines, supra*.

In light of the abundance of unchallenged evidence that the victim suffered severe injuries at defendant's hands, it would strain at credulity to suppose that the prosecutor's single nebulous mention of other photographs caused the jury to convict an innocent man, or otherwise threw the integrity of the proceedings into doubt. Further, because the trial court admonished the jury to decide the case solely on the basis of evidence actually admitted, and that the statements of counsel were not evidence, defendant could hardly have been prejudiced at all by the incident of which he here complains. "It is well established that jurors are presumed to follow their instructions." *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998).

For these reasons, this argument must fail.

IV. Conspirator's Plea as Substantive Evidence

Defendant argues that the prosecutor improperly used Crawford's guilty plea as substantive evidence of defendant's guilt, and that the trial court's instructions compounded the error. We disagree.

"'[C]ompetent and satisfactory evidence against one person charged with an offense is not necessarily so against another person charged with the same offense, and . . . each person charged with the commission of an offense must be tried upon evidence legally tending to show his guilt or innocence.'" *People v Eldridge*, 17 Mich App 306, 317; 169 NW2d 497 (1969), quoting Anno: *Prejudicial effect of prosecuting attorney's argument or disclosure during trial that another defendant has been convicted or has pleaded guilty*, 48 ALR2d 1016, 1017. Accordingly, evidence of the conviction of a defendant's accomplice is generally inadmissible in the trial of that defendant. *People v Kincade*, 162 Mich App 80, 84-85; 412 NW2d 252 (1987). The admission of an accomplice's guilty plea as substantive evidence of a defendant's guilt may require reversal. *Id.* at 85.

Defendant bases his argument on two passages from the prosecutor's rebuttal argument, beginning with the following:

> Now, surprisingly enough Defense Counsel's going to make a big show and say, oh, find him guilty. Find him guilty of this less serious one than that. The evidence before you is that Katie Crawford, who never picked up the bat, who never hid in the trunk, who never put a bandana over her face, and who never whacked [the victim] several times, admitted that she was guilty of the assault with intent to do great bodily harm and the conspiracy to do that crime. So what Defense Counsel wants you to do is . . . give him less than her.

Defense counsel then asked for a mistrial, on the ground that "you cannot use the confession of a co-conspirator to argue the guilt of a co-conspirator." The prosecutor was allowed to continue: "So ladies and gentlemen, if you would like to find the Defendant less guilty than Kathryn Crawford, I guess that's up to you. But in your heart and in your guts and in your common sense for Heaven's sake you know that's not possible."

We note that within these remarks the prosecutor did not expressly mention Crawford's plea agreement. Although the existence of such an agreement was brought to the jury's attention, Crawford testified in court and gave her own detailed account of the events in question. The in-court testimony was, of course, the evidence to which the prosecutor referred, and of which she urged a certain interpretation upon the jury. A prosecutor enjoys wide latitude in fashioning arguments, and may argue the evidence and all reasonable inferences from it. *Bahoda*, *supra* at 282.

In arguing that the trial court's subsequent instructions compounded the error he alleges, defendant quotes the following:

> Katie Crawford says she took part in this, in the crime that the Defendant is charged with committing. Katie Crawford has already been convicted of charges arising out of the commission of that crime and/or the evidence clearly

> shows that Katie Crawford is guilty of the same crime the Defendant is charged with. . . .

If this instructional fragment might seem to suggest that the trial court allowed the jury to attach too much significance to Crawford's plea-based conviction, the instructions that followed, and which defendant chose not to present with this argument, alleviate any such concerns:

> In general, you should consider [an] accomplice's testimony more cautiously than you would that of an ordinary witness. You should be sure that you have examined it closely before you base a conviction on it.
>
> You've heard testimony . . . that a witness, Katie Crawford, made an agreement with the Prosecutor about charges against her in exchange for her testimony in this trial. You are to consider this evidence only as it relates to Katie Crawford's credibility and as it may tend to show Katie Crawford's bias or self interests.

The court's plain admonishment to evaluate Crawford's testimony with extra care, and limiting the jurors' use of the evidence that Crawford appeared under the terms of a plea agreement, should have avoided any prejudice in the matter. Again, jurors are presumed to follow their instructions. *Graves, supra*.

V. Shackles

Defendant argues that reversal is required because some jurors saw him in shackles. We disagree.

We review the court's decision concerning whether a criminal defendant will appear in restraints for an abuse of discretion. *People v Dixon*, 217 Mich App 400, 404-405; 552 NW2d 663 (1996). Because a defendant in shackles presents an image in conflict with the presumption of innocence, the shackling of a criminal accused at trial is disfavored. See *id*.

In this case, defendant admits that he was in fact not shackled during trial, but instead asserts that on approximately three occasions "some jurors observed him in shackles" as he was being taken to and from the courtroom. Defendant appends an affidavit to this effect, conceding that the existing record otherwise does not support these contentions, and styles this issue as a motion to remand for further evidentiary development. Obviously, then, the defense made no issue of defendant's being seen in shackles when the trial court was in a position to remedy any such problem. This issue is thus unpreserved, restricting our review to ascertaining whether plain error occurred affecting defendant's substantial rights. *Carines, supra*.

This Court previously denied defendant's motion to remand on the ground that defendant had the opportunity to present the factual basis for this issue while pressing a motion for a new trial. We reiterate now that because defendant failed to offer such evidence to the trial court in this regard when the issue was first raised, we are disinclined to order further such proceedings now.

Moreover, what defendant alleges is only that, some, not all, jurors, three times in passing saw him in shackles. Any reasonable juror should have understood this to be but an incident of defendant's status as a criminal suspect. The trial court instructed the jury that defendant was presumed innocent, and that his being on trial was not itself evidence of guilt. Assuming, without deciding, the truth of defendant's assertions, we conclude that defendant has failed to show that his being seen in shackles resulted in the conviction of an innocent man, or otherwise compromised the fairness or integrity of the proceedings. *Carines, supra*.

VI. Cumulative Error

Defendant suggests that if no single claim of error itself warrants reversal, such relief is nonetheless required in the face of the cumulative effect of all such errors. See *People v Cooper*, 236 Mich App 643, 659-660; 601 NW2d 409 (1999). Because we conclude that defendant has failed to show any prejudicial error at all, this argument is unavailing. *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998).

VII. Sentencing

Defendant argues that he is entitled to resentencing, on the ground that the trial court acted under the influence of excessive emotion plus personal, extra-judicial information. We disagree.

Not in dispute is that the minimum sentences defendant received fell within the recommendations under the applicable sentencing guidelines.[1] "If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence." MCL 769.34(10). See also *People v Leversee*, 243 Mich App 337, 348; 622 NW2d 325 (2000).

Defendant asserts that the trial court in this instance openly displayed emotion, and points out that the court refused to produce a copy of the videotape of the sentencing proceeding. We do not concern ourselves with this factual account,[2] because, true or not, it does not afford a basis for disturbing sentences whose minimums fall within the guidelines. *Id.*

Defendant further makes issue of the trial court's having acknowledged, in response to a plea for leniency in light of defendant's history of bipolar disorder,[3] some personal experience

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[1] Because the conduct for which defendant was convicted occurred after January 1, 1999, the legislative sentencing guidelines, enacted pursuant to MCL 769.34, were used to determine the recommended range of defendant's minimum sentence.

[2] This Court denied a motion to compel production of the videotape on October 14, 2003.

[3] "Bipolar Disorder, commonly known as Manic-Depression, is characterized by extreme mood swings from manic, bordering on delusional, highs and deep, suicidal lows." Stephanie Proctor Miller, *Keeping the promise: the ADA and employment discrimination on the basis of psychiatric disability*, 85 Cal L Rev 701, 713 n 71 (1997), citing American Psychiatric Ass'n, *Diagnostic & Statistical Manual of Mental Disorders* (4th ed, 1994), 350-355.

with that condition in that a son suffers from it. Defendant does not actually ask this Court to order a reduced sentence because of his affliction, and rightly so. We are not about to rule as a matter of law that persons suffering from bipolar disorder are any less responsible for their actions for that reason. Such a patronizing policy would not only be problematic for the criminal justice system, but would tend to burden persons with disabilities with some special stigma as less than responsible citizens. Such a ruling would run contrary to this state's strong public policy favoring the total integration of persons with disabilities into mainstream society. See *Bednarski v Bednarski*, 141 Mich App 15, 27-28, 366 NW2d 69 (1985), citing MCL 37.1101 *et seq.*

Defendant further protests that defense counsel did not know in advance that the sentencing judge had an offspring who joined defendant in suffering from bipolar disorder. Defendant relies on *People v McKernan*, 185 Mich App 780, 782-784; 462 NW2d 843 (1990), wherein this Court remanded for resentencing because the sentencing court had announced that the defendant's advanced age suggested that recidivism was likely. However, *McKernan* is distinguishable from the instant case in that in *McKernan* the trial court had apparently allowed its personal, unproved, views to influence the sentencing decision. *Id.* at 783. In this case, the trial court steadfastly refused to allow any such development, instead using its personal insight to confirm its resolve not to make concessions to defendant's bipolar disorder.[4]

Because defendant fails to show that the trial court erroneously scored defendant's sentencing variables, or otherwise relied on incorrect factual information, we affirm defendant's sentences. MCL 769.34(10); *Leversee, supra*.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Joel P. Hoekstra
/s/ Kirsten Frank Kelly

[4] We further note what we consider obvious—that to the extent that the sentencing judge understood defendant to be situated similarly to his own son, the judge's sympathies for the latter should have influenced him, if at all, only in the direction of looking more leniently upon defendant.