STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 12, 2009
v	No. 277695 Berrien Circuit Court
SHABREA DREW MCCLINTON, Defendant-Appellant.	LC Nos. 2006-404884-FH; 2006-405093-FH

Before: Murphy, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

A jury convicted defendant of witness intimidation, MCL 750.122(7)(c), resisting and obstructing a police officer, MCL 750.81d(1), and disturbing the peace, MCL 750.170. The trial court sentenced defendant as an habitual offender, third offense, MCL 769.11, to a prison term of 106 months to 30 years for the witness intimidation conviction, and to jail terms of 140 days for resisting and obstructing a police officer and 90 days for disturbing the peace. Defendant appeals as of right. We affirm.

Defendant first argues that the evidence was not sufficient to support defendant's conviction of witness intimidation. In reviewing the sufficiency of the evidence, we view the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proved beyond a reasonable doubt. *People v Jaffray*, 445 Mich 287, 296; 519 NW2d 108 (1994). "Circumstantial evidence and reasonable inferences arising therefrom may be sufficient to prove the elements of the crime." *People v Plummer*, 229 Mich App 293, 299; 581 NW2d 753 (1998). Intent may be inferred from minimal circumstantial evidence and the reasonable inferences that arise from the evidence. *People v Hawkins*, 245 Mich App 439, 458; 628 NW2d 105 (2001).

MCL 750.122 "identif[ies] and criminalize[s] the many ways individuals can prevent or attempt to prevent a witness from appearing and providing truthful information in some sort of official proceeding." *People v Greene*, 255 Mich App 426, 438; 661 NW2d 616 (2003). The statute provides in relevant part:

(3) A person shall not do any of the following by threat or intimidation:

> (a) Discourage or attempt to discourage any individual from attending a present or future official proceeding as a witness, testifying at a present or future official proceeding, or giving information at a present or future official proceeding.
>
> (b) Influence or attempt to influence testimony at a present or future official proceeding.
>
> (c) Encourage or attempt to encourage any individual to avoid legal process, to withhold testimony, or to testify falsely in a present or future official proceeding.
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> (7) A person who violates this section is guilty of a crime as follows:
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> * * *
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> (c) If the violation involves committing or attempting to commit a crime or a threat to kill or injure any person or to cause property damage, the person is guilty of a felony punishable by imprisonment for not more than 15 years or a fine of not more than $25,000.00, or both.

MCL 750.122 punishes both completed and attempted acts of witness interference. *Greene, supra* at 440. An attempt consists of two elements: "(1) an intent to do an act or to bring about certain consequences which would in law amount to a crime; and (2) an act in furtherance of that intent which, as it is most commonly put, goes beyond mere preparation." *People v Jones*, 443 Mich 88, 100; 504 NW2d 158 (1993) (quotation omitted).

Here, because defendant did not succeed in preventing Officer Smigielski from appearing and providing truthful information at the preliminary examination, the jury necessarily found that defendant attempted to prevent Officer Smigielski from appearing and providing truthful information at the preliminary examination. Defendant argues that the prosecutor failed to present evidence that defendant's death threats toward Officer Smigielski were intended to interfere with Officer Smigielski's appearance at the preliminary examination. He contends that the threats he made at the jail on the day before his preliminary examination were merely part of a hostile tirade directed toward all police officers, and that no evidence was presented to support a finding that defendant attempted to prevent or influence Officer Smigielski's testimony with his threats.

The evidence presented at trial revealed that Officer Smigielski arrested defendant on September 11, 2006. On September 20, 2006, the day before defendant's preliminary examination, Officer Smigielski was at the jail booking a suspect in an unrelated case. Defendant was in a cell across the hall from where the booking was taking place. When defendant saw Officer Smigielski, defendant "went berserk." He began yelling angry statements at Officer Smigielski and making death threats. Officer Smigielski testified that defendant asked him if he was going to be attending the "trial" or "hearing" the next day and stated that Officer Smigielski should not wear his "blues" (his police uniform) because defendant would take them from him and when "the Court was all done with," defendant would come and find him and kill him. Officer Smigielski interpreted this as an attempt to discourage him from attending the

preliminary examination. Deputy Brian Thompson witnessed the verbal attack on Officer Smigielski. He recalled that defendant said, "What are you gonna say tomorrow? You need to watch what you gonna say." Deputy Thompson also heard defendant say, "You bitch, I'm gonna kill you," "You're [sic] bullet proof vest isn't gonna do you any good," "You better get you a hard hat because I'm gonna shoot you in the head." Defendant also made reference to a forty-caliber handgun. These threats were unequivocally made in conjunction with defendant's inquiry as to whether Officer Smigielski would be attending the preliminary examination the follow day. Viewed in a light most favorable to the prosecution, the evidence was sufficient to allow reasonable jurors to infer that defendant attempted to discourage Officer Smigielski from testifying or giving information at the preliminary examination, attempted to influence Officer Smigielski's testimony, or attempted to encourage Officer Smigielski to withhold testimony or testify falsely. Further, defendant's threat to kill or injure the officer satisfied the requirement of MCL 750.122(7)(c), that there is a threat to kill or injure.

Defendant also argues that he was denied the right to present a defense when the trial court erroneously prevented him from presenting relevant evidence tending to show the credibility or bias of Officer Smigielski. A trial court's decision to admit evidence is reviewed for an abuse of discretion. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). However, whether a defendant's right to present a defense was violated by the exclusion of evidence is a constitutional question that is reviewed de novo. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002); *People v Pitts*, 222 Mich App 260, 263; 564 NW2d 93 (1997).

A defendant has a right under the state and federal constitutions, Const 1963, art 1, § 13; US Const, Ams VI, XIV, to confront witnesses and to present a defense. *People v Whitfield*, 425 Mich 116, 124 n 1; 388 NW2d 206 (1986). However, the right to confront witnesses and present a defense extends only to relevant and admissible evidence. *People v Hackett*, 421 Mich 338, 354; 365 NW2d 120 (1984). "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. Evidence that is not relevant is not admissible. MRE 402. Here, a review of defendant's offer of proof with regard to the excluded evidence reveals that the evidence was not relevant to the only issue for which it was offered – credibility and bias. Because the proffered evidence was not relevant, the trial court did not abuse its discretion by declining to admit the evidence, and defendant's constitutional right to present a defense was not implicated.

Defendant next argues that he was denied his state and federal constitutional right to due process as a result of being in leg shackles and shackled to the floor during the trial.[1] Constitutional claims are reviewed de novo. *Pitts*, *supra*. However, the ultimate decision whether to restrain a defendant is reviewed for an abuse of discretion under the totality of the circumstances. *People v Dixon*, 217 Mich App 400, 404-405; 552 NW2d 663 (1996). "[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*,

[1] During trial, defendant's legs were shackled together and to the floor under the defense table. A curtain made of cotton skirted the defense table.

446 Mich 409, 425; 521 NW2d 255 (1994). Here, the record supports the trial court' finding that it was necessary to shackle defendant to prevent injury to persons in the courtroom. Defendant had previously threatened to kill police officers. Some of the police officers whose lives were threatened by defendant were planning to testify at the trial. Indeed, defendant was on trial for resisting and obstructing, and on a consolidated, additional charge of witness intimidation for threatening an officer with death related to that officer's plans to testify at the preliminary examination. Further, while defendant claims that the noise from the shackles would have been better masked in another courtroom, the trial court disagreed. More importantly, nothing in the record supports that the jury knew defendant was shackled during trial. Consequently, defendant was not denied his constitutional right to a fair trial and the trial court did not abuse its discretion in determining that defendant's legs should be shackled together and to the floor.

Affirmed.

/s/ William B. Murphy
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey