

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee

v

MAURICE ANTHONY RICHARDS,

Defendant-Appellant.

UNPUBLISHED

October 19, 2010

No. 293285

Macomb Circuit Court

LC No. 2009-000434-FC

Before: BORRELLO, P.J., and CAVANAGH and OWENS, JJ.

PER CURIAM.

Defendant was convicted by a jury of carjacking, MCL 750.529a, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to 8 to 25 years' imprisonment for the carjacking conviction, and a consecutive two-year term of imprisonment for the felony-firearm conviction. He appeals as of right. We affirm.

On January 4, 2009, defendant took the complainant's 2008 Dodge Charger from a gas station in Warren. The prosecution's theory at trial was that defendant approached the complainant and demanded his keys, and that the complainant conceded only after defendant motioned toward a gun in the waistband of defendant's pants. The defense theory at trial was that defendant could not have possessed a gun because the police had performed a pat down search on him and a companion, Dorian Pittman, minutes earlier and did not find a gun. The defense conceded that defendant drove away in the complainant's car and argued that, at most, defendant was guilty only of unlawfully driving away an automobile.

I. JURY DISCUSSION

Defendant first argues that the trial court violated his due process right to a trial by an impartial jury when it instructed the jurors that they could discuss the evidence among themselves during trial recesses. Defendant objected to the trial court's jury instruction at trial on the ground that it would allow the jurors to form premature conclusions without having heard all the evidence and final arguments, thereby preserving that argument for appeal. However, defendant did not argue that the instruction was improper because it allowed alternate jurors to

participate in discussions that might influence the verdict, leaving that claim unpreserved. An objection on one ground is insufficient to preserve an appellate challenge based on a different ground. *People v Bulmer*, 256 Mich App 33, 35; 662 NW2d 117 (2003).

Claims of instructional error are reviewed de novo. *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996). This Court “examines the instructions as a whole, and, even if there are some imperfections, there is no basis for reversal if the instructions adequately protected the defendant’s rights by fairly presenting to the jury the issues to be tried.” *People v Martin*, 271 Mich App 280, 337-338; 721 NW2d 815 (2006). Defendant’s unpreserved claim is reviewed for plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 752-753, 763-764; 597 NW2d 130 (1999).

Defendant correctly observes that the trial court’s instruction allowing the jurors to discuss the evidence during recesses is contrary to longstanding precedent. See *People v Hunter*, 370 Mich 262, 269-270; 121 NW2d 442 (1963), and *People v Blondia*, 69 Mich App 554, 557-558; 245 NW2d 130 (1976). However, the trial court was expressly authorized by Supreme Court Administrative Order No. 2008-2¹ to instruct the jurors in the manner that it did.

We disagree with defendant’s argument that the instruction infringed on his right to a fair trial. Defendant relies on *Commonwealth v Kerpan*, 508 Pa 418, 422; 498 A2d 829 (1985), in which the court identified five primary reasons why pre-deliberation discussions among jurors are not favored: (1) the prosecution’s evidence is presented first and, therefore, the jurors’ initial opinions are likely to be unfavorable to the defendant and jurors will likely note only subsequent evidence that confirms their initial opinions; (2) jurors who express preliminary opinions to other jurors will become locked into their positions and be less likely to be open-minded during deliberations; (3) the defendant is entitled to have his case considered by the entire jury, as opposed to separate cliques; (4) jurors might form premature conclusions before hearing the court’s instructions regarding the applicable law; and (5) jurors might form premature conclusions before hearing the final arguments of counsel.

Defendant concedes that AO 2008-2 addresses two of these concerns. In particular, the jurors received binders containing relevant instructions, and the jurors were expressly prohibited from discussing the evidence unless all jurors were present. We believe that the trial court’s instructions were also responsive to the remaining concerns identified in *Kerpan*. The court cautioned the jurors that “it’s extremely important that you remember and clearly understand that

¹ AO 2008-2 authorized certain judges in Michigan, including the trial judge in this case, to participate in a pilot project to study the effects of proposed reforms to the jury system in Michigan. The proposed reforms include proposed MCR 2.513(K), which states:

Juror Discussion. After informing the jurors that they are not to decide the case until they have heard all the evidence, instructions of law, and arguments of counsel, the court may instruct the jurors that they are permitted to discuss the evidence among themselves in the jury room during trial recesses. The jurors should be instructed that such discussions must be clearly understood as tentative pending final presentation of all evidence, instructions, and argument.

any discussions you have are tentative until you've heard all the evidence, the instructions the court will give, and the argument by the attorneys." After giving additional preliminary instructions, the court further instructed the jury as follows:

You must keep an open mind and not decide any issue in the case until you've heard all the evidence, all the instructions on the law, all the arguments of counsel, and until the court directs you to begin your deliberations. However, you may discuss the case among yourselves in the jury room during trial recesses when all of the jurors are present. Although you can discuss the evidence with your fellow jurors you must clearly understand that any such discussions are tentative pending final presentation of all evidence, instructions, and argument. I cannot stress enough how important it is for you to keep an open mind and to avoid forming opinions about the outcome of the case until I direct you to begin your deliberations.

The trial court's instructions guarded against the jury making premature conclusions by emphasizing that any preliminary discussions were to be considered tentative only. The court also emphasized that the jurors were to keep an open mind throughout the trial, and that the jurors were not to decide any issue until after they heard all the evidence, the parties' arguments, and the court's instructions, and they were directed to begin deliberations. The jury would have also understood from the court's instructions that any views expressed by a given juror would be understood by the other jurors within the framework of these guidelines, thereby minimizing the potential for jurors to become locked into any preliminary opinions that might be expressed. In addition to the specific instructions regarding juror discussions, the trial court also instructed the jury that defendant was presumed innocent and that it must acquit defendant unless it was satisfied beyond a reasonable doubt of his guilt after consideration of all the evidence in the case. Jurors are presumed to follow their instructions. *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003). Viewed as a whole, the trial court's instructions sufficiently protected defendant's right to have his case decided by a fair and impartial jury.

We also reject defendant's unpreserved claim that the instruction violated his right to a fair trial because it improperly allowed alternate jurors who were not part of the final jury to exert their influence on the verdict. Although all jurors were permitted to participate in tentative discussions about the case during trial recesses, those discussions occurred before deliberations began, and a clear distinction was made between tentative discussions and the separate deliberations to reach a final decision. Accordingly, defendant has not established a plain error in this regard.

II. TRIAL COURT'S COMMENT

Defendant next argues that the trial court infringed on his presumption of innocence when it made a comment that defendant contends effectively informed the jury that it could draw an adverse inference from his failure to produce Dorian Pittman as a witness. Because defendant did not object to the trial court's comment, we review this unpreserved claim for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763-764.

Pittman was with defendant on the night of the offense, but was not called as a witness by either side. Testimony was presented that Pittman was interviewed by the police and gave a statement regarding whether defendant possessed a gun, but the content of that statement was not presented. In response to defense counsel's question, however, an officer testified that he did not search for a gun after interviewing Pittman. When the jury sought to further question the officer about Pittman's statement, the trial court explained that neither side had requested Pittman's presence, and that his statement was inadmissible hearsay. Subsequently, during closing arguments, defense counsel argued that the prosecution had the burden of proof, and that "if Dorian Pittman had said there was a gun, you can bet he would've been in court." After overruling the prosecutor's objection to this statement, the court commented that "neither side has requested his presence here . . . during this trial. And they can reach their own conclusions from that."

Contrary to what defendant argues, the trial court's comment was not the equivalent of a "missing witness" instruction, see CJI2d 5.12, whereby the jury was informed that it could infer from defendant's failure to call Pittman that Pittman's testimony would have been unfavorable to defendant. The court merely commented that "neither side" had requested Pittman's presence and that the jurors could draw their own conclusions from that. The comment did not favor a permissible inference for either party. Further, the trial court instructed the jury that defendant was presumed innocent, that the prosecution was required to prove defendant's guilt beyond a reasonable doubt, and that defendant was not required to offer any evidence or do anything to prove his innocence. Defendant has failed to demonstrate a plain error, or shown that his substantial rights were affected.

III. SHACKLING

Defendant lastly argues that the trial court's decision to shackle his ankles during trial violated his right to due process and deprived him of a fair trial. We disagree.

We review a trial court's decision to restrain a defendant during trial for an abuse of discretion under the totality of the circumstances. *People v Dixon*, 217 Mich App 400, 404-405; 552 NW2d 663 (1996). "Freedom from shackling is an important component of a fair trial." *Id.* at 404. A defendant may be shackled only to prevent the defendant's escape, to prevent the defendant from injuring others in the courtroom, or to maintain an orderly trial. *People v Dunn*, 446 Mich 409, 425; 521 NW2d 255 (1994). To justify reversal of a conviction on the basis of being shackled, the defendant must show that prejudice resulted. *People v Payne*, 285 Mich App 181, 186; 774 NW2d 714 (2009). "[A] defendant is not prejudiced if the jury was unable to see the shackles on the defendant." *People v Horn*, 279 Mich App 31, 36; 755 NW2d 212 (2008).

Even if the trial court abused its discretion by denying defendant's request to attend trial without shackles, defendant has failed to show that he was prejudiced. The record discloses that the trial court recognized the importance of the jury not viewing defendant in restraints during trial and took steps to ensure that the jury would not see the shackles. The court stated that defendant was to be shackled only at his ankles, where "the shackles will be blocked by the table and so not in the jury's view throughout the trial." Further, the court ordered that defendant was

not to be shackled during jury selection, when potential jurors would be seated behind defense counsel's table, and that defendant would be permitted to enter and leave the courtroom while the jury was not present. Defendant acknowledges that there is no evidence that any jurors saw him in shackles. Because defendant is unable to show that he was prejudiced by the shackles, a new trial is not required on this basis.

Affirmed.

/s/ Stephen L. Borrello

/s/ Mark J. Cavanagh

/s/ Donald S. Owens