

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TIMOTHY DANIEL FINLEY,

Defendant-Appellant.

UNPUBLISHED

October 21, 2010

No. 293151

Circuit Court

LC No. 08-005181-FC

Before: SAWYER, P.J., and FITZGERALD and SAAD, JJ.

PER CURIAM.

A jury convicted defendant of armed robbery, MCL 750.529; two counts of assaulting, resisting, or obstructing an officer, MCL 750.81d(1), and two counts of felonious assault, MCL 750.82.¹ The trial court sentenced defendant as an habitual offender, fourth offense, MCL 769.12, to concurrent prison terms of 15 to 30 years for the armed robbery conviction, and two to 15 years for each of the assaulting, resisting, or obstructing an officer and felonious assault convictions. The trial court denied defendant's motion for a new trial. Defendant appeals as of right. We affirm.

Defendant's sole argument is that the trial court erred "by shackling defendant [or allowing the trial to proceed with defendant in shackles] without making an individualized determination based on record evidence that the shackling was necessary." Under the circumstances of this case, we disagree.

Generally, a defendant has a due process right to be free of shackles or handcuffs during trial. *People v Dixon*, 217 Mich App 400, 404; 552 NW2d 663 (1996). However, this right is not absolute; a trial court may order a defendant to be restrained where it "is necessary to prevent escape, injury to persons in the courtroom or to maintain order." *People v Dunn*, 446 Mich 409, 425; 521 NW2d 255 (1994). Here, before the jury pool entered the court room on the first day of trial, the trial judge noted that defendant was in leg shackles, and briefly noted that it was

¹ The jury acquitted defendant of one count of receiving and concealing a stolen motor vehicle, MCL 750.535(7).

unusual for a defendant to be brought to court escorted by two deputies.² The record reflects that defense counsel requested that the shackles be removed if defendant chose to testify, and the trial court granted that request. Defense counsel also requested that the shackles be removed during the time that defendant would be representing himself, and the trial court granted that request as well. Defense counsel did not seek to have the shackles removed at any other time. Defendant should not be permitted to take advantage of an alleged error that could have been addressed before jury selection commenced. See *People v Breeding*, 284 Mich App 471, 486; 772 NW2d 810 (2009) (“A defendant should not be allowed to assign error to something that his own counsel deemed proper.”). “To do so would allow a defendant to harbor error as an appellate parachute.” *People v Green*, 228 Mich App 684, 691; 580 NW2d 444 (1998).

Nonetheless, even assuming that it was error for the trial court to fail to make specific findings on the record to justify restraining defendant, see *Deck v Missouri*, 544 US 622, 627; 125 S Ct 2007; 161 L Ed 2d 953 (2005), a defendant must still show that the error prejudiced his trial in order to warrant relief. *People v Horn*, 279 Mich App 31, 36; 755 NW2d 212 (2008). Typically, a defendant will show prejudice by demonstrating that the restraints were visible to the jury. *Id.* at 36-37. The record does not indicate, beyond defendant’s self-serving affidavit, that any member of the jury actually saw defendant in leg shackles or heard the sounds of the leg shackles.³ Defendant has not shown that his restraints were visible to the jury and, for that reason, has not met his burden of showing prejudice. *Horn*, 279 Mich App at 37.

Even if this Court were to conclude that defendant demonstrated that his restraints were visible to the jury, this by itself would not warrant relief. Where a trial court orders a defendant to be shackled without adequate justification, the error is still subject to harmless error analysis. *Deck*, 544 US at 635. In order to be considered harmless, the prosecution must normally “prove ‘beyond a reasonable doubt that the [shackling] error complained of did not contribute to the verdict obtained.’” *Id.*, quoting *Chapman v California*, 386 US 18, 24; 87 S Ct 824; 17 L Ed 2d 705 (1967). However, where, as here, the constitutional error is unpreserved, defendant bears the burden of proving that the shackling error prejudiced his trial. *People v Carines*, 460 Mich

² During the hearing on the motion for new trial, the court, looking at the issue in historical context because defendant never challenged the shackling, noted that defendant presented a security risk. He noted the seriousness of the charges defendant was facing, as well as his juvenile adjudications for assault and battery, felonious assault, and carrying a concealed weapon. Additionally, defendant was previously twice convicted of assaulting a prison employee and for being a prisoner in possession of a weapon.

³ Although defendant states in his affidavit that “at one point a potential juror requested a sidebar to be excused of their jury duty because he couldn’t render an impartial decision due to the fact I looked like a criminal and I reminded him of someone he knew with leg irons on,” our review of the record does not find any facts in support of the statement.

750, 764; 597 NW2d 130 (1999); see also *United States v Miller*, 531 F3d 340, 346 (CA 6, 2008) (examining defendant's unpreserved claim that he was improperly restrained for plain error).

A review of the evidence presented at trial in light of the shackling error reveals that defendant has not demonstrated prejudice. Evidence was presented that an order for pizza was placed from a cell phone owned by Kristina Yager for delivery to "Jerry" at an address belonging to an elderly couple. Lloyd Meade, the pizza delivery man, testified that as he turned into the driveway at that address, a man confronted him in the driveway. The man indicated that his name was "Jeremy" and that he had ordered the pizza. The man then robbed Meade at gunpoint and fled with the cash obtained from the pocket of Meade's pants. Meade described the weapon used during the robbery, as well as the physical description of the robber and the clothing he wore. Meade identified defendant at trial as the man who robbed him. Defendant was later apprehended in a stolen vehicle owned by Yager. Defendant had approximately \$80 cash on his person. Inside the vehicle was a gun matching the description of the gun used during the robbery, clothing matching the description of the clothing worn by the robber, and Yager's cell phone. Yager testified that defendant did not have permission to take her car or her cell phone, and that none of the items found in the car belonged to her. Given the substantial evidence of guilt, and the lack of evidence that the jury saw or heard the shackles during the portions of trial when defendant's legs were shackled, any error in shackling defendant was harmless.

Affirmed.

/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald
/s/ Henry William Saad