STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 13, 2011
V	No. 294464 Kalamazoo Circuit Court
JEREMY TREMON WILSON, Defendant-Appellant.	LC No. 2008-001904-FH

Before: MARKEY, P.J., and ZAHRA and DONOFRIO, JJ.

PER CURIAM.

Defendant Jeremy Tremon Wilson appeals by right his jury trial convictions of second-degree home invasion, MCL 750.110a(3), and larceny in a building, MCL 750.360. The trial court sentenced defendant under MCL 769.11, to concurrent terms of imprisonment, with credit for 59 days served, of 36 months to 30 years for his conviction of second-degree home invasion, and 12 months to 8 years for his conviction of larceny in a building. We affirm.

On October 28, 2008, a 46-inch flat-screen television and Playstation 3 were stolen from the apartment of Robert Edick and Opal McClurg. McClurg left the apartment around 10:30 a.m. through the back door, which remained unlocked. McClurg arrived home after noon and saw that the television and Playstation 3 were gone. Her digital camera and her son's iPod were also missing. McClurg called the police and then went to her next-door neighbor, Mary Anderson, to ask if she had seen anything.

Detective Jeffery Baker interviewed McClurg, Edick and Anderson. Anderson told Baker what she saw, including identifying defendant as the person who took McClurg's property. Anderson also picked defendant out of a photographic lineup and said she was certain it was defendant who had McClurg's television.

Anderson testified at the preliminary examination that she saw defendant walk back and forth several times behind her apartment. The last time, she saw defendant carrying McClurg's television. Anderson told McClurg that she was certain that defendant was the person she saw with the television.

At trial, Anderson testified inconsistently with her preliminary examination testimony and did not answer the prosecution's questions directly. Anderson testified that it was a "possibility" that it was defendant whom she saw walking behind her apartment. She also would

not admit that she told McClurg that defendant had the television. The prosecution tried to refresh Anderson's recollection with the preliminary examination transcripts; however, Anderson testified that she did not mean what she said during the preliminary examination. Consequently, the prosecution requested that the pertinent portion of the DVD of the preliminary examination be shown to the jury. Defense counsel objected on the ground that it showed defendant in handcuffs and an orange jail jumpsuit. The trial court admitted the DVD and allowed Anderson's preliminary examination testimony to be played for the jury. At times, defendant's handcuffs were visible, so the trial court offered to provide a limiting instruction to the jury to the effect that defendant was in custody at the time of the preliminary examination. Defense counsel, however, declined the instruction. During deliberations, the jury requested to see the DVD again. After further deliberations, the jury returned a guilty verdict on both counts.

First, defendant argues that his due process rights to a fair trial were violated because the preliminary examination DVD showed him in handcuffs. Absent a showing of necessity, a criminal defendant enjoys the right to be free from shackles during trial. *People v Dunn*, 446 Mich 409, 426; 521 NW2d 255 (1994). Allowing a defendant to attend trial unrestrained is an important component of a fair trial because a defendant's appearance before a jury handcuffed or shackled erodes the defendant's constitutionally guaranteed presumption of innocence. *People v Banks*, 249 Mich App 247, 256; 642 NW2d 351 (2002). "Visible shackling undermines the presumption of innocence and the related fairness of the factfinding process . . . and the use of shackles at trial 'affronts' the 'dignity and decorum of judicial proceedings that the judge is seeking to uphold.'" *Deck v Missouri*, 544 US 622, 630-631; 125 S Ct 2007; 161 L Ed 2d 953 (2005), quoting *Illinois v Allen*, 397 US 337; 90 S Ct 1057; 25 L Ed 2d 353 (1970).

In this case, the jury did not see defendant in his orange jail jumpsuit and in handcuffs at trial. However, they could see this when viewing the DVD. Nonetheless, we disagree with defendant that his right to due process of law was violated by the trial court's ruling admitting relevant evidence, which incidentally shows defendant in handcuffs and an orange jumpsuit. The instant case is not one "where a court, without adequate justification, order[ed] the defendant to wear shackles that will be seen by the jury . . . ." *Deck*, 544 US at 635. Nor is this a case where the trial court compelled an accused to wear jail clothing at trial without advancing any essential state policy. *Estelle v Williams*, 425 US 501, 505; 96 S Ct 1691; 48 L Ed 2d 126 (1976). Defendant cites no cases extending the rule of *Deck* and *Estelle* to the fact situation of this case where the accused is depicted wearing handcuffs or jail garb in evidence the trial court has admitted under the rules of evidence. We decline to do so.

We conclude the rule applied in *Deck* does not apply here because (1) defendant was not placed in shackles and wore regular clothing during his trial; (2) defendant's ability to communicate and participate in his own defense was not impaired, and (3) the trial court's evidentiary ruling was not an affront to the dignity and decorum of judicial proceedings. See *Deck*, 544 US at 630-632. The trial court here did not gratuitously order defendant to wear shackles or jail garb in front of the jury but rather it exercised its discretion by admitting evidence. Indeed, the trial court considered defendant's argument that his appearance on the DVD would be unfairly prejudicial; consequently, it should not be admitted into evidence. MRE 403 permits the exclusion of evidence when "its probative value is substantially outweighed by the danger of unfair prejudice . . . ." Thus, MRE 403 recognizes the main concern addressed in *Deck* and *Estelle*: that compelling a defendant to appear at trial before a jury in prison garb or

shackles without being justified by an "'essential state policy'" presents an unreasonable risk to the "'fairness of the factfinding process.'" *Deck*, 544 US at 628, quoting *Estelle*, 425 US at 503, 505. The trial court concluded that any unfair prejudice from admitting the DVD into evidence would not outweigh the probative value of the evidence and even offered to give a limiting instruction that defendant refused. Moreover, to the extent that *Deck* and *Estelle* apply, the trial court, in essence, determined that the jury's limited view of defendant on the DVD was "justified by a state interest specific to a particular trial." *Deck*, 544 US at 629. That is, the court's evidentiary ruling that the probative value of the evidence exceeded any unfair prejudicial affect furthered the state interest of the "truth-seeking function of a jury trial." *People v Shafier*, 483 Mich 205, 224; 768 NW2d 305 (2009). "The effective operation of our criminal justice system depends on the discovery of the truth, and evidence is the lifeblood of this pursuit." *People v Yost*, 483 Mich 856, 859; 759 NW2d 196 (2009) (MARKMAN J., *concurring*). In sum, this is not a case of the trial court gratuitously compelling defendant to appear in an inherently prejudicial light before the jury but rather one of admitting relevant evidence the probative value of which was not outweighed by the danger of unfair prejudicial affect.

The record does not reveal that the trial court abused its discretion in deciding this evidentiary issue. The trial court admitted the DVD under MRE 801(d)(1)(A). Thus, Anderson's preliminary examination testimony was admitted as substantive evidence. But which version of her testimony was more credible was of critical importance. Courts have long recognized the importance of actually observing witnesses' appearance and demeanor when judging their credibility. See MCR 2.613(C). Admitting the DVD served this truth-seeking function. The trial court also determined that the depiction of defendant in the DVD wearing orange clothing and handcuffs was unlikely to create unfair prejudice by finding that "aside from the beginning of the tape . . . I felt it was difficult to tell that [defendant] was [handcuffed]. You can see he's in orange. I don't know necessarily that the jurors would understand that in orange in this county means or that people in custody in this county wear orange jumpers. So I don't know that they would even jump to that conclusion and I felt it was difficult to ascertain or see that he was in handcuffs." This Court will "defer to the trial court's superior opportunity to observe the defendant and to determine whether the defendant's appearance prejudicially marks him or her as a prisoner." *People v Payne*, 285 Mich App 181, 186; 774 NW2d 714 (2009).

Defendant next argues his convictions for second-degree home invasion and larceny in a building violate his double jeopardy protection against multiple punishments for the same offense. We disagree. Both the United States Constitution and the Michigan Constitution protect against being twice placed in jeopardy for the same offense. US Const, Am V; Const 1963, art 1, § 15. The Double Jeopardy Clause protects a defendant against (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense. *People v Conley*, 270 Mich App 301, 311; 715 NW2d 377 (2006). Regarding multiple punishments, "a defendant's protected interest is in 'not having more punishment imposed than that intended by the Legislature. The intent of the Legislature, therefore, is determinative.'" *Id.*, quoting *People v Robideau*, 419 Mich 458, 485; 355 NW2d 592 (1984). Thus, "there is no multiple punishment double jeopardy violation if there is a clear indication of legislative intent to impose multiple punishments for the same offense." *Conley*, 270 Mich App at 311. Defendant's double jeopardy rights were not violated because the express language of MCL 750.110a(9) provides: "Imposition of a penalty under this section does not bar imposition of a penalty under any other

applicable law." Although the elements of larceny in a building are included in those of second-degree home invasion, the Legislature specifically provided for multiple punishments in cases like this. *Conley*, 270 Mich App at 311-312; *People v Shipley*, 256 Mich App 367, 378; 662 NW2d 856 (2003). Therefore, defendant's double jeopardy rights were not violated.

Defendant finally argues the trial court erred by scoring ten points for OV 9, MCL 777.39, because McClurg's children should not have been considered victims who were in danger of property loss. According to defendant, the children cannot be considered because they did not purchase the television or Playstation 3. Nothing in the plain language of MCL 777.39 requires that all people must have personally purchased an item to suffer property loss. The children lived in the apartment and they used the television and Playstation 3. Moreover, a replacement Playstation 3 was purchased for the children for Christmas. Therefore, the trial court properly considered the children when scoring ten points for OV 9.

We affirm.

/s/ Jane E. Markey
/s/ Brian K. Zahra
/s/ Pat M. Donofrio