

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
February 7, 2013

v

SANFORD DAVIS,

No. 306461
Wayne Circuit Court
LC No. 11-005385-FC

Defendant-Appellant.

Before: TALBOT, P.J., and WILDER and STEPHENS, JJ.

STEPHENS, J. (*dissenting*)

I respectfully dissent. Our courts have held for decades that a defendant's timely request to wear civilian clothing *must* be granted unless a defendant's request is untimely, or when the trial court makes a finding that the jail clothing in a particular case does not infringe on the presumption of innocence. This defendant's request was timely and, unlike the majority, my review of the transcript does not yield evidence of the necessary fact finding by the trial court. Therefore, unlike the majority, I conclude that the trial court erred. Moreover, unlike the majority, I do not believe that the prosecution has met its burden to show beyond a reasonable doubt that the error was harmless. I would therefore reverse defendant's conviction and remand for a new trial.

I. FACTS

I adopt the majority's statement of facts in this case with the exception of the interpretation of the colloquy regarding the jail clothing. I believe that it is useful to acknowledge the exact words used, because the majority and I come to different conclusions regarding what the trial court actually found. Prior to any jurors entering the courtroom, the trial court asked whether there were any additional pretrial matters. Defendant's counsel responded as follows:

Defendant's Counsel: Yes, there is, Your Honor. My—my client's family attempted to take some civilian clothing over to him earlier this week, and Ms. Ashley Coppin, who is his girlfriend, went on the day of the appointment they gave her, which actually wasn't until yesterday. And I know the time from the preliminary exam to the trial is kind of—kind of compressed here. We were just in 36th District Court on a preliminary exam in June, just slightly over two months ago. They told her they couldn't take the clothes because it needed to

be—notwithstanding the appointment they gave her, it was too close in time to his court date, and *so I brought a back-up set of clothing for him.*

The Court: But we set the trial date on June 13th. Actually his calendar conference was on June 13th. His preliminary exam was June 1st, so they've known for two-and-a-half months what the trial date—or more than two months what the trial date was going to be. And we cannot exchange clothes in the courthouse. It's a violation of court policy to do so as well as for security reasons. Obviously it's a violation for the deputies to allow a change of clothes for a prisoner who is in their custody in the courthouse without proper security. All right. So what we've done is we've had the defendant flip his greens inside out so there's no markings indicating Wayne County Jail and we're ready to proceed.

Defendant's Counsel: And simply—and I understand that, Judge, and I simply want to state that notwithstanding the court rule and court procedure and so forth, and given the, frankly, if I may say, the ease with which a clothing change can be done versus the prejudice my client is going to suffer in sitting in *what is unquestionably a jail uniform that's going to impede negatively and coercively on his presumption of innocence in front of this jury, then I think that's a Constitutional violation regardless of when the—when the trial date was set.*

The Court: Well, you can tell that to the deputies who have been stuck by needles that have been hidden in clothing and all of those things, so the—there's reasons for the security issues. The defendant has had more than two months to arrange for proper clothing. I believe he also has the clothing he was arrested in, which is already in the jail. If he wished to opt to wear that as well, he could have done so. We'll turn his greens inside out so that the—that there are absolutely no markings indicating that he is in custody and we'll proceed to trial. [Emphasis added.]

II. ANALYSIS

A. The Trial Court Erred

A defendant may be denied due process of law if he or she is compelled to stand trial wearing jail clothing, *People v Lee*, 133 Mich App 299, 300; 349 NW2d 164 (1984), if the clothing “can be said to impair the presumption of innocence.” *People v Lewis*, 160 Mich App 20, 31; 408 NW2d 94 (1987). Our Supreme Court explained in *People v Shaw*, 381 Mich 467, 480; 164 NW2d 7 (1969), that “[n]othing could more surely destroy the presumption of innocence and . . . the impartiality of the jury, than to force the defendant to be tried in prison clothes.” Seven years after *Shaw*, the U.S. Supreme Court cited *Shaw* favorably when it explained in *Estelle v Williams*, 425 US 501, 504-505; 96 S Ct 1691; 48 L Ed 2d 126 (1976) that jail clothing inherently impacts the presumption of innocence because it serves as a “constant reminder of the accused’s condition . . . [and] may affect a juror’s judgment,” leading to a conviction based on a presumption that the defendant is guilty, rather than the evidence presented. Therefore, generally, our courts have accepted as a default rule that “[a] defendant’s timely request to wear civilian clothing *must* be granted.” *People v Harris*, 201 Mich App 147,

151; 505 NW2d 889 (1993) (emphasis added, citations omitted). However, where a request to wear civilian clothing is not timely, *Shaw*, 381 Mich at 475, or where the trial court finds that prison clothing appears similar enough to civilian clothing that it would not affect the presumption of innocence, *Harris*, 201 Mich App at 152, a defendant may be compelled to stand trial in prison clothing without a violation of his due process rights.

Here, defendant's request to wear civilian clothing was timely because it was made before any jurors entered the courtroom, and therefore before jurors had the opportunity to see defendant in his jail uniform. Cf. *Shaw*, 381 Mich at 475 (request to wear civilian clothing not timely because it was made after the jury was impaneled and had opportunity to see the defendant in his jail clothing). The majority does not dispute that defendant's request was timely, yet concludes that the trial court made a finding that defendant's jail uniform did not impair his presumption of innocence. I disagree with the majority's reading of the transcript. The trial court found that "there are . . . no markings indicating that [defendant] is in custody . . ." However, the trial court did not directly address the unusual style of the jail garment itself or whether the average juror would likely impute from the jail clothing, even without the visible markings, that defendant was not in ordinary civilian attire but was likely in custody with all the implications flowing therefrom. What the trial court actually found is simply not the same as a finding that the jail uniform did not impair defendant's presumption of innocence. Such a finding is required by case law, and simply does not exist in this record.

To support its conclusion, the majority cites *Harris*, 201 Mich App at 152, where this court drew a nexus between a defendant's presumption of innocence and how closely his jail clothing resembled civilian clothing. I agree that *Harris* is instructive in this case, but believe it supports a result opposite the one reached by the majority. In *Harris*, this Court concluded that where the trial court specifically found that the ". . . defendant's blue pants and shirt did not look like prison clothing," but rather looked "like what teenagers, young people, are wearing now," the defendant's presumption of innocence was not impaired because a jury would simply assume that the defendant was wearing street clothing. *Id.* (quotations omitted). Here, unlike in *Harris*, the trial court made no finding whatsoever that the jail uniform resembled street clothing, and therefore made no finding under *Harris* that the jail uniform would not impair defendant's presumption of innocence. As the majority notes, the trial court found that defendant was wearing "greens." The standard Wayne County jail uniform is colloquially referred to as "greens" because it is dark green cotton; it loosely resembles hospital scrubs. Absent some finding by the trial court to the contrary, I would conclude that no reasonable person could possibly mistake the jail uniform for street clothing, even with the jail markings concealed. Here, not only was the trial court silent regarding whether the uniform resembled street clothing, but defendant's counsel noted on the record that even turned inside out, defendant was wearing what was "unquestionably a jail uniform." I would therefore conclude that the jail uniform in which defendant was forced to be tried clearly marked defendant as a prisoner, even with the Wayne County jail markings concealed, and therefore impaired the presumption of innocence to which defendant was entitled. See *Shaw*, 381 Mich at 480; *Estelle*, 425 US at 504-505.

Moreover, although the majority is correct that the trial court issued a jury instruction, I disagree that the instruction was sufficient to remedy the damage defendant's clothing caused to his presumption of innocence. Again, the majority and I read the transcript differently. The trial court's jury instruction had nothing to do with defendant's clothing. The trial court simply

issued the standard jury instruction regarding the presumption of innocence; CJI2d 1.9. The trial court did not address at all during jury instructions defendant's clothing, or the prejudice that clothing entailed.

The majority notes that the trial court found that defendant had the clothing in which he was arrested, and could have worn that clothing at trial. However, those clothes were not the subject of the inquiry before the trial court or this Court—rather, the issue was, and remains, whether defendant's jail uniform adversely affected defendant's presumption of innocence. Moreover, the majority simultaneously cautions that “[w]e do not encourage trial courts to deny a criminal defendant's request to wear civilian clothing; a trial court should make reasonable efforts to accommodate such requests and where accommodation is not feasible or untimely, a court should create a detailed record explaining the reasons for the denial.” I agree with the majority's advice to trial courts. Here, defendant's trial counsel had in his immediate possession a change of clothes for defendant. Permitting defendant to change into the clothing that his attorney had brought for him would have been minimally time consuming and would not have resulted in an undue delay of the proceedings. Indeed, accommodation here would have been feasible.

Additionally, the majority concludes that the trial court's decision to deny defendant's request was reasonable “given the court's concern for security and safety of the sheriff deputies.” I acknowledge that the Supreme Court has previously held that the presumption that a defendant is entitled to be tried in civilian clothing may be overcome “as the necessary safety and decorum of the court may otherwise require.” *Shaw*, 381 Mich at 473. However, in the case law regarding the prejudicial effect of the shackling of criminal defendants, which raises analogous issues regarding prejudice and the presumption of innocence, Michigan courts have consistently concluded that “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*, 446 Mich 409, 425; 521 NW2d 255 (1994) (emphasis added). See also *People v White*, 439 Mich 942, 942; 480 NW2d 109 (1992), *People v Payne*, 285 Mich App 181, 186; 774 NW2d 714 (2009). The trial court here made no finding supported by record evidence that permitting defendant to change into the clothing his counsel brought to court would pose a safety risk to courthouse officers. Rather, the trial court's finding was speculative and conjectural, based on prior instances where “deputies . . . have been stuck by needles that have been hidden in clothing.” The trial court made no finding that *defendant's clothing* supplied by defendant's counsel, an officer of the court, posed a safety risk.

In short, I believe that the majority misreads the transcript and comes to an incorrect conclusion regarding whether the trial court erred when it denied defendant's timely request to wear the civilian clothing his counsel brought to court for him. For the foregoing reasons, I would conclude that the trial court erred.

B. The Trial Court's Error Was Not Harmless

Although there was evidence of defendant's guilt, I disagree with the majority that there was “substantial evidence” of defendant's guilt. Indeed, the mere existence of some evidence to support a conviction is not sufficient to meet the prosecution's “heavy burden to show that the error was harmless beyond a reasonable doubt in light of the uncertain effect of the defendant's

testimony on the jury.” *People v Solomon*, 220 Mich App 527, 538; 560 NW2d 651 (1996). Accordingly, because the prosecution has not met its burden in this case, I would reverse and remand for a new trial.

The pertinent evidence adduced at trial was as follows. Witnesses observed defendant enter the home and go upstairs to the bedroom. An hour earlier, Sloan had seen Butler sleeping in the bedroom, but no one saw whether Butler was sleeping when defendant struck him. In fact, there were two, and only two, witnesses to what occurred in the bedroom: defendant and Butler. Butler did not testify. Defendant did. Defendant testified that Butler attacked him, unprovoked, when defendant asked him, “Why you . . . putting your hands on my mom?” It is undisputed that Butler took medication for schizophrenia and had, earlier that same day, inappropriately touched defendant’s mother without provocation or invitation. Defendant admitted that he punched Butler in the nose, then hit him with a pole, but testified that he did so only in response to Butler’s unprovoked attack. According to defendant, after the altercation Butler sat down on the bed and asked defendant for a cigarette. Defendant testified that when he left the room, Butler was “sitting on the bed by the window looking for cigarette butts.” Sloan heard a noise, and saw defendant leave the house. Later, the other witnesses found Butler on the bed, bleeding.

The prosecution presented some evidence that conformed to its theory of the case. However, none of the prosecution’s witnesses observed what actually occurred between defendant and Butler. The key question for the jury was not whether defendant struck Butler, but whether he did so in self-defense. To that end, the jury obviously did not find defendant’s testimony credible—it convicted him. However, defendant was compelled to testify in his jail uniform, about which the trial court failed to make a finding that it was not identifiable as such. Accordingly, I cannot say whether the jury would have found defendant credible had his request to wear civilian clothing been granted. See *Estelle*, 425 US at 504-505 (jail clothing inherently impacts the presumption of innocence because it serves as a “constant reminder of the accused’s condition . . . [and] may affect a juror’s judgment”); see also *Shaw*, 381 Mich at 480.

It is *possible* that a jury would have convicted defendant had he been allowed to wear civilian clothes. However, showing a mere possibility of conviction is not the prosecution’s burden under the harmless error standard. Rather, the prosecution must show *beyond a reasonable doubt* that the jury would have convicted defendant despite the trial court’s error. *People v Belanger*, 454 Mich 571, 578-579; 563 NW2d 665 (1997) (emphasis added). To that end, the prosecution is required to show that “there is *no reasonable possibility* that the [error] complained of might have contributed to the conviction.” *People v Anderson (After Remand)*, 446 Mich 392, 406; 521 NW2d 538 (1994) (emphasis added, citations and quotations omitted). Where, as here, the case turns largely on a credibility determination regarding the specific theory of self defense, I cannot conclude that the prosecution has met that burden. I would therefore conclude that the trial court’s error was not harmless, and would remand for a new trial.

/s/ Cynthia Diane Stephens