STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 7, 2013
v	No. 306461 Wayne Circuit Court
SANFORD DAVIS, Defendant-Appellant.	LC No. 11-005385-FC

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

PER CURIAM.

Defendant appeals as of right his jury trial convictions of assault with intent to do great bodily harm less than murder, MCL 750.84, and felonious assault, MCL 750.82(1). Defendant was sentenced as an habitual offender, fourth offense, MCL 769.12, to 76 months to 25 years' imprisonment for assault with intent to do great bodily harm less than murder, and to 60 months to 15 years' imprisonment for felonious assault. For the reasons set forth below, we affirm.

This case arises out of an incident that occurred in the Detroit residence of Samuel Sloan and Tiffany Davis, defendant's sister. On May 19, 2011, Leslie Davis, defendant's mother, was at the residence with Berry Butler, Sloan's 33-year-old cousin who suffered from paranoid schizophrenia. Tiffany was Butler's care-taker and would ensure he took his medications, which caused him to sleep a lot. Leslie testified that on the day of the incident, Butler touched her "private part." Leslie instructed Butler not to do that. Butler hit Leslie in the face. Sloan then physically walked Butler out the door and told him to go for a walk. Tiffany and Butler walked to the pharmacy to obtain Butler's mediation, and when they returned, Butler took the medication and became drowsy. Sloan testified that Butler fell asleep on the couch then went to an upstairs bedroom and fell asleep on a bed. About ten minutes later, Sloan went to check on Butler and saw him sleeping on the bed.

Shortly after Sloan saw Butler sleeping on the bed, defendant knocked on the front door of the residence and Sloan let defendant inside. Sloan did not notice defendant holding anything. Earlier that day, defendant had learned that Butler hit Leslie in the face. Sloan testified that defendant went upstairs for five or six minutes where Butler was sleeping when he heard "something got threw [sic], and then seconds after that [defendant] fell down the stairs." Specifically, Sloan testified that he saw defendant fall down the stairs and then run outside and away from the house without saying anything.

About five to ten minutes later, one of Sloan's children arrived home from the park and went upstairs to where Butler was sleeping. The child immediately came downstairs and informed Sloan that Butler was "bleeding." Sloan went upstairs and found Butler in the same position lying on the bed; however, the back of Butler's head was "gashed all the way across" and was bleeding. Sloan saw the pole to a car-jack that he normally kept in his garage lying on the floor near the bed. Sloan thought that Butler was sleeping because he was still snoring, however, when emergency personnel arrived, Butler was unconscious. Following the injury, Butler was placed in a nursing home and could not walk or talk and required a feeding tube.

Immediately after discovering Butler in an injured state, Sloan called defendant on a cellular telephone. Sloan testified as follows regarding the telephone conversation he had with defendant:

> I put the phone on speaker phone like and said, "I know you going to hit my cousin in his sleep." This cat going to say, "Yeah, I split it to the pink."
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> * * *
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> I asked him why would he hit my cousin in the head . . . I asked him why did he hit my cousin in his sleep, why would you hit my cousin while he sleep. He said, "Yes I did. I split it to the pink meat."
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> * * *
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> He say, um, "You think I'm going to let someone touch my mom?" . . . And I was like, "But in his sleep?" And he said, "You going to call the police?"

Sloan explained that to him, "split it to the pink" meant that defendant "bust my cousin head."

A responding police officer testified that he found Butler unconscious lying on a bed. Police found a four-foot metal pole on the floor near the bed. The pole had blood on it and there was blood spatter on the floor and a large amount of blood on the bed near the pillow. The responding officer and an evidence technician testified that they did not observe any signs that a struggle occurred in the room.

On August 17, 2011, defendant's jury trial commenced. Before jury selection, defense counsel requested that the trial court allow defendant, who was wearing a jail uniform, to change into civilian clothes that defense counsel had brought with him to court. Defense counsel explained that defendant's girlfriend attempted to bring civilian clothing to defendant at the Wayne County Jail the day before trial per instructions from the jail. However, when the girlfriend arrived with the clothing, the jail refused to accept the clothing because it was too close to defendant's trial date. The trial court denied defense counsel's request. The court explained that defendant's preliminary examination was held on June 1, 2011, giving defendant's family over two months to arrange for defendant to have civilian clothing at the jail where he was being held. The court explained that defendant could not change clothing in the courthouse because it was against court policy and because of "security reasons." The court explained that the security policy was necessary because deputies had previously been "stuck by needles hidden in clothing." In addition, the court stated that defendant could have worn the clothing he was

arrested in that was already at the jail. Defense counsel did not contest that defendant had access to the clothing he wore when he turned himself in to police. The court stated that it would have defendant turn his jail uniform inside-out to conceal the "Wayne County Jail" markings so that "there are absolutely no markings indicating that he is in custody."

At trial, defendant testified that Butler charged at him after he confronted Butler about touching Leslie. Specifically, defendant testified that the altercation occurred in the upstairs bedroom. According to defendant, Butler hit him in the face, and defendant pushed Butler away from him. Defendant testified that when Butler lunged at him a second time, defendant hit Butler in the head with a metal pole that was lying on the floor. Defendant explained that Butler stopped attacking him after defendant hit him one time in the head. Defendant testified that Butler was conscious and looking for cigarettes when he left the room. Defendant denied telling Sloan that he "split it to the pink."

Defendant was convicted and sentenced as set forth above. On appeal, defendant contends that the trial court denied him his state and federal constitutional right to due process when it denied his request to change into civilian clothing.

Whether a defendant was denied his right to due process involves a constitutional issue that we review de novo. *People v Sadows*, 283 Mich App 65, 67; 768 NW2d 93 (2009). A preserved, nonstructural constitutional error is reviewed to determine whether the error was "harmless beyond a reasonable doubt." *People v Anderson (After Remand)*, 446 Mich 392, 405-406; 521 NW2d 538 (1994) (citations and quotation omitted). Such errors are harmless, "if [it is] clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *People v Hyde*, 285 Mich App 428, 447; 775 NW2d 833 (2009) (quotation and citations omitted). There must be no "reasonable possibility that the [error] complained of might have contributed to the conviction." *Anderson*, 446 Mich at 406 (quotation omitted).

Incorporated within a criminal defendant's right to a fair trial is the right to appear before a jury without any indicia of incarceration including physical restraints or jail clothing. *People v Banks*, 249 Mich App 247, 256; 642 NW2d 351 (2002); *People v Lee*, 133 Mich App 299, 301; 349 NW2d 164 (1984), citing *Estelle v Williams*, 425 US 501; 96 S Ct 1691; 48 L Ed 2d 126 (1976). Accordingly, a trial court must grant a criminal defendant's timely request to wear civilian clothing during trial. *People v Harris*, 201 Mich App 147, 151; 505 NW2d 889 (1993). In instances where a trial court denies a defendant's request to wear civilian clothing, "[o]nly if a defendant's clothing can be said to impair the presumption of innocence will there be a denial of due process." *People v Lewis*, 160 Mich App 20, 31; 408 NW2d 94 (1987).

In this case, the trial court did not deny defendant his due process right to a fair trial. The trial court noted that defendant could have worn the civilian clothing he had on at the time of his arrest. The clothing remained in the jail where defendant was lodged. Defense counsel did not dispute that defendant had access to this clothing and there is nothing in the record to suggest that defendant did not have access to the clothing. Thus, the trial court had reason to deny

defendant's request to change on the first day of trial given the court's concern for security and safety of the sheriff deputies.[1]

More importantly, defendant cannot show that the attire he wore at trial deprived him of the presumption of innocence. *Lewis*, 160 Mich App at 31. Here, the trial court observed on the record that defendant was wearing "greens" issued by the Wayne County Jail. The court proposed that "[w]e'll turn his greens inside out so that . . . there are absolutely no markings indicating that he is in custody." In doing so, the trial court took measures to assure that defendant was not prejudiced by his jail uniform. See *Harris*, 201 Mich App at 151-152 (holding that jail-issued blue pants and a blue shirt did not deny the defendant his due process rights after the trial court determined that the clothing looked like work clothes).[2] Furthermore, the trial court instructed the jury that defendant was presumed innocent and that it was not to infer guilt simply because defendant was accused of a crime. See *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008) ("jurors are presumed to follow their instructions").

Moreover, even if defendant were able to show constitutional error occurred in this case, any error was harmless beyond a reasonable doubt where a rational juror would have convicted defendant regardless of whether he was wearing jail clothing. *Anderson*, 446 Mich at 406. In this case, there was substantial evidence of defendant's guilt. Although defendant testified that he acted in self-defense and did not throw the first punch, a rational juror could have easily concluded that defendant lacked credibility. Indeed, there was substantial evidence to allow a rational juror to conclude that defendant purposefully sought-out Butler in order to inflict a physical beating on him in retaliation for Butler touching defendant's mother. In particular, evidence showed that Sloan checked on Butler a little over an hour before defendant entered the home and went upstairs. At that time, Butler was sleeping and uninjured. After defendant entered the home, he proceeded directly upstairs for five or six minutes. Sloan heard a noise and defendant then ran from the home. Minutes later, other occupants of the home found Butler lying in the same position on the bed with a bloody head wound and a metal pole with blood on it lying nearby. Sloan testified that defendant admitted that he "split" the victim's head "to the pink" and when Sloan asked him why he hit Butler in his sleep defendant asked Sloan, "[y]ou think I'm going to let someone touch my mom?" In addition, a jury could have rejected

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[1] We 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. A trial court's cursory dismissal of a defendant's request to wear civilian clothing simply invites error for appellate review and potentially jeopardizes a defendant's constitutional rights.

[2] The dissent acknowledges that "a defendant may be compelled to stand trial in prison clothing without a violation of his due process rights" where a trial court finds that the "prison clothing appears similar enough to civilian clothing that it would not affect the presumption of innocence." *Post* at 3. Here, the trial court found that there were no markings indicating that defendant was in custody. This finding is not significantly different from finding that defendant "does not appear to be in jail clothes."

defendant's testimony that defendant happened to find Sloan's car-jack pole lying on the bedroom floor during his alleged altercation with Butler where Sloan testified that he kept the pole in his garage. Rather, evidence would allow the jury to infer that defendant obtained the pole from the garage then entered the residence and hit Butler over the head with the pole.

In sum, we conclude that any error in this case was harmless where it is clear beyond a reasonable doubt that a rational jury would have convicted defendant regardless of his attire. *Hyde*, 285 Mich App at 447; *Anderson*, 446 Mich at 406.

Next, defendant contends that his convictions of assault with intent to commit great bodily harm and felonious assault violate the state and federal protections against double jeopardy. Defendant's argument is devoid of legal merit. See *People v Strawther*, 480 Mich 900; 739 NW2d 82 (2007) (convictions of both assault with intent to commit great bodily harm, MCL 750.84, and felonious assault, MCL 750.82, do not violate double jeopardy); *People v Beasley*, 239 Mich App 548, 556; 609 NW2d 581 (2000) (this Court is bound by our Supreme Court's precedent).

Affirmed.

/s/ Michael J. Talbot
/s/ Kurtis T. Wilder