

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,  
  
Plaintiff-Appellee,

UNPUBLISHED  
August 15, 2013

v

ABDIAS ANTOINE,

Defendant-Appellant.

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No. 310544  
Calhoun Circuit Court  
LC No. 2011-003714-FC

Before: WHITBECK, P.J., and OWENS and M. J. KELLY, JJ.

PER CURIAM.

Defendant, Abdias Antoine, appeals as of right his conviction of assault with intent to commit murder<sup>1</sup> following a jury trial. The trial court sentenced him to serve 285 months' to 40 years' imprisonment. We affirm Antoine's conviction, but vacate his sentence and remand for resentencing.

**I. FACTS**

Antoine testified that in early 2011, Tina Weinert requested that he come visit her in Michigan. Antoine testified that he stayed at Weinert's house for about two weeks. Weinert testified that she and Antoine fought in July 2011, and Antoine was sent to jail. According to Weinert, Antoine warned her not to testify against him or have him sent to jail.

Weinert testified that in August 2011, she was sitting outside of her apartment, watching her son play. Ian Walker, Weinert's boyfriend, testified that he was inside the apartment, watching Weinert's daughter. According to Weinert, she saw Antoine drive past inside of a car. Weinert testified that she panicked and tried to get her son to go inside. While trying to get her son to the apartment, Weinert noticed Antoine attempting to move stealthily on foot. Weinert testified that she had just put her son into the apartment when she saw Antoine approaching her from behind a dumpster while drawing a butcher's knife.

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<sup>1</sup> MCL 750.83.

Weinert testified that Antoine asked her whether she remembered him, began running at her, and stabbed her in the calf, arms, ribs, and stomach. Walker testified that he heard Weinert screaming, went to the door, and saw Antoine “punching” Weinert with a knife. Walker testified that when he went out to help Weinert, Antoine threw the knife down and fled.

Antoine testified that he never stabbed or injured Weinert, and that after he left the jail, he stayed with family in Washington D.C. and Florida. Antoine testified that Weinert was falsely accusing him.

## II. SHACKLING

### A. ISSUE PRESERVATION AND STANDARD OF REVIEW

Generally, this Court reviews for an abuse of discretion the trial court’s decision to shackle a defendant at trial.<sup>2</sup> However, to preserve an issue, the appellant must challenge it before the trial court.<sup>3</sup> Here, Antoine did not challenge the trial court’s use of shackles. We conclude that Antoine has not preserved this issue. This Court reviews unpreserved issues for plain error affecting a defendant’s substantial rights.<sup>4</sup>

### B. LEGAL STANDARDS

“Freedom from shackling is an important component of a fair trial.”<sup>5</sup> When a defendant appears before a jury in shackles, it “negatively affects the defendant’s constitutionally guaranteed presumption of innocence.”<sup>6</sup> In Michigan, if a juror inadvertently sees a defendant in restraints, the defendant must show that he or she was prejudiced.<sup>7</sup>

### C. APPLYING THE STANDARDS

Antoine contends that the jury “saw” his shackles as an effect of his testimony and that Michigan’s standard, which requires the defendant to show that the jury’s inadvertent sight of his shackles prejudiced him, is contrary to the United States Supreme Court’s holding in *Deck v Missouri*.<sup>8</sup> In *Deck*, the United States Supreme Court held that the defendant’s right to due

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<sup>2</sup> *People v Payne*, 285 Mich App 181, 186; 774 NW2d 714 (2009).

<sup>3</sup> *People v Kimble*, 470 Mich 305, 309; 684 NW2d 669 (2004); *People v Danto*, 294 Mich App 596, 605; 822 NW2d 600 (2012).

<sup>4</sup> *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999).

<sup>5</sup> *People v Dixon*, 217 Mich App 400, 404; 552 NW2d 663 (1993).

<sup>6</sup> *People v Banks*, 249 Mich App 247, 256; 642 NW2d 351 (2002); see *People v Dunn*, 446 Mich 409, 425 n 26; 521 NW2d 255 (1994).

<sup>7</sup> *People v Horn*, 279 Mich App 31, 37; 755 NW2d 212 (2008).

<sup>8</sup> *Deck v Missouri*, 544 US 622; 125 S Ct 2007; 161 L Ed 2d 953 (2005).

process is presumptively violated if the trial court orders a defendant to wear shackles visible to the jury without adequate justification.<sup>9</sup> We conclude that Antoine has waived our review of this issue through the doctrine of invited error.

Antoine contends that the following colloquies drew the jury's attention to his shackles, effectively allowing the jury to "see" them:

*Unknown Juror.* . . . I can't understand him.

*[Defense Counsel].* Okay. You need to keep your voice up because people are having a hard time hearing you. So move closer to the—up there and keep your voice up.

*[Antoine].* There's some things that's in my leg. I can't get up there.

*[Defense Counsel].* Okay. Well, just talk louder, okay?

At the close of Antoine's testimony, a juror submitted a written question concerning an injury to Antoine's leg. After discussing the question with defense counsel and the prosecutor, the trial court asked Antoine whether his leg was injured:

*[The Court].* Mr. Antoine, you testified that—as you were asked to move forward to the microphone—that you couldn't straighten your leg, is that—or that you couldn't bend your leg, is that right?

*[Antoine].* Yes.

*[The Court].* That's not an injury, is it?

*[Antoine].* That's not an injury. I—I have—from—this is a strap with a . . .

*[The Court].* Right.

*[Antoine].* . . . with a metal in it that—that they put . . .

*[The Court].* Right.

*[Antoine].* . . . on my feet as . . .

*[The Court].* On the—on the 14th of August of 2011, did you have a leg injury of any kind?

*[Antoine].* No, I don't have no leg injury.

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<sup>9</sup> *Id.* at 635.

On cross-examination, the prosecutor sought clarification:

[*The Prosecutor*]. Now you indicated you had something on your leg. That's something that was placed on it by the Sheriff's Department?

[*Antoine*]. No, just by the jail—by the—by the—I think they—that's they rules and regulations to have this on your leg when you come to court.

We conclude that, even presuming that these colloquies effectively allowed the jury to “see” Antoine's restraint, this effect is directly attributable to Antoine's actions and he has waived appellate relief. A party may not “create[] the very error that it wishes to correct on appeal[.]”<sup>10</sup> “Under the doctrine of invited error, a party waives the right to seek appellate review when the party's own conduct directly causes the error.”<sup>11</sup> A waiver is an intentional abandonment or relinquishment of a known right.<sup>12</sup>

Here, Antoine's uninvited comment concerning his inability to straighten his leg drew the jury's attention to his leg in the first place. When the trial court attempted to simply ask Antoine whether his leg was injured, Antoine's rambling response—over what appear to be the trial court's repeated attempts to cut off his answer—indicated that he was restrained. We conclude that Antoine intentionally relinquished his right to have the jury unaware of his shackles—which the trial court took steps to ensure that the jury did not see and which were otherwise unobtrusive—by informing the jury that he was restrained through unsolicited comments.

### III. SENTENCING

#### A. STANDARD OF REVIEW

The proper interpretation and application of the sentencing guidelines is a question of law that this Court reviews de novo.<sup>13</sup>

#### B. LEGAL STANDARDS AND ANALYSIS

Antoine contends that the trial court erred when it assessed his prior record variables (PRVs) by assessing three of his prior offenses, committed in Florida, in the wrong PRV categories. The prosecution concedes that the trial court should have assessed Antoine zero points under PRV 1, five points under PRV 2, and ten points under PRV 5.

This correction would decrease Antoine's PRV score from 40 points to 15 points and decrease his recommended minimum sentencing range from 171 to 285 months to 135 to 225

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<sup>10</sup> *People v Szalma*, 487 Mich 708, 726; 790 NW2d 662 (2010).

<sup>11</sup> *People v McPherson*, 263 Mich App 124, 139; 687 NW2d 370 (2004).

<sup>12</sup> *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000).

<sup>13</sup> *People v Morson*, 471 Mich 248, 255; 685 NW2d 203 (2004).

months. If a defendant prevails on a preserved sentencing challenge and the defendant's improper score affected his or her recommended minimum sentence, this Court should remand for resentencing.<sup>14</sup> Therefore, we vacate Antoine's sentence and remand for resentencing.

#### IV. INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL

##### A. STANDARD OF REVIEW

A defendant must move the trial court for a new trial or evidentiary hearing to preserve his or her claim that counsel was ineffective.<sup>15</sup> Here, Antoine did not move for an evidentiary hearing concerning the effectiveness of appellate counsel. When the trial court has not conducted a hearing to determine whether a defendant's counsel was ineffective, our review is limited to mistakes apparent from the record.<sup>16</sup>

##### B. LEGAL STANDARDS

In order to establish that appellate counsel was ineffective, the defendant must show that counsel's performance fell below an objective standard of reasonableness and that there is a reasonable probability that, but for appellate counsel's error, the result of the proceedings would have been different.<sup>17</sup> We must presume that counsel's decisions were sound strategy.<sup>18</sup>

##### C. APPLYING THE STANDARDS

In his in propria persona supplemental brief, filed pursuant to Supreme Court Administrative Order No. 2004-6, Standard 4, Antoine contends that appellate counsel rendered ineffective assistance by failing to bring an ineffective assistance of counsel claim against trial counsel for (1) failing to preserve a challenge to the trial court's use of leg restraints, and (2) failing to challenge the trial court's sentencing discrepancies. We disagree.

We conclude that appellate counsel's decision not to assert that trial counsel was ineffective for allowing him to be restrained in the presence of the jury was objectively reasonable. Appellate counsel need not make meritless arguments.<sup>19</sup> As we have discussed, if there was any error concerning the jury's awareness of Antoine's leg restraints, it was attributable to Antoine's unsolicited and unrelated responses to requests and questions. Simply

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<sup>14</sup> *People v Francisco*, 474 Mich 82, 88-90; 711 NW2d 44 (2006); *People v Portellos*, 298 Mich App 431, 452; 827 NW2d 725 (2012).

<sup>15</sup> *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

<sup>16</sup> *Snider*, 239 Mich App at 423.

<sup>17</sup> *People v Uphaus (On Remand)*, 278 Mich App 174, 185; 748 NW2d 899 (2008).

<sup>18</sup> *Id.* at 186.

<sup>19</sup> *Snider*, 239 Mich App at 425.

put, it was invited error. We conclude that appellate counsel was not ineffective for failing to raise this meritless argument.

We also conclude that appellate counsel's decision to challenge the application of Antoine's PRVs directly, rather than by alleging ineffective assistance of trial counsel, did not prejudice Antoine. A defendant's challenge to the effectiveness of appellate counsel fails when he or she is unable to show any possible prejudice.<sup>20</sup> If a defendant prevails on his ineffective assistance of counsel claim concerning the scoring of his sentencing variables, he is entitled to resentencing.<sup>21</sup> Here, Antoine is receiving resentencing because of appellate counsel's direct pursuit of the issue. Because Antoine is receiving the relief he seeks, we conclude that he is unable to show any possible prejudice.

We affirm Antoine's conviction, but vacate his sentence and remand for resentencing. We do not retain jurisdiction.

/s/ William C. Whitbeck

/s/ Donald S. Owens

/s/ Michael J. Kelly

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<sup>20</sup> *People v Pratt*, 254 Mich App 425, 430; 656 NW2d 866 (2002).

<sup>21</sup> See *Kimble*, 470 Mich at 314.