

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHARLES HENRY ARTHUR,

Defendant-Appellant.

UNPUBLISHED

June 26, 2012

No. 301762

Saginaw Circuit Court

LC No. 03-022744-FC

Before: O'CONNELL, P.J., and TALBOT and OWENS, JJ.

PER CURIAM.

Charles Henry Arthur appeals as of right his jury trial conviction of armed robbery,¹ assault with the intent to commit murder,² kidnapping,³ extortion,⁴ carjacking,⁵ felon in possession of a firearm,⁶ carrying a dangerous weapon with unlawful intent,⁷ and possession of a firearm during the commission of a felony (“felony-firearm”).⁸ Arthur was sentenced as a fourth habitual offender⁹ to two years’ imprisonment for the felony-firearm conviction, consecutive to concurrent sentences of life imprisonment for armed robbery, assault with the intent to murder, kidnapping, and carjacking; ten to 20 years for extortion; 20 months to five years for felon in possession of a firearm; and two to five years for carrying a dangerous weapon with unlawful intent. We reverse and remand for proceedings consistent with this opinion.

¹ MCL 750.529.

² MCL 750.83.

³ MCL 750.349.

⁴ MCL 750.213.

⁵ MCL 750.529a.

⁶ MCL 750.224f.

⁷ MCL 750.226.

⁸ MCL 750.227b.

⁹ MCL 769.12.

In 2006, Arthur was tried and convicted by a jury of the same charges involved in this appeal. Arthur appealed his convictions, arguing in part that he was denied his constitutional right to self-representation. The majority of the panel disagreed and affirmed Arthur's convictions.¹⁰ The dissent, however, opined that Arthur's expression of his desire to represent himself was unequivocal and unambiguous and because a structural constitutional error had occurred, the dissent could not agree to affirm his convictions.

Arthur applied for leave to appeal to our Supreme Court. In lieu of granting leave to appeal, the Supreme Court reversed the "portion of the opinion of the Court of Appeals addressing the issue of the right to self-representation, for the reasons stated in the Court of Appeals dissenting opinion[.]" The case was then remanded to the trial court for further proceedings.¹¹

Arthur immediately moved to proceed pro se for his retrial. The trial court took the matter under advisement. Over four months later, the trial court denied Arthur's right to self-representation because of the court's failure to comply with the court rule¹² at the hearing on Arthur's motion. Without elaborating on the almost two year journey that followed Arthur's initial request, on the first day of trial, Arthur renewed his motion to represent himself and his motion was granted. Arthur then requested that the trial court remove his shackles to allow him to move around the courtroom during trial. The court refused his request citing a "security issue." When Arthur objected and asked the court to elaborate on the "security issue," no further explanation was provided. As a result of the trial court's ruling, Arthur felt compelled to abandon his right to self-representation and permit appointed counsel to represent him at trial. After conferring with appointed counsel, Arthur advised the trial court:

I mean I'm not able to move around the courtroom as far as like a normal lawyer would. If I had the right to represent myself, I should be able to, but since I object and you denied it . . . I'm going to turn it over and let [appointed counsel] represent me.

Arthur further asserted that appearing in shackles in the presence of the jury was a "constitutional violation." Defense counsel renewed Arthur's objection to the use of shackles several times during trial, but his objections were overruled.

On appeal, Arthur argues that the trial court's refusal to allow him to appear in court without shackles rendered his right to represent himself illusory and the trial court's insistence without justification on such restraints operated as a de facto denial of his right to self-representation because of its prejudicial effect. Under the facts of this case, we agree. This

¹⁰ *People v Arthur*, unpublished opinion per curiam of the Court of Appeals, issued January 29, 2008 (Docket No. 273577).

¹¹ *People v Arthur*, 481 Mich 882; 748 NW2d 879 (2008).

¹² MCR 6.005(D)(2).

Court reviews the question of whether Arthur was denied his constitutional right to self-representation de novo.¹³

A criminal defendant's right to self-representation is guaranteed by both federal and state law.¹⁴ "[T]he right to self-representation [however] is not absolute."¹⁵ As "a defendant automatically enjoys the right to the assistance of counsel, [] the right of self-representation and the right to counsel are mutually exclusive[.]"¹⁶ As such, in order for a defendant to waive his right to counsel and invoke his right to self-representation, certain procedures must be followed.¹⁷

Upon a defendant's initial request to proceed pro se, a court must determine that (1) the defendant's request is unequivocal, (2) the defendant is asserting his right knowingly, intelligently, and voluntarily through a colloquy advising the defendant of the dangers and disadvantages of self-representation, and (3) the defendant's self-representation will not disrupt, unduly inconvenience, and burden the court and the administration of the court's business.¹⁸

The court must also comply with MCR 6.005(D)(1) which outlines the "procedures concerning a defendant's waiver of the right to an attorney[]" and "prohibits a court from granting a defendant's waiver request without first advising the defendant of the charge, the maximum possible prison sentence for the offense, any mandatory minimum sentence required by law, and the risk involved in self-representation[.]"¹⁹ The court is additionally required to offer the defendant the opportunity to consult with an attorney.²⁰ The improper denial of a defendant's right to self-representation warrants reversal of the defendant's convictions and sentences.²¹

It is undisputed that Arthur effectively invoked his right to self-representation. We find, however, that in this instance the trial court's requirement that Arthur wear shackles on his legs during trial in effect nullified the trial court's grant of Arthur's request for self-representation. A defendant representing himself is held "to the same standard in the presentation of his case as would be required of a member of the bar," including the necessity of compliance "with relevant

¹³ *People v Conat*, 238 Mich App 134, 144; 605 NW2d 49 (1999).

¹⁴ US Const, Am VI; Const 1963, art 1, § 13; MCL 763.1.

¹⁵ *Martinez v Court of Appeal of California*, 528 US 152, 161; 120 S Ct 684; 145 L Ed 2d 597 (2000).

¹⁶ *People v Russell*, 471 Mich 182, 189; 684 NW2d 745 (2004) (citations omitted).

¹⁷ *Id.*

¹⁸ *Id.* at 190.

¹⁹ *People v Williams*, 470 Mich 634, 642-643; 683 NW2d 597 (2004).

²⁰ MCR 6.005(D)(2).

²¹ *McKaskle v Wiggins*, 465 US 168, 177 n 8; 104 S Ct 944; 79 L Ed 2d 122 (1984).

rules of procedural and substantive law.”²² It is well-settled that “[a] defense attorney must enjoy great discretion in the trying of a case – especially with regard to trial strategy and tactics.”²³ Matters of trial strategy include “what evidence to present and whether to call or question witnesses[.]”²⁴ The condition imposed on Arthur’s self-representation prohibited him from using any trial strategy or tactic that would require him to walk in the presence of the jury. As such, Arthur was restricted from approaching witnesses with evidence, moving between the podium and counsel table, or engaging in a bench conference. In fact, Arthur would have been unable to use the podium at all. Arthur would have been forced to remain seated at counsel table throughout trial, even as he questioned witnesses, impermissibly putting him on unequal footing with the prosecution. As a result, under the facts of this case, Arthur was left with no choice but to relinquish his constitutional right to represent himself. Because the trial court’s mandate that Arthur wear shackles during trial prevented him from exercising his constitutional right to self-representation without justification, in this case reversal is warranted.²⁵

Arthur next argues that the trial court’s requirement that he wear shackles in the presence of the jury also violated his due process right to a fair trial. We agree. “We review a trial court’s decision to shackle a defendant for an abuse of discretion under the totality of the circumstances.”²⁶ “A trial court abuses its discretion when it selects an outcome that does not fall within the range of reasonable and principled outcomes.”²⁷

“[T]he criminal process presumes that the defendant is innocent until proved guilty.”²⁸ “Visible shackling,” which “suggests to the jury that the justice system itself sees a need to separate a defendant from the community at large[.]” “undermines the presumption of innocence and the related fairness of the factfinding process.”²⁹ “[S]hackling of a defendant during trial is permitted only in extraordinary circumstances[.]” such as “to prevent the escape of the defendant, to prevent the defendant from injuring others in the courtroom, or to maintain an orderly trial.”³⁰ The reason for shackling must be supported by the record evidence.³¹ To

²² See *Baird v Baird*, 368 Mich 536, 539; 118 NW2d 427 (1962); *People v Burden*, 141 Mich App 160, 164; 366 NW2d 23 (1985).

²³ *People v Pickens*, 446 Mich 298, 330; 521 NW2d 797 (1994).

²⁴ *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

²⁵ *McKaskle*, 465 US at 177 n 8.

²⁶ *People v Payne*, 285 Mich App 181, 186; 774 NW2d 714 (2009).

²⁷ *People v Yost*, 278 Mich App 341, 353; 749 NW2d 753 (2008).

²⁸ *Deck v Missouri*, 544 US 622, 630; 125 S Ct 2007; 161 L Ed 2d 953 (2005), abrogated in part on other grounds *Fry v Pliler*, 551 US 112; 127 S Ct 2321; 168 L Ed 2d 16 (2007).

²⁹ *Id.* (citations and internal quotation marks omitted).

³⁰ *People v Dixon*, 217 Mich App 400, 404; 552 NW2d 663 (1996).

³¹ *People v Dunn*, 446 Mich 409, 425; 521 NW2d 255 (1994).

warrant reversal, a defendant must show that he was prejudiced by the use of shackles during trial.³² Prejudice is established by the defendant proving that the jury observed him in shackles.³³ Demonstration of prejudice does not require that the defendant show that the jury's observation was outcome determinative.³⁴

The trial court failed to articulate any "extraordinary" circumstance compelling the use of shackles during Arthur's trial. The court merely cited a "security issue" and did not elaborate when further explanation was requested. This Court's review of the record fails to reveal any permissible reason for shackling Arthur during trial. Therefore, the trial court's decision to shackle Arthur constituted an abuse of discretion.³⁵ Arthur has also demonstrated prejudice, as the record suggests that the jury saw Arthur's shackles.³⁶ During jury selection, Arthur objected to potential jurors sitting behind him where his shackles could be seen. In response to Arthur's objection, neither the trial court nor the prosecution indicated that Arthur was incorrect in his assertion. Rather the court indicated, "Don't make an issue out of it. I mean they're not – nobody's looking for it." As Arthur was impermissibly shackled during trial and he has shown prejudice, the trial court's decision to shackle Arthur constitutes reversible error.³⁷

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Michael J. Talbot

/s/ Donald S. Owens

³² See, e.g., *Payne*, 285 Mich App at 186; *People v Horn*, 279 Mich App 31, 37; 755 NW2d 212 (2008).

³³ See *Payne*, 285 Mich App at 186.

³⁴ *Id.*

³⁵ *Yost*, 278 Mich App at 353.

³⁶ See *Payne*, 285 Mich App at 186.

³⁷ *Id.*

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O'CONNELL, P.J. (*dissenting*).

According to the majority opinion, “the record fails to reveal any permissible reason for shackling Arthur during trial.” I disagree. The record indicates that for more than five years, veteran Judge Kaczmarek presided over four separate criminal proceedings against this defendant, involving at least 25 charges ranging from first-degree murder to third-degree fleeing and eluding. As early as February 2003, defendant, who stood six feet tall and weighed more than 200 pounds, wrote to Judge Kaczmarek to complain about being held in shackles. Later that year, defendant again wrote to the judge apologizing for his “behavior” and asking for a change of venue, apparently because witnesses against him knew him only by his nickname: Frank Nitti (the infamous mob enforcer depicted in “The Untouchables”).

In the following years, defendant continued to challenge the security of the court. As of 2004, defendant was in the custody of the Department of Corrections serving life sentences imposed by Judge Kaczmarek for two counts of first-degree murder. The proceedings then moved forward on the charges at issue in this case. Defendant asked the Saginaw Chief Judge to disqualify Judge Kaczmarek from the case and sought a writ of habeas corpus to attend a hearing on the disqualification. In April 2005, the Chief Judge denied the writ, noting that defendant “was considered a flight risk when incarcerated at the Saginaw County Jail.” The Chief Judge also denied the disqualification motion. At a subsequent hearing, defendant interrupted the proceedings to the extent that Judge Kaczmarek had to warn defendant that he would be restrained if his behavior persisted.

The next year, matters escalated. In April 2006, defendant received a major misconduct report from the Department of Corrections for engaging in threatening behavior while in a Saginaw holding cell. Among other things, the report stated that defendant kicked the cell door and yelled “I’m going to kick all these mother fuckers’ asses starting with the fucking judge.”

Defendant then appeared at a hearing in arm and leg shackles, with three security officers. His counsel requested that defendant be unshackled for trial. Judge Kaczmarek ordered that defendant's arm shackles be removed for trial. Recognizing, however, that defendant was subject to the Department of Corrections, Judge Kaczmarek deferred to the department's authority concerning the leg shackles. He noted, "Any other security is up to the Department of Corrections on that. I'm not a security expert and I'm not going to attempt to be." The jury ultimately convicted defendant of assault with attempt to murder and of armed robbery, among other things. Our Supreme Court reversed defendant's convictions and remanded the case to the trial court.¹

With this background, Judge Kaczmarek had to determine whether on remand defendant's case presented the type of extraordinary circumstances that would warrant shackling during trial. The judge plainly knew of defendant's prior murder convictions and of the evidence against defendant on the remanded charges. In particular, the evidence at the first trial indicated that defendant had robbed an acquaintance, forced the acquaintance into the trunk of a car, and had then fired a gun several times into the trunk. The evidence also indicated that defendant had opened the trunk and fired several more shots at his acquaintance. By the time of the second trial on those charges, Judge Kaczmarek was well-acquainted with defendant and likely had no desire to end up like defendant's other acquaintances. Moreover, prior to the trial, the judge held a hearing at which he noted that he had spoken with counsel in chambers. The judge then addressed the trial security issue, stating that defendant's legs could be restrained if there was a "curtain" to obscure the restraints, but that defendant's hands must be unrestrained.

Given the trial judge's considerable experience with this particular defendant and the defendant's history of disruptive behavior, the trial judge was within his discretion in the resolution of the security issues presented by defendant. Accordingly, I respectfully dissent.

/s/ Peter D. O'Connell

¹ The horrific facts from this Court's prior opinion were described as follows:

The victim testified that defendant pulled out a gun and took \$130 to \$140 dollars from him. Subsequently, defendant ordered the victim to drive into an alley where, consistent with defendant's demands, he got out of the car, stripped to his underwear and socks, and got into the trunk. Defendant then closed the trunk. While the car was being driven, defendant again asked about some money, and then shot the victim two to four times. When the car stopped, defendant opened the trunk and again asked about the money. The trunk again closed, and defendant drove to another location where he shot the victim four to five more times while he was lying in a fetal position in the trunk. [*People v Arthur*, unpublished opinion per curiam of the Court of Appeals, issued January 29, 2008 (Docket No. 273577), unpub op at 1.]