**S T A T E O F M I C H I G A N**

**C O U R T O F A P P E A L S**

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>October 25, 2012 |
| v | No. 305542<br>Washtenaw Circuit Court |
| JEROME POWELL, JR.,<br><br>Defendant-Appellant. | LC No. 09-001585-FC |

Before: RONAYNE KRAUSE, P.J., and BORRELLO, and RIORDAN, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of unlawful imprisonment, MCL 750.349b. He was sentenced to 6 to 15 years' imprisonment. Defendant appeals as of right and for the reasons set forth in this opinion, we affirm the convictions and sentence of defendant.

## I. FACTS & PROCEDURAL HISTORY

The victim and defendant were in an abusive relationship for over a year. After the relationship ended, the victim went to defendant's residence to retrieve some of his property. The victim did not believe that defendant would be at the residence because defendant told him such. Once inside the residence, the victim saw defendant and tried to escape; however, defendant grabbed the victim, threw him on the ground, and kicked him in the stomach. Defendant showed the victim a knife and dragged the victim by his hair into the apartment's basement. Once in the basement, defendant began to hit the victim's head against the concrete floor. Defendant then tied the victim's wrists, ankles, and mouth with belts and extension cords. Before tying the victim's mouth, defendant gagged the victim with a sock.

Subsequently, defendant's roommate knocked on the upstairs apartment door. Defendant placed the victim in a closet and left to answer the door. While defendant was upstairs with his roommate, the victim hopped up the stairs to the basement door. However, the basement door was locked. Subsequently, defendant came to the basement door, forced the door open, and threw the victim back down the basement stairs. Defendant proceeded to stab his roommate several times in the face and shoulder. The roommate left and called the police. Defendant left the apartment and drove away in the victim's van.

The victim was rescued by a responding police officer about 15 minutes after defendant left. The victim was cut on his tongue and was scratched on his back, wrist, and knees.

Defendant was subsequently arrested and interviewed by police. During the interview, defendant said that tying up the victim was his roommate's idea, that his roommate was the one who wanted to confront the victim, that his roommate had a gun during the incident, and that his roommate prevented defendant from participating in the confrontation with the victim.

On November 10, 2010, following a jury trial, defendant was convicted of the unlawful driving away of a motor vehicle, felonious assault, and domestic assault. Defendant was found not guilty of the charges of assault with intent to murder and assault with intent to do great bodily harm less than murder. The trial court declared a mistrial in regard to defendant's unlawful-imprisonment charge because the jury could not reach a verdict. The prosecution decided to retry defendant on this charge. The second trial was originally scheduled for March 7, 2011.

On February 9, 2011, defense counsel moved for an adjournment of the trial date to allow additional time to receive the first-trial transcripts and to prepare for trial. The trial court granted defendant's motion and the second trial was subsequently rescheduled to begin May 2, 2011.

On April 20, 2011, defense counsel moved for a second adjournment of the trial date. Defense counsel had received the first-trial transcripts the previous day and a witness for the prosecution would not be available on the scheduled trial date. Defense counsel noted that without an adjournment, she would have 12 days to prepare for trial. Specifically, defense counsel said she would be in "a bad place because [she] thought [they] were adjourning [the trial]."

During defense counsel's motion for adjournment, the trial court noted that the next available trial date was September of 2011. The trial court ruled that "[t]he issue regarding the transcript and the adjournment of the earlier trial was dealt with by this Court over two months ago when we set the trial date for May 2nd. Given everything that's in front of the Court at this time, request is denied."

On May 3, 2011, a jury trial was held on the unlawful-imprisonment charge. The defense theory was that the victim either consented to being tied up or that defendant tied up the victim in self-defense. Defendant testified that the victim had a temper, had attacked defendant with a weapon on earlier occasions, and asked defendant to restrain him if he became violent. Defendant said that – based on the victim's instructions – he had restrained the victim on earlier occasions to help the victim calm down.

During the trial, defendant was wearing shackles until he testified. Outside of the jury's presence, the trial court noted "[w]ell I want to make sure that, in fact, your client's [sic] going to testify that [sic] he can have his shackles removed so he can take the witness stand without the shackles." Also, the trial court did not make a finding on the record that defendant's shackles were necessary to prevent escape, maintain order, or prevent injury to persons in the courtroom. But, defendant acknowledges that nothing in the record conclusively shows that the jury saw or heard the shackles.

Also, during defendant's first trial, Quinn McGuinness testified that he heard the victim bragging that he had lied about what happened during the incident so that defendant would be arrested. However, McGuinness did not testify at defendant's second trial. After receiving a subpoena, McGuinness informed defense counsel that he intended to invoke his Fifth Amendment right against self-incrimination.

Also, defendant's roommate and the victim were impeached by retail fraud convictions during defendant's first trial. Defense counsel did not impeach defendant's roommate in the second trial with regard to this conviction.

As stated, the jury found defendant guilty of unlawful imprisonment.

## II. ANALYSIS

Defendant first argues that defense counsel was ineffective. Because defendant failed to preserve this issue by making a testimonial record in the trial court pursuant to a motion for a new trial or a *Ginther*[1] hearing, *People v Musser*, 259 Mich App 215, 220-221; 673 NW2d 800 (2003), our review is limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). Effective assistance of counsel is presumed, and the defendant bears a heavy burdenof proving otherwise. *Premo v Moore*, ___ US ___; 131 S Ct 733, 739, 745; 178 L Ed 2d 649, 659, 665-666 (2011). Counsel's performance must be measured against an objective standard of reasonableness and without benefit of hindsight. *People v Payne*, 285 Mich App 181, 188, 190; 774 NW2d 714 (2009), lv den 486 Mich 925 (2010). To establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms; (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, *Strickland v Wash*, 466 US 668, 688, 694; 104 S Ct 2052, 2064-2065, 2068; 80 L Ed 2d 674, 693-694, 698 (1984), and (3) that the resultant proceedings were fundamentally unfair or unreliable. *People v Lockett*, 295 Mich App 165, 187; 814 NW2d 295 (2012).

Defendant asserts two reasons why defense counsel was ineffective. Defendant first claims that there was no tactical reason for defense counsel's failure to admit the first-trial testimony of McGuinness after he refused to testify during the second trial. For purposes of deciding this claim on its merits, we conclude that trial counsel was ineffective by not admitting the first-trial testimony of McGuinness, however, the failure to call witnesses or present other evidence can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense. *People v Hyland*, 212 Mich App 701, 710; 538 NW2d 465 (1995), vacated in part on other grounds 453 Mich 902; 554 NW2d 899 (1996). A substantial defense is one that might have made a difference in the outcome of the trial. *Hyland*, 212 Mich App at 710. Here, the defense theory was that the victim either consented to being tied up or that defendant tied up the victim in self-defense. Failure to call McGuinness did not deprive defendant of a substantial defense because trial counsel elicited testimony from defendant indicating that the victim had

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

asked defendant on earlier occasions to help him handle his temper by restraining him if he became violent. Trial counsel was also able to elicit testimony from other witnesses to support trial counsel's dual defenses. Accordingly, while trial counsel's failure to admit the first-trial testimony of McGuinness may have fell below an objective standard of reasonableness, we cannot conclude that the failure of trial counsel deprived defendant of a substantial defense. Accordingly, defendant has failed to establish the necessary prejudice to prevail on this issue. *Strickland*, 466 US at 688.

Defendant also claims defense counsel failed to review the first-trial transcripts, which resulted in defense counsel's failure to use available impeachment evidence against the victim and other witnesses. Deference is afforded to counsel's strategic judgments, but strategic choices made after an incomplete investigation are reasonable only to the extent that reasonable professional judgments support the limitation on investigation. *Wiggins v Smith*, 539 US 510, 521-522, 528; 123 S Ct 2527; 156 L Ed 2d 471 (2003). Here, however, we find no record evidence to support defendant's contention that trial counsel failed to review the transcripts. In the absence of any record evidence, we next turn to defendant's contention that trial counsel was ineffective in the manner in which trial counsel failed to impeach certain prosecution witnesses.

Issues centering on impeachment and questioning of witnesses are generally matters of trial strategy and trial counsel is afforded broad discretion in the handling of cases, *Pickens*, 446 Mich 298, 325; 521 NW2d 797 (2004), in part "because many calculated risks may be necessary in order to win difficult cases," *People v Unger*, 278 Mich App 210, 242; 749 NW2d 272, lv den 482 Mich 1027 (2008). This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight. *People v Payne*, 285 Mich App at 190. "A court cannot conclude that effective assistance of counsel is denied merely because a certain trial strategy backfired." *People v Barnett*, 163 Mich App 331, 338; 414 NW2d 378 (1987). Decisions regarding cross-examination of witnesses are presumptively matters of trial strategy. *In re Ayres*, 239 Mich App 8, 23; 608 NW2d 132 (1999). There are a number of reasons why defense counsel would choose not to impeach witnesses with their prior convictions. Generally, while we normally do not question matters of trial strategy, here, even assuming that trial counsel's cross-examination tactics fell below an objective standard of reasonableness, defendant cannot demonstrate that trial counsel's failure to impeach the victim or defendant's roommate deprived defendant of a substantial defense. The failure to call witnesses or present other evidence can constitute ineffective assistance of counsel only when it deprives the defendant of a substantial defense. *Hyland*, 212 Mich App at 710. Again, the defense theory was that the victim either consented to being tied up by defendant or that defendant tied up the victim in self-defense. Also, defense counsel challenged the credibility of both witnesses. Specifically, defendant's roommate was adequately cross-examined concerning his lack of personal knowledge in regard to defendant's actions toward the victim. And the victim was impeached with both prior inconsistent statements and testimony that – before the incident – the victim offered defendant's roommate a laptop computer in exchange for a statement to the police that defendant had hurt the victim in the past. Thus, any failure to present evidence to impeach on prior convictions did not deprive defendant of a substantial defense.

Additionally, defendant's argument also fails because defendant was not prejudiced. When claiming ineffective assistance due to defense counsel's unpreparedness, a defendant must show prejudice resulting from the lack of preparation. The failure to interview witnesses does

not alone establish inadequate preparation. *People v Caballero*, 184 Mich App 636, 640, 642; 459 NW2d 80, lv den 437 Mich 884 (1990). To show prejudice, a defendant must demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Toma*, 462 Mich at 302-303, citing *People v Mitchell*, 454 Mich 145, 158; 560 NW2d 600 (1997). Defendant has the burden of establishing the factual predicate for his claim of ineffective assistance of counsel. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). In the present case, we cannot find from our review of the record as a whole, that the result would not have been different had defense counsel impeached both the victim and defendant's roommate for the retail fraud convictions as well as admitted McGuinness' testimony from the first trial. Defendant's central argument on this issue is that this case turned into a credibility contest between the victim and defendant. Hence, failure to properly impeach these witnesses prejudiced defendant.

However, defendant's argument ignores facts in the record. Trial counsel offered impeachment evidence of the victim's story through the testimony of defendant's friend, Justin Arens. Arens testified that sometime before the incident, the victim offered Arens a laptop computer in exchange for his statement to police that defendant had hurt the victim in the past. Arens also testified that he was with defendant at the apartment at the time of the incident and he testified that it was the victim who initially lunged at defendant with a knife.

Next, the record reveals that two witnesses, Reginald Tooson, a friend of defendant's and the lessor of the apartment where defendant had told the victim to come to retrieve some of his property, and Tooson's friend, Winona Kerr, testified that defendant grabbed a knife out of the kitchen and attacked Tooson. While defendant attacks Tooson's credibility, he does not attack Kerr's credibility. According to the testimony of Kerr, defendant's attack on Tooson was an aggressive act. This fact is important because even if we discount Tooson's testimony, defendant was unable to impeach the credibility of Kerr who named defendant as the aggressor. Defendant as the aggressor was consistent with the victim's version of events. Hence, there was testimony from someone other than Tooson, defendant or the victim which characterized defendant as being the aggressor.

In addition, there was evidence from Ann Arbor police officers Sahr and Schneider that the victim was tied with belts and an extension cord. Sahr testified that she saw the victim's wrists and ankles tied tightly using an extension cord and that a belt was wrapped around the victim's neck. Sahr also found that a sock had been used to gag the victim's mouth. The jury was shown injuries which the victim suffered to his mouth, back and wrists. The extensive nature of the victim's bondage and injuries were additional evidence which contradicted defendant's argument that the victim consented to the restraint.

Hence, this trial was far more than a credibility contest between the victim and defendant. Instead, independent, and often times undisputed evidence contradicted defendant's defenses and supported the victim's credibility. Thus, even if we presume defense counsel was ineffective in failing to introduce the evidence at issue, defendant fails to prove that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Strickland*, 466 US at 688.

Defendant also argues that he was deprived of due process when the trial court denied his counsel's request for an adjournment 12 days before trial. This Court reviews the grant or denial of an adjournment for an abuse of discretion. *People v Snider*, 239 Mich App 393, 421; 608 NW2d 502 (2000). We review claims of due process violations de novo. *People v Schumacher*, 276 Mich App 165, 176; 740 NW2d 534 (2007). In *People v Coy*, 258 Mich App 1; 669 NW2d 831 (2003), we articulated the test for a trial court's denial of a motion for adjournment. "[T]o invoke the trial court's discretion to grant a continuance or adjournment, a defendant must show both good cause and diligence." *Id*. at 18. Good cause factors are whether defendant (1) asserted a constitutional right, (2) had a legitimate reason for asserting the right, (3) had been negligent, and (4) had requested previous adjournments. *Id.*, quoting *People v Lawton*, 196 Mich App 341, 348; 492 NW2d 810 (1992).

In the present case, defendant did not show good cause, although defendant did assert a constitutional right and was not negligent. Defense counsel moved for adjournment because counsel needed more time to prepare for trial. General principles of due process are implicated where there is a claim of lack of adequate time to prepare for trial. *People v Suchy*, 143 Mich App 136, 142; 371 NW2d 502 (1985). Also, defendant was not negligent. The record indicates defense counsel took appropriate action to procure the transcripts.

However, defendant has not shown a legitimate reason for asserting his right to adequate time to prepare for trial. Here, defense counsel had been assigned to defendant's case at the end of December, 2010. Defense counsel had four full months to prepare for defendant's second trial. Although defense counsel received the first-trial transcripts 13 days before the start of defendant's second trial, defense counsel was not prevented from preparing a thorough defense using the remaining information available to her before the transcripts arrived.

Also, defendant had moved for and received a prior adjournment. Specifically, on February 9, 2011, defense counsel moved for an adjournment of the trial date to allow additional time to receive the first-trial transcripts and to prepare for trial. The trial court granted defendant's motion and the trial was subsequently rescheduled to begin May 2, 2011.

After weighing the good-cause factors, this Court concludes that defendant lacked good cause to request adjournment. Although defendant did assert a constitutional right and was not negligent, defendant had moved for and received a prior adjournment and did not show a legitimate reason for asserting the right to adequate time to prepare for trial.

Further, even if a defendant shows that a trial court abused its discretion in denying a request for an adjournment, a defendant must also show prejudice from that abuse of discretion to be entitled to reversal. *Coy*, 258 Mich App at 18-19. Here, defendant failed to provide any evidence in support of his claim that if defense counsel had been given more time, she would have been able to produce additional impeachment evidence or exculpatory information that was not introduced at trial. *Id.* As a result, defendant was not prejudiced.

Thus, for the reasons stated above, the trial court did not abuse its discretion when it denied defense counsel's request for adjournment 12 days before trial.

Finally, defendant argues that his due process rights were violated by the trial court's decision to require him to wear leg shackles throughout his trial. Freedom from shackling during trial has long been recognized as an important component of a fair and impartial trial. *People v Dunn*, 446 Mich 409, 426; 521 NW2d 255 (1994). Thus, the shackling of a defendant during trial is permitted only in extraordinary circumstances. *People v Dixon*, 217 Mich App 400, 404; 552 NW2d 663 (1996), lv den 455 Mich 871 (1997). A defendant may be shackled only to prevent the defendant's escape, to prevent the defendant from injuring others in the courtroom, or to maintain an orderly trial. *Payne*, 285 Mich App at 186. The existence of such circumstances must be supported by record evidence. *Id.* at 186*; Dunn*, 446 Mich at 425.

The decision to shackle a defendant is within the sound discretion of the trial court, and this Court reviews the decision for an abuse of discretionunder the totality of the circumstances. *Payne*, 285 Mich App at 186.

Here, defendant did not object to being shackled at trial. When a defendant does not object to being shackled at trial, the issue is unpreserved. See *People v Solomon (Amended Opinion)*, 220 Mich App 527, 532; 560 NW2d 651 (1996). A criminal defendant can forfeit a right by failing to timely assert it, but a forfeited right can still be reviewed for plain error, while the intentional relinquishment of a known right constitutes a waiverthat extinguishes the error. *People v Vaughn*, 491 Mich 642, 663; ___ NW2d ___ (2012). Unpreserved claims are reviewed for plain error. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999). Here, the trial court did not make a finding on the record that defendant's shackles were necessary to prevent escape, injury to persons in the courtroom, or to maintain order. Thus, the fact that defendant wore shackles during his trial was plain error.

To avoid forfeiture under the plain error rule, clear or obvious error must have occurred and affected defendant's substantial rights. *Id*. at 763. This requirement requires a showing of prejudice, specifically that the error affected the outcome of the lower-court proceedings. *Id*. A defendant is not prejudiced if the jury was unable to see the shackles on the defendant. *People v Horn*, 279 Mich App 31, 36; 755 NW2d 212 (2008). Defendant acknowledges on appeal that there is nothing in the record that conclusively shows that the jury saw or heard the leg shackles. Also, the record indicates that the trial court took the affirmative step of ordering the removal of defendant's shackles before defendant testified. Thus, defendant cannot show prejudice. *Horn*, 279 Mich App at 36.

Affirmed.

/s/ Stephen L. Borrello
/s/ Michael J. Riordan

# STATE OF MICHIGAN

# COURT OF APPEALS

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| PEOPLE OF THE STATE OF MICHIGAN,<br><br>Plaintiff-Appellee, | UNPUBLISHED<br>October 25, 2012 |
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| JEROME POWELL, JR.,<br><br>Defendant-Appellant. | LC No. 09-001585-FC |

Before: RONAYNE KRAUSE, P.J., and BORRELLO and RIORDAN, JJ.

RONAYNE KRAUSE, P.J. *(concurring in part and dissenting in part)*

I concur with the majority's conclusions regarding defendant's claims of ineffective assistance of counsel and due process violations of the trial court denying defense counsel's motion for adjournment. However, on the issue of whether defendant was prejudiced by being shackled during his trial, I respectfully dissent. I do not believe that the trial record is adequate to determine whether the jury was able to see defendant's shackles. Accordingly, I would remand for further evidentiary proceedings on the issue.

Although we previously denied a motion to remand for such a hearing, *People v Jerome Powell, Jr.*, unpublished order of the Court of Appeals, entered July 3, 2012 (Docket No. 305542), upon full review of the trial court record, I do not believe that we can adequately address the issue of defendant wearing shackles at trial without further evidentiary proceedings. Our order only denied the motion "for failure to demonstrate a need for a remand at this time." The order does not address the merits of the case, and therefore the law of the case doctrine does not apply. *Grievance Administrator v Lopatin*, 462 Mich 235, 260; 462 NW2d 120 (2000).

I would permit defendant to develop a record on the issue of whether his shackling prejudiced the result of the trial. See *People v Davenport*, 488 Mich 1054; 794 NW2d 616 (2011); see also *Rhoden v Rowland*, 10 F3d 1457, 1459-1460 (9th Cir. 1993). My decision is further influenced by the record-intensive approach reflected in our analysis of prejudice created

by shackles. See, e.g., *People v Dunn*, 446 Mich 409; 521 NW2d 255 (1994); *People v Payne*, 285 Mich App 181; 774 NW2d 714 (2009); *People v Horn*, 279 Mich App 31; 755 NW2d 212 (2008); *People v Dixon*, 217 Mich App 400; 552 NW2d 663 (1996).

Without more evidence, I cannot determine whether defendant's shackles prejudiced him. Therefore, I would remand for an evidentiary hearing on that issue only.

/s/ Amy Ronayne Krause