

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
December 13, 2012

V

ERVINE LEE DAVENPORT,

Defendant-Appellant.

No. 306868
Kalamazoo Circuit Court
LC No. 2007-000165-FC

Before: TALBOT, P.J., and MARKEY and RIORDAN, JJ.

PER CURIAM.

Defendant appeals as of right the trial court's opinion, after remand, holding that the prosecution proved beyond a reasonable doubt that the shackling error did not contribute to defendant's conviction of first-degree murder, MCL 750.316. We affirm.

I. FACTUAL BACKGROUND

The sole issue on appeal is the impact of defendant's partial shackling at trial. While this Court previously held there were no errors requiring reversal and no need to remand for an evidentiary hearing, in lieu of granting leave to appeal, our Supreme Court reversed this Court's order denying defendant's motion to remand for an evidentiary hearing. *People v Davenport*, 488 Mich 1054; 794 NW2d 616 (2011). The Court held that "defendant should have been permitted to develop the record on the issue of whether his shackling during trial prejudiced his defense" and remanded the case to the trial court for proceedings consistent with its order. *Id.*

On remand, the trial court conducted two evidentiary hearings. Only five jurors testified that they observed defendant's shackles during trial. While some of the jurors remembered a comment being made about the shackling from one of the jurors, all 12 jurors testified that defendant's shackles were not discussed during deliberations and did not influence the verdict. The trial court issued an opinion finding that although many of the jurors were able to observe defendant's shackles during trial, in light of the jurors' testimony that it did not affect their verdict, the prosecution demonstrated beyond a reasonable doubt that the shackling error did not contribute to defendant's conviction. Defendant now appeals.

II. SHACKLING

A. Standard of Review

“We review a trial court’s decision to shackle a defendant for an abuse of discretion under the totality of the circumstances.” *People v Payne*, 285 Mich App 181, 186; 774 NW2d 714 (2009). However, “where a court, without adequate justification, orders the defendant to wear shackles that will be seen by the jury, the defendant need not demonstrate actual prejudice to make out a due process violation.” *Deck v Missouri*, 544 US 622, 635; 125 S Ct 2007; 161 L Ed 2d 953 (2005). Instead, the prosecution “must prove beyond a reasonable doubt that the [shackling] error complained of did not contribute to the verdict obtained.” *Id.* (internal quotations and citation omitted).

B. Analysis

Defendant argues that he was denied due process when the trial court erroneously required him to be shackled during trial and the prosecution failed to prove beyond a reasonable doubt that the shackling error did not contribute to his conviction. We disagree.¹

Although a defendant does not have an absolute right to be unshackled at trial, “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.’” *Payne*, 285 Mich App at 186, quoting *People v Dunn*, 446 Mich 409, 425; 521 NW2d 255 (1994). If the trial court improperly orders a defendant to be shackled, the burden falls on the prosecution to prove beyond a reasonable doubt that the error did not contribute to the guilty verdict. *Deck*, 544 US at 635.

In the instant case, it is uncontroverted that defendant was shackled and that the trial court erred in ordering his shackling. Five jurors also testified that they recalled seeing defendant shackled at some point during the proceedings. While some of the jurors testified that they remembered a minor comment by one of the jurors about the shackling, none could even remember who made the comment. Further, every juror testified that defendant’s shackles were not discussed during jury deliberations and that the verdict was based solely on the evidence presented at trial. The five jurors who observed defendant’s shackles each testified that they believed there was nothing unusual about his shackling and that it did not influence their respective verdicts. All of the evidence indicated that the shackling did not affect the verdict in any way. Thus, the trial court properly found that the prosecution met its burden of proving beyond a reasonable doubt that the error did not affect the jury’s verdict. See *Deck*, 544 US at 635.

¹ Defendant also makes a passing reference to the prejudicial effect of wearing his orange jail uniform. However, the issue on remand was limited to the shackling, not defendant’s apparel. See *Davenport*, 488 Mich at 1054.

Defendant contends that despite the jurors' specific testimony to the contrary, their testimony about defendant's shackles demonstrated that they were clearly affected by his shackling. Defendant emphasizes the testimony of three jurors who observed his shackles—Robert Jankord, James Vanderveen, and Michael Whately—and who testified that they thought defendant might be dangerous. However, Jankord, Vanderveen, and Whately each testified that his belief that defendant might be dangerous was based the charge of first-degree murder, not the shackling. They testified that they presumed defendant's shackles were routine procedure given the charge and that the shackles did not influence their verdict in any way. Therefore, contrary to defendant's assertion, the jurors' testimony did not indicate that the shackling error contributed to the verdict against defendant.

Also contrary to defendant's argument, it was proper for the jurors to testify regarding how viewing the shackles affected their deliberations. Jurors may only consider the evidence presented at trial when deliberating and may not consider "extraneous facts not introduced in evidence." *People v Budzyn*, 456 Mich 77, 88; 566 NW2d 229 (1997). Subsequent to trial, jurors may not impeach their own verdict by testimony or affidavits that "challenge mistakes or misconduct inherent in the verdict." *Id.* at 91. However, one exception is that "oral testimony or affidavits" from jurors may "be received on extraneous or outside errors[.]" *Id.* Here, the fact that defendant was shackled was extrinsic error, completely unrelated to the evidence introduced at trial. See *id.* at 89. While defendant concedes that the viewing of the shackling is an extraneous error, he maintains that whether the jury discussed the shackling is not an extraneous error and should not have been subject to juror testimony at the evidentiary hearings. However, the Michigan Supreme Court has recognized that a trial court may properly elicit and consider testimony from the jurors "to determin[e] the extent to which the jurors saw *or discussed* the extrinsic evidence." *Budzyn*, 456 Mich at 91 (emphasis added). Thus, the trial court was not in error.²

III. CONCLUSION

The trial court did not err in finding that the prosecution proved beyond a reasonable doubt that the shackling error did not affect the verdict. We affirm.

/s/ Michael J. Talbot
/s/ Jane E. Markey
/s/ Michael J. Riordan

² Defendant also contends that the evidence at trial was "hotly disputed" and that the jury's decision was essentially one of credibility, rendering the shackling all the more prejudicial. Contrary to this assertion, the evidence at trial overwhelmingly established defendant's guilt and belied his contention that he killed the 103 pound victim in self-defense, a theory that was explicitly disputed by expert medical testimony.