

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES CASTLE,

Defendant-Appellant.

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UNPUBLISHED

June 7, 2007

No. 265379

Ingham Circuit Court

LC No. 04-001044-FC

Before: Markey, P.J., and Sawyer and Bandstra, JJ.

PER CURIAM.

Defendant was convicted by a jury of first-degree premeditated murder, MCL 750.316(1)(a), and first-degree felony murder, MCL 750.316(1)(b), arising from the stabbing death of a 13-year-old girl. He was sentenced for a single murder conviction to life imprisonment without parole. He appeals as of right. We affirm.

Defendant first argues that the trial court erred in requiring him to appear in visible restraints throughout the trial. We agree, but conclude that the error was harmless beyond a reasonable doubt.

Constitutional claims of due process violations are reviewed de novo. *People v Pitts*, 222 Mich App 260, 263; 564 NW2d 93 (1997). However, the ultimate decision whether to restrain a defendant is reviewed for an abuse of discretion. *People v Dixon*, 217 Mich App 400, 404-405; 552 NW2d 663 (1996).

It is well settled that, absent a showing of manifest need for restraints, appearing shackled or handcuffed before a jury can adversely affect a defendant's constitutional presumption of innocence. See *People v Dunn*, 446 Mich 409, 425 n 26; 521 NW2d 255 (1994); see also *People v Banks*, 249 Mich App 247, 256; 642 NW2d 351 (2002). "The Sixth Amendment guarantee of the right to a fair trial means that 'one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial.'" *Id.*, quoting *Taylor v Kentucky*, 436 US 478, 485; 98 S Ct 1930; 56 L Ed 2d 468 (1978). Accordingly, "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." *Dunn*, *supra* at 425; see also *Dixon*, *supra* at 404-405.

In *Deck v Missouri*, 544 US 622; 125 S Ct 2007; 161 L Ed 2d 953 (2005), which was decided during defendant's trial, the United States Supreme Court characterized the right to be free from visible restraints as

a basic element of the "due process of law" protected by the Federal Constitution. Thus, the Fifth and Fourteenth Amendments prohibit the use of physical restraints visible to the jury absent a trial court determination, in the exercise of its discretion, that they are justified *by a state interest specific to a particular trial*. Such a determination may of course take into account the factors that courts have traditionally relied on in gauging potential security problems and the risk of escape at trial. [*Id.* at 629 (emphasis added)]

The Court explained that visible shackling (1) "undermines the presumption of innocence and the related fairness of the factfinding process"; (2) "suggests to the jury that the justice system itself sees a 'need to separate a defendant from the community at large'"; (3) "almost inevitably implies to the jury, as a matter of common sense, that court authorities consider the offender a danger to the community"; (4) diminishes the right to counsel by interfering with the accused's ability to communicate with his lawyer and ability to participate in his own defense, "say, by freely choosing whether to take the witness stand on his own behalf"; (5) undermines the courtroom's formal dignity, which includes the respectful treatment of defendants; and (6) undermines the importance of the determination of an accused's guilt or innocence, and "the judicial system's power to inspire the confidence and to affect the behavior of the general public." *Id.* at 630-633. The Court noted, however, that "[t]here will be cases, of course where the perils of shackling are unavoidable." *Id.* at 632.

The Court further explained that to satisfy "the important need to protect the courtroom and its occupants," the trial court may "take account of special circumstances, including security concerns." *Id.* at 633. But the Court cautioned that "any such determination must be case specific" and "should reflect particular concerns," such as "special security needs or escape risks, *related to the defendant on trial.*" *Id.* (emphasis added).

In the present case, despite the prosecutor's agreement with defense counsel's request to remove defendant's restraints, the trial court stated at the start of trial that defendant would remain in restraints "for security purposes," but failed to make any findings or articulate any particular concerns related to this individual defendant. The trial court's attempt to retroactively justify its decision, at the end of the third day of trial, was ineffective. First, the jury had already observed defendant wearing visible restraints for three days. Second, despite testimony that defendant made rude, inappropriate, and even arguably threatening gestures, neither of the sheriff deputies who witnessed defendant's conduct testified that he was concerned that defendant would attempt to injure someone. Rather, their concern was that defendant's behavior was disrespectful and disruptive. Lastly, the trial court made its decision to require defendant to appear in restraints before becoming aware of defendant's disruptive conduct, and the court did not attempt to reshape defendant's behavior by any other means, such as warning him, holding him in contempt, or briefly removing him from the courtroom.

Similarly, the trial court's attempt to justify its decision by reference to an unspecified jailhouse incident that occurred during defendant's trial was likewise ineffective. As before, the trial court made its original decision that defendant remain restrained six days before the incident

transpired. Moreover, the record does not contain enough detail concerning the incident—and no testimony of any kind—to justify the conclusion that defendant’s behavior demonstrated that he was a security risk in the courtroom, as opposed to being merely disrespectful and disruptive.

When the trial court made its initial decision to keep defendant in visible restraints, it was not aware that defendant had engaged in any disruptive behavior and, therefore, that behavior cannot serve as a basis for justifying the court’s decision. Nonetheless, examining the record as a whole, we conclude that the due process violation attendant to defendant appearing in visible restraints during trial was harmless beyond a reasonable doubt.<sup>1</sup> The evidence presented at trial showed that defendant had access to the victim’s home and had shown a sexual interest in the victim. Defendant was identified as the likely donor of foreign DNA found under the victim’s fingernails; the probability that someone else was the donor was .002 percent. Defendant admitted being at the victim’s home twice on the day of her death and two witnesses saw his truck at the victim’s home at the approximate time of her death. There was also circumstantial evidence that the victim was sexually assaulted. And James Wilford testified that defendant admitted killing the victim.

Apart from the strong evidence against defendant, there is no suggestion in the record, nor does defendant contend, that defendant’s restraints interfered with his ability to participate in his defense. Further, the restraint was minimal, involving alternating incapacitation of one hand rather than traditional handcuffs, chains or similar shackling that would have had a more prejudicial impact. Also, defense counsel questioned the jurors during voir dire about the presence of restraints on defendant and none of the jurors indicated that the restraints would affect their ability to be impartial. Additionally, the trial court later instructed the jury that the security procedures adopted by the court were not evidence, that the procedures did not reflect any opinion of the court or the parties about the case or the nature of the charges, and that the security procedures should not be considered during deliberations.

In light of this record, we are convinced beyond a reasonable doubt that defendant’s appearance in restraints did not contribute to the jury’s verdict. Therefore, reversal on this basis is not warranted.

Defendant next argues that Kelly Bailey’s testimony that the victim had identified “Jimmy” as the ice cream truck driver who made sexual passes at her was erroneously admitted at trial. We disagree.

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<sup>1</sup> The prosecutor argues that defendant has failed to show prejudice. However, as the *Deck* Court explained, “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.” The State must prove “beyond a reasonable doubt that the [shackling] error complained of did not contribute to the verdict obtained.” *Deck, supra* at 635. See also *People v Anderson (After Remand)*, 446 Mich 392, 404-406; 521 NW2d 538 (1994). Thus, the burden is on the prosecutor to show that the trial court’s error was harmless beyond a reasonable doubt; it is not defendant’s burden to show prejudice. *Id.* at 406.

A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998). Preliminary questions of law concerning admissibility, such as whether a rule or statute precludes the admission of the evidence, are reviewed de novo. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

At trial, Bailey was permitted to testify that the victim told Bailey that she did not want to ride in the ice cream truck anymore because "Jimmy" made sexual advances toward at her and made her feel uncomfortable when she rode the truck with him, and that Jimmy had commented that the victim's "butt looked really cute in a pair of shorts that she was wearing . . . and had put his hand on [the victim's] butt." The prosecutor moved to admit the victim's statement to Bailey under the residual hearsay exception set forth MRE 804(b)(7), relying on MRE 803(3) to argue that the statement had sufficient indicia of reliability to be admitted. The trial court ruled that Bailey's testimony was admissible under both MRE 804(b)(7) and MRE 803(3), to show the victim's state of mind. We agree with defendant that the victim's statement was not admissible under MRE 803(3). However we conclude that the trial court did not abuse its discretion in admitting the statement under MRE 804(b)(7).

The victim's statement to Bailey concerning the advances of the ice cream truck driver was "a statement of memory or belief to prove the fact remembered or believed," and was used for that purpose, i.e., to show that defendant had a sexual interest in the victim. Therefore, the statement was not admissible under MRE 803(3). Nonetheless, "residual [hearsay] exceptions may be used to admit statements that are similar to, but not admissible under, the categorical hearsay exceptions." *People v Katt*, 468 Mich 272, 290; 662 NW2d 12 (2003).

As noted by the prosecutor, defendant does not argue that the statement fails to meet the enumerated requirements of the residual hearsay exception set forth in MRE 804(b)(7). Rather, defendant's only argument with regard to MRE 804(b)(7) is that he was not given sufficient notice that the victim had specifically named "Jimmy" as the ice cream driver about whom she was speaking. The record shows that the prosecutor notified defense counsel that Bailey would testify that the victim used the name "Jimmy" when talking about the ice cream truck driver on May 9, 2005, the first day of trial and that Bailey did not testify until May 19, 2005. Further, defense counsel later conceded that he received notice of the testimony on May 5, 2005. Thus, defendant had two weeks to prepare to meet Bailey's testimony. Defendant fails to specify what else he could have done to meet the statement, if he had received additional notice that the victim specifically named "Jimmy" as the ice cream truck driver about whom she was speaking. Defendant has failed to show that he was prejudiced in any way by the lack of earlier notice. Therefore, we conclude that the trial court did not abuse its discretion in allowing Kelly Bailey to testify that the victim told her that Jimmy was the ice cream truck driver that had made sexual advances toward her.

Defendant also argues that the trial court erred in allowing Bailey's mother, Dawn Bailey, to testify that Bailey told her in the car while they were riding home from Bailey's interview with police that the victim named "Jimmy" as the ice cream truck driver that made sexual advances toward her. At trial, defendant objected to Dawn's testimony on the basis that it was tainted because Dawn was present in the courtroom when Bailey testified to making such a statement to Dawn. Defendant also argued that Dawn was not listed as a witness, so she could not be called until rebuttal. Defendant did not argue at trial, as he does on appeal, that Dawn's testimony was not admissible under MRE 801(d)(1)(B) because there had been no claim of

recent fabrication. Therefore, defendant's argument that the trial court erred in admitting Dawn's testimony under MRE 801(d)(1)(B) is unpreserved. *People v Grant*, 445 Mich 535, 553; 520 NW2d 123 (1994). Accordingly, we review defendant's assertion for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Plain error affects a defendant's substantial rights when it affects the outcome of the trial. *Id.* at 763.

"Generally, a witness's prior consistent statement is inadmissible as substantive evidence." *Palmer v Hastings Mut Ins Co*, 119 Mich App 271, 273; 326 NW2d 476 (1982). But such statements are not hearsay when the "declarant testifies at the trial . . . and is subject to cross-examination concerning the statement, and the statement is . . . consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive." MRE 801(d)(1)(B). "While a consistent statement that predates the motive [to fabricate] is a square rebuttal of the charge that the testimony was contrived, consistent statements made after the motive to fabricate arose provide very little support against a charge of fabrication. . . . Therefore, . . . a consistent statement made after the motive to fabricate arose does not fall within the parameters of the hearsay exclusion for prior consistent statements." *People v Rodriquez*, 216 Mich App 329, 331-332; 549 NW2d 359 (1996).

Here, then, Bailey's statement to Dawn that the victim told her that "Jimmy" was the ice cream truck driver that had made sexual advances toward her was admissible if: Bailey testified at trial and was subject to cross-examination, Bailey's statement to Dawn was consistent with Bailey's trial testimony, Dawn's testimony concerning Bailey's prior consistent statement was offered to rebut an express or implied charge against Bailey of recent fabrication, or improper influence or motive, *and* Bailey's statement to Dawn was made before any motive to fabricate arose. MRE 801(d)(1)(B); *Rodriquez, supra*.

Bailey testified at trial, consistently with her earlier statement to Dawn that the victim identified "Jimmy" when speaking to Bailey about the ice cream truck driver making sexual advances. And defendant did assert, at least implicitly, that Bailey's testimony about the victim naming "Jimmy" as the ice cream driver about whom she was speaking was fabricated. Thus, Dawn's testimony regarding Bailey's prior consistent statement was admissible if, *but only if*, it was made before any motive to fabricate arose. Defendant asserts on appeal that Bailey's motive to fabricate a statement that the victim specifically named "Jimmy" arose as Bailey left the police interview when she realized that the police would need the name of the ice cream truck driver to proceed. Even assuming that argument is valid, however, we do not conclude that the trial court committed plain error in failing to *sua sponte* disallow the testimony under MRE 801(d)(1)(B).

Even if we agreed with defendant that plain error occurred, defendant cannot establish that the admission of Dawn's testimony affected the outcome of his trial and, therefore, its admission was harmless. *Rodriquez, supra* at 332. As noted above, the evidence presented at trial showed that defendant had access to the victim's home, that he had shown a sexual interest in the victim, that he was the likely donor of foreign DNA found under the victim's fingernails, that he admitted being at the victim's home twice on the day of her death, and that two witnesses saw his truck at the victim's home at the approximate time of her death. There was also circumstantial evidence that the victim was sexually assaulted. And James Wilford testified at

trial that defendant admitted to killing the victim. Given the evidence presented against him at trial, we cannot say that Dawn's testimony affected the outcome of defendant's trial. Consequently, reversal is not warranted. *Carines, supra* at 763-764.

Next, defendant argues that his right to present a defense was violated when the trial court excluded testimony of Diane Purvis, defendant's ex-wife, regarding allegations that the victim's paternal step-grandfather, Earl Pease, sexually molested Purvis as a child and was violent toward Purvis's brothers. We disagree.

The United States Constitution guarantees a defendant "a meaningful opportunity to present a complete defense." *Holmes v South Carolina*, 547 US 319; 126 S Ct 1727, 1731; 164 L Ed 2d 503 (2006). "This right is abridged by evidence rules that 'infring[e] upon a weighty interest of the accused' and are 'arbitrary or disproportionate to the purposes they are designed to serve.'" *Id.* (citation omitted). However, a trial court may exclude evidence if the probative value is outweighed by certain other factors, such as unfair prejudice, confusion of the issues, or potential to mislead the jury. *Id.* at 1732. This includes evidence that is repetitive, only marginally relevant, or that poses an undue risk of harassment, prejudice, or confusion of the issues. *Id.*

Applying this balancing test in the context of evidence proffered to show that someone else may have committed the crime charged, we recognize evidence may be introduced "when it is inconsistent with, and raises a reasonable doubt of, [defendant's] own guilt," but not when the evidence is "remote" and lacks a sufficient "connection with the crime." *Id.* at 1733. Accordingly, evidence tending to inculcate another may be introduced when it tends to prove that another person may have committed the crime, but it may be excluded "where it does not sufficiently connect the other person to the crime, as, for example, where the evidence is speculative or remote, or does not tend to prove or disprove a material fact in issue at the defendant's trial." *Id.* The goal is to "focus the trial on the central issues by excluding evidence that has only a very weak logical connection to the central issues." *Id.* at 1734.

Michigan's rule is to the same effect. This Court has held that "evidence tending to incriminate another is admissible if it is competent and confined to substantive facts which create more than a mere suspicion that another is the perpetrator." *People v Kent*, 157 Mich App 780, 793; 404 NW2d 668 (1987).

In the present case, Purvis's allegations that Pease sexually molested her as a child provided a reason for the police to investigate Pease in connection with this case. However, her testimony concerned a remote event and lacked a sufficient connection with the crime at issue to warrant admission. In other words, while Purvis's testimony tended to cast suspicion upon Pease, it did not provide any substantive facts specifically connecting Pease to this crime or addressing any material fact at issue in defendant's trial. We conclude that Purvis's testimony was too remote to be probative and the trial court did not err in excluding it. Defendant's right to present a defense was not violated.

Defendant next argues that the trial court abused its discretion in allowing the late endorsement of James Wilford as a witness. We disagree.

A trial court's decision whether to allow the late endorsement of a witness is reviewed for an abuse of discretion. *People v Gadomski*, 232 Mich App 24, 32-33; 592 NW2d 75 (1998).

MCL 767.40a provides:

(3) Not less than 30 days before the trial, the prosecuting attorney shall send to the defendant or his or her attorney a list of the witnesses the prosecuting attorney intends to produce at trial.

(4) The prosecuting attorney may add or delete from the list of witnesses he or she intends to call at trial at any time upon leave of the court and for good cause shown or by stipulation of the parties.

The late discovery of a witness can constitute good cause to allow the late endorsement of the witness. *Gadomski, supra* at 37.

In the present case, defendant does not dispute the prosecutor's representation that he moved to endorse Wilford as soon as he learned of his existence. The prosecutor made a record of Wilford's expected testimony, defense counsel was provided with a continuance to prepare for the testimony and was given the jailhouse records he requested, and defense counsel indicated to the trial court that he was prepared for cross-examination before Wilford testified. Additionally, Wilford's testimony, while damaging, was nearly identical to the proposed testimony of another witness, John Kelly, of which defendant was already aware. Under the circumstances, the trial court did not abuse its discretion in permitting the late endorsement.

Lastly, defendant argues that the trial court erred in allowing LeAnn Holland to testify as an expert concerning the incidence of injury and physical evidence in sexual assault cases. We disagree.

MRE 702 provides:

If the court determines that scientific, technical, or other specialized knowledge will assist the trier of fact to understand evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Defendant argues that he did not have timely notice that Holland would testify as an expert or of the substance of her testimony and therefore, was unable to properly prepare to meet it.<sup>2</sup> However, the record discloses that defendant received 11 days' notice of the general nature

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<sup>2</sup> Defendant argues that he was entitled to discovery of reports concerning Holland's proposed testimony under MCR 6.201(A)(3). He concedes, however, that the rule does not compel the creation of expert witness reports, only the disclosure of existing reports. Defendant does not challenge the prosecutor's representation that no report existed in this case.

of Holland's testimony and was allowed to procure an expert. He had two days' notice of the specifics of Holland's testimony and was granted a continuance to prepare for his cross-examination of Holland. Additionally, Holland's testimony concerning the autopsy photographs and the significance of finding no physical evidence and no injury to the hymen was cumulative. Defendant fails to explain what else he could have done to prepare for Holland's testimony if he had received earlier notice. Thus, defendant has failed to show that he was prejudiced by the allegedly short notice, particularly as Holland's testimony was largely cumulative.

Defendant does not argue that expert testimony was unnecessary to assist the jury in evaluating the evidence presented in this case. See MRE 702. Rather, defendant argues that because there was no evidence that an actual or attempted sexual assault was committed, it was unfair to allow Holland to testify as an expert on sexual assault issues. We disagree.

The evidence showed that the victim was found lying sideways on her parents' bed, wearing only a T-shirt, brassiere, and socks, and that her sweatpants and underwear were found next to her. There were no holes in the T-shirt matching her stab wounds, thus indicating either that she was not wearing the T-shirt when she was stabbed, or that her shirt was pulled up. There was also evidence that defendant was sexually interested in the victim. Further, defendant was identified as the likely donor of the foreign DNA found under the victim's fingernails. Lastly, there was an area of irritation in the victim's genitals that could be indicative of sexual activity, although there was no physical injury to the genitals and no trace evidence was found therein. Therefore, contrary to defendant's argument, there was evidence suggesting that an actual or attempted sexual assault occurred in this case, making Holland's testimony relevant and probative.

Defendant also argues that Holland presented no data to support her testimony concerning the incidence of physical evidence and injury in sexual abuse cases or to justify her comments concerning the autopsy photographs. However, Holland's testimony was based upon her observations during the performance of her job as a sexual assault nurse examiner, which also gave her the expertise to evaluate the photographs. Therefore, Holland's testimony sufficiently complied with MRE 702.<sup>3</sup>

Defendant concedes that even if the trial court erred in allowing Holland to testify as an expert, the error only warrants reversal of the felony-murder conviction. Accordingly, defendant argues that the cumulative effect of multiple errors warrants reversal of his premeditated murder conviction. We disagree.

"Although one error in a case may not necessarily provide a basis for reversal, it is possible that the cumulative effect of a number of errors may add up to error requiring reversal," if the defendant was denied his right to a fair trial. *People v Daoust*, 228 Mich App 1, 16; 577 NW2d 179 (1998). Here, the trial court erred in requiring defendant to appear in restraints in

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<sup>3</sup> Defendant did not argue that Holland's opinions were based upon insufficient data, nor did he challenge the reliability of her methods or their applicability to this case. See MRE 702(1), (2), and (3).



view of the jury, but the error was harmless beyond a reasonable doubt. Because no other errors occurred at defendant's trial, there was no cumulative effect of multiple errors that deprived defendant of a fair trial.

We affirm.

/s/ Jane E. Markey  
/s/ David H. Sawyer  
/s/ Richard A. Bandstra