Order

Michigan Supreme Court
Lansing, Michigan

December 29, 2025

168596

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 168596
COA: 361493
Jackson CC: 21-002425-FC

ZACHARIE SCOTT BORTON,
Defendant-Appellant.

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On order of the Court, the application for leave to appeal the April 10, 2025 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

THOMAS, J. (*concurring*).

While I concur in the Court's denial order, like Justice WELCH, I am troubled by the trial court's decision to order midtrial that defendant wear leg restraints notwithstanding defense counsel's objection and the lack of record evidence providing a particularized justification for such an order. Everyone agrees that this was erroneous under well-established law. See *People v Dunn*, 446 Mich 409, 411, 425-427 (1994); see also *Deck v Missouri*, 544 US 622, 624 (2005).[1] However, the lower courts concluded that defendant was not entitled to relief because he failed to establish that any juror saw the restraints. While I share Justice WELCH's skepticism of the trial court's factual finding, I cannot say

[1] In rejecting defendant's motion for a new trial, the trial court admitted that it erred by ordering the restraints "because it had no reason for doing so other than the seriousness of the charges against him." *People v Borton*, unpublished opinion of the Jackson Circuit Court, issued August 22, 2024 (Case No. 21-2425-FC), p 3; see also *People v Borton*, unpublished per curiam opinion of the Court of Appeals, issued April 10, 2025 (Docket No. 361493), p 7 (concluding that the trial court failed to make the required inquiry and instead "relied on a general concern, relayed to the attending deputy by his supervisor, that someone charged with three counts of open murder should be shackled. No evidence showed that defendant said or did anything during trial to justify the use of shackles, and it was error for the trial court to do so."). The prosecutor's Court of Appeals brief—which it attached to its answer in this Court—concurs: "The trial court unquestionably erred in electing to shackle defendant based only on the severity of the offense."

the court *clearly* erred by concluding that defendant failed to demonstrate that any juror saw him in restraints.[2]

I write separately to note that Michigan's caselaw regarding improper restraints is underdeveloped, gives insufficient attention to binding United States Supreme Court precedent, and may warrant this Court's attention in a future case. No binding Michigan appellate decision has thoroughly considered the issue since the Supreme Court's decision in *Deck*,[3] which first formally recognized that improper restraining of a criminal defendant violates the federal constitutional right to due process. The leading precedential Michigan appellate opinions either predate *Deck* or fail to cite that decision *at all*, let alone substantively analyze it.[4] And I question whether our stated standard for assessing if a restrained defendant is entitled to a new trial is consistent with the principles articulated in *Deck*.

In *Deck*, the United States Supreme Court affirmed what had been previously suggested by its cases—that the routine use of visible shackles during the guilt phase is constitutionally forbidden. *Deck*, 544 US at 626. "The law has long forbidden routine use of visible shackles during the guilt phase; it permits a State to shackle a criminal defendant only in the presence of a special need." *Id*. The *Deck* Court then examined whether visible shackling without special need during the sentencing phase of a death penalty case, where the defendant had already been found guilty of a homicide, also violated the defendant's due-process rights. The Court held that it did. *Id*. at 635. Further, the *Deck* Court placed the burden on the state to show that such an error was harmless beyond a reasonable doubt. *Id*. "Thus, 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." *Id*.

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[2] See *People v Bryant*, 491 Mich 575, 595 (2012) ("We review the factual findings of a trial court for clear error, which exists if the reviewing court is left with a definite and firm conviction that the trial court made a mistake.") (quotation marks and citation omitted).

[3] But cf. *People v Willie Johnson*, unpublished per curiam opinion of the Court of Appeals, issued March 21, 2024 (Docket No. 363544), pp 3-6 (reversing the conviction of a self-represented defendant because of a *Deck* violation).

[4] See *People v Dunn*, 446 Mich 409 (1994); *People v Dixon*, 217 Mich App 400 (1996); *People v Horn*, 279 Mich App 31 (2008); *People v Payne*, 285 Mich App 181 (2009). This Court has made fleeting references to *Deck*, but only in short orders that contained little or no substantive analysis and were entered without hearing oral argument. See, e.g., *People v Davenport*, 488 Mich 1054 (2011); *People v Porter*, 493 Mich 972 (2013); *People v Arthur*, 495 Mich 861 (2013).

In this case, the Court of Appeals relied on *People v Payne*, 285 Mich App 181 (2009), which states:

> Included within the right to a fair trial, absent extraordinary circumstances, is the right to be free of shackles or handcuffs in the courtroom. [*People v Dixon*, 217 Mich App 400, 404 (1996)]. While this right is not absolute, 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." *People v Dunn*, 446 Mich 409, 425 (1994). But even if a trial court abuses its discretion and requires a defendant to wear restraints, the defendant must show that he suffered prejudice as a result of the restraints to be entitled to relief. *People v Horn*, 279 Mich App 31, 36 (2008). "[A] defendant is not prejudiced if the jury was unable to see the shackles on the defendant." *Id*. [*Payne*, 285 Mich App at 186 (parallel citations omitted).]

Like the Court of Appeals did here, Michigan courts regularly rely on this standard to require that a defendant show that improperly imposed restraints were visible to the jury to obtain relief.[5]

There are two doctrinal presumptions in this approach that I think are worth considering further in light of *Deck*.

As an initial matter, this approach presumes that the only cognizable prejudice to a defendant from improper restraints occurs if the jury sees or is otherwise aware of the restraints. Undoubtedly, the risk that jurors will assume an improperly restrained defendant is dangerous or guilty is an important component of the rule against unjustified restraints. See, e.g., *Deck*, 544 US at 633 ("The appearance of the offender . . . in shackles . . . almost inevitably implies to a jury, as a matter of common sense, that court authorities consider the offender a danger to the community[.]"). However, *Deck* explained that routine imposition of visible restraints undermines three "fundamental legal principles": (1) the presumption of innocence, (2) the right to secure a meaningful defense with the assistance of counsel, and (3) the ability to "maintain a judicial process that is a dignified process," which includes "the respectful treatment of defendants . . . ." *Id*. at 630-631. While

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[5] See, e.g., *People v McCants*, unpublished per curiam opinion of the Court of Appeals, issued July 17, 2018 (Docket No. 331248), pp 13-15; *People v Derrick Johnson*, unpublished per curiam opinion of the Court of Appeals, issued March 20, 2014 (Docket No. 310075), pp 3-4; *People v Thomas*, unpublished per curiam opinion of the Court of Appeals, issued August 21, 2012 (Docket No. 301683), pp 2-3; *People v Hahn*, unpublished per curiam opinion of the Court of Appeals, issued June 13, 2013 (Docket No. 305509), p 5.

ensuring that improperly imposed restraints are shielded from the jury likely *mitigates* these concerns, I'm not sure that it eliminates them entirely.[6]

Imposing restraints on a defendant standing trial without any particularized showing that they are necessary is arguably inconsistent with the presumption of innocence even if the jury is unaware of them. As the Illinois Supreme Court opined:

> The possibility of prejudicing a jury . . . is not the only reason why courts should not allow the shackling of an accused in the absence of a strong necessity for doing so. The presumption of innocence is central to our administration of criminal justice. In the absence of exceptional circumstances, an accused has the right to stand trial with the appearance, dignity, and self-respect of a free and innocent man. . . . It jeopardizes the presumption's value and protection and demeans our justice for an accused without clear cause to be required to stand in a courtroom in manacles or other restraints while he is being judged. [*People v Allen*, 222 Ill 2d 340, 346 (2006) (quotation marks and citations omitted).]

Former Chief Justice MCCORMACK made a similar point more viscerally: "As one clinical law professor put it, 'Our client has a difficult time believing that the presumption of innocence still cloaks him when all he can feel are chains.' " *People v Horton*, 506 Mich 966, 967 n 1 (2020) (MCCORMACK, C.J., dissenting), quoting Berkheiser, *Unchain the Children*, Nev Lawyer 30, 30 (June 2012).[7] Moreover, a defendant subject to nonvisible restraints might still be limited in their ability to communicate with their lawyer, and such

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[6] In *Dunn*, this Court held that the trial court erred by ordering the defendant restrained without a sufficient justification and added, "The record does not show . . . that any member of the jury saw or could see the leg irons, and, therefore, the record does not provide a basis for a finding that the use of leg irons deprived Dunn of a fair trial." *Dunn*, 446 Mich at 425. However, this decision was issued before *Deck* articulated the rationale for the federal due-process rule against routine imposition of restraints. Moreover, whether the defendant was entitled to a new trial on the basis of the improper restraints was not a dispositive issue in *Dunn*, as that defendant was granted a new trial on a different basis. *Id*. at 411, 417. The Court ordered that "[o]n the retrial, Dunn shall not be required to wear leg irons or otherwise be physically restrained in the courtroom absent a finding supported by record evidence that would justify such restraint." *Id*. at 427. Notably, the Court did not indicate that this record finding could be avoided by ensuring that the jury wasn't aware of the restraints.

[7] As noted earlier, even during the sentencing phase of a death penalty case, where "the defendant's conviction means that the presumption of innocence no longer applies," an unjustified restraint violates due process. *Deck*, 544 US at 632.

restraints could otherwise "interfere with a defendant's ability to participate in his own defense, say, by freely choosing whether to take the witness stand on his own behalf." *Deck*, 544 US at 631.[8] Finally, the courtroom's "formal dignity" and "the respectful treatment of defendants" is seemingly undermined by improper restraints regardless of whether the jury can see them. *Id*.; see also *Allen*, 222 Ill 2d at 346; *Horton*, 506 Mich at 967 n 1 (MCCORMACK, C.J., dissenting). Thus, it is not apparent to me whether a jury's lack of knowledge regarding improperly imposed restraints—even if conclusively shown—should per se preclude a defendant from obtaining a new trial.[9]

Second, in tension with *Deck*, the Court of Appeals' current standard purports to require a defendant to demonstrate prejudice from improper restraints—including that the restraints were visible to the jury—even if a defendant timely objects to those restraints. *Deck* is clear that "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*, 544 US at 635. Rather, like other preserved constitutional errors, "[t]he State must prove 'beyond a reasonable doubt that the [shackling] error complained of did not contribute to the verdict obtained.' " *Id*., quoting *Chapman v California*, 386 US 18, 24 (1967) (second alteration in original). Thus, the current standard appears inconsistent with *Deck* to the extent it requires a defendant who

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[8] See *Horton*, 506 Mich at 968 (MCCORMACK, C.J., dissenting) (questioning whether improper shackling "effectively denied" a defendant his right to self-representation). As another example, defendant here suggests the improper shackling order affected his ability to be present during a jury view of the scene. See *People v Mallory*, 421 Mich 229, 245-250 (1984) (holding that a defendant generally has the right to be physically present during a jury view).

[9] See *Allen*, 222 Ill 2d at 346 ("[W]e find that the *Deck* Court's stated reasons which prompt due process scrutiny in visible restraint cases—the presumption of innocence, securing a meaningful defense, and maintaining dignified proceedings—may be applied with like force to [restraining devices] which are not necessarily visible to the jury."); see also *People v Buchanan*, 13 NY3d 1, 4 (2009) (ordering a new trial under New York law where the trial court failed to provide adequate justification for ordering a defendant to wear a stun belt—a type of physical restraint—without regard to whether the restraint was visible to the jury); *People v Jackson*, 58 Cal 4th 724, 744 (2014) (determining that there was no evidence jurors saw the improperly imposed restraint or that it inhibited the defendant's defense and then assessing whether the restraint "had any other adverse effect on defendant"). But see, e.g., *Commonwealth v Romero*, 595 Pa 275, 297 (2007) (concluding that the defendant was not prejudiced where there was no dispute that the restraint was not visible to the jury and there was no evidence that the restraint psychologically hindered him from fully participating in his trial).

was subject to restraints visible to the jury to demonstrate prejudice.[10] *Deck* also does not conclusively resolve whether a defendant must demonstrate that jurors did, in fact, see the restraints before invoking this presumption of error. See *Deck*, 544 US at 634 (describing the record in that case, from which it inferred that the jury saw the shackles, but did not require direct testimony from a juror).

I question whether a defendant who timely objects to improper restraints should bear the burden to demonstrate that jurors saw or were otherwise aware of them. Such a burden is in tension with the general rule that the state bears the burden to demonstrate beyond a reasonable doubt that a preserved constitutional error did not contribute to the verdict obtained and with *Deck*'s statement that a defendant is presumed to be prejudiced from visible shackling. See *Deck*, 544 US at 635, citing *Chapman*, 386 US at 24. Moreover, as this case illustrates, it is not necessarily a simple or straightforward task to demonstrate that jurors were aware that a defendant was restrained.[11] Yet there are myriad situations in which even a well-placed box or sheet may not prevent jurors from learning or suspecting that a defendant is restrained.[12]

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[10] See *People v Davenport*, 488 Mich 1054, 1054 (2011) (remanding for an evidentiary hearing and explaining, citing *Deck*, that "[i]f it is determined that the jury saw the defendant's shackles, the circuit court shall determine whether the prosecution can demonstrate beyond a reasonable doubt that the shackling error did not contribute to the verdict against the defendant"). But see, e.g., *Horn*, 279 Mich App at 37 (concluding in the context of a preserved challenge to the imposition of leg restraints that "when jurors inadvertently see a defendant in shackles, there still must be some showing that the defendant was prejudiced"), citing *People v Moore*, 164 Mich App 378, 385 (1987); *McCants*, unpub op at 10 (a 2018 opinion quoting the standard from *Horn*).

[11] Defendant in this case attempted to show the jurors' awareness of the restraints by compiling photographs of the courtroom, having an investigator send postcards to the jurors, and questioning multiple witnesses during a two-day evidentiary hearing addressing this and other claims of error. Moreover, one juror in this case indicated in a returned postcard that he was aware that defendant had leg restraints, but he later denied seeing the restraints when called to testify at the evidentiary hearing. While Michigan courts have generally permitted parties to elicit from jurors testimony regarding their awareness of physical restraints and whether this awareness affected their verdict, see, e.g., *People v Arthur*, 493 Mich 935 (2013); *Davenport*, unpub op at 2, defendant makes a reasonable point that the same jurors who convict a defendant might be hesitant to admit they saw a defendant in restraints. See *Deck*, 544 US at 633 ("The appearance of the offender . . . in shackles . . . almost inevitably implies to a jury, as a matter of common sense, that court authorities consider the offender a danger to the community[.]").

[12] See *People v Hampton*, unpublished per curiam opinion of the Court of Appeals, issued April 4, 2019 (Docket No. 338418), pp 5-6 (in which one juror stated he could see

For example, it is common practice for a court officer to ask those in the courtroom to "rise for the jury" as they enter.[13] In those circumstances, a restrained defendant has the choice to not stand (and risk calling attention to themselves), or to stand and potentially reveal the restraints visibly, audibly, or through subtle movements that reflect a restraint.[14] There is also the risk that jurors will inadvertently see the defendant in restraints during voir dire,[15] while the defendant is being moved in and out of the courtroom,[16] while they are testifying on their own behalf,[17] while they are representing themselves,[18] or while they

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defendant in restraints even though the defense table was entirely covered by a cloth and defense counsel checked to see if the jury could see the restraints from the jury box and was satisfied that they could not).

[13] According to defendant, the court officer in this case did so 47 times over the course of his nine-day trial.

[14] See *People v Crump*, unpublished per curiam opinion of the Court of Appeals, issued December 16, 2014 (Docket No. 316583), p 4 (in which defendant argued that the jury may have seen him in handcuffs when he stood as the jury entered and exited the courtroom).

[15] See *McCants*, unpub op at 12; *Thomas*, unpub op at 2; *People v Jones*, unpublished per curiam opinion of the Court of Appeals, issued August 20, 2020 (Docket No. 344107), pp 8-10.

[16] See *People v Moore*, 164 Mich App 378, 384-385 (1987); *Horn*, 279 Mich App at 37; *Jones*, unpub op at 8-9; see also *People v Rumpf*, unpublished per curiam opinion of the Court of Appeals, issued January 30, 2018 (Docket No. 333544), pp 8-9 & 9 n 6 (in which jurors allegedly saw defendant in handcuffs in the parking lot being escorted into a police car); *People v Lu*, unpublished per curiam opinion of the Court of Appeals, issued February 7, 2012 (Docket No. 300854), p 1 (in which jurors accidentally saw defendant placed in chains and walked out of the courtroom while watching a video recording of the complainant's trial testimony during their deliberations).

[17] Cf. *Horn*, 279 Mich App at 36-37 (noting that the court removed defendant's restraints before he testified); *People v Powell*, unpublished per curiam opinion of the Court of Appeals, issued October 25, 2012 (Docket No. 305542), p 7 (same).

[18] See *Willie Johnson*, unpub op at 3-6 (reversing the conviction of a self-represented defendant because of a *Deck* violation where the restraints were likely visible while he was representing himself); *Horton*, 506 Mich at 967 (MCCORMACK, C.J., dissenting) ("Because the defendant elected to represent himself, he was confined to the counsel's table while the prosecution moved freely about the courtroom. The jury could have reasonably inferred

are attempting to communicate with defense counsel.[19] Thus, the possibility that at least one juror will discover or suspect that a defendant is in restraints is significant, yet both this fact and any resulting prejudice may be difficult to prove.

While minor or inadvertent juror exposure to restraints may seem trivial, *Deck* explains that it is "inherently prejudicial" for jurors to see a defendant in restraints even if these effects "cannot be shown from a trial transcript." *Deck*, 544 US at 635 (quotations marks and citations omitted). This is because it communicates that the defendant is dangerous and "thereby inevitably undermines the jury's ability to weigh accurately all relevant considerations . . . ." *Id*. at 633. This unfair tainting of the jury's perception may have an impact on a trial even if, post hoc, jurors attest that this knowledge had no effect on their deliberations or verdict.[20]

In sum, Michigan courts have not closely examined the improper restraining of criminal defendants since *Deck*,[21] and I believe this Court should do so in an appropriate case. Because the defendant here fails to meaningfully challenge this status quo, I concur in the Court's denial order.

WELCH, J. (*dissenting*).

I am concerned that multiple errors at defendant's jury trial affected the outcome of the case and deprived him of a fair trial. After a nine-day trial, a jury convicted defendant of first-degree murder, MCL 750.316(1)(a); second-degree murder, MCL 750.317;

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that the defendant was shackled, making his restraints constructively visible."); but see *Derrick Johnson*, unpub op at 4 (rejecting a similar argument).

[19] Cf. *Deck*, 544 US at 631 (noting that restraints can interfere with a defendant's ability to communicate with their lawyer).

[20] See *People v Yarbrough*, 511 Mich 252, 271 (2023) (recognizing unconscious biases that may affect a juror's decisions); Marouf, *The Unconstitutional Use of Restraints in Removal Proceedings*, 67 Baylor L Rev 214, 280 (2015) (arguing for protective steps to counteract implicit biases from the use of restraints that may affect the decisions of immigration judges).

[21] Effective January 1, 2024, this Court adopted MCR 6.009 and an amendment to MCR 6.001 to provide procedural guidelines for effectuating a defendant's right to be free from unjustified restraints. See *People v Tallman*, 513 Mich 893, 895 (2023) (CAVANAGH, J., dissenting) (summarizing these amendments). These procedures are not limited to *visible* restraints and apply to any "court proceeding that is *or could have been* before a jury . . . ." MCR 6.009(A) (emphasis added). While these rules were not in effect for this defendant's trial, they may affect how courts assess future challenges of this nature.

carrying a firearm during the commission of a felony (felony-firearm), MCL 750.227b(1), second offense; and stealing a financial transaction device, MCL 750.157n(1). He is currently serving a life sentence without the possibility of parole for the first-degree murder conviction. The Court of Appeals acknowledged that multiple errors occurred at trial but found that they were not prejudicial. I am less sure of that finding, and I think the court should have considered whether these errors amounted to cumulative error that prejudiced defendant. For this reason, I would have heard oral argument on the application for leave to appeal in this case.

I. FACTS AND PROCEDURAL HISTORY

On the morning of August 22, 2021, law enforcement officers found three men shot dead at a property in Grass Lake, Michigan. All three men were elderly and in poor health: Michael Pauli was 70; Edward Kantzler was 70 and had recently undergone a lung transplant; and Delmar Fraley was 80 and suffered from Parkinson's disease that had progressed to the point where he could barely eat or drink. All three men were also members of the Iron Coffins, a motorcycle club that the prosecution and defendant characterized as "outlaw."

Officers found Pauli's and Fraley's bodies inside the house on the property and found Kantzler's body outside the house. Ballistics testing confirmed that Pauli and Fraley were killed with a .40-caliber semi-automatic handgun while Kantzler was killed with a .38-caliber revolver. A toxicology report showed that at the time of death Pauli tested positive for methamphetamine and cocaine, Fraley for cocaine and marijuana, and Kantzler for methamphetamine.

When law enforcement apprehended defendant, he readily admitted to shooting Pauli and Fraley, claiming self-defense. Defendant had been staying at the compound in Grass Lake for about a week before the tragic events transpired. Defendant claims that early one morning, Pauli entered his room, pointed a gun at him, and threatened to kill him. Defendant claims he believed he was in danger and shot back in self-defense. Similarly, defendant maintains that he thought Fraley had a weapon in his hand and he shot in self-defense. Defendant denies shooting Kantzler and suggests that one of the other men shot Kantzler before attacking defendant. After the shooting, defendant took Kantzler's car, used Kantzler's debit card to buy gas, and fled to Grand Rapids.

The prosecution charged defendant with felony-firearm, carjacking, stealing a financial transaction device, and three counts of open murder. After a lengthy trial, the jury deliberated for several days before returning convictions of first-degree murder for Fraley, second-degree murder for Pauli, second-offense felony-firearm, and stealing a financial transaction device. The jury could not reach a verdict on the charge of open murder for Kantzler or the carjacking charge. The trial court ultimately granted the

prosecutor's motion for *nolle prosequi* on those charges. Defendant moved for a new trial, and the trial court denied the motion.

The trial court sentenced defendant to life imprisonment without the possibility of parole for the first-degree murder conviction. In addition to the life sentence, the trial court imposed a concurrent term of 40 to 80 years for second-degree murder and 34 months to 15 years for stealing a financial transaction device, all consecutive to the mandatory five-year term for second-offense felony-firearm.

After sentencing, defendant filed a claim of appeal on the ground that his counsel was ineffective and moved to remand for a *Ginther* hearing.[1] The prosecution agreed with defendant's motion, and the Court of Appeals granted the motion to remand. The trial court held a two-day *Ginther* hearing before denying a retrial. Back before the Court of Appeals, the panel held that the trial court had committed at least three errors but, examining each error individually, concluded that none of them warranted reversal. *People v Borton*, unpublished per curiam opinion of the Court of Appeals, issued April 10, 2025 (Docket No. 361493). Defendant then sought leave to appeal in this Court.

II. ERROR 1: ADMISSION OF OTHER-ACTS EVIDENCE

The Court of Appeals held that the trial court erred by admitting evidence of two domestic incidents involving defendant's wife. *Borton*, unpub op at 2-4.

At the time of defendant's trial, MRE 404(b)(1) provided:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case. [Former MRE 404(b)(1), as amended May 1, 1995, 448 Mich cxxvii (1995).]

Of course, evidence introduced under MRE 404(b) must meet the other evidentiary requirements as well. That is, the other act must be relevant under MRE 402 and must not be unduly prejudicial under MRE 403. See *People v VanderVliet*, 444 Mich 52, 74 (1993). And these evidentiary requirements interact: "If the prosecution creates a theory of relevance based on the alleged similarity between a defendant's other act and the charged offense, we require a 'striking similarity' between the two acts to find the other act

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[1] *People v Ginther*, 390 Mich 436 (1973).

admissible." *People v Denson*, 500 Mich 385, 403 (2017), quoting *VanderVliet*, 444 Mich at 67.

Here, the trial court allowed the prosecutor to introduce evidence about two domestic abuse incidents under MRE 404(b). At least three witnesses testified about the time defendant used his car to bump his wife's car while she was driving and the time defendant shot into the windows of his wife's home. The prosecutor argued that this evidence showed intent, absence of mistake, and defendant's knowledge of firearms, as well as countered defendant's claim of self-defense.

The error here is clear. As the Court of Appeals explained, "There was no allegation of self-defense in defendant's alleged crimes against his wife, and no evidence that he aimed a gun at or shot her. Rather, because of the dissimilarity between the crimes and the other acts, the evidence tended to only show that defendant had a propensity to act violently." *Borton*, unpub op at 3. In other words, the other-acts evidence of domestic abuse was not strikingly similar to the charged offenses—in fact, it was utterly distinct. Thus, the evidence was not relevant under MRE 402. And the evidence tended to paint defendant as an excitable and predatory person, making it unduly prejudicial under MRE 403.

I am concerned that the evidence of defendant's prior acts painted defendant as prone to violence—exactly the portrait that MRE 404(b) protects against. Such propensity evidence is especially prejudicial when a defendant, as here, must convince the jury that he acted in self-defense. See *Denson*, 500 Mich at 410, quoting *United States v Commanche*, 577 F3d 1261, 1269-1270 (CA 10, 2009) (" '[O]ther crimes evidence is strong medicine for juries. Even if not argued at closing, when faced with the single disputed issue in the case—self defense—the jury could not escape[] the clear articulation that [defendant] was a violent and aggressive person who was merely repeating that tendency.' ") (first and second alterations in *Denson*).

III. ERROR 2: JURY VIEW PROTOCOL

The Court of Appeals also held that the trial court erred when it excluded defendant from the jury view of the crime scene without defendant expressly waiving his right to attend. *Borton*, unpub op at 5. MCL 768.3 provides, in part: "No person indicted for a felony shall be tried unless personally present during the trial[.]" This right to be present is grounded in the United States and Michigan Constitutions' Due Process Clauses, as well as in the common law. US Const, Am XIV; Const 1963, art 1, § 17; *People v Mallory*, 421 Mich 229, 246 n 10 (1984). Further, the right sustains other fundamental rights, including the right to participate in one's own defense. See *Taylor v Illinois*, 484 US 400, 418 n 24 (1988).

In *Mallory*, we held that a jury view is part of trial because it is a moment "where the defendant's substantial rights might be adversely affected." *Mallory*, 421 Mich at 247. We elaborated:

> A jury view may provide a defendant with an opportunity to render assistance to defense counsel at, during, or after its occurrence. . . . Although a defendant can impart knowledge of the area to defense counsel prior to the view, the defendant's presence will make it more likely that any significant observations of aid to the defense are made. [*Id*. at 247-248.]

Consequently, defendant's right to be present at trial means that defendant has a right to be present at a jury view, absent affirmative waiver. *Id*.

In this case, the jury went to the Grass Lake compound before closing arguments. The trial court did not invite defendant to participate. Defendant was in pretrial detention. Thus, his absence cannot be read as his own choice to forgo attending the view. At the view, a police sergeant, who was not under oath, narrated the features of the property. The sergeant misstated the location of two individuals who lived on the property and who heard the shooting and its aftermath. The jurors had access to a map and an aerial photograph marking accurate locations. When back in the courtroom, defense counsel corrected the officer's inaccurate statements for the record.

I am concerned that this jury view inhibited not only defendant's right to be present, but also his right to aid in his own defense. Because he was not present at the scene, he was unable to correct the officer's misstatements in a timely manner. And, although defense counsel corrected them once back in the courtroom, it is common sense that impressions from a "field trip" are indelible while a post hoc note in a "lecture" is forgettable.

IV. ERROR 3: SHACKLING DEFENDANT HALFWAY THROUGH TRIAL

Finally, the trial court, Court of Appeals, and prosecutor agree that the trial court erred by shackling defendant after four uneventful days of trial. *Borton*, unpub op at 7. In *People v Dunn*, 446 Mich 409 (1994), this Court emphasized that "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." *Id*. at 425 (emphasis added).[2] However, under our current caselaw, "even if a trial court abuses its discretion

[2] Similarly, federal law is clear that

> during the guilt phase of a trial, a criminal defendant has a right to remain free of physical restraints that are visible to the jury; that the right has a constitutional dimension; but that the right may be overcome in a particular

and requires a defendant to wear restraints, the defendant must show that he suffered prejudice as a result of the restraints to be entitled to relief." *People v Payne*, 285 Mich App 181, 186 (2009). And there is no prejudice if the jury does not perceive the shackles. *Id*.

In this case, the judge had no concerns about defendant's behavior for the first four days of the trial. However, an attending deputy relayed a concern from the sheriff that an individual charged with three counts of open murder should be shackled. Without any further investigation or reflection, and over the objections of defense counsel, the trial court ordered defendant shackled. The court staff and defense attorney attempted to hide the leg iron from the jury by placing cardboard boxes in front of defendant's feet.

Prior to the *Ginther* hearing, the defense sent out a postcard to jurors asking: "During the trial of defendant Zacharie Borton, did you notice whether Mr. Borton was wearing shackles or leg irons?" One juror returned the postcard with the box marked "Yes." But, when subpoenaed for the *Ginther* hearing, the juror was upset about having to testify and, according to the defense investigator who sought his testimony, asked whether he could " 'just say [he] checked the wrong box' " and said, " 'I never should have sent that postcard back.' " At the *Ginther* hearing, the juror said he made a mistake filling out the postcard, said that defendant was always sitting down when the jury entered, and said that he did not base his decision to convict on whether defendant was shackled during trial. The trial court concluded that the jury did not see the shackles and that defendant therefore suffered no prejudice. The Court of Appeals refused to disturb this finding.

Once again, in my view, the error is clear: the trial court ordered defendant shackled halfway through trial without justification. Indeed, the Court of Appeals chastised the trial court for relying on a "general concern," as opposed to any evidence or particularized finding, when deciding to shackle defendant halfway through the trial. *Borton*, unpub op at 7.

Further, I disagree with the lower courts' prejudice analysis. Justice THOMAS's thoughtful concurrence questions the no-visibility, no-prejudice standard and suggests that shackling is problematic even when a defendant cannot show that the jury perceived the restraints. She raises an important point and one we should explore. However, here, I do not believe we need to reach that question because the evidence indicates that the jury perceived the shackles.

> instance by essential state interests such as physical security, escape prevention, or courtroom decorum. [*Deck v Missouri*, 544 US 622, 628 (2005).]

It seems clear that the jury both saw and heard the shackles. While one juror testified that he did not see the shackles, the record contradicts his post hoc testimony. The court ordered defendant to stand—a position that would reveal the restraints—each time the jury entered and exited the room. As Justice THOMAS notes, this formality repeated 47 times over the course of the trial. Additionally, video from the sentencing phase of trial indicates that the shackles would have been audible to the jury whenever defendant shifted in his seat.[3] Further, I worry that the midtrial timing of the shackling was particularly prejudicial. Logic dictates that the jury would see and hear the shackles for the first time on the fifth day of trial and assume that defendant had misbehaved. In other words, the shackles not only undermined the presumption of innocence, they also painted defendant as a violent and unruly individual.

In sum, the lower courts and I agree that the trial court erred by ordering defendant shackled. But I believe that defendant has demonstrated prejudice.

V. CUMULATIVE ERROR

Finally, even if the serious errors noted above do not individually warrant consideration of a new trial, I find that cumulatively, the errors are troublesome. "The cumulative effect of several minor errors may warrant reversal even where individual errors in the case would not warrant reversal." *People v Knapp*, 244 Mich App 361, 388 (2001). "In making this determination, only actual errors are aggregated to determine their cumulative effect." *People v Bahoda*, 448 Mich 261, 292 n 64 (1995). "Thus, 'cumulative error,' properly understood, actually refers to cumulative unfair *prejudice* . . . ." *People v LeBlanc*, 465 Mich 575, 592 n 12 (2002).

As set forth in the above sections, there were at least three *actual* errors in defendant's trial: the trial court improperly admitted other-acts evidence, painting a picture of defendant as an inherently violent person; the trial court excluded defendant from the jury view without an affirmative waiver of his right to be present, impeding his ability to correct a misstatement about material evidence; and the trial court shackled defendant halfway through the trial without reason, risking the impression that defendant had acted out. I believe that when considered together, it is possible that these errors unfairly prejudiced defendant.

When assessing the errors individually, the prosecution and the Court of Appeals suggested that because the jury rejected a first-degree murder conviction for Pauli and hung on the murder charge for Kantzler, the jurors weighed the evidence for each charge

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[3] MLive, *Judge John McBain Sentences Zacharie Borton on Two Murder Charges* (May 4, 2022) <https://www.youtube.com/watch?v=OeiTT1h-4Jc> (accessed November 13, 2025).

carefully and the errors were not prejudicial. However, this divided outcome could cut the other way as well: it shows that it was a close case. Perhaps if the jurors had not heard about defendant's domestic violence incidents and had not seen him wearing shackles, they might have assigned him less culpability. Hearing oral argument on the application for leave to appeal would have allowed the Court to consider how the errors interacted and whether, together, they deprived defendant of his right to a fair trial. Accordingly, I respectfully dissent from the Court's decision to deny leave to appeal.

CAVANAGH, C.J., joins the statement of WELCH, J.