STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

OLIVER FRENCH, JR.,

Defendant-Appellant.

UNPUBLISHED
July 15, 1997

No. 186834
Detroit Recorder's Court
LC No. 94-010499

Before: White, P.J., and Cavanagh and J. B. Bruff*, JJ.

PER CURIAM.

A jury found defendant guilty but mentally ill of first-degree murder, MCL 750.316; MSA 28.548, second-degree murder, MCL 750.317; MSA 28.549, assault with intent to commit murder (two counts), MCL 750.83; MSA 28.278, and possession of a firearm during the commission of a felony, MCL 750.227b; MSA 28.424(2). Defendant was sentenced to life imprisonment without parole for the first-degree murder conviction, fifteen to thirty years' imprisonment for each of the second-degree murder and assault with intent to murder convictions, and two years' consecutive imprisonment for the felony-firearm conviction. On appeal, defendant challenges the trial court's giving a supplemental deadlock instruction to the jury to continue deliberations, in defense counsel's absence, as violative of his Sixth Amendment right to counsel and MCR 6.414, and also argues that the instruction substantially departed from ABA standard jury instruction 5.4 and was coercive. Additionally, he challenges limitations placed on jury voir dire. We affirm.

I

After a fourteen day trial, the jury began deliberating on the afternoon of April 27, 1995. The jury was instructed to choose a foreperson and, about ten minutes later, the jury was dismissed until the next morning.

---

* Circuit judge, sitting on the Court of Appeals by assignment.

On April 28, 1995 the jury began deliberating around 9:15 a.m.[1] At about 2:58 p.m. that afternoon, the jury sent out the first of three notes indicating it was deadlocked. The first note stated "We can't reach a unanimous decision. Our minds are set." The jury was brought into the courtroom at 3:25 p.m., and the court stated that it had received the note, but that it was adjourning for the day and weekend.

On the morning of Monday, May 1, outside the jury's presence, the court informed counsel that it was going to read the deadlocked jury instruction to the jury because "[T]hey have not deliberated long enough in my mind." The following colloquy ensued:

> MR. HUTTING [prosecutor]: I have no objection to that, Judge. I think that we have spent by my count 13 trial days trying this case. That's from opening statement to final argument. We spent another four trial days seeking to pick a jury, picking the jury. So that's 17 actual trial or working days.
>
> And in a case of that long [sic], obviously one day of deliberation is nowhere near sufficient, and I think that we should indicate that to the jury, and whatever can be done to help them reach a verdict or assist them, we are here to do that.
>
> THE COURT: All right.
>
> MR. PITTS [defense counsel]: My position, Judge, is that in light of the note, the definitive nature of the note, it doesn't appear to me that we have to be conscious of running a forced verdict type concept on the jury. That is, this type of deadlock jury instruction I guess it is similar to the Allen Charge that I heard sometime before, is one that seems to coerce a jury, and I am not too sure that is what we want to do.
>
> I agree that not a lot of time has elapsed since the time the deliberations began, but by the same token the definitive nature of the note seems to say that it doesn't matter how much time we are allowed, it doesn't matter indeed what instruction is given, our minds are made up, and not we are unable or looks like we are unable, we are definitely of the opinion we can't reach a verdict.
>
> So my position is that I would object to the instruction, and I think that as difficult as it might be, that a mistrial would be in order.
>
> THE COURT: Thank you, counsel. But in view of the fact that basically we have had 16 or 17, 18 perhaps working days in this trial, I think it would be unrealistic to think that the jury would deliberate and come back with a verdict in a day's time.
>
> So, I am of the opinion that we should give this instruction and hopefully their minds are not set, and we don't force them to do anything. But I don't think they have had enough time to discuss the case.
>
> So I will bring the jury out.

The jury was brought into the courtroom at 9:30 a.m. and instructed as follows:

THE COURT: Good morning. I do trust you had a good weekend.

Okay. Ladies and gentlemen, we did receive your note Friday afternoon stating,

"We can't reach a unanimous decision. Our minds are set."

And I just called you out to indicate as you probably know we have been in a trial in this matter at least 13 or 14 days. We took a few days to select a jury. And this Court [is] of the opinion that you may still reach a verdict, but I don't think you have had enough time to deliberate adequately or to adequately deliberate I should say.

I'm going to read an instruction to you, and hopefully you will pay careful attention to it and try to make application to it before you are convinced that you your minds are set.

Ladies and gentlemen, it is your duty to consult with your fellow jurors and try to reach agreement if you can do so without violating your own judgment.

To return a verdict you must, as you know, all agree, and the verdict must represent the judgment of each of you. As you deliberate, you should carefully and seriously consider the views of your fellow jurors. You should talk things over in a spirit of fairness and frankness.

As we understand, and it is natural that there will be differences of opinion. But you should each not only express your opinion, but you should also give the facts and reasons on which you base your opinion. And by reasoning the matter out, jurors more often than not can reach agreement.

When you continue your deliberations again, ladies and gentlemen, don't hesitate to rethink your own views and change your opinion if you decide that it was wrong. But again we're not asking that any of you should give up your honest beliefs about the weight or effect of the evidence only because of what your fellow jurors think or only for the sake of reaching an agreement.

But again you should talk this matter over. Rethink your position. Make some adjustment if you find that your position was taken erroneously, but the most important thing, ladies and gentlemen, is to talk it over and to reason it out, and we are sure if you do this in the spirit of fairness and frankness and in an honest effort, that you really can come to a decision.

It would be far-fetched to think that you could arrive at a decision within, really within a day's deliberation because this matter has gone on for some time. But the thing

> is to communicate and explain ideas and give opinions for your ideas and talk about it. You can't reach a decision unless you talk about it. And as I stated before, sometimes it requires that you do rethink your position. But don't go in with your mind set. Have an open mind as you discuss things in fairness.
>
> So again we are going to ask that you return to the jury room. Deliberate and talk, exchange ideas. Give the basis for your various ideas and opinions, and we think you will be able to reach a fair verdict.
>
> We will ask that you retire again to the deliberation room, ladies and gentlemen, and try your best to reach a fair, honest decision not feeling pressured or anything of that nature, but you must exchange ideas and opinions. That is all we're asking that you do.
>
> Thank you.

The jury deliberated until about 3:20 p.m., when it sent its second note that it was deadlocked. The jury was then excused for the day.

On the morning of May 2, 1995, the court indicated to the jury that it had received its note of May 1, which stated "We have followed your instructions. We are still unable to reach a decision." The court then stated:

> Well, I just want to let you know that if there is anything we can do to assist you within the, of course, rules and the law, we will be more than happy to do that.
>
> If there are any exhibits or anything that you need, all you need to do is to ask for them. But again we just ask that you just at this time continue to communicate. Express your opinions, your views, reasons for them and just continue to deliberate and see if you can reach a verdict. But you must communicate. That you must do. Okay. That's all.

An hour and a half later, at about 11:00 a.m., the jury sent out its third note regarding being deadlocked, which the court took up after lunch, at a time when the prosecutor was present but defense counsel were not.

> THE COURT: I trust you had a good lunch. I did too. We received your last note that stated: "We are not able to reach a verdict. We are <u>not</u> underlined going a [sic] reach a verdict."
>
> That was approximately 11 o'clock this morning. Then we sent you to lunch to give you an opportunity to just kind of toss it around individually in your minds, and then we got you back this afternoon after lunch.

Now, ladies and gentlemen, I must remind you that you did take an oath to render a true and just verdict. But if you are to be expected to render a verdict, you must communicate, and you must talk with each other.

This case lasted how many days, Mr. Hutting? Approximately 16 days?

MR. HUTTING: Fourteen days trial. For jury selection –

THE COURT: All right. So it wouldn't be uncommon for deliberations to go on for some time, and I might remind you that you began to deliberate I think Friday, and I don't know how you can come to the conclusion that you are not going to reach a verdict.

Based upon your oath that you would reach a true and just verdict, we expect you will communicate. As I stated before, exchange ideas. Give your views. Give your opinions and try to come to a verdict, if at all possible.

But if you don't communicate, you know that you can't reach a verdict. And when you took the oath, that was one of the promises that you made by raising your hand taking the oath, that you would deliberate upon a verdict, to try to reach a verdict. And we told you at the outset it would not be an easy task, but we know that you can rise to the occasion.

So we'll ask that you return to the jury room. Thank you.

(Whereupon the jury leaves the courtroom at 2:10 p.m.)

The jury deliberated until 3:30 p.m. on May 2, 1995.

On May 3, 1995, defense counsel again moved for a mistrial, on the basis that the jury's three notes expressed definitively and emphatically that they could not reach a verdict, and that due process dictated that defendant be tried again. Defense counsel did not raise that he or co-counsel was not present when the court last instructed the jury to continue deliberating. Shortly after the court stated that it was not prepared to declare a mistrial, and as counsel continued to argue, the jury came in with its verdict.

Defendant moved for a new trial before sentencing on the basis that defendant was deprived of his Sixth Amendment right to counsel when the court instructed the jury, after receiving the third note regarding being deadlocked, in defense counsel's absence, and on the basis that the instruction was coercive.

The court heard defendant's motion for new trial on the day of sentencing. The prosecutor[2] argued that he was certain that, while neither Mr. Pitts nor Mr. Wilson were present when the court addressed the jury after the third note was sent out, Mr. Ty Jones had been present, and that Mr. Jones had been present throughout the jury's deliberations. Defense counsel responded by arguing that Mr.

Jones was merely an investigator assisting counsel, did not file an appearance, was licensed to practice law only in California, and never addressed the court or questioned witnesses.

The court noted that

> The only argument that . . . has some merit is the one that pertains to . . . . the actual representation of Mr. French by either of his lawyers.
>
> However, at this time this Court is prepared to go ahead with the sentencing, and I would deal with that issue as to the none [sic] representation by counsel of Mr. French at a period that this Court will concede would be a critical stage in these proceedings.

The court denied defendant's motion for new trial. This appeal ensued.

II

Defendant first argues that the Sixth Amendment and MCR 6.414(A) mandate that his conviction be reversed because the trial court gave supplemental instructions to the jury and engaged in a colloquy with the prosecutor in defense counsel's absence. Defendant argues that a harmless error analysis does not apply, and even if it does, the error was not harmless. Relatedly, defendant asserts that the supplemental instruction requires reversal, in and of itself, because it substantially deviated from ABA Standard Jury Instruction 5.4.

A criminal defendant has a due process right to be present and to have counsel present at all critical stages of trial. *Rushen v Spain*, 464 US 114, 117; 78 L Ed 2d 267; 104 S Ct 453 (1983). The United States Supreme Court has "uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding." *United States v Cronic*, 466 US 648, 659 n25; 104 S Ct 2039; 80 L Ed 2d 657 (1984). Jury deliberations and the return of the verdict constitute critical stages of a criminal trial for purposes of the Sixth Amendment, although counsel's absence does not require automatic reversal. *Siverson v O'Leary*, 764 F2d 1208, 1217 (CA 7, 1985).

It is well-settled that once the jury has begun to deliberate, counsel must be given an opportunity to be heard before the trial court responds to any juror inquiry. *United States v Smith*, 31 F 3d 469, 471 (CA 7, 1994)(citing *Rogers v United States*, 422 US 35; 95 S Ct 2091; 45 L Ed 2d 1 (1975)). Communications with a deliberating jury outside the presence of the counsel are prohibited. *People v Wytcherly*, 172 Mich App 213, 217-218; 431 NW2d 463 (1988), on reh'g 176 Mich App 714 (1989); MCR 6.414. However, automatic reversal does not necessarily follow. *People v France*, 436 Mich 138, 142-143; 461 NW2d 621 (1990). It is incumbent on a reviewing court to first categorize the communication that is the basis of the appeal as either substantive, administrative, or housekeeping. *Id.* Administrative communications include instructions that encourage a jury to continue its deliberations, and carry no presumption of prejudice. Upon an objection, the burden of persuasion lies with the nonobjecting party to demonstrate that the communication lacked any prejudicial effect. *Id.* at 143. Alternatively, a reviewing court, upon its own volition, may find that an instruction which

encourages a jury to continue its deliberations was prejudicial to the defendant because it violated ABA Standard Jury Instruction 5.4(b). *Id.* at 143-144, 163-164. In the instant case, applying this analysis, we conclude that while defendant's Sixth Amendment right was violated, reversal is not required.

In *People v Sullivan*, 392 Mich 324, 341-342 (1974), the Michigan Supreme Court adopted the American Bar Association's Minimum Standard for Criminal Justice 5.4 as the instruction that should be read to juries that are deadlocked. The most recent version of the ABA instruction was quoted in *People v Pollick*, 448 Mich 376, 381-382; 531 NW2d 159 (1995), and is as follows:

> (a) Before the jury retires for deliberation, the court may give an instruction which informs the jury:
>
> (i) that in order to return a verdict, each juror must agree thereto:
>
> (ii) that jurors have a duty to consult with one another and to deliberate with a view to reaching an agreement, if it can be done without violence to individual judgment;
>
> (iii) that each juror must decide the case for himself or herself but only after an impartial consideration of the evidence with the other jurors;
>
> (iv) that in the course of deliberations, a juror should not hesitate to reexamine his or her own views and change an opinion if the juror is convinced it is erroneous; and
>
> (v) that no juror should surrender his or her honest conviction as to the weight or effect of the evidence solely because of the opinion of the other jurors, or for the mere purpose of returning a verdict.
>
> (b) If it appears to the court that the jury has been unable to agree, the court may require the jury to continue their deliberations and may give or repeat an instruction as provided in paragraph (a). The court shall not require or threaten to require the jury to deliberate for an unreasonable length of time or for unreasonable intervals.
>
> (c) The jury may be discharged without having agreed upon a verdict if it appears that there is no reasonable probability of agreement.

CJI2d 3.12 is based upon the ABA model instruction.

Any substantial departure from the ABA instruction is reversible error. *Pollick*, *supra* at 382. However, the test for determining whether an instruction substantially departs from the ABA standard is whether the instruction is unduly coercive, not whether the words used match the words of the ABA standard:

> The significance of a 'substantial departure' is the risk that the resultant instruction will be more coercive than the ABA instruction. The test for determining whether a departure from ABA standard 5.4 is substantial cannot rest simply on a gross difference in language. The instruction that departs from ABA standard 5.4 must also have an

> undue tendency of coercion - e.g., could the instruction given cause a juror to abandon his conscientious dissent and defer to the majority solely for the sake of reaching agreement? [*People v Hardin*, 421 Mich 296, 314; 365 NW2d 101 (1984).]

The instruction should be examined in the factual context in which it was given. *Pollick, supra* at 384.

> Also relevant is whether the court required, or threatened to require, the jury to deliberate for an unreasonable length of time or for unreasonable intervals. . . . In addition, as we noted in *People v Goldsmith* [411 Mich 555; 309 NW2d 182 (1981)], a case concerning a *Sullivan* instruction given as part of the main charge to the jury, an instruction that calls for the jury, as part of its civic duty, to reach a unanimous verdict and which contains the message that the failure to reach a verdict constitutes a failure of purpose, is a substantial departure, but the reason it is, is because it tends to be coercive. [*Pollick*, 448 Mich at 384-385, quoting *Hardin*, 421 Mich at 316.]

"The optimum instruction will generate discussion directed towards the resolution of the case but will avoid forcing a decision." *Sullivan*, 392 Mich at 334.

In the case at bar, the trial court gave the instruction at issue after the jury had been deliberating for its third day (April 28, May 1 and May 2). Thus, this is unlike the situation in *Pollick, supra*, where the jury had not yet begun to deliberate. Instructions given to a jury that has not yet begun to deliberate are less likely to weigh on dissenting jurors or to be interpreted as a request for the jurors to abandon their views for the sake of reaching a verdict. *Pollick, supra* at 385. However, this does not alone render the instruction coercive. *Hardin, supra.*

The trial court's instructions must be read as a whole. *People v Moldenhauer*, 210 Mich App 158, 159; 533 NW2d 9 (1995). The trial court gave the standard jury instruction on deliberating before the jury began its deliberations. The court then instructed the jury consistent with the ABA model instruction and CJI2d 3.12 after the jury sent out its first note. Thus, the jury was well instructed on the deliberative process and was reminded, even after first declaring itself deadlocked, that no jury member should surrender his or her honest conviction solely for the purpose of returning a verdict. While the court's last instruction did not remind the jury of this point, it did not negate the point either. The court's supplemental instruction focused on deliberation and the need for discussion and communication. It told the jury that it had an obligation to communicate, not that it had an obligation to render a verdict. The court spoke of "try[ing] to come to a verdict" and of a promise to "deliberate upon a verdict, to try to reach a verdict." There was no plea to the jurors' civic duty or threat to require the jurors to deliberate indefinitely. The trial court's comments regarding the jurors' oath to return a verdict did not unduly emphasize the need to reach a verdict, but, rather, focused on the need to communicate with one another to try to reach a verdict, if possible. Further, the jury did not respond to the instruction by rendering a verdict immediately, or before retiring for the day. Rather, the jury resumed deliberations, deliberating for an hour and twenty minutes that afternoon, and 2 ½ to three hours the following morning, eventually rendering a verdict.

While the court did not follow the ABA standard instruction in its third instruction to the jury, this alone is not a basis for reversal. *Hardin, supra.* The court's supplemental instruction did not threaten the jurors into giving up their honest convictions, or imply that a juror should give up his or her views in order to reach a verdict. While we caution against departure from the ABA standard instruction and urge the trial court to measure any supplemental instructions against that standard before instructing the jury, we conclude that the overall effect of the court's supplemental instruction in this case was to focus on the obligation to communicate and that the instruction was not coercive.

III

Defendant next argues that the trial court refused to let defense counsel ask prospective jurors probing questions concerning their attitudes about race and thereby deprived defendant of a fair trial. We disagree. During voir dire, racial prejudice was a theme both sides explored because the victims were white and defendant is African-American. While the prosecutor only briefly mentioned this fact, defense counsel asked numerous questions and addressed the jury on this topic many times. Defense counsel posed two questions that the trial court disallowed following the prosecutor's objection. The first question had to do with the jurors' views on affirmative action, and the second question was whether a white juror would allow his daughter to marry a black man. The trial court restricted the questioning to more objective areas, such as whether the jurors socialized with those of other races and the racial composition of their neighborhoods. We conclude that in light of the extensive voir dire, defendant's inability to pursue these two questions did not deprive him of an opportunity to explore the prospective juror's racial attitudes and did not deprive him of a fair trial.

Affirmed.

/s/ Helene N. White
/s/ Mark J. Cavanagh
/s/ John B. Bruff

[1] At 10:25 a.m. the jury sent out a note requesting the curriculum vitaes and reports of the doctors that testified, copy of the transcript, and guidelines and definitions of possible verdicts. At 10:56 a.m., the jury was read the elements of the charges and counts, and the definitions of mental illness, mental retardation and legal insanity. The jury returned to deliberate at 11:15 a.m. and later that afternoon (time not indicated in transcript) sent out another note, which stated:

> Please, we respectfully request a copy of the elements of first degree and second degree murder. Definition of mental illness, legal insanity. We would like to have a copy, not to rely on memory. If we cannot have a copy, just tell us no. Please do not brings [sic] us out again.

The court sent the jury written instructions, and deliberations continued.

[2] The sentencing transcript indicates that the court made this argument, but it appears from the context that the prosecutor made these remarks.