STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 8, 2000
v	No. 214692 Wayne Circuit Court
MICHAEL K. COWAN, Defendant-Appellant.	LC No. 97-008086

Before: Murphy, P.J., and Kelly and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right from his conviction by a jury of possession with intent to deliver marijuana, MCL 333.7401(2)(d)(iii); MSA 14.15(7401)(2)(d)(iii). We reverse. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

On appeal, defendant argues that error requiring reversal occurred when no presiding trial judge responded to the jury's reasonable request to review certain testimony of two key witnesses. We agree. A trial judge has a duty to control all proceedings during a trial, MCL 768.29; MSA 28.1052, and "[w]henever the judge of any circuit or superior court fails to attend a court session, the court shall stand adjourned until a judge authorized to hold court is in attendance," MCL 600.1501(3); MSA 27A.1501(3). A trial judge's absence from the courtroom at any stage of the proceeding constitutes a non-jurisdictional defect, but the defect will not result in reversal unless a timely objection was made below and it resulted in prejudice to the complaining party. *People v Morehouse*, 328 Mich 689, 692; 44 NW2d 830 (1950), cert den 341 US 922 (1951); *People v Clyburn*, 55 Mich App 454, 459; 222 NW2d 775 (1974).

Here, while defense counsel expressed approval when a substitute judge responded to the jury's initial note requesting all transcripts, defense counsel placed an objection on the record in front of another judge after the verdict was entered, at which point counsel apparently became aware of the jury's subsequent notes to which no judge had responded. Counsel also filed a timely motion for new trial, which was denied. Thus, we find that the issue was properly preserved for appellate review.

When a jury makes a request to have certain testimony read back to resolve a disagreement or correct a memory failure, a trial court cannot simply refuse all such requests, but must exercise its discretion to assure fairness and to refuse unreasonable requests. *People v Carter*, ___ Mich ___; ___ NW2d ___ (No. 113817, issued 6/27/00), slip op pp 5, 14; *People v Howe*, 392 Mich 670, 675-676; 221 NW2d 350 (1974). The court may order the jury to deliberate further without the requested review, so long as the possibility of having the testimony read back at a later time is not foreclosed. MCR 6.414(H). In *People v Smith*, 396 Mich 109; 240 NW2d 202 (1976), the trial judge specifically instructed the jury before it began deliberations that the opportunity to have testimony read back was foreclosed. This Court had affirmed the defendant's conviction, concluding that the error was harmless because the jury indicated no confusion or ambiguity as to the testimony of witnesses, and the jury had reached its verdict in less than two hours. *People v Smith*, 65 Mich App 95, 100; 237 NW2d 199 (1975). The Supreme Court reversed, holding that the harmless error doctrine could not be applied to the facts of the case:

> Since the judge specifically foreclosed any rereading, it is impossible for one not present in the jury room to know if in fact the jury needed testimony read back to it 'to resolve a disagreement or correct a memory failure.' *Howe, supra* at 676. Although we pointed out potential sources of ambiguity in *Howe*, we also said, 'We have no knowledge, of course, of the extent of the jury's confusion.' *Id.* at 678. We were able in *Howe* to pinpoint the jury's concern about specific testimony because the instruction foreclosing rereading came after the jury had begun deliberating and in response to a request to the court for further enlightenment. In this case, the judge's instruction before the jury began deliberations that a request would not be honored informed the jury that a request would have been unavailing. [*Smith, supra* at 111.]

Here, the trial judge's absence from the courtroom resulted in a complete failure to exercise his or her discretion in responding to the jury's requests. Following the substitute judge's proper instruction to the jury the day before to narrow their request to specific testimony, the jury complied and sent what appears to be a reasonable request to review certain testimony of the two most important witnesses at trial -- Sergeant Lewis and defendant. The evidence against defendant was strong, but only if it is assumed that the jury found the police witnesses to be credible. Hence, a determination of prejudice to defendant can only be based on speculation as to what occurred in the jury room when no response was given to their requests.[1] Absent any factual basis upon which to review whether the error committed was harmless, application of the harmless error doctrine is inappropriate. *Smith, supra* at 111-112.

Moreover, harmless error cannot be demonstrated by the fact, as found by the trial court in denying defendant's new trial motion, that the jury reached a verdict a half-hour after no response was

[1] In his motion for new trial and appeal brief, defendant alleges that after the court bailiff delivered the 10:30 a.m. note from the jury, the court clerk was overhead in a loud voice to say "they ain't getting nothing." However, defendant has not submitted an affidavit from anyone with personal knowledge of this alleged statement. Therefore, it is not relevant to this appeal.

made to its note seeking a status as to its request for a review of specific testimony. In *Smith, supra* at 111, the Court rejected a similar conclusion drawn by this Court in finding harmless error:

> It is conjectural to point to the time of jury deliberation, as the Court of Appeals did, as support for the supposition that the jury was not confused; it could also mean that those jurors who did not remember specific testimony, after being advised that they could not get additional help, allowed themselves to be persuaded by those who did remember. Conjecture about what actually went on in the jury room should not be the basis for determining whether the error was harmless. The fact is we do not know what occurred in the jury room.

Given the foregoing, we hold that the absence of a trial judge from the courtroom, and the consequent failure to respond to the jury's notes, cannot be deemed harmless error. See also *People v Lukity*, 460 Mich 484, 496; 596 NW2d 607 (1999).

Reversed.

/s/ William B. Murphy
/s/ Michael J. Kelly
/s/ Michael J. Talbot