

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EDWARD LEE BELL,

Defendant-Appellant.

UNPUBLISHED

December 14, 2004

No. 247714

Wayne Circuit Court

LC No. 02-1628-01

Before: Whitbeck, C.J., and Saad and Talbot, JJ.

PER CURIAM.

A jury convicted defendant Edward Lee Bell of one count each of possession of a firearm by a felon,¹ possession of a firearm during the commission of a felony (felony-firearm),² and possession of body armor,³ and two counts of possession of a firearm in a motor vehicle.⁴ The jury acquitted defendant of one count of carrying a concealed weapon.⁵ The trial court sentenced defendant to a mandatory term of five years in prison for the felony-firearm conviction,⁶ and to a consecutive term of two years' probation for the remaining convictions.⁷

I

¹ MCL 750.224f.

² MCL 750.227b.

³ MCL 750.227g.

⁴ MCL 750.227c.

⁵ MCL 750.227.

⁶ This was a repeat conviction of felony-firearm, which mandates a five-year term as opposed to the two-year term imposed for a first offense.

⁷ This represented a downward departure from the sentencing guidelines. The trial court cited defendant's cooperation with law enforcement officials in the investigation of several other crimes as the basis for this departure from the guidelines.

Defendant asserts that he was denied a fair trial because the trial court communicated with the jury in the absence of the parties in violation of MCR 6.414(A).⁸ The prosecution concedes that the trial court communicated with the jury in violation of MCR 6.414(A), but argues that reversal is not warranted because the nature of the communication was such that defendant was not prejudiced, and because defense counsel promptly objected at trial, and together with the trial court, fashioned a remedy that waived any error.

During the course of jury deliberation, the jury sent a note to the trial court, and asked, “[d]o we have to agree either way in the voting process?” The trial court responded by sending the courtroom deputy sheriff into the jury room, “and told them the judge instructs you it has to be unanimous.” When defense counsel learned that this had happened, he objected to the trial court, and characterized its actions as inappropriate. Defense counsel then asked the trial court to bring the jury back into the courtroom to instruct the jury that a guilty verdict must be unanimous. The trial court called the jury into the courtroom and read the following instruction:

[Y]ou have to, I, this court cannot instruct you how to vote. Okay? I can’t tell you how to vote. Nobody can tell you how to vote. That is entirely up to you. Okay?

And when you’re discussing this case, and you’re discussing the testimony and you’re deciding the charges, each one of you has to make up his or her own mind. Okay. It’s that simple. But in a criminal case, a guilty verdict must be unanimous. That means that every one of you must, must vote to convict.

It is undisputed here that the trial court, when it sent the deputy to instruct the jury, communicated with the jury in violation of MCR 6.414(A). However, while Michigan law once provided an automatic reversal rule with respect to any trial court communication with the jury in violation of MCR 6.414(A), that rule was modified by our Supreme Court in *People v France*, 436 Mich 138, 162; 461 NW2d 621 (1990). In place of an automatic reversal rule, the Court instituted a rule that “centers on a showing of prejudice.” *Id.* The Court in *France* created three categories into which a trial court’s communications with the jury fit: (1) substantive, (2) administrative, and (3) housekeeping. *Id.* at 163.

Substantive communication encompasses supplemental instruction on the law given by the trial court to a deliberating jury. A substantive communication carries a presumption of prejudice in favor of the aggrieved party regardless of whether an objection is raised. The presumption may only be rebutted by a firm and definite showing of an absence of prejudice.

Administrative communications include instructions regarding the availability of certain pieces of evidence and instructions that encourage a jury to continue its deliberations. An administrative communication has no presumption of prejudice. The failure to object when made aware of the communication will be

⁸ MCR 6.414(A) states, in relevant part, that a trial court “may not communicate with the jury or any juror pertaining to the case without notifying the parties and permitting them to be present.”

taken as evidence that the instruction was not prejudicial. Upon an objection, the burden lies with the nonobjecting party to demonstrate that the communication lacked any prejudicial effect. [*Id.*, citations omitted.]

“Housekeeping” communications pertain to meal orders, the use of rest rooms, and other matters that have no relation to the case that the jury is deciding. *Id.* at 164. Housekeeping communications “carr[y] the presumption of no prejudice.” *Id.*

We conclude that the instruction given here, one that clearly and specifically addressed the jury’s determination of defendant’s guilt or innocence, was a substantive communication. Because this substantive communication was made outside the presence of defendant and the prosecution, there is a presumption of prejudice. *France, supra* at 163. However, the prosecution may overcome this presumption with a clear showing that defendant was not prejudiced. *Id.* The prosecution maintains that defendant was not prejudiced because defense counsel requested that the trial court recall the jury, and give the jury an instruction, on the record and in the presence of defendant and the prosecution, that a guilty verdict must be unanimous. The trial court complied with defense counsel’s request. The jury is presumed to follow the trial court’s instructions. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). We agree with the prosecution that defendant was not prejudiced here, because his trial counsel requested a remedial instruction be given, and the trial court complied.

II

Defendant argues that the trial court improperly instructed the jury with respect to the definition of the “possession” element of the felony-firearm charge. However, defendant concedes that the issue is waived. This issue is waived because defendant’s trial counsel expressed satisfaction with the instruction in question at trial. *People v Carter*, 462 Mich 206, 215-219; 612 NW2d 144 (2000). This Court is precluded from reviewing an issue that has been waived because waiver “extinguishes” any error. *Id.*

III

Defendant says that he was denied a fair trial and impartial jury because the trial court did not sua sponte declare a mistrial when a juror failed to appear for deliberations on the third and final day of deliberations.

The juror in question telephoned the court, and stated that he would not be in court because he was ill. However, the trial court ultimately learned that the juror, a postal worker, had actually returned to work, informed his supervisor that “he was through” with his jury service, and that he had gone out to deliver mail on his postal route. The trial court issued a bench warrant for the juror’s arrest. Eventually, the court clerk ultimately made contact with the juror, and told him that deputies were on the way to pick him up. The juror stated that he was on his way to court, and appeared shortly after noon. The trial court sent him directly to the jury room, where the juror resumed deliberations with the jury, which returned its verdict at approximately 2:20 p.m.

Defendant failed to timely object to the fact that the juror was immediately returned to the jury to deliberate. Defense counsel did express dissatisfaction with the way the trial court

handled the incident, but waited until after the verdict was returned to express this dissatisfaction; additionally, defense counsel did not request any specific action.⁹ Accordingly, this Court will review this unpreserved error for plain error that affects defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). Defendant argues that despite the fact that defense counsel made no objection, the trial court should either have sua sponte declared a mistrial, or at the very least questioned the juror about his actions. However, our Supreme Court has held that sua sponte declarations of mistrials are discretionary, and appropriate where "the judge is persuaded that such emergent circumstances exist that 'justice . . . cannot be achieved without aborting the trial . . .'" *People v Clark*, 453 Mich 572, 581 n 6; 556 NW2d 820 (1996), quoting *United States v Perez*, 22 US (9 Wheat) 579, 580; 6 L Ed 165 (1824).

We hold that defendant has not made a showing that the trial court abused its discretion in not declaring, sua sponte, a mistrial. Moreover, we hold that any error that may have occurred here is not plain error, and thus, does not require reversal. *Carines, supra*.

Affirmed.

/s/ William C. Whitbeck
/s/ Henry William Saad
/s/ Michael J. Talbot

⁹ Indeed, defense counsel stated that, "I'm not suggesting that this court didn't deal with it in the appropriate way."