STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JESSE PEOPLES,

Defendant-Appellant.

UNPUBLISHED
December 14, 2004

No. 250680
Wayne Circuit Court
LC No. 03-003825-01

Before: Cavanagh, P.J., and Jansen and Fort Hood, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of first-degree premeditated murder, MCL 750.316(1)(a), first-degree felony murder, MCL 750.316(1)(b), felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent terms of life imprisonment for each murder conviction, and thirty-eight months to five years' imprisonment for the felon in possession conviction, and a consecutive two-year term of imprisonment for the felony-firearm conviction. He appeals as of right. We remand for modification of defendant's judgment of sentence to reflect a single conviction and sentence for first-degree murder, supported by two different theories, but affirm in all other respects.

Defendant's dual convictions of both first-degree premeditated murder and first-degree felony murder, arising from the death of a single victim, violate the constitutional protections against double jeopardy. *People v Long*, 246 Mich App 582, 588, 633 NW2d 843 (2001). The appropriate remedy is to modify the judgment of sentence to specify a single conviction of first-degree murder, supported by two different theories. *Id.* Accordingly, we remand for this purpose.

Next, defendant raises several claims of error associated with the trial court's response to a jury note asking, "Are we allowed to see the transcript." In response, the court advised the jury that "the transcript is not available." Neither defendant nor the attorneys were present when the trial court responded to the jury's note. Defendant first argues that the trial court's response violated MCR 6.414(H), which provides:

> Review of Evidence. If, after beginning deliberation, the jury requests a review of certain testimony or evidence, the court must exercise its discretion to ensure fairness and to refuse unreasonable requests, but it may not refuse a

> reasonable request. The court may order the jury to deliberate further without the requested review, so long as the possibility of having the testimony or evidence reviewed at a later time is not foreclosed.

This Court reviews a trial court's decision whether to grant a jury's request to review certain testimony for an abuse of discretion. *People v Davis*, 216 Mich App 47, 56; 549 NW2d 1 (1996). Here, the trial court did not abuse its discretion in responding to the jury's inquiry. The jury's note did not inquire about the availability of specific testimony. To the extent the jury's request can be characterized as a request to see the entire transcript, it was unreasonably broad. Moreover, the trial court's response merely advised the jury, accurately, that a transcript was not available. The court did not foreclose the future possibility of *rehearing* specific testimony. Under these circumstances, the trial court's response did not violate MCR 6.414(H), and the court did not abuse its discretion. *Davis, supra.*

Defendant further argues that reversal is required because the trial court's response occurred ex parte. While we agree that an improper ex parte communication took place, reversal is not warranted absent a showing of prejudice. *People v France*, 436 Mich 138, 162-163; 461 NW2d 621 (1990). Here, the trial court's communication may be categorized as an administrative communication because it concerned the availability of evidence. *Id.* at 163. An administrative communication has no presumption of prejudice. *Id.* Because actual prejudice has not been shown, reversal is not warranted.

Defendant also characterizes this issue as a violation of his right to be present at trial and a violation of his right to counsel during critical stages of trial. We disagree. An accused has a right to be present at his trial. This right is conferred by statute, MCL 768.3, impliedly guaranteed by the federal and state Confrontation Clauses, US Const, Am VI; Const 1963, art 1, § 20, and also grounded in common law. *People v Mallory*, 421 Mich 229, 246 n 10; 365 NW2d 673 (1984). But a defendant's absence from a part of his trial warrants reversal only if "there was any reasonable possibility that defendant was prejudiced by his absence." *People v Armstrong*, 212 Mich App 121, 129; 536 NW2d 789 (1995). In this case, defendant has not demonstrated actual prejudice arising from his absence during the trial court's brief response to the jury's inquiry concerning an administrative matter.

A criminal defendant also has a due process right to have counsel present at all critical stages of trial. *Rushen v Spain*, 464 US 114, 117; 104 S Ct 453; 78 L Ed 2d 267 (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 n 25; 104 S Ct 2039; 80 L Ed 2d 657 (1984). But the determination whether a trial court's communication with the jury is a critical stage depends on the nature of the communication. See *Hudson v Jones*, 351 F3d 212, 216-218 (CA 6, 2003). Because the brief communication in this case was administrative in nature, as opposed to a communication of substantive law, we conclude that it did not involve a critical stage of the trial and that a harmless error analysis is appropriate. *Rushen, supra* at 119. This conclusion is supported by our Supreme Court's decision in *France*, *supra* at 163, wherein the Court recognized that different presumptions of prejudice arise depending on the nature of an ex parte communication. Accordingly, because prejudice may not be presumed, and because actual prejudice has not been shown, reversal is not warranted.

Finally, defendant argues that trial counsel was ineffective for failing to call a police officer as a witness. We disagree. Because there was no *Ginther*[1] hearing, our review of this issue is limited to mistakes apparent from the record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). A defendant seeking a new trial on the ground that trial counsel was ineffective bears a heavy burden. To justify reversal under either the federal or state constitutions, the defendant must show that counsel's performance was deficient, and that the deficient performance was prejudicial. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). In so doing, the defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Id.*

The decision whether to call a witness is presumed to be a matter of trial strategy, which this Court will not second-guess with the benefit of hindsight. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999); *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999). Further, the failure to call witnesses constitutes ineffective assistance of counsel only if it deprives the defendant of a substantial defense. *People v Hoyt*, 185 Mich App 531, 537-538; 462 NW2d 793 (1990).

Defendant argues that the witness, a police officer, could have refuted testimony that defendant was driving the Jaguar at the time of his arrest, and instead, would have identified Cornelius Harris as the driver. Defendant asserts that such testimony would have contradicted Harris' version of the circumstances surrounding the arrest and linked Harris to the gun that killed the victim, which was located on the driver's side floorboard of the Jaguar. We conclude that counsel's failure to call the police officer as a witness did not deprive defendant of a substantial defense. The police officer's identification of Harris as the driver of the Jaguar was inconsequential where it was undisputed that defendant and Harris were both present in the Jaguar and where this incident was unrelated to the charged crime. Moreover, witness Powell testified that the impact of the crash altered the location of the guns, and one gun was located outside the car following the crash. Furthermore, at trial, counsel attempted to limit the information that the jury heard about the circumstances surrounding defendant's arrest. Had counsel questioned the police officer about the arrest, it may have opened the door to additional information that counsel preferred the jury did not hear. Defendant has not overcome the presumption that counsel's decision not to call the police officer was a matter of trial strategy. *Rockey, supra.* Accordingly, defendant has not shown that trial counsel was ineffective.

Affirmed as modified and remanded for correction of the judgment of sentence. We do not retain jurisdiction.

/s/ Mark J. Cavanagh
/s/ Kathleen Jansen
/s/ Karen M. Fort Hood

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).