STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RODRIQUES POUNCHO JACKSON,

Defendant-Appellant.

UNPUBLISHED
December 27, 2007

No. 273310
Oakland Circuit Court
LC No. 2001-179908-FC

Before: Saad, P.J., and Jansen and Beckering, JJ.

PER CURIAM.

Defendant was charged with four counts of first-degree criminal sexual conduct (CSC-1), MCL 750.520b(1)(e), one count of third-degree criminal sexual conduct (CSC-3), MCL 750.520d(1)(b), and four counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Following a jury trial, defendant was convicted on three counts of CSC-1 and three counts of felony-firearm. He was sentenced to 20 to 40 years' imprisonment for each CSC-1 conviction and two years' imprisonment for each felony-firearm conviction. Defendant now appeals as of right. We affirm.

I

Defendant argues that his trial counsel rendered ineffective assistance of counsel. The trial court denied defendant's timely motion for a hearing pursuant to *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973). Because no hearing was held and no findings were made, our review is limited to errors apparent on the record. *People v Matuszak*, 263 Mich App 42, 48; 687 NW2d 342 (2004).

To establish ineffective assistance of counsel, defendant must show that defense counsel's performance was so deficient that it fell below an objective standard of reasonableness and denied him a fair trial. *People v Henry*, 239 Mich App 140, 145-146; 607 NW2d 767 (1999). Furthermore, defendant must show that, but for defense counsel's error, it is likely that the proceeding's outcome would have been different. *Id*. at 146. Effective assistance of counsel is presumed; therefore, defendant must overcome the presumption that defense counsel's performance constituted sound trial strategy. *Id*. See also *Strickland v Washington*, 466 US 668, 687, 690-691, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984).

A.

Defendant argues that he was denied effective assistance of counsel because his retained counsel was not present when the trial court responded to several notes from the jury. Defendant asserts that the absence of his retained counsel during this "critical stage" of the proceedings constituted structural error requiring automatic reversal under *US v Cronic*, 466 US 648; 104 S Ct 2039; 80 L Ed 2d 657 (1984). We disagree.

The Sixth Amendment, US Const, Am VI, right to counsel attaches to criminal prosecutions when the judicial process is initiated, and it extends to every "critical stage" of the proceeding. *People v Williams*, 470 Mich 634, 641; 683 NW2d 597 (2004). A "critical stage" requiring counsel is one in which "counsel's absence might derogate from the accused's right to a fair trial." *People v Buckles*, 155 Mich App 1, 6; 399 NW2d 421 (1986). A "critical stage" is "understood to mean prosecutorial activity which has some effect on the determination of guilt or innocence which could properly be avoided, or mitigated, by the presence of counsel." *People v Killebrew*, 16 Mich App 624, 627; 168 NW2d 423 (1969). A trial court's communication with a deliberating jury may constitute a "critical stage" of the proceedings depending on the nature of the communication. Compare *French v Jones*, 332 F3d 430 (CA 6, 2003) (giving a new, nonstandard supplemental instruction constituted a "critical stage") with *Hudson v Jones*, 351 F3d 212 (CA 6, 2003) (rereading instructions originally given to the jury did not constitute a "critical stage"). This is consistent with our state law, which draws different presumptions of prejudice depending on the nature of the communication. See *People v France*, 436 Mich 138, 142-144; 461 NW2d 621 (1990) (in determining whether a trial court's ex parte communication with the jury is prejudicial, the communication must first be categorized as either substantive, administrative, or housekeeping).

"Most claims of ineffective assistance of counsel are analyzed under the test developed in *Strickland*, *supra*." *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007). Under this test, counsel is presumed effective, and the defendant must show that counsel's performance fell below an objective standard of reasonableness, and that it is reasonably probable that the results of the proceeding would have been different but for counsel's error. *Strickland*, *supra* at 687, 690-691, 694. But in *Cronic*, *supra* at 659-662, the United States Supreme Court found that where counsel is absent or otherwise unable to assist the defendant during a "critical stage" of the proceedings, the defendant is entitled to relief even without a showing of actual prejudice. "The *Cronic* test applies when the attorney's failure is *complete*, while the *Strickland* test applies when counsel failed at specific points of the proceeding." *Frazier*, *supra* at 244 (emphasis in original), citing *Bell v Cone*, 535 US 685, 697; 122 S Ct 1843; 152 L Ed 2d 914 (2002).

We agree with the prosecution that the correct Sixth Amendment analysis in this case is the ineffective assistance of counsel test of *Strickland*, *supra*, rather than the presumed prejudice test of *Cronic*, *supra*. The record reveals that defendant's retained counsel was not present during jury deliberations because of a medical condition. During deliberations, the jury sent several notes to the trial court. In response to the notes, the trial court encouraged the jury to continue its deliberations, handled "administrative" and "housekeeping" matters, and referred the jury to the previously provided instructions. In only one instance did the trial court provide a "substantive" instruction. In response to a juror's inquiry, the trial court instructed the jury that a "gun does not have to be pointed to be a threat." We agree with defendant that this particular communication between the court and the jury constituted a "critical stage" of the proceedings necessitating defendant's right to counsel. Cf. *French*, *supra*. That said, however, defendant

cannot establish that he was completely deprived of the assistance of counsel during this "critical stage" of the proceedings. Substitute counsel represented defendant throughout jury deliberations, without objection from defendant. Defendant's substitute counsel signed the trial court's proposed responses to the jury's notes, indicating their approval of the court's instructions. Accordingly, we find the presumed prejudice test of *Cronic*, *supra*, inapplicable here.

Further, defendant has failed to show actual prejudice as a result of his retained counsel's absence during jury deliberations. Substitute counsel stood in for defendant's retained counsel throughout deliberations, and we disagree with defendant's assertion that "it was reversible error for [the jury's] questions to be reviewed by 'fill in' attorneys who could have had no real knowledge of the case." As indicated above, the majority of the communications between the jury and the trial court were "administrative" or "housekeeping" in nature and are presumed to be nonprejudicial. Cf. *France*, *supra* at 143-144. Furthermore, while the trial court provided one substantive instruction to the jury, that a "gun does not have to be pointed to be a threat," the instruction involved a question of law that any competent substitute attorney could review. Moreover, defendant has provided no evidence that he was actually prejudiced as a result of the instruction. Because defendant has failed to demonstrate how his retained counsel's presence during jury deliberations would have altered the outcome of the case, his ineffective assistance of counsel claim must fail. *Strickland*, *supra* at 691; *Henry*, *supra* at 146.

B.

Defendant next argues that he was denied effective assistance of counsel because his retained counsel elicited testimony from the officer-in-charge regarding defendant's post-arrest, post-*Miranda*[1] silence. Again, we disagree.

At trial, defendant testified that he and the victim engaged in consensual sexual intercourse and that after his arrest no one advised him of his constitutional rights or asked him to make a statement. Defense counsel argued that the police officers who investigated the incident failed to conduct "objective police work" and consider defendant's "side of the story." During cross-examination of the officer-in-charge, defense counsel asked if there was "any evidence in this case that anybody, at any point in time, took a statement [from defendant] or attempted to investigate [him] regarding his version of the facts of this case?" The officer testified that after being arrested and advised of his *Miranda* rights, defendant refused to make a statement. On redirect, the officer further testified that defendant "invoked his Constitutional right to remain silent."

Defendant has failed to establish that defense counsel's question to the officer-in-charge constituted anything but sound trial strategy. See *Henry*, *supra* at 146 (stating that "defendant must overcome a strong presumption that counsel's assistance constituted sound trial strategy"). This case hinged on the credibility of the witnesses, and defense counsel apparently sought to undermine the credibility of the police witnesses by demonstrating their decision to believe the

[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

victim's version of the facts and their unwillingness to learn defendant's "side of the story." We will not substitute our judgment for that of counsel regarding matters of trial strategy. *People v Kevorkian*, 248 Mich App 373, 414; 639 NW2d 291 (2001). The fact that defense counsel's strategy ultimately failed does not amount to ineffective assistance of counsel. *Id*. at 414-415. Moreover, the jury heard defendant testify that he and the victim engaged in consensual sexual intercourse and the jury apparently rejected defendant's version of the events. The credibility of the witnesses is within the province of the jury. *People v Williams*, 268 Mich App 416, 419; 707 NW2d 624 (2005). Therefore, defendant cannot establish that the outcome of the case would have been different but for defense counsel's alleged error in questioning the officer-in-charge. See *Henry*, *supra* at 146.

Defendant has failed to overcome the presumption of effective assistance of counsel. Reversal is not warranted.

II

Defendant further argues that the prosecutor engaged in misconduct by calling defendant a "predator" during closing arguments. Defendant's unpreserved claim of prosecutorial misconduct is reviewed for plain error affecting his substantial rights. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003). Plain error exists if the error resulted in the conviction of an innocent defendant or "seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of defendant's innocence." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Where a curative instruction could have alleviated any prejudicial effect, reversal is not warranted. *Ackerman*, *supra* at 449; *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001).

The role and responsibility of the prosecution is to seek justice, and not merely to convict; thus, the test for prosecutorial misconduct is whether a defendant was denied a fair and impartial trial. *People v Jones*, 468 Mich 345, 354; 662 NW2d 376 (2003); *Watson*, *supra* at 586. We review claims of prosecutorial misconduct on a case-by-case basis, examining the entire record and evaluating the prosecution's remarks in context. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). Generally, the prosecution has "great latitude to argue the evidence and all [reasonable] inferences relating to the [prosecution's] theory of the case." *People v Walker*, 265 Mich App 530, 542; 697 NW2d 159 (2005), vacated in part on other grounds 477 Mich 856 (2006). We evaluate the prosecution's comments in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Brown*, 267 Mich App 141, 152; 703 NW2d 230 (2005). The prosecution must not denigrate the defendant. *People v Bahoda*, 448 Mich 261, 283; 531 NW2d 659 (1995). Prosecutors may, however, "use 'hard language' when it is supported by evidence and are not required to phrase arguments in the blandest of all possible terms." *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996).

During closing arguments, the prosecutor stated in relevant part:

> [The victim], who is a human being, who has again been victimized, she was a foster child of this defendant's girlfriend, she was an easy target, and that man knew it. That makes that man the *predator* of the worst sort, because this man is a *predator*, ladies and gentlemen who prays [sic] on the weakest and most

vulnerable members of our society. She trusted him and he breached that trust in the most despicable way. That's why you are here.

* * *

This girl is raped by her foster mother's boyfriend. She tells those most closest to her the very next morning what that *predator* did to her. Her brother fled over to [the victim's friend's] house absolutely worried about what had happened to his sister because he knew something horrible happened. And when he got there, she was hysterical telling him that man raped [her]. And the . . . foster mother takes her to the hospital, like any other parent would do.

* * *

This girl went into the apartment to turn on the TV. She trusted him. And I want you to think about this. What does she tell you? I started to get a weird feeling. What is that weird feeling? What is it? It's a gut feeling knowing something is wrong.

There's your *predator*, ladies and gentlemen. This, what we have proven to you, and take a good look, because that is what a sexual *predator* looks like. Knowing he trusts her [sic], gets her into the apartment, foster mom had to call three times to find out where this girl was, sets her up, tells her I've been watching you. Why are you scared of me?

* * *

This is no different than what a *predator* does in the wild. They pick on the ones they perceived to be the weakest and most vulnerable. That's exactly what he did to her. [Emphasis added.]

We acknowledge that in calling defendant "a predator," the prosecutor did not use the blandest of all possible terms. The prosecutor's remarks were, however, supported by the evidence and responsive to defendant's theory that he and the victim engaged in consensual sexual intercourse. In *People v McElhaney*, 215 Mich App 269, 285; 545 NW2d 18 (1996), this Court found that calling the defendant "a monster" because he committed the charged offenses was permissible commentary on the evidence. Likewise, in this case, the evidence supported the assertion that defendant invited his girlfriend's foster daughter into his apartment, brandished a gun, and forced her to engage in vaginal intercourse and oral sex, arguably making him a "predator." Moreover, even if the prosecutor went too far in repeatedly calling defendant a "predator," the trial court cured any potential for error by instructing the jury that the lawyers'

statements and arguments were not evidence. Therefore, defendant cannot establish that the prosecutor's statements affected the outcome of the trial, and reversal is not required. *Ackerman*, *supra* at 449; *Watson*, *supra* at 586.

Affirmed.

/s/ Henry William Saad
/s/ Kathleen Jansen
/s/ Jane M. Beckering