STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 30, 2008
v	No. 269739 Macomb Circuit Court
STEVEN JAMES HOCH, Defendant-Appellant.	LC No. 2005-003002-FH

Before: Schuette, P.J., and Borrello and Gleicher, JJ.

PER CURIAM.

A jury convicted defendant of unarmed robbery, MCL 750.530, fourth-degree fleeing and eluding of a police officer, MCL 257.602a(2), larceny of less than $200 from a motor vehicle, MCL 750.356a(2)(a), and driving with a suspended license, MCL 257.904(3)(a). The trial court sentenced defendant as a fourth habitual offender, MCL 769.12, to concurrent terms of 114 to 180 months' imprisonment for the unarmed robbery conviction, 24 to 48 months for the fleeing and eluding count, and a year of incarceration for each of his convictions of breaking and entering a vehicle and operating with a suspended license. Defendant appeals as of right. We reverse and remand.

I. Factual and Procedural Background

Defendant saw a purse on the seat of LeAnn Goforth's parked, unlocked, unoccupied Chevrolet Yukon. Defendant stole the purse, carried it into his red truck, and drove away. Someone reported the robbery to Goforth, and she "went after" defendant in her Yukon. Goforth spotted defendant stopped at a traffic light, and blocked his progress by maneuvering her vehicle in front of his truck. She approached defendant's truck, opened his side door, and asked him to return her purse. During an ensuing argument, defendant either deliberately or accidentally moved his truck forward. Goforth described that when the truck hit her shoulder, she feared being "squish[ed]" between the two vehicles, and grabbed defendant's steering wheel to regain her balance. According to Goforth, defendant drove "about . . . ten feet" while she held onto his steering wheel.

Defendant testified that Goforth placed her foot inside his truck, grabbed the steering wheel, and attempted to look around the truck's interior for her purse. Defendant averred that as he was "shyin' away … kinda pushin' away" from Goforth, his foot slipped off the brake. He described that his truck lurched forward, and "she jumped out." After Goforth departed from

defendant's truck, he drove away. Goforth called 911 and followed defendant in her Yukon. Goforth admitted chasing defendant's truck at speeds exceeding 80 miles an hour. After defendant eventually stopped his truck at a busy intersection, the police arrested him. The prosecutor charged him with unarmed robbery, larceny from a person, and fleeing and eluding a police officer.

From the outset of this criminal prosecution through its conclusion, defendant contended that because he did not assault Goforth, the prosecutor could not prove that he possessed the intent required to convict him of unarmed robbery. Five months before trial, defendant brought a motion to quash the charges against him. Regarding the unarmed robbery count, defendant argued that Goforth's preliminary examination testimony failed to establish the requisite assault element of unarmed robbery. Circuit court Judge Donald Miller denied defendant's motion. In a brief written opinion, Judge Miller explained,

> Defendants' [sic] Motion to Quash Count I shall be denied; MCL 750.530 (as amended July 1, 2004). The amended statute overrules *People v Randolph*, 466 Mich 532, 436-437 (2002) by removing the requirement that force must be contemporaneous with the taking.

The case proceeded to trial before Judge Roland Olzark, a visiting judge. After the prosecutor rested, defendant brought a directed verdict motion contending that the prosecutor failed to present sufficient evidence of an unarmed robbery. Defense counsel argued that "there's been really no testimony as with respect to the assault, which is another element of the offense." Judge Olzark took defendant's motion "under advisement," and later denied it after the defense rested.

In her closing argument, the prosecutor acknowledged that whether defendant assaulted Goforth represented the primary question for the jury's consideration, summarizing the case as follows:

> [A]nother part of this case that's not an issue is the fact that the defendant stole Mrs. Goforth's purse. He's not contesting that. He said, yes, I went inside—I went . . . into her car, I stole her purse. Which means that when we come to the charge of robbery—robbery unarmed, that the larceny part, we already all agree. He agrees that he took the purse, he agrees that he lied about taking the purse. *The issue is is whether or not he assaulted or put LeAnn Goforth* . . . in fear. *So whether he assaulted her or whether he put her in fear.* [Emphasis supplied.]

Defense counsel admitted that defendant committed "a larceny from a motor vehicle." He disputed, however, that the prosecutor had proved the assault element of unarmed robbery:

> Now we've got—these elements obviously are very, very important and I know that you will consider them carefully when we go through here, but, you know, let's—let's look at these. First, as the prosecutor said, the defendant either assaulted or put in fear LeAnn Goforth. Now, the prosecutor will have you believe that she was placed in fear. I submit to you, that's not the case whatsoever. And the testimony was, from her, herself, that she had a . . . flood—I

> don't know if that was [the] right word, but she had a whole range of emotions and one of them was anger, but *she was not in fear*. She pursued this man. She confronted him. Whether you believe she got in the vehicle or not, she opened the door, she got in, and she was in his face. She was not fearful.
>
> So, therefore, the issue becomes was she assaulted? *And you will get an instruction on what the definition of assault is. And obviously, you're going to go over that and you're going to look at that very carefully and you have to decide whether or not this was an assault.* [Emphasis supplied.]

According to defense counsel, defendant had accidentally moved his truck forward by taking his foot off the brake. Counsel theorized,

> Now, whether or not you believe that it lurched forward or whether, you know, went forward ten feet, I mean, that's what we're talking about, the difference, that's a dispute. We have a lurch or ten feet, but regardless of that, was it his intent to assault her by doing that action? First of all, *I submit to you that it was accidental*, regardless of what happened, whether it was a lurch or ten feet or what have you, *it was merely accidental in nature*. He wanted to get away from her, granted. He denied having the purse and he wanted to get away, but you saw him. You . . . were able to . . . listen [to] him and look at his demeanor, assess his credibility, his composure. And you alone will decide whether or not he was telling the truth as to what happened. And he told you he had no intentions of assaulting her. He is a purse thief. He stole her purse and he wanted to get away from her. He didn't want to have anything more to do with her, but he knew he had to get away because she was going to call the police. So, I submit to you, then, there's no assault. There were no threats and that was clear from the evidence. Nobody made any threats. He didn't say to her, get the hell away [from] here, I'm going to . . . punch you or kick you. He didn't throw any objects at her. He had no weapons. He didn't say anything verbally or otherwise to cause an assault and she wasn't fearful. So, I submit to you, there was no assault.
>
> And down at the bottom, the fourth one, which is another element. LeAnn Goforth was present while the defendant was in the course of committing the larceny. And you've heard testimony that when this larceny from a motor vehicle occurred, it occurred from her truck while she was inside the gas station paying. It's clear, uncontroverted, all the witnesses we heard that she was not present when this purse was stolen.
>
> Now, the fact that she became present later, she came up and confronted him in the car, does that constitute being in the course of this larceny? And I submit to you that it's not. The larceny was over. He stole the purse, he was not fleeing or attempting—it says, or in flight after the commission of a larceny or an attempt to retain possession. He was not fleeing, at that point, he was stopped. He told you in his own words, I thought I'd stolen a purse, I thought I'd gotten away with it. In his mind, it was over. And but for LeAnn Goforth coming forth again, she initiated a second incident. So, it's separate. So, therefore there's no assault. She was not present during the course of committing a larceny. There

> was no flight and they did not—and the commission of the larceny, either in the flight or the attempted flight to retain possession, so he did not try to retain possession of the property because he already it, so that fails also. [Emphasis supplied.]

Judge Olzark instructed the jury during the afternoon of Friday, February 24, 2006. The trial transcript indicates that the prosecutor and defense counsel discussed and agreed on the jury instructions read by Judge Olzark. The jury began deliberating at approximately 3:30 p.m. At 4:55 p.m., Judge Olzark excused the jury for the weekend.

On Monday, February 27, 2006, Judge Miller returned from vacation. At approximately 3:18 p.m. that day, the jury returned its verdict, convicting defendant of all charged offenses. Six weeks later, on April 6, 2006, Judge Miller conducted a sentencing hearing. At the hearing, defendant questioned Judge Miller as follows:

> My regular judge—the original trial judge, Olzark, was a visiting judge and when you returned from vacation, while my jury . . . was deliberating after Judge Olzark left, the jury sent a note out asking for further instructions on an inadvertent assault—to how to apply an inadvertent assault as the assault element for robbery. And I wasn't in here. I was kept in the holding cell. And I would just like you to—ask you what I—I was told by my—even my attorney wasn't here. Somebody else stood in. I have no idea who it was, but he said that you refused further instruction on inadvertent assault and I don't know what happened. If I don't ask you now, I'll never know as long as I live. And that's why I'm just askin' to be filled in a little bit on what happened on that.

The following colloquy then took place between Judge Miller and defendant:

> *The Court*: As I recall, the jury was instructed to refer to their notes, refer to the jury instructions that they had before them, and refer to the testimony that they heard in this room. And also, to use their judgment as—as citizens, as—as qualified jurors to work through the evidence as they see it before them and . . . arrive at their own conclusion and that's as I recall. Obviously, I didn't keep notes, but that's what happened.
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> *Defendant*: The . . . only reason that it concerns me so much is I—the defense wanted an assault instruction and a specific intent instruction given to the jury. And we got a copy of all the written instructions that the jury had in the jury room. And they didn't have the assault instruction or the specific intent in the packet made up for them to—and it says right in the assault instruction, assault cannot happen by accident, but they didn't have that in there and they asked for further instruction.
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> *The Court*: I'm sure that Judge Olzark, at the conclusion of the instructions to the jury, asked defense counsel and the prosecutor whether they were satisfied with the instructions. And I—I wasn't there.
>
> *Defendant*: They were—they were. And they were satisfied—

The Court: —they were satisfied.

Defendant: —verbally.

The Court: End of argument.

Defendant: Okay. . . .

The prosecutor does not dispute that Judge Miller engaged in an ex parte, unrecorded conversation with the jury in response to a note that does not appear in the court record. The prosecutor also does not dispute that this conversation occurred in the absence of defendant and his trial counsel. Defendant's appellate counsel supplied this Court with a copy of a letter written by David Cucinella, the court reporter for the trial, stating, "Per your request, I have reviewed the videotape for the proceedings held on February 27, 2006 in front of Judge Donald Miller. There were no additional proceedings, and the transcript for this date is the complete proceedings for that day." The trial court record provided to this Court also does not include a copy of the written or recorded jury instructions, and contains no additional information regarding the jury's inquiry, or Judge Miller's response.[1] Based on the statements of Judge Miller and defendant, Judge Miller indisputably responded to the jury's question regarding a substantive legal issue in the absence of defendant or his counsel, and off the record. This communication qualifies as prejudicial constitutional error that requires reversal of defendant's convictions.

II. Analysis

A. Constitutional Rights Violated

A criminal defendant enjoys a due process right to be present at a proceeding "whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." *Snyder v Massachusetts*, 291 US 97, 105-106; 54 S Ct 330; 78 L Ed 674 (1934), overruled in part on other grounds in *Malloy v Hogan*, 378 US 1; 84 S Ct 489; 12 L Ed 2d 653 (1964). In *Faretta v California*, 422 US 806, 819 n 15; 95 S Ct 2525; 45 L Ed 2d 562 (1975), the United States Supreme Court reiterated its holding in *Snyder*, explaining,

> This Court has often recognized the constitutional stature of rights that, though not literally expressed in the document, are essential to due process of law in a fair adversary process. It is now accepted, for example, that an accused has a right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings. . . .

[1] The transcript supports defendant's claim that a copy of the instructions accompanied the jurors into the jury room when they began deliberating. Judge Olzark stated, "When you go to the jury room, you'll be given a written or electronically recorded copy of instructions you just heard." The trial court's failure to include the instructions in the record violated MCR 6.414(I), which provides that if the jury possesses a copy of the instructions, "the court must ensure that such instructions are made a part of the record."

Although a defendant need not be present during every interaction between a judge and juror, the Supreme Court has never retreated from the principle that "the right to personal presence at all critical stages of the trial and the right to counsel are fundamental rights of each criminal defendant." *Rushen v Spain*, 464 US 114, 117; 104 S Ct 453; 78 L Ed 2d 267 (1983). Citing *Snyder*, the Michigan Supreme Court observed in *People v Mallory*, 421 Mich 229, 247; 365 NW2d 673 (1984),

> A defendant has a right to be present during the voir dire, selection of and subsequent challenges to the jury, presentation of evidence, summation of counsel, instructions to the jury, rendition of the verdict, imposition of sentence, and any other stage of trial where the defendant's substantial rights might be adversely affected.

According to our Supreme Court, "the right to be present at trial is independent of and considerably broader in scope than the right of confrontation." *Id*.

Equally fundamental is the right of an accused to have representation by counsel during critical stages of a prosecution. "The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial." *United States v Cronic*, 466 US 648, 659; 104 S Ct 2039; 80 L Ed 2d 657 (1984). The gravity of a defendant's right to counsel is underscored by the United States Supreme Court's determination that "the complete denial of counsel during a critical stage of a judicial proceeding mandates a presumption of prejudice." *Roe v Flores-Ortega*, 528 US 470, 483; 120 S Ct 1029; 145 L Ed 2d 985 (2000).

The prosecutor does not contest that jury reinstruction is a critical stage of trial proceedings. *French v Jones*, 332 F3d 430, 438-439 (CA 6, 2003).[2] The prosecutor maintains, however, and the dissent agrees, that Judge Miller did not reinstruct the jury.[3] Assuming that reinstruction occurred, the prosecutor nevertheless suggests that Judge Miller sufficiently protected defendant's Sixth Amendment right to counsel by arranging for "someone . . . to fill in during [defense counsel's] absence."

Perhaps we could agree with the prosecutor's position, and the dissent's logic, if the record provided any evidence concerning the "somebody's" identity, and establishing that defendant consented to a substitution of counsel. But the record remains entirely silent regarding whether the stand-in "somebody" was in fact an attorney, a law clerk, or a passerby. In a strikingly similar scenario, the "somebody" who stood in for the defendant's counsel during jury

[2] The Sixth Circuit is not alone in this determination. Other federal circuits also have recognized that jury reinstruction qualifies as a critical stage. See *Curtis v Duval*, 124 F3d 1, 4-5 (CA 1, 1997), and *United States v Toliver*, 330 F3d 607, 613-614 (CA 3, 2003).

[3] The prosecutor in his brief on appeal entirely fails to refer to any authority for the proposition that Judge Miller did not "reinstruct" the deliberating jury, and thus has effectively abandoned this argument on appeal. *People v Schumacher*, 276 Mich App 165, 178; 740 NW2d 534 (2007). Nevertheless, we discuss this issue further in part II(B) of the opinion, *infra*.

reinstruction in *French* proved to be a mere observer of the trial, and not an attorney. *Id*. at 432. On the basis of the record in this case, it is simply impossible to conclude that the unknown person who apparently substituted for defense counsel was, in fact, qualified as counsel, or that defendant consented to the substitution. See *People v Evans*, 156 Mich App 68, 70-71; 401 NW2d 312 (1986) (finding error because the trial court appointed stand-in counsel at the sentencing hearing, and proceeded with sentencing over defendant's objection, and without ascertaining any explanation for defense counsel's failure to appear or the status of defense counsel's availability); and *Olden v United States*, 224 F3d 561, 568-569 (CA 6, 2000) (observing that a defendant must knowingly and intelligently approve the appearance of a substitute counsel on his behalf).[4] Because the record establishes only that neither defendant nor his counsel attended a critical stage of the proceedings, we must presume prejudice and reverse defendant's convictions.

B. Response to the Dissent's Finding that Judge Miller did not Reinstruct the Jury

The dissent concludes that Judge Miller did not reinstruct the jury because "the jury was not given any additional instructions and no instruction or testimony was reread." *Post* at 2. In reaching this conclusion, the dissent relies solely on *United States v Combs*, 33 F3d 667, 670 (CA 6, 1994). The majority cites *Combs* for the proposition that "[a] reinstruction 'goes beyond reciting what has previously been given; it is not merely repetitive.'" *Post* at 2, quoting *Combs, supra* at 670. But *Combs*, and the federal cases on which it relies, instead recognize the principle that a judge should meaningfully respond to a jury's confusion by supplying appropriate reinstruction.

The dissent's direct quotation from *Combs* derives from *United States v Nunez*, 889 F2d 1564 (CA 6, 1989),[5] which in turn borrowed the quotation from *United States v Giacalone*, 588 F2d 1158 (CA 6, 1978). In *Giacalone*, the jury asked two questions during deliberations. The first revealed that it could not reach a unanimous verdict, and requested the court's guidance. *Id*. at 1164. Without consulting defense counsel, the trial court returned a note to the jury stating,

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[4] In *Caver v Straub*, 349 F3d 340, 343 (CA 6, 2003), the Sixth Circuit affirmed a district court's grant of habeas corpus based on the appellate counsel's failure to raise an ineffectiveness of counsel claim. The district court conducted an evidentiary hearing and determined that the petitioner's trial counsel had been absent during reinstruction of the jury, although counsel for the petitioner's codefendants were present. *Id*. at 349-350, 353. Despite the presence of cocounsel, the Sixth Circuit presumed prejudice. *Id*. at 351-352.

[5] In *Nunez*, the jury asked questions indicating that it did not understand the definition of a conspiracy. *Id*. at 1567. Instead of answering the jury's questions directly, the trial court repeated its earlier instruction. *Id*. at 1567-1568. The Sixth Circuit disapproved, observing that

> the court must respond to [jury] questions concerning important legal issues. If the issue that is the subject of an inquiry has been fully covered in the court's instructions, a reference to or rereading of the instructions may suffice. In a case such as the present one, however, rereading the instructions did not answer the question, and could have been [mis]interpreted . . . . [*Id*. at 1569.]

"Please continue your deliberations." *Id*. The Sixth Circuit offered no criticism of the trial court's response to this question because the defendant's jury "did not solicit and the court did not give any Ex parte instructions about the merits of the case or the manner of the jury's deliberations." *Id*.

The jury later requested "further assistance on the definition of the term 'knowingly.'" *Giacalone*, *supra* at 1165. The trial court drafted instructions, and showed them to counsel. *Id*. The defendant's counsel objected to the supplemental instructions, but the trial court gave them over his objection. *Id*. The Sixth Circuit "subject[ed] the judge's instructions to close scrutiny because of the highly sensitive nature of his role at that state of the trial," but approved them. *Id*. at 1166. The defendant claimed that the mere giving of the supplemental instructions violated Fed R Crim P 30 "because they went beyond the instructions originally submitted to the jury." *Id*. The Sixth Circuit rejected this argument, however, explaining as follows:

> Our court has recognized the duty of the trial court to clear up uncertainties which the jury brings to the court's attention. We do not believe that Rule 30 precludes any supplemental instructions except those which simply recite what was previously given; were that so, the instructions would be merely repetitive and not supplemental. We prefer a rule which measures the propriety of a supplemental instruction not by whether it is a verbatim repetition but instead by whether it fairly responds to the jury's inquiry without creating prejudice which Rule 30 was designed to avoid. [*Id*.]

Contrary to the dissent's interpretation, the quoted material from *Combs* does not define "reinstruction," but explains or interprets that the federal rules permit supplemental instructions beyond mere repetition of the instructions previously provided. See also *United States v Duran*, 133 F3d 1324, 1334 (CA 10, 1998) ("[V]ague answers or mere exhortations to continue deliberating are plainly inadequate when the jury has demonstrated its misunderstanding of relevant legal principles.").

Furthermore, *Combs* itself does not support the dissent's view that "reinstruction goes beyond reciting what has previously been given." *Post* at 2. The Sixth Circuit described the factual scenario in *Combs* as follows:

> During deliberations, the jury forwarded the following handwritten note to the court:
>
> > We need further clarification on Count 4. Is Count 4 specific to which civil right was violated? Must it be dependent on Count 1?
>
> The court, through its law clerk, notified counsel for all parties that it was inclined to answer "yes" to the first question, and "no" to the second. The law clerk directed counsel to submit any comments or objections to the proposed responses to him, rather than to the court. The record does not reflect any such objections, although the defendants unsuccessfully attempted to supplement the record after trial with an objection purportedly given to the law clerk by Snow's counsel.

> Without further consultation, and without taking the bench, the district court responded in writing to the jury's questions. In answer to the jury's first query, the court wrote, "Yes. Please refer to Jury Instructions # 25(6) at pages 23-24, and to Count 4 of the Indictment." In response to the second question, the court simply wrote, "No." [*Id*. at 668-669.]

The Sixth Circuit characterized the trial court's communication with the jury as "supplemental instruction," explaining, "The defendants admit that the district court's initial jury instructions adequately represented the law, and that the supplemental instructions merely repeated these original instructions." *Id*. at 669. In other words, the Sixth Circuit recognized that the instructions repeated by the trial court constituted supplemental instructions. Despite that the supplemental instructions given in *Combs* imparted no new legal information, the Sixth Circuit disapproved the district court's decision to merely repeat the previous instructions:

> [T]he district court ordinarily does not discharge its duty by giving categorical "yes" or "no" answers, especially where, as here, the instructions involve sophisticated issues in a multi-count indictment. Upon receipt of questions from a deliberating jury, it is incumbent upon the district court to assume that at least some jurors are harboring confusion, which the original instructions either created or failed to clarify. Therefore, the trial judge must be meticulous in preparing supplemental instructions, taking pains adequately to explain the point that obviously is troubling the jury. …
>
> However, while we find that *the district court's supplemental instructions here were inadequate*, they were not plain error. The court's answers to the jury's queries certainly could have been more educational, but they were, in fact, legally correct. …" [*Id*. at 670 (emphasis supplied).]

According to the version of events confirmed by Judge Miller at defendant's sentencing hearing, Judge Miller provided the jury with supplemental instructions. The label ultimately attached to this process—supplemental instruction or reinstruction—does not matter. Irrespective whether the trial court merely repeats the previous instructions or gives additional information, the court imparts critically important information concerning the substantive law that the jury must apply. Here, Judge Miller supplemented the prior assault instruction by directing the jurors to refer to their notes and the written instructions. This supplemental instruction may or may not have been adequate, but it nevertheless qualified as *instruction*. See MCR 6.414(H) ("After jury deliberations begin, the court may give additional instructions that are appropriate."). Judge Miller thus supplied ex parte, substantive guidance to the jury during a critical stage of defendant's trial, and thereby violated his constitutional rights.

C. The Ex Parte Instruction Occasioned Prejudicial Error Requiring Reversal

Relying on *People v France*, 436 Mich 138; 461 NW2d 621 (1990), the prosecutor submits that an instruction given in the absence of a defendant does not necessarily prejudice him. A lengthy line of precedent establishes without question, however, that Judge Miller's ex parte communication qualified as both improper and prejudicial.

In *Shields v United States*, 273 US 583; 47 S Ct 478; 71 L Ed 787 (1927), the United States Supreme Court held that the trial court's ex parte communication with the jury constituted error requiring reversal. During the second day of deliberations, the jury in *Shields* "returned for additional instructions on the subject of entrapment, and having received the same, retired for further deliberation." *Id*. at 584. Later that day, the jury "again returned to court, in the absence of petitioner and his counsel, and reported that they could not agree." *Id*. The Supreme Court continued, "What instructions, if any, were then given the jury the record does not disclose." *Id*. After further deliberation, the jury returned a verdict convicting several of Shields's codefendants, acquitting others, and stating that it was "unable to agree" regarding Shields. *Id*. The court again replied to the jury in writing, without consulting the defendant or his lawyer. *Id*. at 584-585. The jury subsequently convicted Shields. *Id*. at 585.

The United States Supreme Court commenced its legal analysis by examining a civil case, *Fillippon v Albion Vein Slate Co*, 250 US 76; 39 S Ct 435; 63 L Ed 853 (1919), in which a deliberating jury sent the court a note "on the question of contributory negligence." *Shields*, *supra* at 588. The trial court in *Fillippon* replied by "sending a written instruction to the jury room, in the absence of the parties and their counsel, and without their consent, and without calling the jury in open court." *Shields*, *supra* at 588. The *Shields* Court then quoted from *Fillippon* as follows:

> "Where a jury has retired to consider of its verdict, and supplementary instructions are required, either because asked for by the jury or for other reasons, they ought to be given either in the presence of counsel or after notice and an opportunity to be present; and written instructions ought not to be sent to the jury without notice to counsel and an opportunity to object." [*Shields*, *supra* at 588.]

The rule established in *Fillippon* controlled the outcome in *Shields.* The Supreme Court reversed Shields's conviction on the basis of "the rule of orderly conduct of jury trial, entitling the defendant, especially in a criminal case, to be present from the time the jury is impaneled until its discharge after rendering the verdict." *Id.* at 588-589.

The United States Supreme Court revisited the impact of ex parte jury communications in *Rogers v United States*, 422 US 35; 95 S Ct 2091; 45 L Ed 2d 1 (1975). The *Rogers* jury deliberated for less then two hours before sending the trial court a note inquiring whether the court "would 'accept the Verdict—"Guilty as charged with extreme mercy of the Court."'" *Id*. at 36. The trial court failed to notify the defendant or his counsel of the note, and instructed a marshal to advise the jury "that the Court's answer was in the affirmative." *Id*. Five minutes later, the jury returned with its verdict of guilty, with the recommendation for extreme mercy. *Id*. at 36-37. The Supreme Court considered whether it should apply harmless error analysis. After reviewing *Fillippon* and *Shields*, the Supreme Court observed, "As in *Shields*, the communication from the jury in this case was tantamount to a request for further instructions." *Id*. at 39. Acknowledging that a court's ex parte communication with the jury "may in some circumstances be harmless error," the Supreme Court distinguished that when the trial court responded to the jury's note in *Rogers*, it

> should not have confined [it]s response to the jury's inquiry to an indication of willingness to accept a verdict with a recommendation of "extreme mercy." At the very least, the court should have reminded the jury that the recommendation

> would not be binding in any way. In addition, the response should have included the admonition that the jury had no sentencing function and should reach its verdict without regard to what sentence might be imposed. [*Id*. at 40.]

The Supreme Court rejected that the trial court's error was harmless, because "the nature of the information conveyed to the jury, in addition to the manner in which it was conveyed, does not permit that conclusion in this case." *Id*.

In *France*, *supra*, the Michigan Supreme Court established a framework for ascertaining whether a trial court's ex parte communication with a jury requires reversal of a defendant's subsequent conviction. Our Supreme Court rejected "the strict rule requiring reversal of a conviction in the event of communication with a deliberating jury outside the courtroom and the presence of counsel," and introduced the concepts of "substantive," "administrative," and "housekeeping" categories of communication. *Id*. at 142-144. "Substantive communication" includes "supplemental instructions on the law given by the trial court to a deliberating jury." *Id*. at 143. "Administrative communications include instructions regarding the availability of certain pieces of evidence and instructions that encourage a jury to continue its deliberations." *Id*. An ex parte substantive communication "carries a *presumption* of prejudice," which "may only be rebutted by a firm and definite showing of an *absence* of prejudice." *Id*. (emphasis in original). "An administrative communication carries no presumption." *Id*.

In this case, Judge Miller acknowledged that he instructed the jurors to "refer to the jury instructions that they had before them." This directive went beyond encouraging additional deliberation. It served to answer a substantive question regarding the law that the jury was to apply, and therefore plainly fell within the category of substantive communications.[6]

Regardless of the label attached here, defendant sustained prejudice. Because no record exists regarding the jury's note or Judge Milller's response, this Court must necessarily speculate with respect to whether Judge Miller properly instructed the jury. We also lack any ability to accurately determine the cause of the jury's confusion. Defendant posited that the jury had requested additional instruction concerning the elements of an assault. Perhaps the jurors felt uncertain about the law because, as defendant claims, the written instructions did not mesh with the instructions the court provided orally. Perhaps after hours of discussion, the jurors determined that a fuller explanation of the elements of an assault would supply critically important direction to their application of the law to the facts. Perhaps Judge Miller failed to

[6] The *France* majority determined that "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 the ABA Standard Jury Instruction 5.4(b), as adopted by this Court in *People v Sullivan*, 392 Mich 324; 220 NW2d 441 (1974)." *France*, *supra* at 143–144. In dissent, Justice Levin commented in *France*, "An instruction 'encourag(ing) a jury to continue its deliberations' may also be a substantive communication, if the communication includes, and possibly if it fails to include, a supplemental instruction on the law . . . ." *Id*. at 192. In our view, this prescient observation well describes Judge Miller's substantive ex parte communication with defendant's jury.

determine what troubled defendant's jury because he did not preside at the trial. Whatever the concern, defendant and his counsel, if present, would have been able to assist the court in making a determination whether further instruction would assist the jury. Counsel and defendant, if present, could have advocated for a meaningful substantive communication, rather than mere repetition of instructions that the jury did not understand. At the very least, defense counsel would have had an opportunity to make a record for defendant's appeal.

The absence of a record denies defendant an opportunity for meaningful review of what occurred, and casts ineradicable doubt on the fundamental fairness of the proceedings. See *People v Horton (After Remand)*, 105 Mich App 329, 331; 306 NW2d 500 (1981) ("The courts of this state have held that the inability to obtain the transcripts of criminal proceedings may so impede a defendant's right of appeal that a new trial must be ordered."). Because the record is silent regarding this critical juncture of defendant's trial, we simply cannot determine whether the substance of Judge Miller's communication affected defendant's substantial rights. Thus, the outcome of his trial qualifies as unreliable and must be reversed. *Cronic*, *supra* at 659 n 25.

D. Judge Miller Committed Error Requiring Reversal by Failing to Reinstruct the Jury Regarding Assault

Because jury instruction may again become a topic of concern on remand, we offer the following cautionary guidance to the trial court. Judge Olzark initially instructed the jury that

> to prove the assault, the prosecutor must prove each of the following elements beyond a reasonable doubt. First, that the defendant either attempted to commit a battery on LeAnn Goforth or did an illegal act that caused LeAnn Goforth … to reasonably fear an immediate battery. Now, a battery is a forceful violent or offensive touching of the person or something closely connected with the person or another. Second, that the defendant intended either to commit a battery upon LeAnn Goforth or to make LeAnn Goforth reasonably fear an immediate battery. … An assault . . . cannot happen by accident. . . .
>
> > . . . For the crime of robber[y] unarmed, this means that the prosecution must prove that the defendant intended to assault or put in fear LeAnn Goforth while the defendant was in the course of committing a larceny and that LeAnn Goforth was present in the course of … the defendant committing the larceny.

According to defendant, the jury's question concerned "inadvertent assault," and therefore may have related to the instruction that "an assault cannot happen by accident." Defendant also asserted that the written instructions provided to the jury did not include any assault instructions, including that the jury must find that defendant acted with specific intent. Assuming that defendant accurately characterized what happened, the jury's confusion mandated a substantive response from Judge Miller.

The importance of reinstructing a confused jury was emphasized by the United States Supreme Court in *Bollenbach v United States*, 326 US 607; 66 S Ct 402; 90 L Ed 350 (1946). In that case, a jury asked a question regarding proof of conspiracy. "The trial judge made some unresponsive comments but failed to answer the question." *Id*. at 609. When the jury again asked for further instruction, the judge answered without consulting counsel present in the

courtroom regarding the substance of the answer. On appeal, the government admitted that the judge's answer to the jury's question had been legally incorrect, but urged that other evidence proved the defendant's guilt. *Id*. at 611. The Supreme Court disagreed, observing that "[t]he jury was obviously in doubt" regarding the defendant's guilt, and that the jury's questions "clearly indicated that the jurors were confused concerning" the application of the facts of the case to the law. *Id*. at 612. In reversing the defendant's conviction the Supreme Court explained,

> Discharge of the jury's responsibility for drawing appropriate conclusions from the testimony depended on discharge of the judge's responsibility to give the jury the required guidance by a lucid statement of the relevant legal criteria. When a jury makes explicit its difficulties a trial judge should clear them away with concrete accuracy. In any event, therefore, the trial judge had no business to be "quite cursory" in the circumstances in which the jury here asked for supplemental instruction. … [*Id*. at 612-613.]

In *People v Martin*, 392 Mich 553, 558; 221 NW2d 336 (1974), overruled in part on other grounds in *People v Woods*, 416 Mich 581; 331 NW2d 707 (1982), the Michigan Supreme Court adopted the United States Supreme Court's analysis in *Bollenbach*: "Where confusion is expressed by a juror, it is incumbent upon the court to guide the jury by providing a lucid statement of the relevant legal criteria." (Internal quotation omitted).

From the inception of this prosecution, defendant contended that he had not assaulted Goforth. The legal definition of an assault committed during an unarmed robbery framed the entire defense. Defendant sought to quash the information based on the prosecution's alleged failure to establish an assault. Defendant moved for a directed verdict based on his contention that the evidence failed to reveal an assault, and argued in closing that no assault had occurred. The prosecutor acknowledged in her closing argument that because defendant admitted stealing the purse, "[t]he issue is whether or not he assaulted or put LeAnn Goforth … in fear. So whether he assaulted her or whether he put her in fear." The scant record available reveals that the jury sought further instruction concerning the assault element of unarmed robbery.

The fact that Judge Olzark took defendant's directed verdict motion under advisement rather than ruling immediately compels a conclusion that whether defendant had assaulted Goforth constituted a legally and factually complex issue.[7] Furthermore, this case presented a rather unique factual scenario, in which a victim not only gave chase, but confronted her assailant by opening the door of his car, putting her hand on his steering wheel, and then chasing him again. Given Goforth's persistent courage combined with her arguable lack of fear, it is unsurprising that at least one member of defendant's jury harbored uncertainty regarding the assault element of unarmed robbery. Moreover, defendant testified that he had inadvertently moved his truck. This testimony, if believed, could have relieved him from responsibility for an

[7] Judge Olzark's failure to rule on the directed verdict motion constituted separate error, i.e. a violation of MCR 6.419(A), which provides that "[t]he court may not reserve decision on the defendant's motion."

assault, and thereby for unarmed robbery. If the jury's written instructions did not include the assault instruction or the instruction regarding specific intent—and we have no way to know—confusion regarding the applicable law becomes even more understandable.

E. Summary

The integrity of a criminal trial depends on the ability of an accused to fully defend against the state's charges. This fundamental principle links a defendant's right to attend all stages of a criminal trial with his right to have counsel at his side throughout the proceedings. When a jury expresses confusion regarding the law it is to apply, the validity of the trial outcome is at stake. The presence of counsel protects the defendant's ability to urge reinstruction or clarification of the law, and allows the defense to independently assess the jury's needs. The refusal to assist a jury struggling to understand the law relegates jurors to conjecture and legal invention. Under such circumstances, a guilty verdict is inherently tainted. Absent basic protections afforded by constitutional provisions such as the right to counsel, "a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair." *Arizona v Fulminante*, 499 US 279, 309-310; 111 S Ct 1246; 113 L Ed 2d 302 (1991) (internal quotation omitted).

Given our conclusion that reversal of defendant's convictions is mandated because Judge Miller (1) violated defendant's constitutional right to be present and represented by counsel during the critical period in which he substantively discussed jury instructions with the deliberating jury, and (2) inadequately reinstructed the jury, we need not address the additional issues defendant raises on appeal.

We reverse defendant's convictions and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ Elizabeth L. Gleicher