STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 30, 2009
v	No. 280887 Kent Circuit Court
MARCO ANTONIO HERCULES-LOPEZ, Defendant-Appellant.	LC No. 06-000220-FC

Before: Markey, P.J., and Murphy and Borrello, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery, MCL 750.529, conspiracy to commit armed robbery, MCL 750.157a, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent prison terms of 10 to 27 years for the robbery conviction and 9 to 27 years for the conspiracy conviction, to be served consecutive to a two-year term of imprisonment for the felony-firearm conviction. We reverse and remand for a new trial.

As an initial matter, we disagree with defendant's argument that the evidence was insufficient to support his conspiracy conviction. In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005).

Defendant argues that he could not be convicted of conspiracy because the evidence showed that he agreed to participate in the offense only to gather evidence to report codefendants Martin Harris and Solivan Francisco Solivan to the police, which he did. We disagree.

Any person who conspires together with one or more persons to commit an offense prohibited by law or to commit a legal act in an illegal manner is guilty of conspiracy. MCL 750.157a. Conspiracy requires proof of both the intent to combine with others and the intent to accomplish the illegal objective. *People v Mass*, 464 Mich 615, 629; 628 NW2d 540 (2001). This may be shown by evidence a defendant participates cooperatively to further the objective of an existing conspiracy. *People v Blume*, 443 Mich 476, 483-484; 505 NW2d 843 (1993). Feigned agreement or participation is insufficient. *People v Smyers*, 398 Mich 635, 640; 248 NW2d 156 (1976); *People v Barajas*, 198 Mich App 551, 558-559; 499 NW2d 396 (1993).

Thus, to establish defendant's guilt of conspiracy, the prosecutor was required to prove that defendant intended to agree with Solivan and/or Harris to commit the robbery, and intended the robbery occur. It is undisputed that defendant was not working on behalf of the police or with police authorization. Therefore, his agreement to participate in the robbery could not be excused on this basis, and he could not claim feigned agreement or participation. Compare *Smyers, supra*, and *People v Atley*, 392 Mich 298, 311-312; 220 NW2d 465 (1974), overruled in part on other grounds *People v Hardiman*, 466 Mich 417; 646 NW2d 158 (2002). Even if defendant's claim that he wanted to see Harris and Solivan punished for their involvement was true, and that he participated in the robbery toward that end, the evidence showed that he agreed to commit the robbery and intended for it to occur. Accordingly, there was sufficient evidence of defendant's guilty intent to support his conspiracy conviction.

We agree with defendant, however, that reversal is required because the trial court gave a supplemental jury instruction[1] outside of defense counsel's presence and without defendant's having waived his right to counsel's presence. Because defendant did not object when the trial court initially made a record of its communication with the jury, which was after the jury returned its verdict, this issue is unpreserved. But an unpreserved constitutional error that is structural in nature requires automatic reversal. *People v Duncan*, 462 Mich 47, 51; 610 NW2d 551 (2000).

The Sixth Amendment 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). The complete denial of counsel at a critical stage of a criminal proceeding is structural error. *Roe v Flores-Ortega*, 528 US 470, 483; 120 S Ct 1029; 145 L Ed 2d 985 (2000); *Duncan, supra* at 51-52. A "critical stage" is "a step of a criminal proceeding, such as an arraignment, that [holds] significant consequences for the accused." *Bell v Cone*, 535 US 685, 695-696; 122 S Ct 1843; 152 L Ed 2d 914 (2000). This Court has also defined a "critical stage" requiring counsel as 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 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) (the giving of a new, nonstandard supplemental instruction constitutes a "critical stage"), and *Hudson v Jones*, 351 F3d 212 (CA 6, 2003) (the rereading of instructions previously given to the jury is not a "critical stage").[2] Unlike in *Hudson*, the trial court here did not simply reread an unchallenged original instruction, but rather crafted a new, nonstandard supplemental instruction in response to the jury's question, similar to the situation in *French*.

---

[1] The jury asked, "Does [defendant's] intent, goals, thoughts, change any verbal agreement that he may have made to commit a crime?" Without consulting defense counsel and outside of defense counsel's presence, the trial court responded, "If the defendant actually agreed with another to commit a crime, it does not matter why he agreed."

[2] While not binding, federal decisions can constitute persuasive authority. *Walters v Nadell*, 481 Mich 377, 390 n 32; 751 NW2d 431 (2008).

Because the nature of the instruction was substantive, it involved a critical stage of the proceedings. Therefore, prejudice is presumed and automatic reversal is required unless defendant waived his right to have counsel present. The record does not indicate that defendant did so. A silent record is insufficient to establish a valid waiver. *People v Willing*, 267 Mich App 208, 220; 704 NW2d 472 (2005). Accordingly, we must reverse defendant's convictions and remand for a new trial. *Duncan*, *supra* at 51-52.

In light of our decision, it is unnecessary to address defendant's remaining issues on appeal.

We reverse and remand for a new trial. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Stephen L. Borrello