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PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 30, 2009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.

MURPHY, J. (*concurring in part and dissenting in part*).

I agree with the majority that there was sufficient evidence to support the conspiracy conviction. I respectfully disagree, however, with the majority's conclusion that reversal is required because the trial court responded in writing to a jury question absent the presence and input of defense counsel. Accordingly, I concur in part and dissent in part.

During jury deliberations, the jurors sent a note to the court asking whether defendant's intent (motives, goals, and thoughts) changed any verbal agreements that defendant made to commit the crime of armed robbery, which question, as indicated in the note, was relative to resolution of the conspiracy charge. Defense counsel was not present in the courtroom at the time the note was sent, nor was counsel present when the court provided the jury with a written response to the question.[1] The court wrote, "If the defendant actually agreed with another to commit a crime, it does not matter why he agreed." Defense counsel returned to the courtroom shortly thereafter, was informed of what transpired relative to the note and response, and did not object to the court's actions or ask for a change in the supplemental instruction. The jury subsequently returned a verdict against defendant. Earlier, when the trial court was reading all of the instructions to the jury, at which time defense counsel was present, the court stated in pertinent part:

[1] The court asked the clerk to summon the prosecutor and defense counsel when the note was sent by the jury, and the prosecutor returned to the courtroom in short order. However, the clerk was unable to reach defense counsel and, after a 15-minute wait, the court decided to respond to the posed question absent the presence of defense counsel.

> You need to understand that it is no defense which excuses criminal behavior that a defendant acted, if you find that he did, for purposes of helping the police. That can, in very limited circumstances, be a defense but only in two circumstances and they're not even claimed here.
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> So what you've got to decide is did he participate in the crimes in ways that satisfied the statute, but there is no excuse or justification or over-arching defense for the fact that he claims he did it to help the police because he doesn't even claim he did it in the way that would make that a defense.
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> And there was some suggestion here as I heard some things unfold of what's called the defense of duress; that, you know, maybe he did what he did because he was in fear of what would happen if he didn't do it. That way again . . . can be a defense but under extremely limited circumstances, and he doesn't claim those circumstances existed here, so that's not a defense either.
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> Like I said yesterday, to prove that kind of a charge [conspiracy] with the evidence presented at this trial, all of it taken as a whole, has to do is convince you that Mr. Hercules-Lopez agreed with somebody else to commit an armed robbery.

"The Sixth Amendment safeguards the right to counsel at all critical stages of the criminal process for an accused who faces incarceration." *People v Williams*, 470 Mich 634, 641; 683 NW2d 597 (2004). "A critical stage of the proceedings is any stage where the absence of counsel may harm a defendant's right to a fair trial[.]" *Duncan v Michigan*, __ Mich __; __ NW2d __, issued June 12, 2009 (Docket Nos. 278652, 278858, and 278860), slip op at 7. In *Van v Jones*, 475 F3d 292, 306-307 (CA 6, 2007), the Sixth Circuit for the United States Court of Appeals observed:

> In the last several years, our court has recognized as critical stages both the issuance of jury reinstructions and the pretrial period, broadly defined. In *French v Jones*, 332 F3d 430 (6th Cir. 2003), a panel affirmed the district court's grant of a writ of habeas corpus where the "trial judge delivered a supplemental instruction to a deadlocked jury" without the presence of the defendant's counsel. *Id.* at 438. We cited [several cases] . . . in support of our conclusion that harmless error analysis was not warranted where counsel was shown to be absent during a critical stage. *Id.* at 438-39. This court confirmed and reiterated the holding of *French* in *Caver v Straub*, 349 F3d 340, 350 (6th Cir. 2003), a case presenting similar facts, both with respect to the status of jury reinstruction as a critical stage and to the presumption of prejudice. In *Hudson v Jones*, 351 F3d 212 (6th Cir. 2003), we declined to extend critical stage status to a court's *re*-reading of specific

jury instructions that had already been read, in presence of defense counsel, to the jury. [See also *Hereford v Warren*, 536 F3d 523, 530 n 4 (CA 6, 2008).]

The *Hudson* court began by acknowledging that a criminal conviction must be vacated, even if no prejudice resulted, where the accused is denied counsel at a critical stage in the proceedings. *Hudson, supra* at 216. The court then stated, "Because the trial judge here simply repeated, at the jury's request, specific instructions that had previously been given in the presence of . . . counsel, we conclude that their repetition should not be deemed a 'critical stage in the proceedings.'" *Id.* at 218. The *Hudson* court had noted a comparable First Circuit ruling in which the supplemental instructions were similar to portions of the charged instructions given previously when counsel was present and did not object. *Id.* at 217. The Sixth Circuit's decision in *French* was distinguished "because the supplemental instructions given in *French* had not been articulated by the trial court before the jury began deliberating." *Hudson, supra* at 217. The *Hudson* court spoke of this distinction as the "new-versus-repeated" distinction. *Id.*

Before applying the above-cited law to the facts presented, I will briefly touch on the issue of structural error. In *People v Duncan*, 462 Mich 47; 610 NW2d 551 (2000), the defense attorney failed to object to an instructional omission related to a felony-firearm charge. Interestingly, although the case involved a forfeited error, which typically implicates the plain-error test, *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999), the Court addressed the issue in terms of whether the harmless-error test, normally applicable to preserved error, should be applied. *Duncan, supra*, 462 Mich at 51, 57. The Court indicated that the constitutional error must be classified as either structural or nonstructural, and if the error was structural, reversal is automatic. *Id.* at 51.[2] Structural errors are intrinsically harmful, without regard to their effect on the outcome, and they necessarily render unfair and unreliable the determination of guilt or innocence. *Id.* "[S]tructural errors deprive defendants of basic protections without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence." *Id.* at 52. As an example of structural error, the Court cited the complete denial of counsel. *Id.*

I conclude that, assuming structural-error analysis is implicated in the context of a forfeited/plain-error situation, the circumstances presented here fall within *Hudson* and that a critical stage of the proceedings was not involved relative to the trial court's action in responding to the jury's note without defense counsel being present. The absence of counsel did not threaten to harm defendant's right to a fair trial. *Duncan, supra*, __ Mich App __, slip op at 7. I emphasize that my conclusion is limited to the specific factual record that exists in this case. The trial court's supplemental instruction merely indicated that defendant's motive ("why he agreed") was immaterial if defendant indeed agreed to commit the crime. While not using the exact same verbiage when originally instructing the jury, the same principle was clearly communicated to the jurors earlier when the court instructed them that it was immaterial that defendant may have acted in an effort to help the police or that he may have acted out of fear or

[2] In *Carines, supra* at 774, the Court indicated that only preserved constitutional error, as opposed to forfeited constitutional error, required a determination whether the error was structural or nonstructural.

duress. In other words, the court had effectively instructed the jurors, in the presence of counsel, that "why [defendant] agreed" was immaterial, and the court thus essentially repeated itself later when counsel was not present. Furthermore, it is difficult to conclude that defendant was deprived of counsel on the matter or that a critical stage was involved, given that counsel returned to the courtroom *while deliberations were still progressing*, that counsel was informed of what transpired relative to the note and the court's instruction, and that counsel took no steps whatsoever to challenge the court's action or to suggest a different or more appropriate response, which could still have been given to the jurors during continuing deliberations.

Because a critical stage of the proceedings was not implicated under the facts presented, structural error did not occur. The forfeited error did not amount to plain error that affected defendant's substantial rights, nor is defendant actually innocent and neither was the integrity of the proceedings compromised independent of defendant's guilt or innocence. *Carines, supra* at 763-764.[3] Counsel's momentary absence did not prejudice defendant under the circumstances.[4]

With respect to the legal soundness of the court's response to the jury's note, the law provides that one who is a government informer or police officer and only feigns participation in a criminal enterprise may not be convicted of conspiracy. *People v Smyders*, 398 Mich 635, 640; 248 NW2d 156 (1976); *People v Atley*, 392 Mich 298, 311-312; 220 NW2d 465 (1974), overruled on other grounds in *People v Hardiman*, 466 Mich 417; 646 NW2d 158 (2002); *People v Barajas*, 198 Mich App 551, 558-559; 499 NW2d 396 (1993), aff'd 444 Mich 556 (1994). However, there was no factual dispute that defendant was not an informer, officer, or working on behalf of the police; therefore calling into question the relevancy of his motivation or reasoning for agreeing to the armed robbery predicated on the claim that he was doing so to help the police. I do note that a "[c]onspiracy is a specific-intent crime, because it requires both the intent to combine with others and the intent to accomplish the illegal objective." *People v Mass*, 464 Mich

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[3] I also note our Supreme Court's ruling in *People v France*, 436 Mich 138; 461 NW2d 621 (1990), which has not been overruled and wherein the Court stated:

> Substantive [ex parte] communication encompasses supplemental instruction on the law given by the trial court to a deliberating jury [outside the presence of defense counsel]. 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. [*Id.* at 163.]
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> The prosecution may rebut the presumption of prejudice with a showing that the instruction was merely a recitation of an instruction originally given without objection, and that it was placed on the record. [*Id.* at 163 n 34.]

I do note that *France* was focused on a defendant's constitutional right to a fair trial and not on the right to counsel.

[4] I also note that the jury's question expressly related to the conspiracy charge and not the armed robbery and felony-firearm charges.

615, 629; 628 NW2d 540 (2001). "[T]here must be proof demonstrating that the parties specifically intended to further, promote, advance, or pursue an unlawful objective." *People v Justice (After Remand)*, 454 Mich 334, 347; 562 NW2d 652 (1997). Defendant only argues that the supplemental instruction misstated the law, without any express argument presented that the initial instructions on the crime of conspiracy were incorrect, even though they are consistent with the supplemental instruction. Regardless, assuming any mistake in the court's instructions, I cannot conclude, given the overwhelming evidence of guilt, that it affected defendant's substantial rights, nor that defendant is actually innocent or that the integrity of the proceedings was compromised independent of defendant's guilt or innocence.

I respectfully concur in part and dissent in part.

/s/ William B. Murphy