STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

WILLIS CALVIN CHRONINGER,

Defendant-Appellant.

UNPUBLISHED
March 20, 1998

Nos. 202943, 202944
Saginaw Circuit Court
LC No. 94-009107-FH

Before: Fitzgerald, P.J., and Hood and Sawyer, JJ.

PER CURIAM.

On remand from the Michigan Supreme Court for consideration as on leave granted, defendant appeals his jury trial convictions of obtaining money by false pretenses over $100, MCL 750.218(b); MSA 28.415, and filing a false police report, MCL 750.411a; MSA 28.643(1). Defendant was sentenced to three years' probation for the false pretenses conviction and was fined for the false police report conviction. We affirm.

Defendant's convictions stem from a police report and insurance claim filed regarding the alleged theft of a shotgun and hunting gear from defendant's car

Defendant first argues that he was denied his right to a fair trial by the unobjected-to substitution of a judge during jury deliberations. The original judge, Judge William A. Crane, presided over jury selection, opening statements, the trial, closing arguments, and the charging of the jury. Then, Judge Leopold P. Borrello reinstructed the jury pursuant to their request for clarification.

MCR 6.440(A) governs the substitution of a judge during a jury trial:

> If, by reason of death, sickness, or other disability, the judge before whom a jury trial has commenced is unable to continue with the trial, another judge regularly sitting in or assigned to the court, on certification of having become familiar with the record of the trial, may proceed with and complete the trial.

Here, it is clear from Judge Crane's brief comments at trial that he did not become unavailable to continue with the trial as the result of "death, sickness, or other disability."[1] Further, the record is insufficient to determine whether Judge Borrello had familiarized himself with the record of the trial. Hence, it appears that the court rule was not complied with.

We certainly do not condone Judge Crane's manner and method of absenting himself from the trial in apparent violation of the court rules. However, automatic reversals are not favored. *People v McCline*, 442 Mich 127, 134, n 10; 499 NW2d 341 (1993). In *McCline*, the Court held that although it is preferable that a single judge preside over all aspects of a trial, substitution of a judge before opening argument or the admission of evidence is not an automatic ground for reversal. Rather, the defendant must demonstrate prejudice to warrant the grant of a new trial. *Id.* at 134.

In *People v Bell*, 209 Mich App 273, 275; 530 NW2d 167 (1995), the original judge presided over jury selection, opening statements, the trial, closing arguments, and the charging of the jury. The original judge also reinstructed the jury as requested. The original judge then became ill, and the substitute judge twice reinstructed the jury pursuant to their requests for clarification. Because the record did not reflect that the substitute judge had familiarized himself with the details of the trial pursuant to MCR 6.440(A), this Court concluded that the court rule was not complied with. Relying on *McCline*, this Court declined to reverse defendant's conviction, however, finding that the substitution was harmless because the defendant failed to demonstrate actual prejudice. See also *Brown v Swartz Creek Memorial Post 3720*, 214 Mich App 15, 21; 542 NW2d 588 (1995). Thus, we must determine whether the error was harmless in the present case.

Defendant contends that he was prejudiced as a result of the substitute judge's reinstruction of the jury. We disagree.

Jury instructions are to be read as a whole, not taken one by one out of context. *People v Dabish*, 189 Mich App 469, 478; 450 NW2d 44 (1989). Even if somewhat imperfect, there is no error if the instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights. *Bell*, *supra* at 276.

During deliberations, the jury asked for clarification of the following portion of the instructions: "If State Farm Insurance made and relied more on its own investigation, or an independent source than on what the Defendant said, then State Farm Insurance cannot claim that the Defendant misled them and you must find the Defendant not guilty." The substitute judge first reread the instructions regarding the crime of false pretenses, then attempted to further explain the relevant portion of the instruction on reliance. Within the explanation, the judge told the jury to "[r]emember that the first thing [that must be proven] is that the defendant used a pretense . . ." and "if they made their own independent investigation or did something that they didn't not -- did not rely on the representation made by the Defendant, then of course they can't claim that they were -- they were misled . . . " and "someone makes a representation, says something, and if you rely on it, then you -- on any part of it . . . " and "[t]here's a claim that was filed." A juror then asked, "Shall we then rely totally on what we heard here --" The judge answered, "Well, where else would you rely on? You can only -- you can only make your decision based on the evidence you are presented in this courtroom."

Taken as a whole, these instructions fairly presented the issues to be tried and sufficiently protected defendant's rights.[2] Thus, defendant has failed to demonstrate that he was prejudiced by the substitution, which took place only after the jury had already been instructed at length by the judge who presided over the trial. Accordingly, violation of the court rule does not warrant reversal of defendant's convictions.

Next, defendant argues that the trial court abused its discretion by allowing testimony that defendant had suffered prior thefts of his hunting gear. Defendant asserts that this evidence should have been excluded as prior bad acts evidence under MRE 404(b). Assuming, without deciding, that admission of the testimony was improper, any error in the admission of the evidence was harmless. In light of the overwhelming evidence presented, it is not reasonably possible that, in the absence of this information, a juror would have voted to acquit. *People v Winchell*, 171 Mich App 662, 664; 430 NW2d 812 (1988):

Lastly, defendant challenges an ex parte conversation that took place between Judge Crane and Judge Borrello. The only reference to the conversation in the lower court record was made by the original judge during a hearing on defendant's post-trial motion for new trial:

> The -- of course, I had the benefit of talking with Judge Borrello, so I guess I'm less persuaded that he didn't understand what the case was all about because I briefed him on it, and he was aware that this was a case that centered around the filing of this claim for the theft of a gun and its value.

This Court has held that an ex parte discussion between two sentencing judges does not constitute a violation of any constitutionally protected right. *People v Sexton*, 113 Mich App 145, 146; 317 NW2d 323 (1982). Although *Sexton* involved sentencing judges, defendant has cited no case which supports the proposition that a judge cannot confer with a substitute judge. To comply with the court rule, a substitute judge must become familiar with the case. Perhaps one of the best ways is for the original judge to fill him in, as referred to by this Court without any assignation of error in *People v Bell*, 209 Mich App 273, 275; 530 NW2d 167 (1995). Further, defendant has shown no prejudice as a result of the conversation.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Harold Hood
/s/ David H. Sawyer

[1] Judge Crane simply stated that he "had a prearrangement today for a commitment, and so to meet that, I would have to go on and read the instructions and then you'd be able to deliberate and one of the other judges can receive your verdict."

[2] Defendant argues that Judge Borrello essentially instructed the jury that an element of the crime had been established by stating that "there's a claim that was filed." However, filing a claim is not an element of the crime of false pretenses. That defendant filed a claim does not mean that defendant filed a false or misleading claim. Moreover, it is undisputed that defendant filed a claim. Defendant contested only the falseness of the claim, not the making of the claim.