

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMAL S. ALLEN,

Defendant-Appellant.

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UNPUBLISHED

March 23, 2001

No. 218921

Wayne Circuit Court

LC No. 98-003030

Before: Murphy, P.J., and Hood and Cooper, JJ.

COOPER, J. (*dissenting*).

I respectfully dissent from the majority opinion. The trial court in this case failed to define the meaning of reasonable doubt. The majority opinion opines that a trial court is not required to define reasonable doubt and cites two cases from the 1920's. The majority believes these cases have never been overruled or modified.

The Michigan Supreme Court, in *People v Duncan*, 462 Mich 47; 610 NW2d 551 (2000), very carefully outlined the essential differences between structural and non-structural constitutional error. Citing the United States Supreme Court, in *Neder v United States*, 527 US 1, 8; 119 S Ct 1827; 144 L Ed 2d 35 (1999), they emphasized that if the error is structural, reversal is automatic.

Structural errors, as explained in *Neder*, are intrinsically harmful, without regard to their effect on the outcome, so as to require automatic reversal. Such an error necessarily renders unfair or unreliable the determining of guilt or innocence. As the United States Supreme Court said in *Rose v Clark*, structural 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. [*Duncan, supra* at 51-52 (citations omitted).]

Most unpreserved claims of instructional error are reviewed for plain error that affect substantial rights. *People v Carines*, 460 Mich 750, 761-764; 597 NW2d 130 (1999). However, a structural constitutional error is automatically reversible and not subject to the harmless error analysis of *Carines*. *Duncan, supra* at 57.

In the examples referred to in *Neder*, as quoted in *Duncan*, the Michigan Supreme Court and the United States Supreme Court specifically note that a defective reasonable doubt instruction is structural error.

Defendant is constitutionally entitled to have every element of his criminal offenses proven beyond a reasonable doubt. *Sullivan v Louisiana*, 508 US 275, 277-278; 113 S Ct 2078; 124 L Ed 2d 182 (1993). In order for a reasonable doubt instruction to pass scrutiny, “the instruction, when read in its entirety, must leave no doubt in the mind of the reviewing court that the jury understood the burden which was placed upon the prosecution and what constituted a reasonable doubt.” *People v Jackson*, 167 Mich App 388, 391; 421 NW2d 697 (1988). In the instant case the trial court simply informed the jury that each element of defendant’s crimes must be proven beyond a reasonable doubt. In *Duncan*, the Court held that a “wholesale failure to define an offense for the jury” resulted in structural constitutional error that required automatic reversal. *Duncan*, *supra* at 56.

The failure to provide the jury with any definition of reasonable doubt is clearly error requiring reversal. The majority refers to the fact that the trial court read a preliminary instruction to an unsworn venire prior to jury selection. However, in *Duncan* the Michigan Supreme Court decided that instructions given to potential jury members during jury selection were insufficient to fully instruct the later impaneled jury. *Id.* at 49-50. Consequently, the *Duncan* Court did not permit these preliminary jury instructions to correct the erroneous omission of an instruction before jury deliberations. *Id.*

Additionally, the Michigan Court Rules require that, absent the parties’ consent, the court must instruct the jury as required and appropriate after closing arguments are made. MCR 6.414(F).

With an improper reasonable doubt instruction there can be no presumption that the jury made findings of fact beyond a reasonable doubt upon which a reviewing court could rely. *Sullivan*, *supra*. However, without any definition of reasonable doubt it would be virtually impossible for this Court to comprehend what the jury believed constituted a reasonable doubt.

Irrespective of the amount of evidence, convicting defendant without a proper reasonable doubt instruction would negate his constitutional rights to a trial by jury and due process. Presumption of innocence until proven guilty beyond a reasonable doubt is the crux of criminal jurisprudence and its importance should not be given mere passing reference when instructing criminal juries. See *In re Winship*, 397 US 358, 374; 90 S Ct 1068; 25 L Ed 2d 368 (1970), *People v Goss*, 446 Mich 587, 639-640; 521 NW2d 312 (1994).

I would reverse and remand for a new trial.

/s/ Jessica R. Cooper