STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 16, 2002
v	No. 228565 Oakland Circuit Court
CORNELIUS CORTEZ COPELAND, Defendant-Appellant.	LC No. 00-170369-FC

Before: Holbrook, Jr., P.J., and Jansen and Wilder, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of first-degree premeditated murder, MCL 750.316(1)(a), and first-degree felony murder, MCL 750.316(1)(b), stemming from the death of a single victim, and two counts of possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to consecutive terms of life imprisonment for each of the first-degree murder convictions and two years' imprisonment for each of the felony-firearm convictions. The trial court subsequently vacated the sentences for the first-degree premeditated murder conviction and the related felony-firearm conviction. Defendant appeals as of right. We affirm.

I

Defendant's convictions arise from the fatal shooting of the manager at a Kentucky Fried Chicken (KFC) restaurant where defendant was employed in March 1998. The manager fired defendant after he threatened her, but defendant was rehired on March 11, 1998. Although someone else worked defendant's shift that day, defendant remained at the KFC for the entire shift. He was the last person seen with the manager after the KFC closed for the night. The victim was found lying on the floor near the office the next morning. She had been shot once in the back of the head. An open safe in the office was empty. Defendant was arrested in October 1999. After his arrest, defendant was interrogated at the Oakland County Sheriff's Department. He initially denied that he was the perpetrator, but later stated that the manager was shot accidentally while he was moving his gun from a coat pocket to a pants pocket.

II

Defendant first argues that his statements were taken in violation of his *Miranda*[1] rights and his right to counsel because questioning continued after he invoked the right to counsel. Because defendant does not support his argument with citations to the factual basis for his argument, we could decline to consider this issue. *People v Norman*, 184 Mich App 255, 260; 457 NW2d 136 (1990). Regardless, assuming that the principal basis for defendant's argument is grounded in the following statements made to Detective Sergeant William Harvey before defendant signed the waiver of rights form, we find that appellate relief is not warranted. Detective Harvey's questioning of defendant consisted, in pertinent part, of the following:

> WH: But I can't do that unless you tell me it's okay to get into questions and answers with you.
>
> CC: *Now can ya'll – can my lawyer just come down here – like . . .*
>
> WH: He can.
>
> CC: *Right now or something*?
>
> WH: No. No. No. You can have a lawyer be here all right? I don't think and I don't want to speak for a lawyer, all right? But a lawyer is not going to allow me to talk to you. Okay? That's what they do, but that's their thing. All right? You have to understand Cornelius, that by doing what you're doing today. By talking to me now, you're not saying you don't – you never want a lawyer. [Emphasis added.]

In determining whether the above communication establishes that defendant unambiguously invoked his right to counsel, we review the record de novo, but review the trial court's findings of fact for clear error. *People v Adams*, 245 Mich App 226, 235; 627 NW2d 623 (2001). Examining defendant's "right now or something" remark in light of the circumstances, we find that it is more indicative of the "right now" language that was found to constitute a mere inquiry into the way the process works in *Adams*, *Id.* at 236-238, rather than the thrice-repeated "right now" language found to constitute an unequivocal request for counsel in *Alvarez v Gomez*, 185 F3d 995 (CA 9, 1999). Because defendant did not make an unambiguous request for counsel, Sergeant Harvey was not required to refrain from further questioning. *Adams, supra.* See also *People v Granderson*, 212 Mich App 673, 678; 538 NW2d 471 (1995).

We have also reviewed the other attorney references during the interrogation that are mentioned in defendant's first issue on appeal, and likewise find that they do not reflect an unambiguous request for counsel. *Adams, supra.* Further, we are not persuaded that defendant has established any basis for disturbing the trial court's determination that his statements were voluntary. Whether examined in the context of due process rights or defendant's waiver of *Miranda* rights, voluntariness depends on the absence of police coercion. *People v Daoud*, 462 Mich 621, 635; 614 NW2d 152 (2000). Considering the totality of the circumstances, we are not left with a definite and firm conviction that the trial court erred in finding that defendant's

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[1] *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

statements were voluntarily made. *People v Sexton (After Remand)*, 461 Mich 746, 752-753; 609 NW2d 822 (2000).

III

Defendant next argues that defense counsel was ineffective by choosing not to be present during part of the trial proceedings. Defendant further asserts that prejudice should be presumed because defense counsel's absence constituted structural error.

Because defendant did not present this claim to the trial court, he must show a plain error affecting his substantial rights, unless the error was structural in nature. *People v Carines*, 460 Mich 750, 763-765; 597 NW2d 130 (1999). A structural error is one that "deprives defendants of basic protections without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence." *People v Duncan*, 462 Mich 47, 52; 610 NW2d 551 (2000).

With regard to a claim of ineffective assistance of counsel specifically, because defendant did not raise this issue in an appropriate post-trial motion, our review is limited to mistakes apparent from the record. *People v Avant*, 235 Mich App 499, 507; 597 NW2d 864 (1999). "For a defendant to establish a claim that he was denied his state and federal right to the effective assistance of counsel, he must show that his attorney's representation fell below an objective standard of reasonableness and that this was so prejudicial to him that he was denied a fair trial." *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). There are, however, exceptions to the requirement that prejudice be proven. *People v Mitchell*, 454 Mich 145, 153-155; 560 NW2d 600 (1997); see also *United States v Cronic*, 466 US 648; 104 S Ct 2039; 80 L Ed 2d 657 (1984). Exceptions are recognized in those circumstances "so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *Id.* at 658.

Here, defendant has failed to show that a presumption of prejudice should apply to defense counsel's absences from the trial. Without the presumption, there is no basis for relief because there is no evidence of actual prejudice.

We note that the particular exception underlying defendant's argument is the presumption of unfairness that arises when an accused is denied counsel at a critical stage of the trial. *Id.* at 659. What constitutes a "critical" stage has been subject to judicial interpretation. See generally *United States v Russell*, 205 F3d 768, 771 (CA 5, 2000). One meaningful standard is whether the denial of counsel is of such consequence that it makes the adversary process itself unreliable. *Id.* at 771; see also *Cronic*, *supra* at 659. Another meaningful standard is that it is "*only* when surrounding circumstances justify a presumption of ineffectiveness can a Sixth Amendment claim be sufficient without inquiry into counsel's actual performance at trial" (emphasis in original). *Russell*, *supra* at 768, quoting *Cronic*, *supra* at 662. It is the effect of defense counsel's absence on the fairness of the proceeding, and not the cause, that is relevant. *Burdine v Johnson*, 262 F3d 336, 345 (CA 5, 2001), cert pending.

Limiting our review to the record, we find that defendant has established only two absences of defense counsel during trial. First, defense counsel was late for an unknown length of time at the start of a trial session during which videotapes of his interrogation at the Oakland County Sheriff's Department were played for the jury at counsel's own request. We do not find

that defense counsel's tardiness occurred during a critical stage of the trial. Considering that the record reflects that the videotape was already admitted as evidence, this is not a situation where defense counsel missed the actual introduction of evidence of the defendant's guilt. *Green v Arn*, 809 F2d 1257 (CA 6, 1987), vacated on other grounds 484 US 806 (1987), reinstated 839 F2d 300 (CA 6, 1988). Rather, it involved the ministerial act of displaying evidence to the jury. Not all temporary absences from a trial during the presentation of evidence constitute prejudice per se. *Russell*, *supra*; *Vines v United States*, 28 F3d 1123 (CA 11, 1994). We conclude, under the circumstances, that defendant has not shown that prejudice should be presumed under *Cronic*, *supra*, or that defense counsel's absence otherwise constituted a structural error.

Defense counsel's other absence occurred when he did not appear at a hearing at which proposed jury instructions were discussed outside the presence of the jury. Because the record does not show that this was the only opportunity afforded to defense counsel to request or object to the proposed jury instructions, we conclude that defendant has not established any basis for presuming prejudice from this absence. Defendant's reliance on *French v Jones*, 114 F Supp 2d 638 (ED Mich, 2000), is misplaced because the record in this case reflects that defense counsel was present when the jury was instructed by the trial court.

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Kathleen Jansen
/s/ Kurtis T. Wilder