STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 21, 2006
v	No. 264330 Wayne Circuit Court
CONNEZE REDMOND, Defendant-Appellant.	LC No. 05-003284-01

Before: Borrello, P.J., and Neff and Cooper, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced as a third habitual offender, MCL 769.11, to five to ten years' imprisonment for the felon in possession of a firearm conviction and two years' imprisonment for the felony-firearm conviction. We affirm defendant's convictions, and his sentence for the felony-firearm conviction. We vacate defendant's sentence for the felon in possession of a firearm conviction and remand this matter for resentencing with respect to that offense only.

I

On appeal, defendant argues that he is entitled to a new trial because he was denied his constitutional right to counsel during a critical stage of the proceedings. We disagree. This issue presents a constitutional question, which this Court reviews de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). "The Sixth Amendment safeguards the right to counsel at all critical stages of the criminal process for an accused who faces incarceration."[1] *People v Williams*, 470 Mich 634, 641; 683 NW2d 597 (2004), citing *Maine v Moulton*, 474 US 159, 170; 106 S Ct 477; 88 L Ed 2d 481 (1985). "The phrase 'critical stage' refers to 'a step of a criminal proceeding, such as arraignment, that [holds] significant consequences for the accused.'" *People*

[1] "The Sixth Amendment right to counsel is applicable to the states through the Due Process Clause of the Fourteenth Amendment." *People v Williams*, 470 Mich 634, 641; 683 NW2d 597 (2004), citing *Gideon v Wainwright*, 372 US 335; 83 S Ct 792; 9 L Ed 2d 799 (1963).

v Willing, 267 Mich App 208, 228; 704 NW2d 472 (2005), quoting *Bell v Cone*, 535 US 685, 695-696; 122 S Ct 1843; 152 L Ed 2d 914 (2002).

The United States Supreme Court "has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding." *United States v Cronic*, 466 US 648, 659 n 25; 104 S Ct 2039; 80 L Ed 2d 657 (1984). The uncertainty of the prejudice suffered by a defendant who is unrepresented during a critical stage makes the outcome of the defendant's trial unreliable. *French v Jones*, 332 F3d 430, 438 (CA 6, 2003). However, if the circumstance at issue is not deemed to be a "critical stage of the proceeding," the absence of counsel does not mandate a presumption of prejudice under *Cronic*, and any alleged error is instead considered in light of the actual prejudice. *Hudson v Jones*, 351 F3d 212, 218 (CA 6, 2003).

Following the instruction of the jury after closing arguments, the parties stipulated that any specific evidence or instructions could be sent to the jury upon its request without prior notification to the attorneys. However, the court noted that the attorneys would be notified if a jury request exceeded the scope of the stipulation. The jury subsequently sent the court two notes asking if it could see certain evidence admitted at trial and if it could see Joaquin Van Horn's testimony and witness statement. Although the requested evidence was provided to the jury, the court explained,

> . . . [I]f [Van Horn's testimony and witness statement is] absolutely required for a verdict, you may after consulting with each other and trying to recall the pertinent parts of that statement request it. But our reporter takes down what is said in shorthand. There is no transcript of it. It can be made, but it will take some time, it may be available for you tomorrow. I don't know the length of it. I don't know exactly how much time; it may be late this afternoon or tomorrow, probably not until tomorrow.

After the trial court addressed the jury's questions, defense counsel claimed that she was not present in the courtroom for this instruction because the court clerk failed to timely notify her of the jury's requests, and consequently, defendant was unrepresented when the instructions were provided. After noting that defense counsel had arrived late and that the court clerk had attempted to call defense counsel at least once or twice, the trial court responded that the jury was merely provided with the standard instruction regarding the availability of Van Horn's testimony and witness statement.

The initial question is whether defense counsel was absent during a critical stage of the proceedings, such that prejudice is presumed under *Cronic*. *Hudson, supra* at 216. To determine whether a trial court's communication with a deliberating jury constitutes a critical stage of the proceedings, this Court must determine the nature of the communication. Compare *French, supra* (the trial court's new, nonstandard supplemental instruction constituted a critical stage of the proceedings) with *Hudson, supra* (rereading the instructions originally given to the jury did not constitute a critical stage of the proceedings).

In *French*, in which the court found a presumption of prejudice, the trial judge delivered a nonstandard supplemental instruction to a deadlocked jury. *French, supra* at 432, 438. Defense counsel did not have an opportunity to respond to the jury's note that prompted the supplemental instruction, and defense counsel was not present when the judge gave the instruction. *Id*. at 438.

Here, in response to the jury's request to see the transcript of Van Horn's testimony and witness statement, the trial court informed the jury that it should continue deliberating and that the transcript could be made available sometime later. Defendant concedes that the court's limited response to the jury request was not error in and of itself. Defendant argues only that the presence of defense counsel may have led to "a different, more comprehensive response," and may have significantly affected the jury's deliberations.

Given that the trial court's instruction merely encouraged the jury to continue their deliberations and did not involve any substantive law, the instruction did not hold any significant consequences for defendant. *Willing*, *supra* at 228. Therefore, defendant was not denied counsel during a critical stage of the proceedings.

Further, defendant has failed to show actual prejudice. As the prosecution concedes, the trial court's ex parte communication with the jury was improper. See MCR 6.414(B); *People v France*, 436 Mich 138, 142; 461 Mich 621 (1990). However, a trial court's ex parte communication with a jury does not require automatic reversal, but rather "centers on a showing of prejudice." *Id*. To determine prejudice, the communication must first be categorized as either substantive, administrative, or housekeeping. *Id*. Here, because the instruction at issue merely encouraged the jury to continue its deliberations and explained that a transcript could be made available at some later time, the instruction was an administrative communication. *Id*. at 143.

Moreover, although defense counsel noted that she was not present when the court provided the instructions at issue to the jury, she failed to object to these instructions after the trial court made her aware of them. Thus, given that, "[t]he failure to object when made aware of the communication will be taken as evidence that the administrative instruction was not prejudicial," *Id.* at 143, the ex parte communication did not prejudice defendant. We find no error requiring a reversal of defendant's convictions.

II

Defendant next argues that the prosecutor's reference to his prior felony conviction should have resulted in a mistrial. We disagree. This Court reviews preserved issues of prosecutorial misconduct de novo "to determine if the defendant was denied a fair and impartial trial." *People v Thomas*, 260 Mich App 450, 453; 678 NW2d 631 (2004). Where a defendant is charged with felon in possession of a firearm in addition to other charges arising from the same incident, "'adequate safeguards' can be erected to ensure that a defendant . . . suffers no unfair prejudice if a single trial is conducted for all the charges." *People v Green*, 228 Mich App 684, 691; 580 NW2d 444 (1998), citing *People v Mayfield*, 221 Mich App 656, 659-660; 562 NW2d 272 (1997). Specifically, these "safeguards" include: "(1) the introduction by stipulation of the fact of the defendant's prior conviction, (2) a limiting instruction emphasizing that the jury must give separate consideration to each count of the indictment, and (3) a specific instruction to consider the prior conviction only as it relates to the felon-in-possession charge." *Green, supra*

at 691, citing *Mayfield*, *supra* at 660, citing *United States v Mebust*, 857 F Supp 609, 613 (ND Ill, 1994).

The parties stipulated that although the jury would be informed of an unspecified prior felony conviction, the jury would not be informed that the prior felony conviction was carrying a concealed weapon. However, during closing argument, the prosecutor told the jury, "You heard a stipulation . . . that [defendant] has previously been convicted of a possession of a firearm [offense]." The trial court subsequently instructed the jury that it must disregard any statement specifying the prior felony conviction and that any statement of this nature was "stricken from any evidence."

We conclude that "adequate safeguards" in the instant case ensured that defendant was not prejudiced or denied a fair trial given that a limiting instruction was provided after the jury was informed of the specified prior felony conviction even though the parties had stipulated otherwise. It should be noted that the trial court not only told the jury that it could not consider and must disregard the reference to the specific prior felony conviction, but went one step farther than the safeguards in *Green* require and told the jury that it was not required to accept the stipulation as fact. Therefore, although the prosecutor's reference during closing argument was improper, "adequate safeguards" ensured that defendant was not denied a fair and impartial trial. *Id*. at 691; *Thomas*, *supra* at 453.

III

Defendant next argues that the trial court failed to provide a substantial and compelling reason for its upward departure from the appropriate sentencing guidelines. We agree. "[A] sentence that is outside the appropriate guidelines sentence range, for whatever reason, is appealable regardless of whether the issue was raised at sentencing, in a motion for resentencing, or in a motion to remand." *People v Kimble*, 470 Mich 305, 310; 684 NW2d 669 (2004). Therefore, although defendant did not challenge the trial court's departure from the appropriate sentencing guidelines range at sentencing, in a motion for resentencing, or in a motion to remand, this issue is appealable and is reviewed for plain error. *Id*. at 312, citing *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

A trial court may depart from a sentencing guidelines range provided it has a substantial and compelling reason and it states this reason on the record. MCL 769.34(3); *People v Hegwood*, 465 Mich 432, 439; 636 NW2d 127 (2001). A substantial and compelling reason must be objective and verifiable. *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). "Objective and verifiable" means that the facts considered must be "actions or occurrences that are external to the minds of the judge, defendant, and others involved in making the decision, and . . . [are] capable of being confirmed." *Id*. An objective and verifiable reason must "keenly" or "irresistibly" grab the court's attention and be of "considerable worth.'" *People v Hendrick*, 472 Mich 555, 563; 697 NW2d 511 (2005), quoting *People v Babcock*, 469 Mich 247; 666 NW2d 231 (2003). Moreover, the court may not depart from the guidelines range based on an offense or offender characteristic already accounted for in determining the appropriate sentence range unless the "court concludes that the characteristic was given inadequate or disproportionate weight." *People v Havens*, 268 Mich App 15, 18; 706 NW2d 210 (2005), citing MCL 769.34(3)(b).

Defendant's sentencing guidelines range was 12 to 34 months for his felon in possession of a firearm conviction. However, the trial court sentenced defendant to five to ten years' imprisonment for this conviction. In determining defendant's sentencing guidelines range, defendant was assessed ten points for PRV 2, which takes into account prior convictions for attempted carrying a concealed weapon and a controlled substance offense, and ten points for PRV 6, which takes into account that "[t]he offender is on parole, probation, or delayed sentence status or on bond awaiting adjudication or sentencing for a felony," pursuant to MCL 777.56(1)(c). Defendant was also assessed 25 points for OV 1, which takes into account that "[a] firearm was discharged at or toward a human being" pursuant to MCL 777.31(1)(a), and 100 points for OV 3, which takes into account that "[a] victim was killed" pursuant to MCL 777.33(1)(a).

In departing from the appropriate sentencing guidelines range, the court explained:

> . . . [T]here was no doubt by the jury conviction that this [d]efendant did possess a firearm, that he was a felon when he possessed the firearm and the altercation and argument between these young men in the park that night caused the death and not specifically this [d]efendant's bullet maybe at that time, but a sixteen year old died as a result of the incident and there's also no question that [defendant], you are at this point twenty-seven years old and had been previously convicted by plea of attempt carrying a concealed weapon [sic] as well as drug charges and that the presentence report, as you have read, states that you have a very poor success on probation.
>
> This crime occurred a very short time after another incident at the - - at age twenty-seven it's not your first opportunity at all to learn from your police contacts. To the contrary, the police contacts that you have had, the convictions that you have and, the time frame of those convictions, the choice to be involved in carrying a weapon and involved in this type of and incident is objective and verifiable and shows this Court that you are a special danger, an added danger to the community, other than what's been shown simply by the guidelines or simply by the conviction of felony[-]firearm and felon in possession of a firearm.

Initially, we note that the presentence investigation report supports the trial court's findings that a teenager died as a result of this altercation, that defendant had previously been convicted of attempted carrying of a concealed weapon and a controlled substance charge, and that defendant had absconded from probation supervision. However, as noted above, the sentencing guidelines applicable to defendant and defendant's convictions already take into account defendant's prior weapons conviction as well as defendant's decision to carry a weapon during this altercation in which another individual died. The trial court's remarks at sentencing do not address whether the characteristics accounted for in the sentencing guidelines were given "inadequate or disproportionate weight," *Havens*, *supra* at 18, to support the court's upward departure.

Further, although "a defendant's conduct while on probation can be considered as a substantial and compelling reason for departure from the legislative sentencing guidelines," *Hendrick*, *supra* at 565, according to the record before us, defendant was not under probation supervision at the time he committed the instant offenses. Because it is unclear from the trial

court's statements whether the court relied on appropriate factors to support an upward departure from the sentencing guidelines, we remand this case for resentencing.

We affirm defendant's convictions and sentence for felony-firearm, but vacate defendant's sentence for felon in possession of a firearm and remand for resentencing. We do not retain jurisdiction.

/s/ Stephen L. Borrello
/s/ Janet T. Neff
/s/ Jessica R. Cooper