

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

UNPUBLISHED
April 2, 2013

v

MAUQKI JAVON HOBBS,

Defendant-Appellant.

No. 308477
Macomb Circuit Court
LC No. 2010-003150-FC

Before: MURPHY, C.J., and O'CONNELL and BECKERING, JJ.

PER CURIAM.

Defendant appeals as of right his jury-trial convictions of prisoner taking a hostage, MCL 750.349a, unlawful imprisonment, MCL 750.349b, assault of a prison employee, MCL 750.197c, assault with intent to do great bodily harm less than murder, MCL 750.84, assault with a dangerous weapon, MCL 750.82, and prisoner in possession of a weapon, MCL 800.283(4). Defendant was sentenced to 15 to 25 years' imprisonment on each conviction, except for the offense of assault with a dangerous weapon for which he was sentenced to serve 10 to 15 years, with all sentences to run concurrently to each other, but consecutively to the sentence defendant had already been serving when he engaged in the conduct leading to the current convictions. We affirm.

On July 17, 2009, inmate defendant, wielding a shank (homemade knife), violently attacked a prison secretary at the Macomb Correctional Facility and held her against her will. Eventually, the secretary was able to escape as responding officers cornered the combative defendant and then apprehended him. The evidence against defendant presented by the prosecutor at trial was overwhelming. And defendant took the stand and testified, "I'm guilty of every charge that's been made." Because of defendant's demeanor, history, and behavior, the trial court ordered him handcuffed and shackled during trial. Defendant was tried wearing prison garb after refusing offers to provide him with civilian clothing. Defendant was often disrespectful to the court and the attorneys.

On appeal, defendant first argues that he was denied his state and federal constitutional right to counsel pursuant to *United States v Cronin*, 466 US 648; 104 S Ct 2039; 80 L Ed 2d 657 (1984), where trial counsel's failure to consult with him prior to the start of trial amounted to a denial of counsel at the critical pretrial stage of the proceedings, thereby mandating a presumption of prejudice. Defendant then argues, citing various instances, that he was denied

the effective assistance of counsel during trial and prejudiced by counsel's flawed representation, requiring reversal under *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Finally, defendant contends that he was denied his constitutional right to due process when the trial court ordered him handcuffed and shackled during trial based on undisclosed comments by corrections officers that were never made part of the record.

While a party preserves a claim of ineffective assistance of counsel by moving for a new trial or *Ginther*¹ hearing, if ultimately no hearing is conducted, our review is limited to mistakes apparent on the record. *People v Payne*, 285 Mich App 181, 188; 774 NW2d 714 (2009); *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). This Court reviews the issue of whether a person has been denied the effective assistance of counsel as a mixed question of fact and constitutional law, which we review, respectively, for clear error and de novo. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002).

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defence.” “This requirement was made applicable to the states through the Due Process Clause of the Fourteenth Amendment.” *People v Russell*, 471 Mich 182, 187; 684 NW2d 745 (2004). Under the Michigan Constitution, “[i]n every criminal prosecution, the accused shall have the right to . . . have the assistance of counsel for his or her defense.” Const 1963, art 1, § 20. The right to counsel is a safeguard deemed necessary to ensure the fundamental human rights of life and liberty without which justice will not be done. *Gideon v Wainwright*, 372 US 335, 343; 83 S Ct 792; 9 L Ed 2d 799 (1963). “The right of one charged with [a] crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.” *Id.* at 344. “An accused’s right to be represented by counsel is a fundamental component of our criminal justice system.” *Cronic*, 466 US at 653.

In *People v Frazier*, 478 Mich 231, 243; 733 NW2d 713 (2007), our Supreme Court discussed and differentiated the United States Supreme Court’s decisions in *Strickland*, 466 US 668, and *Cronic*, 466 US 648, the two landmark cases regarding ineffective assistance of counsel:

Most claims of ineffective assistance of counsel are analyzed under the test developed in *Strickland, supra*. Under this test, counsel is presumed effective, and the defendant has the burden to show both that counsel's performance fell below objective standards of reasonableness, and that it is reasonably probable that the results of the proceeding would have been different had it not been for counsel's error. But in *Cronic*, the United States Supreme Court identified three rare situations in which the attorney's performance is so deficient that prejudice is presumed. One of these situations involves the complete denial of counsel, such as where the accused is denied counsel at a “critical stage” of the proceedings. For purposes of distinguishing between the rule of *Strickland* and that of *Cronic*, [the] difference is not of degree but of kind.” *Bell v Cone*, 535 US 685, 697; 122 S Ct 1843; 152 L Ed 2d 914 (2002). [Citations omitted.]

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

“There are . . . circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified[.]” such as where there was a “complete denial of counsel.” *Cronic*, 466 US at 658-659. 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.” *Id.* at 659 n 25.

Here, on the second day of trial, after the prosecution had fully presented its case-in-chief on the first day of trial, defendant himself complained to the trial court that his attorney had not visited defendant in prison nor otherwise met with him during the six-week interim between counsel’s appointment and the start of trial. There was no request for an adjournment. On the first day of trial, while defendant engaged in a discussion with the trial court and counsel on various matters, defendant said nothing about not meeting with counsel prior to trial. Up until the appointment of trial counsel, defendant had been represented by another attorney who was allowed to withdraw as counsel due to health problems. The initial attorney handled defendant’s preliminary examination, successfully defended against the prosecutor’s motion to amend the complaint to add a criminal sexual conduct charge, and guided defendant in connection with a rejected plea offer. There is no claim that defendant’s first attorney failed to meet, consult, or communicate with defendant. We note that, during the entire pretrial and trial stages of the proceedings, defendant always had counsel present for court appearances.

Assuming that the pretrial period during which trial counsel represented defendant was a critical stage of the proceedings, see *Powell v Alabama*, 287 US 45, 57; 53 S Ct 55; 77 L Ed 158 (1932); *People v Mitchell*, 454 Mich 145, 152-157; 560 NW2d 600 (1997); *Mitchell v Mason*, 325 F3d 732, 742-744 (CA 6, 2003), we nonetheless decline to invoke *Cronic* and its presumption of prejudice under the particular circumstances presented.² Because our review is

² The prosecution, citing *Bell v Cone*, 535 US 685, 695; 122 S Ct 1843; 152 L Ed 2d 914 (2002), and *People v Murphy*, 481 Mich 919, 921 n 2; 750 NW2d 582 (2008) (MARKMAN, J., concurring), argues in its appellate brief that “[s]tate and federal courts have overwhelmingly concluded . . . that *Cronic* applies only to situations where defense counsel was actually absent from a specific event, not where counsel simply failed to communicate with the defendant.” We initially note that a concurring opinion on a Supreme Court order is hardly binding precedent. Regardless, in *Murphy*, 481 Mich at 921 n 2, JUSTICE MARKMAN stated, in its entirety, that “[a]lthough *Cronic* uses the term ‘denial,’ it makes clear that this prong is implicated either when counsel is ‘totally absent’ or when counsel has been ‘prevented from assisting the accused.’” (Citation omitted). Contrary to the prosecution’s argument, there is no statement in the *Murphy* concurrence that *Cronic* only applies to cases wherein counsel was actually absent from a specific event, nor a statement that *Cronic* does not apply where counsel simply failed to communicate with the defendant. Moreover, in *Bell*, 535 US at 695-696, the United States Supreme Court stated:

A trial would be presumptively unfair, we said, where the accused is denied the presence of counsel at “a critical stage,” a phrase we used in *Hamilton v Alabama*, 368 US 52, 54; 82 S Ct 157; 7 L Ed 2d 114 (1961), and *White v Maryland*, 373 US 59, 60; 83 S Ct 1050; 10 L Ed 2d 193 (1963) (*per curiam*), to

limited to mistakes apparent on the record, the only information that we can consider is defendant's claim on the record that trial counsel failed to meet with defendant prior to trial. Defendant did not assert that counsel failed to communicate or consult with him in a manner other than a face-to-face meeting, e.g., by telephone. Our Supreme Court in *Mitchell*, 454 Mich at 152 n 9, noted that the right to counsel at critical stages does not guarantee a defendant an in-depth private interview during the pretrial phase in a place of the defendant's choosing. Stated otherwise, a defendant does not have a right to consult with counsel at a particular location or in a particular manner. We also have no information regarding the nature of any consultation or communications that may have taken place between trial counsel and defendant's first attorney. Furthermore, given that defendant, who showed nothing but contempt for the legal process, counsel, and the trial court, and who is a fourth habitual offender familiar with the criminal justice system, failed to voice any complaints on the matter until the prosecution had presented its entire case, we will not reward his gamesmanship and permit him to harbor error as an appellate parachute. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000); *People v Fetterley*, 229 Mich App 511, 520; 583 NW2d 199 (1998). Because of the particular procedural aspects of this case, it is distinguishable from *Mitchell*, 325 F3d 732, a case heavily relied on by defendant.

Next, in the context of applying *Strickland*, we have carefully examined all of the claimed instances of ineffective assistance of counsel set forth by defendant, including the matter concerning the alleged failure to meet with defendant before trial commenced. And considering the overwhelming evidence of guilt and testimony by defendant himself that he was guilty of committing all of the charged offenses, we must conclude that defendant was not prejudiced by any presumed errors committed by counsel. It is unnecessary to explore each of the claimed instances of a deficient performance. Defendant simply cannot demonstrate a reasonable probability that the outcome of the trial would have been different had it not been for counsel's presumed errors. *Frazier*, 478 Mich at 243.

Finally, we reject defendant's argument that he was denied his constitutional right to due process and a fair trial when the court had him restrained during the trial. We review a trial court's decision to handcuff and shackle a defendant during a jury trial for an abuse of discretion under the totality of the circumstances. *Payne*, 285 Mich App at 186. "Restraints should be permitted only to prevent the escape of a defendant, to prevent the defendant from injuring others in the courtroom, or to maintain an orderly trial." *People v Dixon*, 217 Mich App 400, 404; 552 NW2d 663 (1996).

denote a step of a criminal proceeding, such as arraignment, that held significant consequences for the accused. [Citation omitted.]

We do not read this language as supporting the proposition that a critical stage in the proceeding cannot be identified as a general pretrial period. And the quoted passage from *Bell* certainly does not support the contention that *Cronic* does not apply to situations where an attorney merely failed to communicate with a defendant. Ultimately, we need not resolve the issue for the reasons indicated below.

Defendant was antagonistic and hostile at the beginning of and throughout the trial. For example, the following colloquy took place between the trial court and defendant before jury selection commenced relative to an offer by the court to provide defendant with civilian clothes:

THE COURT: And you understand that 12 people sitting in that jury box are going to see you in prison garb? I'm talking to you.

DEFENDANT HOBBS: And your point is what?

THE COURT: The point is . . . that they will not be favorably impressed with the fact that you are in prison garb.

DEFENDANT HOBBS: Okay. And I just told you I don't want to wear it. Now, what's [your] point?

Shortly thereafter, the trial court stated on the record, "Based upon information received from the officers from MDOC regarding his violent propensities, he will remain shackled and handcuffed." Although no particulars were given, it can reasonably be implied that defendant either threatened violence or actually engaged in some altercation or act of violence while with the officers, and there is no dispute regarding defendant's violent history. We must also defer to the court's superior opportunity to observe defendant. *Payne*, 285 Mich App at 186. There was no abuse of discretion, and we would note that the issue was not preserved, as there was no objection to the restraints. We fail to see the prejudice, nor can it be said that defendant is actually innocent or that any presumed error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Affirmed.

/s/ William B. Murphy
/s/ Peter D. O'Connell
/s/ Jane M. Beckering