

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TOBY ALLAN FARLEY,

Defendant-Appellant.

UNPUBLISHED

January 6, 2009

No. 278667

Van Buren Circuit Court

LC No. 07-015452-FH

Before: Hoekstra, P.J., and Bandstra and Donofrio, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of disarming a police officer of a non-firearm weapon, MCL 750.479b(1), and resisting or obstructing a police officer, MCL 750.81d(1). Defendant was sentenced to concurrent prison terms of 4 to 15 years on the disarming conviction and 46 months to 15 years on the resisting or obstructing conviction. He appeals as of right. Because we conclude that defendant was denied the assistance of counsel at a critical stage of the criminal prosecution, we reverse defendant's convictions and remand for a new trial.

I

The trial court, without defendant, defense counsel, and the prosecutor present in the courtroom, announced to the jury venire that "today we have a criminal jury trial" and that it was taking the "opportunity to give you some orientation as to what you might expect here." The trial court discussed such topics as selection for jury duty, length of service, calling to find out whether to report, compensation, and the role of the bailiff, interns, courtroom clerk, and court reporter. The trial court informed the venire that serving on a jury would be different than shown on certain televised trials and television shows because different laws and rules of evidence applied. Therefore, the trial court explained, attention would need to be paid to its instructions on the law. The trial court further instructed the venire that they could not talk to witnesses or the parties. The trial court then stated that production of the record is

not instantaneous, so if you're deliberating and you say, well, we'd like to see the testimony of John Smith, she [the court reporter] can't just hand it to you. She's going to have to go produce it. It might take an hour or 2 hours, 3 hours. It depends on how long John Smith testified. So keep those limitations in mind.

The court clerk then called roll, and the trial court swore in the venire.

The trial court continued by informing the venire that 13 jurors would be selected, including an alternate, who would be randomly selected at the end of trial. It encouraged the venire to give honest answers during voir dire because a mistrial would be called if, during trial, too many jurors discovered a conflict. The trial court indicated that its goal in selecting a jury was to determine if each juror could be fair and impartial, and stated that questions about potential bias, like having been a crime victim, would be asked. The trial court explained:

And you have to understand, of course, that the prosecutor is going to want somebody that's kind of kind to law enforcement and looks upon it, you know, the law is the law. And the defense is going to want to have somebody who is going to be a little more understanding, maybe not so rigid. So they're each looking for jurors that will favor their side at least.

The trial court informed the venire that there were "two ways" a juror could be challenged, either for cause or with a peremptory challenge. The trial court explained that challenges for cause were unlimited in number but limited in reason and that peremptory challenges were limited in number and unlimited in reason, except the challenge could not be based on race or gender. The trial court then recited the oath the jury would ultimately take and explained that it meant the jurors would

take the law as I give it to you, whether you like the law or not, you'll listen to the witnesses and listen to the testimony, look at the exhibits, and then you'll decide whether or not you are convinced in a criminal case beyond a reasonable doubt that all of the elements of the crime have been proven by the prosecutor.

The trial court emphasized to the venire that it would be important for the jury to follow the oath in order to avoid "jury nullification." The trial court read to the venire a newspaper article to illustrate jury nullification. The article told of a jury that acquitted a defendant, while believing the defendant to be guilty, in order to give him another chance, but not knowing that he faced two more trials for similar crimes. The trial court explained that, given the rules of evidence, the jury would not have known of the defendant's upcoming trials. The trial court told the venire that "what's wrong with jury nullification is we will not give you the facts that make you good at it." The trial court then stated:

One of the rules in court is that a defendant may choose to put his character in evidence. He can call witnesses to say this guy is a peaceful, law abiding, nonviolent guy, and also has a reputation for truth and veracity. So when he testifies we know him to be a very truthful person.

A defendant can choose to do that. The defendant doesn't have to do that. And if the prosecutor wanted to do the other side of that, if he wanted to say, "We want to show to you this guy has got 17 felony convictions and he's got 6 perjury charges so you ought to convict him," they can't do that.

Of course, if he takes [the] stand and testifies, they can show you he committed perjury in the past, but they cannot put the defendant's character in evidence and say, "He's probably worth locking up anyway."

And you need to understand that to understand why jury nullification is bad because you don't get to know these things. Anyhow, follow your oath, is all I ask you to do.

The trial court also informed the venire that "[s]ometimes I have to direct a verdict, like today's case, if an essential element of the crime isn't established by the prosecutor, for some reason, then I'll direct you to find the defendant not guilty. But that doesn't happen too often. But occasionally it does." The trial court asked the venire to turn off their cellular telephones, and then it stated, "And with that, I would ask if any of you have questions, and then I'll see if our lawyers are ready to start this trial." After answering a few questions, including one about why a request to be excused for religious reasons had been denied, the trial court ended the orientation by stating, "Okay, we'll take a short recess. I saw one of the lawyers peak [sic] their head in here so they're probably ready." Court proceedings resumed after a short recess with the parties present; the trial court announced the case and asked the attorneys if they were ready to proceed. Both indicated that they were, and the trial court directed the clerk to call thirteen jurors.

II

On appeal, defendant argues that the trial court denied him his constitutional rights to counsel and to be present at trial when it instructed the jury venire on substantive matters outside his presence and the presence of counsel. Because defendant did not object at trial or raise this issue in a motion for a new trial under MCR 6.431 or 7.208(B)(1), the issue is unpreserved. Review of an unpreserved constitutional issue is for plain error. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

An accused in a criminal prosecution has a due process right "to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure." *Kentucky v Stincer*, 482 US 730, 745; 107 S Ct 2658; 96 L Ed 2d 631 (1987). In addition, the accused is entitled to the assistance of counsel at all "critical stages" of the prosecution. *People v Bladel (After Remand)*, 421 Mich 39, 51-52; 365 NW2d 56 (1984), aff'd sub nom *Michigan v Jackson*, 475 US 625; 106 S.Ct 1404, 89 L Ed 2d 631 (1986). A "critical stage" of the prosecution is any stage "where counsel's absence might derogate from the accused's right to a fair trial." *Id.* at 52 (quotation marks and citation omitted). See also *People v Willing*, 267 Mich App 208, 228; 704 NW2d 472 (2005) ("The phrase 'critical stage' refers to a step of a criminal proceeding, such as arraignment, that [holds] significant consequences for the accused.") (quotation marks and citation omitted).

Neither defendant nor defense counsel were present when the trial court, after announcing to the jury venire that "today we have a criminal trial," oriented the venire as to what it should expect. Several of the comments or instructions given by the trial court during this orientation were substantive in nature, rather than administrative or housekeeping. See *People v France*, 436 Mich 138, 142-143; 461 NW2d 621 (1990). In particular, we note the following statements to the venire: (1) that, despite a perceived need for the review of testimony during

deliberations, the jury should consider the time it would take to prepare a transcript in making such a request; (2) that the prosecutor would be looking for jurors who would be adamant about the rule of law, while the defense would want jurors who were sympathetic; (3) that it would be important to follow the oath and not to engage in jury nullification, the explanation of which contained an implication that the jury might not be made aware of negative information about defendant; and (4) that, if the prosecutor did not establish an essential element of the crime, the trial court would direct the jury to find defendant not guilty, a statement which could imply that if the trial court did not direct a verdict, then the prosecution had established all elements of the charged crimes. These statements were substantive in nature because they concerned legal issues, but also because they were of such a nature that they could have impacted the jury's deliberations. Accordingly, the orientation held significant consequences for defendant. *Willing, supra*. The orientation was, therefore, a critical stage of the criminal prosecution. Because defendant and his counsel were not present at the orientation, defendant was denied his constitutional right to the assistance of counsel at all critical stages of the criminal prosecution.

Moreover, we note that the above four statements were objectionable. First, the trial court's admonition that the jury, before requesting a transcript of a witness's testimony, should consider the time necessary to prepare the transcript is inconsistent with MCR 6.414(J), which provides that a trial court may not refuse any reasonable request by a jury to review a witness's testimony. Second, the trial court's statement that the defense would seek jurors who are "a little more understanding," while the prosecutor would seek jurors who would follow the rule of law, can only be categorized as a violation of defendant's right to a fair trial. The statement implies that defendant, because he was seeking sympathetic jurors, did, in fact, commit the charged crimes. Third, the trial court's caution about jury nullification is inconsistent with the recognized power of the jury. See *People v Vaughn*, 409 Mich 463, 466; 295 NW2d 354 (1980), in which the Supreme Court stated:

Juries are not held to any rules of logic nor are they required to explain their decisions. The ability to convict or acquit another individual of a crime is a grave responsibility and an awesome power. An element of this power is the jury's capacity for leniency.

Fourth, the implied assertion that if the trial court did not direct the jury to find defendant guilty, the prosecution had established the elements of the charged crimes fails to recognize the standard under which a trial court must decide a motion for a directed verdict. In deciding such a motion, a trial court may not consider the credibility of witnesses; rather it must view all the evidence in a light most favorable to the nonmoving party and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Mehall*, 454 Mich 1, 6; 557 NW2d 110 (1997). A jury, however, is under no similar obligation; it must decide which witnesses are credible. Because the trial court's statements were objectionable, defense counsel's absence from the orientation did derogate from defendant's right to a fair trial. *Bladel, supra*.

"The complete denial of counsel at a critical stage of a criminal proceeding is a structural error that renders the result unreliable, thus requiring automatic reversal." *People v Russell*, 471 Mich 182, 194 n 29; 684 NW2d 745 (2004). We therefore reverse defendant's convictions and remand to the trial court for a new trial.

III

Defendant also argues on appeal that the trial court erred in denying his motion for a mistrial based on the introduction of bad-acts evidence. We briefly address defendant's argument because the issue whether evidence of defendant's status as a parolee, the outstanding parole violation warrant for his arrest, and defendant's statements that he did not want to return to jail is admissible may arise on retrial.

A mistrial should be granted only for an irregularity that results in prejudice to the defendant and impairs his ability to get a fair trial. *People v Alter*, 255 Mich App 194, 205; 659 NW2d 667 (2003). A trial court's decision on a motion for a mistrial is reviewed for an abuse of discretion. *People v Bauder*, 269 Mich App 174, 194; 712 NW2d 506 (2005).

"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." MRE 404(b)(1). However, bad-acts evidence may be admissible under MRE 404(b)(1) if offered for a proper purpose, such as "proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident." *Id.*; *People v Dobek*, 274 Mich App 58, 85; 732 NW2d 546 (2007). In this case, defendant argued that, after the officer began tasing him, he went into a "fight or flight" mode; he was in fear for his life, and he lost conscious control of his decisions. Evidence that defendant was a parolee, that there was an outstanding parole violation warrant for his arrest, and that he did not want to go back to jail was relevant to whether defendant's actions were intentional. In other words, the evidence was probative of an intent to resist arrest and to disarm the officer. Accordingly, the evidence was offered for a proper purpose. The trial court did not abuse its discretion in denying defendant's motion for a mistrial.

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ Joel P. Hoekstra
/s/ Richard A. Bandstra
/s/ Pat M. Donofrio