

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEVEN JAMES HOCH,

Defendant-Appellant.

UNPUBLISHED

October 30, 2008

No. 269739

Macomb Circuit Court

LC No. 2005-003002-FH

Before: Schuette, P.J., and Borrello and Gleicher, JJ.

SCHUETTE, P.J. (*dissenting*).

I respectfully dissent from the majority opinion of my distinguished colleagues, Judges Borrello and Gleicher. I do not believe that the trial court’s *ex parte* communication with the jury constitutes prejudicial constitutional error requiring reversal. Therefore, I would affirm defendant’s convictions.

The Sixth Amendment to the United States Constitution guarantees a defendant the right to the assistance of counsel for his defense. *People v Marsack*, 231 Mich App 364, 372; 586 NW2d 234 (1998). The right to counsel attaches when an adversary criminal proceeding is commenced against a defendant by a formal charge, a preliminary hearing, an indictment, an information, or an arraignment. *Id.* at 376-377. Once the right attaches and a defendant asserts his right to counsel, the Sixth Amendment provides that he must be afforded counsel at all critical stages of the proceedings. See *People v Williams*, 470 Mich 634, 641; 683 NW2d 597 (2004). A critical stage of the proceedings is one in which “counsel’s absence might derogate from the [defendant’s] right to a fair trial.” *People v Barnett*, 163 Mich App 331, 335; 414 NW2d 378 (1987). Likewise, a defendant has the right to be present at any stage of trial where his or her substantial rights might be adversely affected, including “voir dire, selection of an and subsequent challenge to the jury, presentation of evidence, summation of counsel, instructions to the jury, rendition of the verdict, [and] imposition of sentence.” *People v Mallory*, 421 Mich 229, 247; 365 NW2d 673 (1984).

Defendant argues, and the majority agrees, that the absence of defendant and defense counsel during the communication between Judge Miller and the jury was structural error—requiring automatic reversal—because this was a critical stage of the proceedings. I disagree. While a jury’s reinstruction is a critical stage of the proceedings, *French v Jones*, 332 F3d 430, 438 (CA 6, 2003), in this case, Judge Miller did not reinstruct the jury. A reinstruction “‘goes beyond reciting what has previously been given; it is not merely repetitive.’” *United States v*

Combs, 33 F3d 667, 670 (CA 6, 1994) (citation omitted). Here, the jury was not given any additional instructions and no instruction or testimony was reread. Judge Miller instructed the jury “to refer to their notes, refer to the jury instructions that they had before them, and refer to the testimony that they heard in this room.” Also, the jury was instructed “to use their judgment as citizens, as qualified jurors to work through the evidence as they see it before them and arrive at their own conclusion” Therefore, because this was not a critical stage of the proceedings, defendant’s and defense counsel’s absence did not constitute error requiring reversal.¹

Defendant further contends that even if there was no structural error in this case, reversal is still required because the jury reinstruction was an improper, prejudicial ex parte communication. Again, I disagree. An ex parte communication between the judge and jury only requires reversal when the reviewing court determines that the communication has prejudiced a party. *Meyer v Center Line*, 242 Mich App 560, 565; 619 NW2d 182 (2000); *People v France*, 436 Mich 138, 163; 461 NW2d 621 (1990). Under these circumstances, prejudice is defined as ““any reasonable possibility of prejudice.”” *France, supra* at 162-163 (citations omitted). However, a court must first determine whether the communication was substantive, administrative, or housekeeping before prejudice can be determined. *Id.* at 163; see also *Meyer, supra* at 565.

Our Supreme Court has distinguished between substantive ex parte communications that carry a presumption of prejudice and administrative and housekeeping ex parte communications that carry no presumption of prejudice. *France, supra* at 143-144. A substantive communication “encompasses supplemental instructions on the law given by the trial court to a deliberating jury,” and an administrative communication involves “instructions that encourage a jury to continue its deliberations.” *Id.* at 143.

Here, Judge Miller’s ex parte communication with the jury was an administrative communication. As discussed above, he did not reinstruct the jury. Judge Miller only encouraged the jury to continue its deliberations. The jury was not given new instructions, no additional instructions were added, and no instructions or testimony was reread. The jury based its decision on only what was put forth at trial. Therefore, because the ex parte communication was not improper or prejudicial, I do not believe that reversal is required.

Accordingly, I would affirm defendant’s convictions.

/s/ Bill Schuette

¹ Further, even if the communication between Judge Miller and the jury was a reinstruction, i.e., a critical stage of the proceedings, defendant acknowledged that he was represented by stand-in counsel. Therefore, defendant was not deprived of his Sixth Amendment right to counsel.