

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARCO ANTONIO HERCULES-LOPEZ,

Defendant-Appellant.

UNPUBLISHED

June 22, 2010

No. 280887

Kent Circuit Court

LC No. 06-000220-FC

ON REMAND

Before: MARKEY, P.J., MURPHY, C.J., and BORRELLO, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery, MCL 750.529, conspiracy to commit armed robbery, MCL 750.157a, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant to concurrent prison terms of 10 to 27 years for the robbery conviction and 9 to 27 years for the conspiracy conviction, to be served consecutively to a two-year term of imprisonment for the felony-firearm conviction. In defendant's appeal by right, a majority of this Court held that structural error occurred when the trial court, in the absence of defense counsel, responded to a question by the jury while it was deliberating by providing a hand-written supplemental instruction regarding the conspiracy charge. *People v Hercules-Lopez*, unpublished opinion per curiam of the Court of Appeals, issued June 30, 2009 (Docket No. 280887). Our Supreme Court reversed this Court "for the reasons stated in the Court of Appeals dissenting opinion" and remanded this case "for consideration of the issues raised by the defendant but not addressed by that court during its initial review of this case." *People v Hercules-Lopez*, 485 Mich 1118 (2010). We now affirm.

This case arose from a robbery of a supermarket in Grand Rapids. Defendant admitted that he acted as a lookout while another person committed the robbery but maintained that he did so in order to acquire information that might be used against the robber and the getaway driver, the two of whom defendant thought responsible for other robberies in the area. The trial court initially instructed the jury regarding defendant's claims when it read all of the instructions to the jury in the presence of defense counsel, stating in pertinent part:

You need to understand that it is no defense which excuses criminal behavior that a defendant acted, if you find that he did, for purposes of helping the

police. That can, in very limited circumstances, be a defense but only in two circumstances and they're not even claimed here.

* * *

So what you've got to decide is did he participate in the crimes in ways that satisfied the statute, but there is no excuse or justification or over-arching defense for the fact that he claims he did it to help the police because he doesn't even claim he did it in the way that would make that a defense.

* * *

Like I said yesterday, to prove that kind of a charge [conspiracy] with the evidence presented at this trial, all of it taken as a whole, has to do is convince you that Mr. Hercules-Lopez agreed with somebody else to commit an armed robbery. [*Hercules-Lopez*, unpub op at 2 (MURPHY, C.J., concurring and dissenting).]

While the jury was deliberating, it asked the trial court, "Does [defendant's] intent, goals, thoughts, change any verbal agreement that he may have made to commit a crime (conspiracy)[?]" The trial court asked the clerk to summon the prosecutor and defense counsel; the prosecutor soon returned to the courtroom, but the clerk was unable to reach defense counsel. After a 15-minute wait, the trial court decided to respond to the jury's question in the absence of defense counsel by writing an answer on the jury's note which read, "If the defendant actually agreed with another to commit a crime, it does not matter why he agreed." Defense counsel arrived within minutes of the note's being given to the jury and was informed of its contents on the record while the jury was still deliberating. She raised no objection.

On appeal, defendant challenged the supplemental instruction on the conspiracy charge on the grounds that it was an ex parte communication with the jury prohibited by court rule,¹ that structural error occurred in its delivery to the jury in the absence of counsel, and that it did not accurately state the law. Defendant also argued that the prosecutor presented insufficient evidence to sustain his conviction on the conspiracy charge, and that if that conviction were reversed, the sentencing guidelines would change requiring that defendant be resentenced on his conviction for committing armed robbery.

In our prior opinion, this Court unanimously rejected defendant's challenge to the sufficiency of the evidence regarding the conspiracy charge. *Hercules-Lopez*, unpub op. Because our Supreme Court denied defendant's application for leave to appeal regarding this Court's opinion on this issue, it is therefore the law of case.

¹ Defendant cites MCR 6.414(A) but it is clear defendant refers to MCR 6.414(B), which provides in pertinent part regarding a trial court's responsibilities: "The court may not communicate with the jury or any juror pertaining to the case without notifying the parties and permitting them to be present."

Although the majority in our prior decision found structural error in the trial court's providing the supplemental instruction to the jury in the absence of counsel, Chief Judge Murphy opined that reversal was not warranted because the provision of the supplemental instruction did not constitute a critical stage of proceedings when "the absence of counsel did not threaten to harm defendant's right to a fair." *Hercules-Lopez*, unpub op at 3 (MURPHY, C.J., concurring and dissenting). Chief Judge Murphy reasoned that the supplemental instruction was substantially similar or repetitive of instructions the trial court had given earlier in the presence of counsel, and therefore, providing the supplemental instruction to the jury in the absence of counsel was not a critical stage of the proceedings. *Id.* at 3-4, citing *Hudson v Jones*, 351 F3d 212 (CA 6, 2003). Chief Judge Murphy also observed that "it is difficult to conclude that defendant was deprived of counsel on the matter or that a critical stage was involved, given that counsel returned to the courtroom *while deliberations were still progressing*, that counsel was informed of what transpired relative to the note and the court's instruction, and that counsel took no steps whatsoever to challenge the court's action or to suggest a different or more appropriate response, which could still have been given to the jurors during continuing deliberations." *Hercules-Lopez*, unpub op at 4 (MURPHY, C.J., concurring and dissenting). Given our Supreme Court's adoption of this reasoning, it too is the law of case. *Hercules-Lopez*, 485 Mich 1118.

Regarding defendant's challenge to the substantive accuracy of the supplemental instruction, because he did not object at trial, defendant must establish plain error affected his substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). "Reversal is warranted only when the plain, forfeited error resulted in the conviction of an actually innocent defendant or when an error seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence." *Id.* (internal quotations and citation omitted). We adopt Chief Judge Murphy's prior opinion, finding that the substance of the supplemental instruction did not violate defendant's substantial rights:

With respect to the legal soundness of the court's response to the jury's note, the law provides that one who is a government informer or police officer and only feigns participation in a criminal enterprise may not be convicted of conspiracy. *People v Smyders*, 398 Mich 635, 640; 248 NW2d 156 (1976); *People v Atley*, 392 Mich 298, 311-312; 220 NW2d 465 (1974), overruled on other grounds in *People v Hardiman*, 466 Mich 417; 646 NW2d 158 (2002); *People v Barajas*, 198 Mich App 551, 558-559; 499 NW2d 396 (1993), *aff'd* 444 Mich 556 (1994). However, there was no factual dispute that defendant was not an informer, officer, or working on behalf of the police; therefore calling into question the relevancy of his motivation or reasoning for agreeing to the armed robbery predicated on the claim that he was doing so to help the police. I do note that a "[c]onspiracy is a specific-intent crime, because it requires both the intent to combine with others and the intent to accomplish the illegal objective." *People v Mass*, 464 Mich 615, 629; 628 NW2d 540 (2001). "[T]here must be proof demonstrating that the parties specifically intended to further, promote, advance, or pursue an unlawful objective." *People v Justice (After Remand)*, 454 Mich 334, 347; 562 NW2d 652 (1997). Defendant only argues that the supplemental instruction misstated the law, without any express argument presented that the initial instructions on the crime of conspiracy were incorrect, even though they are consistent with the supplemental instruction. Regardless, assuming any

mistake in the court's instructions, I cannot conclude, given the overwhelming evidence of guilt, that it affected defendant's substantial rights, nor that defendant is actually innocent or that the integrity of the proceedings was compromised independent of defendant's guilt or innocence. [*Hercules-Lopez*, unpub op at 4-5 (MURPHY, C.J., concurring and dissenting).]

For much the same reasoning, we conclude that if the trial court's providing the jury with the supplemental instruction in the absence of defense counsel violated MCR 6.414(B), prejudice to defendant's substantial rights did not occur so as to warrant reversal. MCR 6.414(B) states that a court "may not communicate with the jury or any juror pertaining to the case without notifying the parties and permitting them to be present." In reviewing the application of this court rule, our Supreme Court in *People v France*, 436 Mich 138, 142-144; 461 NW2d 621 (1990), defined three types of ex parte communication between a court and a jury and identified the corresponding level of prejudice that has to be shown in order to require reversal, rejecting the previous rule of automatic reversal. "[B]efore a reviewing court can make a determination regarding the prejudicial effect of an ex parte communication, it must first categorize the communication into one of three categories: substantive, administrative, or housekeeping." *Id.* at 163. Here, the ex parte supplemental instruction was a substantive communication, which is presumed to be prejudicial. The *France* Court opined:

Substantive communication encompasses supplemental instructions on the law given by the trial court to a deliberating jury. A substantive communication carries a *presumption* of prejudice in favor of the aggrieved party regardless of whether an objection is raised. The presumption may only be rebutted by a firm and definite showing of an *absence* of prejudice. *France*, 436 Mich at 143 (emphasis in original).]

For the reasons already discussed, on the facts of this case, we conclude that defendant was definitely not prejudiced as result of the trial court's providing an ex parte supplemental instruction to the jury. Indeed, the *France* Court essentially described this case as an example of an ex parte supplemental instruction that is definitely not prejudicial. The Court noted that "[t]he prosecution may rebut the presumption of prejudice with a showing that the instruction was merely a recitation of an instruction originally given without objection, and that it was placed on the record." *Id.* at 163 n 34. Consequently, we conclude that defendant has not established that the trial court's violation of MCR 6.414(B) affected his substantial rights. *Carines*, 460 Mich at 763.

The last issue defendant raises that we have not previously addressed is his claim for resentencing on his armed robbery conviction should his conspiracy conviction be reversed. Because we have concluded that error warranting reversal did not occur regarding defendant's conspiracy conviction, defendant's last argument is moot.

We affirm.

/s/ Jane E. Markey
/s/ William B. Murphy
/s/ Stephen L. Borrello