

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

UNPUBLISHED
October 20, 2015

v

FIDEL KINSEY,

No. 322145
Wayne Circuit Court
LC No. 13-011016-FH

Defendant-Appellant.

Before: FORT HOOD, P.J., and CAVANAGH and K. F. KELLY, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of assault by strangulation, MCL 750.84(1)(b), and aggravated domestic violence, MCL 750.81a(2), arising from an altercation defendant had with his ex-girlfriend. We affirm.

At the beginning of the second day of trial, defendant and the complaining witness were late. The trial judge provided to the jury the following explanation for the delay:

Unfortunately the defendant hasn't shown up yet. The complaining witness who's on the witness stand under cross-examination hasn't shown up yet. And the defense lawyer has run off to another courtroom. He was here earlier and had something else he wanted to do.

So here we are stuck. This is one of the reasons why our dockets get congested in this courthouse. We can never seemingly start things on time unless everybody involved in the case is in jail, then we know we can get them here on time. But unfortunately that's not the case here.

But, so I'm sorry to say I'm gonna [sic] ask you to go back into the jury room. We will get started as soon as humanly possible.

Thank you for your patience. I'm sorry for the delay.

When the absent parties arrived, the judge informed them, "I told the jury that both you and the defendant were late getting here which is the reason why there was a delay in the proceedings. So they're probably not pleased with either one of you. So I guess that's evenhanded."

On appeal, defendant argues that he was denied a fair trial because the trial court's comments demonstrated bias and caused the jury to view him with prejudice. We disagree.

Defendant did not object when he learned of the trial court's comments; therefore, his claim of judicial bias is not preserved. See *People v Jackson*, 292 Mich App 583, 597; 808 NW2d 541 (2011). An unpreserved constitutional issue is reviewed for plain error affecting defendant's substantial rights. *Id.* at 592. The defendant bears the burden of demonstrating that a plain error occurred and that it affected the outcome of the trial court proceedings. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

Trial judges have great discretion in matters of trial conduct, and there is a heavy presumption of judicial impartiality. *Jackson*, 292 Mich App at 598. The "veil of judicial impartiality" is only pierced when the trial court's comments may have deprived the defendant of a fair trial by unduly influencing the jury. *Id.* (citations omitted). Ex parte communications between a judge and jury should only result in a new trial if there is a reasonable possibility that the communication caused prejudice. *People v Powell*, 303 Mich App 271, 275; 842 NW2d 538 (2013).

To evaluate the prejudicial effect of an ex parte communication, a court must first categorize the communication as either a substantive, administrative, or housekeeping communication. *People v France*, 436 Mich 138, 163; 461 NW2d 621 (1990). A substantive communication "encompasses supplemental instructions on the law" and carries a presumption of prejudice. *Id.* at 143. An administrative communication "include[s] instructions regarding the availability of certain pieces of evidence and instructions that encourage a jury to continue its deliberations," and carries no presumption, although failing to object once aware of the communication is evidence that it was not prejudicial. *Id.* A housekeeping communication "occur[s] between a jury and a court officer regarding meal orders, rest room facilities, or matters consistent with general 'housekeeping' needs that are unrelated in any way to the case being decided," and carries a presumption of no prejudice. *Id.* at 144.

The trial court did not discuss any substantive legal issues with the jury without the presence of defense counsel. The communication only dealt with when the trial would resume and had no bearing on the merits of the case. Therefore, the communication was either an administrative or housekeeping matter. See *id.* at 143-144. Even evaluated using the strictest remaining standard—the administrative communication "no presumption" standard—the judge's communication was not prejudicial. See *id.* at 144. Defense counsel did not even object to the judge's communication when he was made aware of it. This constitutes evidence that the communication was not prejudicial. See *id.* at 143; *Powell*, 303 Mich App at 275.

Even "[c]omments that are critical of or hostile to counsel and the parties are generally not sufficient to pierce the veil of impartiality." *Jackson*, 292 Mich App at 598. Furthermore, the negative comments made by the trial court referenced both defendant and the complaining witness, which weighs against any suggestion of judicial bias. Finally, the trial court instructed the jury at the beginning and end of trial to disregard any judicial ruling or comment which might seem to indicate an opinion on the case. "Jurors are presumed to follow their instructions." *People v Unger*, 278 Mich App 210, 235; 749 NW2d 272 (2008). After closing arguments, the judge instructed the jurors before they left to deliberate:

[A] person accused of a crime is presumed to be innocent. And this means that you must start with the presumption that the defendant is innocent. And this presumption continues throughout the trial and entitles the defendant to a verdict of not guilty unless or until you're satisfied beyond a reasonable doubt that he is guilty.

* * *

My comments, rulings, questions, and even the instructions themselves are not actually evidence. . . . [W]hen I make a comment or give an instruction, I'm not trying to influence your vote or express a personal opinion about the case. And if you believe I have such an opinion, then pay no attention to that. You are the only judges of the facts, and you must decide this case based on the evidence.

There is no basis to believe that the brief comments by the judge to the jury had any influence on the jury's decision or deprived defendant of a fair trial. See *id.* Thus, we reject defendant's claim of judicial bias. See *Jackson*, 292 Mich App at 598.

Next, defendant argues that the absence of defense counsel during the trial court's comments to the jury deprived him of his right to have counsel at a critical stage of trial, constituting structural error subject to automatic reversal. We disagree.

We review de novo whether a defendant was denied his right to the assistance of counsel. *People v Swain*, 288 Mich App 609, 643; 794 NW2d 92 (2010). A proceeding is deemed to be a "critical stage" of trial when (1) there could be substantial prejudice to a defendant's rights during the proceeding and (2) having counsel present could help avoid such prejudice. *Coleman v Alabama*, 399 US 1, 7; 90 S Ct 1999; 26 L Ed 2d 387 (1970). A critical stage of trial holds "significant consequences for the accused." *People 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).

Here, as discussed above, the trial judge's comments to the jury were brief and nonsubstantive. There was no chance of substantial prejudice to defendant when the judge briefly explained to the jury why the trial would be starting late. Therefore, there was no need to have defense counsel present during that communication to help avoid prejudice, and, indeed, once defense counsel learned of the communication, he did not object to it. See *Coleman*, 399 US at 7; *France*, 436 Mich at 143. Furthermore, there were no significant consequences for defendant based on what occurred that morning. Therefore, the morning before the second day of trial, when the trial judge explained the delay to the jury, was not a critical stage of defendant's trial. See *Coleman*, 399 US at 7; *Willing*, 267 Mich App at 228. Accordingly, defendant was not denied counsel at a critical stage of trial and, thus, structural error requiring automatic reversal did not occur. See *People v Russell*, 471 Mich 182, 194 n 29; 684 NW2d 745 (2004). Further, as previously discussed, there was no prejudice resulting from the trial court's

comments to the jury made in the absence of defense counsel. Therefore, any error that occurred was harmless. See *Carines*, 460 Mich at 773.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Mark J. Cavanagh
/s/ Kirsten Frank Kelly