

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENNETH JEROME HATCHER,

Defendant-Appellant.

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UNPUBLISHED  
December 23, 2003

No. 242786  
Oakland Circuit Court  
LC No. 2001-181882-FC

Before: Wilder, P.J., and Griffin and Cooper, JJ.

PER CURIAM.

Defendant appeals as of right from his jury conviction of felonious assault, MCL 750.82; felon in possession of a firearm, MCL 750.224f; and two counts of possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced as a third-felony offender to fifty-seven months' to eight years' imprisonment for the felonious assault conviction, fifty-seven months' to ten years' imprisonment for the felon in possession conviction, and to the mandatory two-year consecutive sentence for the two counts of felony-firearm. We affirm defendant's convictions but remand for further proceedings.

Defendant first contends that his right to due process of law,<sup>1</sup> and his rights under MCR 6.412(B) and (F) were violated by the trial court's failure to give the jury "appropriate preliminary instructions." Defendant acknowledges that he failed to request such instructions or to object to the trial court's failure to give them; therefore, he has failed to preserve this issue for appellate review. *People v Cain*, 238 Mich App 95, 115; 605 NW2d 28 (1999). This Court reviews unpreserved issues for plain error that affected the defendant's substantial rights, that is, obvious error that prejudiced the defendant by "affect[ing] the outcome of the lower court proceedings." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

MCR 6.412 provides, in relevant part:

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<sup>1</sup> US Const, Am XIV and Const 1963, art 1, § 17.

(B) Instructions and Oath Before Selection. Before beginning the jury selection process, the court *should* give the prospective jurors appropriate preliminary instructions and *must* have them sworn.

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(F) Instructions and Oath After Selection. After the jury is selected and before trial begins, the court *must* have the jurors sworn and *should* give them appropriate pretrial instructions. [Emphasis supplied.]

As indicated by the emphasized portions of the court rule, while the court *must* swear the jurors, the same mandatory language is not used with regard to the giving of appropriate pretrial instructions; the court *should* give such instructions, but is not mandated to do so. Furthermore, the court rules do not indicate *what* preliminary instructions are appropriate. Defendant nonetheless argues that the trial court should have instructed the jury concerning the restriction that they not discuss the case with anyone – including each other – and the presumption of innocence, the burden of proof, and reasonable doubt.

In *People v Blondia*, 69 Mich App 554, 557-558; 245 NW2d 130 (1976), this Court held that error requiring a new trial occurred when the trial judge instructed the jurors that they *could* talk with each other about the case before final deliberations. See also *People v Hunter*, 370 Mich 262, 269-273; 121 NW2d 442 (1963); *People v Rohrer*, 174 Mich App 732, 737; 436 NW2d 743 (1989). However, this Court observed in *Blondia*, *supra* at 557:

While it is clearly the law that the trial judge should instruct the jury not to discuss the case among themselves, the cases have held that the omission is not reversible error absent prejudice or at least a showing of such conversations. *People v Scott*, 55 Mich App 739; 223 NW2d 330 (1974), *People v Taylor*, 46 Mich App 259; 207 NW2d 899 (1973), *People v McIntosh*, 6 Mich App 62; 148 NW2d 220 (1967), *People v Haugabook*, 23 Mich App 356, 358-359; 178 NW2d 556 (1970).

In this case, defendant has failed to demonstrate – or even allege – that any conversations occurred between the jurors before the trial court admonished them not to discuss the case. After the jurors were selected and sworn, they were briefly excused from the courtroom. While they may have been able to discuss matters among themselves at that point, no testimony or evidence had been presented so there was really nothing to discuss. When they returned to the courtroom, opening statements were presented and immediately thereafter, the first witness was called to testify. Midway through the first witness's testimony, there was a lunch break. Before excusing the jury, the trial court instructed the jurors not to discuss the case with anyone, or even among themselves, until the conclusion of the trial. We conclude that this instruction, given at a time before the jury could have discussed any substantive evidence, was sufficient to protect defendant's right to a fair trial.

Regarding defendant's claim that the trial court failed to instruct the jurors concerning the presumption of innocence, the burden of proof, and reasonable doubt, the trial record shows that the trial court questioned the prospective jurors about these concepts at the beginning of the voir dire. Also, both the prosecutor and defendant's counsel admonished the jury in their opening

statements concerning the prosecutor's burden of proof. The record does not indicate that any jurors exhibited a lack of comprehension regarding these important concepts. We conclude that the court's inquiry was sufficient to protect defendant's right to a fair trial.

Defendant also claims that failure to give preliminary instructions constitutes a structural error that entitles him to automatic reversal. "Structural errors are defects that affect the framework of the trial, infect the truth-gathering process, and deprive the trial of constitutional protections without which the trial cannot reliably serve its function as a vehicle for determination of guilt or innocence." *People v Watkins*, 247 Mich App 14, 26; 634 NW2d 370 (2001), *aff'd* on other grounds 468 Mich 233; 661 NW2d 553 (2003), citing *United States v Pavelko*, 992 F2d 32, 35 (CA 3, 1993).

Defendant has not cited any authority holding that the failure to give *suggested* – but unspecified – preliminary instructions constitutes structural error. We therefore conclude that the provision of some preliminary instructions – such as the early admonition not to discuss the case, and the provision of basic information regarding reasonable doubt, the burden of proof, and the presumption of innocence – by the trial court was sufficient to avoid any claim that the framework of the trial was defective, that the truth-seeking process was infected, or that the trial was deprived of necessary constitutional protections.

Defendant finally argues that even if not a structural error, the failure to give preliminary instructions was constitutional error that must be shown to be harmless beyond a reasonable doubt. The harmless-beyond-a-reasonable-doubt standard only applies to *preserved* constitutional error, *People v Anderson (After Remand)*, 446 Mich 392, 405-406; 521 NW2d 538 (1994); as defendant has admitted, his claim was *not preserved* and is therefore subject to plain error review. Therefore, we decline to apply the harmless-beyond-a-reasonable-doubt test in assessing defendant's claim of error.

Defendant's second claim of error relates to his sentencing. Defendant argues that, despite agreeing that two factual errors in the presentence information report (PSIR) would be corrected, those corrections were not made. Defendant further argues that the trial court completely failed to respond to one claim of inaccurate information concerning an alleged prior drug conviction. Defendant preserved these challenges by raising them to the trial court at sentencing. *People v McCrady*, 244 Mich App 27, 32; 624 NW2d 761 (2000).

The prosecutor on appeal agrees that this case should be remanded to the trial court for correction of the PSIR and for resolution of defendant's challenge to the alleged prior drug conviction. Accordingly, we affirm defendant's conviction, but remand this case for correction of the PSIR and for resolution of defendant's challenge to the information regarding the alleged prior drug conviction. *People v Landis*, 197 Mich App 217, 219; 494 NW2d 865 (1992).

Affirmed, but remanded for correction of the PSIR and resolution of defendant's challenge to the alleged prior drug conviction. We do not retain jurisdiction.

/s/ Kurtis T. Wilder  
/s/ Richard Allen Griffin  
/s/ Jessica R. Cooper