

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

PATRICK MICHAEL KENNEY,

Defendant-Appellant.

UNPUBLISHED

February 15, 2005

No. 251018

Oakland Circuit Court

LC No. 03-189864-FH

Before: Talbot, P.J., Whitbeck, C.J., and Jansen, J.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of felonious assault, MCL 750.82, and two counts of possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced as an habitual offender, second offense, MCL 769.10, to concurrent prison terms of one to six years on the assault convictions, to be served consecutively to the mandatory two-year terms for felony-firearm. Defendant appeals as of right. We affirm.

During deliberations, the jury sent out a note asking, “When exactly did Walker accusation occur?” Without conferring with counsel, the court send back a note stating, “There is no testimony to this effect.” Defendant contends that the communication resulted in a denial of counsel during a critical stage of the proceedings and constituted structural error warranting reversal. The issues have not been preserved for appeal because defendant did not raise them below. *People v Grant*, 445 Mich 535, 546; 520 NW2d 123 (1994). Therefore, defendant must shown plain error that affected his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

A criminal defendant is entitled to the assistance of counsel during all critical stages of the criminal proceedings. *People v Kurylczyk*, 443 Mich 289, 296; 505 NW2d 528 (1993). “Critical stages of the proceedings are stages ‘where counsel’s absence may harm the defendant’s right to a fair trial,’ ” *People v James Green*, 260 Mich App 392, 399; 677 NW2d 363 (2004), and include the trial stage. *People v Russell*, 471 Mich 182, 187-188; 684 NW2d 745 (2004). Where counsel is absent or otherwise unable to assist the defendant during a critical stage, the defendant is entitled to relief absent the showing of prejudice. *United States v Cronie*, 466 US 648, 658-659 n 25; 104 S Ct 2039; 80 L Ed 2d 657 (1984).

Whether a trial court’s communication with a deliberating jury constitutes a critical stage of the proceedings depends upon the nature of the communication. Compare *French v Jones*,

332 F3d 430 (CA 6, 2003) (giving a new, nonstandard supplemental instruction constituted a critical stage of the proceedings) with *Hudson v Jones*, 351 F3d 212 (CA 6, 2003) (rereading instructions given during the original charge did not constitute a critical stage of the proceedings). This is consistent with state law, which draws different presumptions of prejudice depending on the nature of the communication. *People v France*, 436 Mich 138, 142-144; 461 NW2d 621 (1990).

The communication at issue was of an administrative nature, *id.* at 165, and did not involve a new instruction on substantive law. Therefore, it did not constitute a critical stage of the proceedings. Pursuant to *France*, such a communication was not presumptively prejudicial, defense counsel did not object when informed of the communication (which is evidence that it was not prejudicial), and we cannot perceive “any possibility of prejudice” to defendant from the message informing the jury that the requested information was not available because it was not admitted into evidence. *Id.* at 143, 165. Accordingly, we find that defendant has failed to establish plain error.

Affirmed.

/s/ Michael J. Talbot
/s/ William C. Whitbeck
/s/ Kathleen Jansen