

* PMS

STATE OF MICHIGAN
SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

Supreme Court
No.

-vs-

^{JAMES}
STEVEN J. HOCH,
Defendant-Appellee,

Court of Appeals
No. 269739 *Opn 10-30-08*

Macomb Circuit
No. 05-3002-FH

D. Miller

_____ */ok*

137908

PLAINTIFF-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL

APPL

1/13

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FILED

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TABLE OF CONTENTS

	Page
TABLE OF CONTENTS.....	i
INDEX OF AUTHORITIES.....	ii
ISSUE PRESENTED.....	iii
STATEMENT OF FACTS	1
ISSUE.....	3
THE TRIAL COURT’S ACTION OF ANSWERING THE JURY’S QUESTION BY TELLING THE JURY THAT IT SHOULD RELY ON THE INSTRUCTIONS IT HAD BEEN GIVEN DOES NOT REQUIRE REVERSAL EVEN THOUGH THE DEFENDANT WAS NOT PRESENT IN THE COURTROOM BECAUSE THE TRIAL COURT DID NOT REINSTRUCT THE JURY.....	3
RELIEF REQUESTED.....	7

INDEX OF AUTHORITIES

Cases

People v Carines, 460 Mich 750, 597 NW2d 130 (1999)3, 5

People v Ginther, 390 Mich 436; 212 NW2d 922 (1973)5

People v Mallory, 421 Mich 229; 365 NW2d 673 (1984).....6

ISSUE PRESENTED

ISSUE

DOES THE TRIAL COURT'S ACTION OF ANSWERING THE JURY'S QUESTION BY TELLING THE JURY THAT IT SHOULD RELY ON THE INSTRUCTIONS IT HAD BEEN GIVEN REQUIRE REVERSAL EVEN THOUGH THE DEFENDANT WAS NOT PRESENT IN THE COURTROOM WHEN THE TRIAL COURT DID NOT REINSTRUCT THE JURY?

Plaintiff-Appellant's Answer: "No".

Defendant-Appellee's Answer: "Yes".

The Court of Appeals Answer: "Yes".

STATEMENT OF FACTS

The Defendant, Steven Hoch, was convicted by the jury of Unarmed Robbery¹, Fleeing and Eluding in the Fourth Degree², Larceny from a Motor Vehicle³, and Driving with a Suspended License⁴. The Defendant's conviction and sentence arose out of the Defendant's theft of a purse. LeAnn Goforth left her purse sitting on the seat of her Chevrolet Yukon while she exited the auto momentarily to pay for her gas purchase. T, 2-23-06, pp. 124-125. The Defendant grabbed Goforth's purse and fled the area in his red truck. Goforth pursued the Defendant in her vehicle and, after catching up with him at a stop light, used her vehicle to block his truck. T, 2-23-06, pp. 127-129. Goforth exited her vehicle, approached the Defendant's truck, opened his driver's side door, and attempted to retrieve her purse. T, 2-23-06, pp. 131-132. During the ensuing argument the Defendant's truck moved forward, striking Goforth, and she was thrown from the vehicle. T, 2-23-06, pp. 134-137. The Defendant fled the scene and a police chase ensued that eventually led to the Defendant's arrest. T, 2-23-06, p. 137.

The case was assigned to circuit court Judge Donald Miller but preceded to trial before visiting Judge Roland Olzark while Judge Miller was away on vacation. At trial the Defendant denied the allegation that

¹ MCL § 750.530.

² MCL § 257.602a(2).

³ MCL § 750.356a(2)(a).

⁴ MCL § 257.904(3)(a).

he assaulted Goforth. He claimed that his truck moved accidentally when Goforth attempted to get her purse back. The jury however, did not agree and found the Defendant guilty of Unarmed Robbery. The Defendant was sentenced as a habitual offender to several concurrent terms of incarceration, the longest of which was 114 to 180 months in prison for the Unarmed Robbery conviction.

On appeal the Defendant raised several issues including the issue of whether the trial court violated his constitutional right to be present at a critical stage of the proceedings. The Defendant claimed that during deliberations Judge Miller, who had returned from vacation and taken over the case from Judge Olzark, improperly instructed the jury without the Defendant being present. The Court of Appeals, in an unpublished per curiam opinion, agreed⁵ and reversed the Defendant's conviction.

The People appeal from that decision, seeking reinstatement of the Defendant's conviction.

⁵ Schuette, P.J. dissented.

ISSUE

THE TRIAL COURT'S ACTION OF ANSWERING THE JURY'S QUESTION BY TELLING THE JURY THAT IT SHOULD RELY ON THE INSTRUCTIONS IT HAD BEEN GIVEN DOES NOT REQUIRE REVERSAL EVEN THOUGH THE DEFENDANT WAS NOT PRESENT IN THE COURTROOM BECAUSE THE TRIAL COURT DID NOT REINSTRUCT THE JURY.

STANDARD OF REVIEW

Issues not raised in the trial court are reviewed under the plain error rule. *People v Carines*, 460 Mich 750, 597 NW2d 130 (1999).

ARGUMENT

On February 24, 2006 at 3:26 p.m. the jury was sent out to begin its deliberations. T, 2-24-06, p. 226. At 4:55 p.m. that same day the jurors were released to go home for the weekend. T, 2-24-06, p. 227. The jury returned to deliberate on February 27, 2006 and on that day at 3:18 p. m. the jury returned a verdict of guilty on all counts. Some time between the jury's return on the 27th and its verdict the jury had a question. Neither the jury's question nor Judge Miller's response to the question was preserved in the record. The only recollection of what occurred is based upon a conversation between the Defendant and Judge Miller at the Defendant's sentencing proceeding.⁶ Based upon Judge

⁶ During the Defendant's sentencing the following colloquy took place between Judge Miller and the Defendant:

The Defendant: -- and then I also have one question for you, your Honor, that I'm not sure about the proceedings, how it actually happened if I wasn't in the courtroom when a proceeding happened.

Miller's handling of the jury's question the Court of Appeals reversed the Defendant's conviction.

The majority of the Court of Appeals found that Judge Miller's handling of the jury's question violated the Defendant's right to be present at all proceedings. The People however, submit that the Court of Appeals erred in concluding that Judge Miller's error required reversal of the Defendant's conviction. The majority never considered the fact that the Defendant failed to preserve the issue for appellate review. Even

My regular judge -- the original trial judge, Olzark, was a visiting judge and when you returned from vacation, while my jury -- jury was deliberating, after Judge Olzark left, the jury sent a note out asking for further instructions on an inadvertent assault -- to how to apply an inadvertent assault as the assault element for robbery. And I wasn't in here. I was kept in the holding cell. And I would just like you to -- ask you what I-- I was told by my -- even my attorney wasn't here. Somebody else stood in. I have no idea who it was, but he said that you refused further instruction on inadvertent assault and I don't know what happened. If I don't ask you now, I'll never know as long as I live. And that's why I'm just askin' to be filled in a little bit on what happened on that.

The Court: As I recall, the jury was instructed 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. And also, to use their judgment as -- as citizens, as -- as qualified jurors to work through the evidence as they see it before them and -- and arrive at their own conclusion and that's as I recall. Obviously, I didn't keep notes, but that's what happened.

The Defendant: The -- the only reason that it concerns me so much is I -- the defense wanted an assault instruction and a specific intent instruction given to the jury. And we got a copy of all the written instructions that the jury had in the jury room. And they didn't have the assault instruction or the specific intent in the packet made up for them to -- and it says right in the assault instruction, assault cannot happen by accident, but they didn't have in there and they asked for further instruction.

The Court: I'm sure that Judge Olzark, at the conclusion of the instructions to the jury, asked defense counsel and the prosecutor whether they were satisfied with the instructions. And I -- I wasn't there.

The Defendant: They were -- they were. And they were satisfied --

The Court: (Interposing) They were satisfied.

The Defendant: -- verbally.

The Court: End of argument.

constitutional error requires a defendant to preserve the error for appellate review. *People v Carines*, 460 Mich 750, 597 NW2d 130 (1999). When a defendant urges the reviewing court to find error based upon facts that do not appear in the record it is incumbent upon the defendant to seek to make a record to support his claim. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). In the case at bar, Judge Miller's comment at the Defendant's sentencing leads the People to believe that something happened. It does not however, answer the question of what exactly did happen. If the Court reviews the Defendant's sentencing transcript and the Defendant's motion for new trial it would note several notable omissions. It would note that defense counsel is completely silent on this point. Defense counsel did not say anything at the Defendant's sentencing in support of the Defendant's claim; never asked Judge Miller why he was not informed of the jury's question and given a chance to respond; never asked Judge Miller if he could make a record of what happened regarding the jury's question. Similarly, there was nothing in the Defendant's motion for new trial mentioning the incident or asking for an evidentiary hearing. The People submit that the failure to even attempt to make a record or request an evidentiary hearing should be held against the Defendant. The Defendant should be required to do more than merely raise the issue in order to preserve the issue for reviewing by the court.

Since the Defendant did not request an evidentiary hearing or otherwise attempt to make a record of what happened the Court of Appeals should not have assumed that the Defendant was prejudiced by the incident. While the Defendant had a Constitutional right to be present if the jury was reinstructed, *People v Mallory*, 421 Mich 229, 247; 365 NW2d 673 (1984), there is no record to support the Defendant's claim that Judge Miller did reinstruct the jury. Judge Miller stated that he told the jury to rely on the instructions that they had already been given. That should not be considered reinstruction. The better reasoned interpretation of Judge Miller's action is the one set forth in Judge Schuette's dissenting opinion in this case, when he found:

“Here, Judge Miller's ex parte communications 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.” (Dissent, p. 2.)

The People urge the Court to adopt the dissenting opinion of Judge Schuette and reinstated the Defendant's conviction.

RELIEF REQUESTED

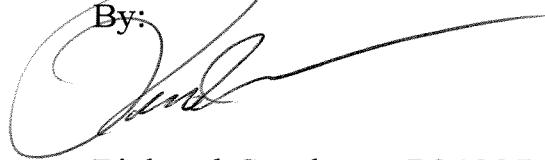
The Plaintiff-Appellant requests that this Honorable Court **GRANT** the Plaintiff-Appellant's Application For Leave To Appeal.

Respectfully submitted,

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DATED: December 15, 2008.