STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES WILLIAMS,

Defendant-Appellant.

UNPUBLISHED
August 2, 1996

No. 174838
LC No. 93-009601

Before: Reilly, P.J., and Cavanagh, and R.C. Anderson,* JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of manslaughter, MCL 750.321; MSA 28.553, for which he was sentenced to five to fifteen years of imprisonment. We reverse and remand for a new trial.

Defendant first contends that the evidence was insufficient to support a finding beyond a reasonable doubt that defendant had not acted in justifiable self-defense when he killed the victim. Although defendant testified that the victim had defendant's head in a death lock and was choking him, a woman who saw the incident did not corroborate this account. She stated that the victim struggled to free himself from defendant's grasp and once loose, attempted to run away. She observed as defendant followed, caught and stabbed the victim. Viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could find that the prosecutor had disproved self-defense beyond a reasonable doubt.

Defendant argues that his conviction should be reversed because the court failed to respond to the jury's questions on the record, or if it did respond, it did so out of the presence of defendant. During deliberations, the jury sent out a note saying "Can we have the definition of self defense and manslaughter?" and another note saying, "Did you get our definitions?" According to the testimony of the trial prosecutor, the judge and the prosecutor discussed how to resolve it. The court or the clerk contacted defense counsel by telephone and asked if the court could "send in the written pages the

* Circuit judge, sitting on the Court of Appeals by assignment.

judge read off of." The prosecutor did not have a recollection of any objection to handling the request in that manner. Pages or copies of pages from the standard criminal jury instructions were submitted to the jury, but the prosecutor stated that he did not review the contents of the pages. According to defendant's counsel at the hearing, defense trial counsel had no recollection, but she hadn't yet reviewed her file. The court recalled that a "sanitized version" of the definitions of the elements was sent to the jury. Upon questioning by the prosecutor, the court stated that the instructions were the same as had been given in open court, and that the explanation appearing in the handbook was removed. The discussions between counsel and the court and the instructions that were submitted to the jury are not part of the lower court record.

In *People v France*, 436 Mich 138,; 461 NW2d 621 (1990), the Supreme Court set forth a two-part test for determining whether a particular ex parte communication with the jury required reversal. First, the reviewing court must categorize the nature of the communication as substantive, administrative, or housekeeping. *Id.* at 166. Supplemental instructions on the law given by the court to a deliberating jury are substantive communication. Second, the court must analyze whether the communication carried any reasonable possibility of prejudice to the defendant. *Id.* A communication deemed substantive 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. *Id.* at 143.

We conclude that the prosecution failed to make a firm and definite showing that defendant was not prejudiced by the communication. Because no record was made of the discussions between counsel and the court, and the written instructions that were submitted to the jury are not part of the lower court record, this Court is left to speculate as to the accuracy and fairness of the instructions. The testimony of the prosecutor, who did not review the instructions, and the statements of the trial court are inadequate to overcome the presumption of prejudice.

Finally, we agree with defendant that the court should have granted him credit for the time served while awaiting sentence on this matter. *People v Johnson*, 205 Mich App 144; 517 NW2d 273 (1994). However, because defendant will have a new trial, and, if convicted, will be resentenced, the issue of sentencing credit is moot.

Reversed and remanded for a new trial. We do not retain jurisdiction.

/s/ Maureen Pulte Reilly
/s/ Mark J. Cavanagh
/s/ Robert C. Anderson