

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

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CRAIG JAMES MARR,

Defendant-Appellant.

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UNPUBLISHED  
February 21, 2006

No. 258399  
Ingham Circuit Court  
LC No. 00-075986-FC

Before: Meter, P.J., Whitbeck, C.J., and Schuette, J.

PER CURIAM.

Defendant appeals as of right from his conviction by jury of second-degree murder, MCL 769.317, and possession of a firearm during the commission of a felony, MCL 750.227b(1). The trial court sentenced him to 220 to 360 months' imprisonment for the murder conviction and to a consecutive two-year term for the felony-firearm conviction. We affirm.

The convictions resulted from the shooting death of Nicholas Brown in Lansing. The multiple-day trial began on January 4, 2001. Lauren Solomon testified that, on the evening of May 22, 2000, she visited a house at 401 North Pennsylvania in Lansing. Her friend Brandon White lived in the upstairs apartment of the house, and Brown often visited him there. When Solomon arrived at the apartment, White, Brown, defendant, and Lloyd Hines were there. Two other people, Savitra McClurkin and Roosevelt Corwin, arrived later.

Solomon testified as follows: McClurkin, Corwin, and defendant went downstairs at some point during the evening. McClurkin then returned to the upstairs apartment, and she and Solomon had a conversation. Solomon, McClurkin, Corwin, White, Brown, and Hines were all in the apartment when defendant and a downstairs tenant came to the door. White asked them to leave, and Brown asked defendant "what his problem was." Defendant tried to keep an argument going, and eventually Brown and defendant decided to "go outside and fight." Solomon, McClurkin, Brown, defendant, and the downstairs tenant went outside, and Solomon saw defendant take a gun from the downstairs tenant. She heard the gun discharge, and then Brown fell off the house's porch. Defendant then aimed the gun at Brown, kneeled, and shot Brown a second time. Solomon did not hear Brown say anything to defendant before the gun was fired and did not see Brown with a weapon in the apartment.

Lloyd Hines testified as follows: He was staying at the upper apartment of 401 North Pennsylvania at the time of the incident. He saw defendant with a gun on May 22, 2000. At one

point during the evening, McClurkin, who had been outside, came into the apartment, grabbed a knife or an object like a knife, and ran back outside. Hines went downstairs and saw defendant restraining McClurkin against the stairs. Later, after Hines, McClurkin, and others had gone back to the upstairs apartment, defendant came upstairs to apologize to McClurkin. Brown became upset that defendant was in the apartment and challenged defendant to fight.

Hines testified that Brown initiated the fight with defendant. Hines also testified that he did not see Brown with a weapon on the day of the incident.

Miranda Lesoski testified that, at the time of the shooting, she lived in a downstairs apartment at 401 North Pennsylvania. She stated that she heard two shots on the night of May 22, 2000, and that her husband placed a 911 telephone call after the shooting. According to Lesoski, Brown said the following while he and defendant were fighting: “White boy, if you point that gun at me, I’ll kill you and your brother.” Lesoski testified that her husband, David Lesoski, was friendly with defendant.

David Lesoski (David) testified that, after he placed the 911 call, he received a telephone call from defendant, who disguised his voice and asked, “Is anybody talking?” or “Is anybody running their mouth?” David testified that he saw defendant with a gun immediately before defendant left to fight with Brown. According to David, defendant ignored David’s pleas to put away the gun and instead went to confront Brown. Minutes later, David heard two gunshots. David stated that the prosecutor’s exhibit 7 was the same gun he saw defendant with on the night of the shooting.

Roosevelt Corwin testified as follows: He used to live with defendant and considered him a brother. Defendant started the altercation with Brown and shot Brown, twice, even though Brown was carrying no weapons. Corwin ran away from the scene with defendant after the incident and witnessed defendant trying to hide his gun in a pile of dirt; it was the same gun as the prosecutor’s exhibit 7. After the incident, defendant told Corwin, “I kill[ed] that n—ger.”

Corwin additionally testified that defendant telephoned him before trial and tried to convince him to testify, falsely, that Brown had been reaching for a gun at the time of the shooting. On cross-examination, Corwin testified that Brown told defendant and Corwin, before the shooting, that he was going to “kill both of [them].”

Jerry Buckner testified that defendant came to his porch, shaking, on the night in question and told Buckner, “I’ll give you \$2500 if you hide me in your basement.” According to Buckner, defendant stated, “I just killed this man.” Buckner’s wife provided testimony that corroborated her husband’s.

Brandon White testified that Brown threatened to kill defendant and Corwin before the shooting, but he indicated that he saw no weapons on Brown at the time.

Micah Moore testified that defendant approached him on the evening of the shooting and asked he and his friend for a ride in the friend’s truck because “he had just been in a fight [and] the cops were coming.” Moore’s friend, Francis Doerr, corroborated Moore’s testimony.

Savitra McClurkin's testimony from the preliminary examination was read into the record. She testified that defendant shot Brown and that she saw no weapons on Brown at the time.

Guadalupe Pecina testified that, in June 2000, she was walking home from school in the area where the shooting occurred when she found the gun that became the prosecutor's exhibit 7. She stated that she found it in a pile of dirt and gave it to her brother-in-law, who turned it into the police.

Norman Miller, M.D., testified, for the defense, that defendant was an alcoholic and also addicted to marijuana at the time of the shooting. Dr. Miller stated that, because of the substances, including LSD, ingested and used by defendant on the night in question, defendant's judgment was impaired when he shot Brown. According to Dr. Miller, defendant's "capacity to make choices, to form intent was very severely eliminated, if not totally lacking." Dr. Miller testified that, at the time of the shooting, defendant "did not have the capacity to form intent, premeditated, or to deliberately harm the victim." Dr. Miller stated that defendant shot the victim because of a "sudden impulse."

Defendant, who was eighteen years old at the time of the incident, testified as follows: Brown had a reputation as a violent person. Defendant was feeling anxious from drugs and alcohol on the evening in question. He never intended to kill Brown or cause him great bodily harm. He felt scared that evening because of Brown's reputation and because defendant was "outnumbered." When he and Brown went outside to fight, he became scared "that he could have shot me." He fired the gun once, without aiming it at anyone, out of fear. He did not aim the gun when he fired it the second time, either, but simply fired it out of fear because he saw Brown reaching for his ankle, where a gun had been located earlier.

Although defendant was charged with first-degree murder, the jury convicted defendant of the lesser-included offense of second-degree murder. The jury also convicted defendant of felony-firearm.

On appeal, defendant first claims that the trial court erred in excluding evidence relevant to defendant's claim of self-defense. Specifically, defendant contends that the trial court erred in limiting testimony about Brown's history of violence. We review for an abuse of discretion a trial court's decision to admit or exclude evidence. *People v Bulmer*, 256 Mich App 33, 34; 662 NW2d 117 (2003).

In considering whether to admit testimony concerning Brown's violent history, the trial court ruled that "reputation as to violence and/or aggressiveness may be admitted. Evidence of specific acts may not." Defendant contends that the trial court should have allowed defense counsel to inquire of police witness and of defendant about specific acts of violence perpetrated by Brown. Defendant submits that this type of questioning was pertinent "to show that [d]efendant legitimately feared Nicholas Brown not only because of his violent reputation, but because of his past violent actions." Defendant also submits that the questioning was pertinent to help show "that Brown was the aggressor."

In *People v Harris*, 458 Mich 310, 319; 583 NW2d 680 (1998), the Supreme Court made clear that evidence of specific instances of violent conduct on the part of the victim are not

admissible to prove that the victim was the aggressor in an altercation that results in a self-defense claim. Accordingly, defendant is incorrect in arguing otherwise. The *Harris* Court, citing *People v Cooper*, 73 Mich App 660, 664; 252 NW2d 564 (1977), also indicated, however, that “specific acts . . . may be shown to establish reasonable apprehension of harm.” *Harris*, *supra* at 319. Obviously, in order for these specific acts to be relevant for such a purpose, they would have to be *known about by defendant*. There is no reason from the existing record to surmise that the various police witnesses had knowledge of both Brown’s previous acts of violence *and* of defendant’s knowledge regarding those acts. Therefore, the trial court did not err in precluding defense counsel from asking the police witnesses whether they knew of specific acts of violence committed by Brown.

To the extent that the trial court failed to allow defense counsel to ask *defendant* about specific acts of violence perpetrated by Brown, we conclude that any error was harmless. Indeed, it does not affirmatively appear to us “that it is more probable than not that the error was outcome determinative.” *People v Mateo*, 460 Mich 484, 495-496; 596 NW2d 607 (1999). Indeed, defendant testified that, at the time of the shooting, he saw Brown reaching for his ankle, where a gun had been located on an earlier occasion. Defendant also testified that he bought the gun used in the shooting from Brown. He further testified that Brown was a violent person because of “the way he acts. The fight I seen him in, the problems that me and him had.” Moreover, multiple witnesses testified that Brown threatened to kill defendant on the evening in question, and defendant clearly testified that he shot Brown out of fear. Through this evidence, the jury was sufficiently informed of defendant’s state of mind at the time of the shooting. We cannot conclude that additional evidence of specific acts of violence perpetrated by Brown would have affected the outcome of the case, and defendant was not deprived of presenting his claim of self defense.<sup>1</sup>

Defendant also mentions that the trial court erred in precluding evidence that the upstairs apartment at 401 North Pennsylvania was a “drug house.” However, defendant’s briefing in connection with this argument is deficient. He fails to elaborate his argument and fails to cite any authorities supporting the admissibility of the evidence. Under these circumstances, the issue has been waived. *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001).

Defendant next argues that the trial court erred in failing to instruct the jury on the lesser offense of reckless or careless discharge of a firearm resulting in death, MCL 752.861. The trial court denied the request, indicating that there was no evidence of an “accidental” shooting. We review claims of instructional error de novo. *People v Kurr*, 253 Mich App 317, 327; 654 NW2d 651 (2002).

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<sup>1</sup> Defendant, in the course of his somewhat disjointed argument, also suggests that the trial court erroneously prevented defense counsel from inquiring of witnesses other than defendant about Brown’s reputation for violence. The record does not support defendant’s assertion. Indeed, the trial court ruled that “reputation as to violence and/or aggressiveness may be admitted” and did not rule that this evidence could come in only through the testimony of defendant. In fact, the court went on to discuss how defense counsel could lay a foundation for asking various witnesses about Brown’s reputation for violence.

In *People v Cornell*, 466 Mich 335, 357; 646 NW2d 127 (2002),<sup>2</sup> overruled in part on other grounds by *People v Mendoza*, 468 Mich 527; 664 NW2d 685 (2003), the Court indicated that “a requested instruction on a necessarily included lesser offense is proper if the charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense and a rational view of the evidence would support it.” Here, even assuming that the “charged greater offense requires the jury to find a disputed factual element that is not part of the lesser included offense,” *id.*, a rational view of the evidence did not support an instruction on the offense of reckless or careless discharge of a firearm. MCL 752.861 states that “[a]ny person who, because of carelessness, recklessness or negligence, but not wilfully or wantonly, shall cause or allow any firearm under his immediate control, to be discharged so as to kill or injure another person, shall be guilty of a misdemeanor . . . .” Defendant himself testified that he intentionally fired the gun *out of fear* and that he was essentially trying to protect his life. This testimony was at odds with a conclusion that the firearm was discharged because of “carelessness, recklessness or negligence.” The trial court did not err in refusing to instruct the jury with regard to MCL 752.861.

Defendant next argues that the trial court erred in failing to instruct the jury with regard to statutory involuntary manslaughter, MCL 750.329. MCL 750.329(1) states: “A person who wounds, maims, or injures another person by discharging a firearm that is pointed or aimed intentionally but without malice at another person is guilty of manslaughter if the wounds, maiming, or injuries result in death.” In *Mendoza*, *supra* at 541, the Court held that manslaughter<sup>3</sup> is a necessarily included lesser offense of murder and that a manslaughter instruction must be given in a murder trial if a rational view of the evidence supports it. A rational view of the evidence does not support the instruction in this case. Indeed, the prosecutor’s evidence supports the finding of a deliberate killing. Defendant contends that his own testimony supports an instruction on statutory involuntary manslaughter. However, defendant testified that he did *not* point the gun at anyone when he fired it. His testimony does not fit with the elements of MCL 750.329, and an instruction on statutory involuntary manslaughter was unwarranted.

Defendant also argues that the trial court erred in failing to instruct the jury with respect to voluntary manslaughter and common-law involuntary manslaughter. Defendant’s argument is without merit because his counsel did not request instructions on those offenses. While counsel did request that the court read an instruction providing that premeditation and deliberation can be negated by “the heat of the moment,” he did *not* request an instruction on voluntary manslaughter. Accordingly, defendant’s argument to the contrary on appeal is unavailing.<sup>4</sup>

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<sup>2</sup> We conclude that *Cornell* applies here because this case was pending appeal at the time of the *Cornell* decision. See *Cornell*, *supra* at 367.

<sup>3</sup> Although the *Mendoza* Court was addressing voluntary manslaughter and common-law involuntary manslaughter, we presume that its holding extends also to statutory involuntary manslaughter, at least insofar as a particular case involves a murder perpetrated by the discharge of a firearm.

<sup>4</sup> We note that defendant does not argue on appeal that the trial court should have *sua sponte* (continued...)

Defendant next argues that the trial court erred in determining that the police exercised due diligence in attempting to secure the presence of Savitra McClurkin for trial. Defendant contends that McClurkin's preliminary examination testimony should not have been read at trial because of the lack of due diligence. See *People v Bean*, 457 Mich 677, 682-683; 580 NW2d 390 (1998). We review this issue for an abuse of discretion. See *id.* at 684-685. Here, even assuming, without deciding, that the trial court abused its discretion in ruling that due diligence had been shown, we conclude that the error was harmless beyond a reasonable doubt,<sup>5</sup> in light of the testimony provided by other witnesses.

Solomon testified that she saw defendant aim the gun at Brown, kneel, and shoot Brown even after Brown had already been shot. Corwin testified that defendant started the altercation with Brown and shot Brown, twice, even though Brown was carrying no weapons. Hines also testified that he saw no weapon on Brown on the day in question. Hines additionally testified that he saw defendant restraining McClurkin before defendant's altercation with Brown. Defendant emphasizes that McClurkin, in her preliminary examination testimony, stated that she did not hear Brown threaten defendant at the time of the shooting. However, two other prosecution witnesses admitted that Brown did threaten defendant at the time. Under the circumstances, we conclude, beyond a reasonable doubt, that there is no reasonable possibility that McClurkin's preliminary examination testimony affected the verdict. *People v Anderson*, 446 Mich 392, 406; 521 NW2d 538 (1994). Reversal is unwarranted.

Defendant next argues that the prosecutor belittled Dr. Miller and thereby committed misconduct requiring reversal. Specifically, defendant objects to the following statements made by the prosecutor during her closing argument:

Yesterday you got an opportunity to hear from [defendant's] expert, Doctor Miller. Doctor law student<sup>6]</sup> Miller. Doctor Miller who was paid \$3,000 to testify by the Marris. I submit to you he pretty much gave them their money's worth because he didn't let any of the facts of this case interfere with his decision.

Generally, "[w]e review claims of prosecutorial misconduct case by case, examining the remarks in context, to determine whether the defendant received a fair and impartial trial." *Watson, supra* at 586. However, defendant did not object at trial to the statements he now challenges. Therefore, this issue is unpreserved, and we review it using the plain error doctrine. *Id.* To show that reversal is warranted, defendant "must demonstrate plain error that was outcome determinative." *Id.*

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(...continued)

instructed the jury with respect to voluntary manslaughter or common-law involuntary manslaughter.

<sup>5</sup> We employ the harmless-beyond-a-reasonable-doubt standard here because this issue involves the constitutional right of confrontation. See *Bean, supra* at 690, and *People v Anderson*, 446 Mich 392, 404-406; 521 NW2d 538 (1994).

<sup>6</sup> During her voir dire of Dr. Miller, the prosecutor elicited that Dr. Miller was attending law school at the time of trial.

A prosecutor may comment on the fact that an expert witness has been paid, as long as that fact has been introduced into evidence. *People v Williams*, 162 Mich App 542, 549; 414 NW2d 139 (1987). Here, the fact that Dr. Miller had been paid was indeed introduced into evidence. Moreover, the prosecutor, after making the challenged comments, went on to explain how the evidence at trial belied Dr. Miller's conclusions about defendant's level of intoxication on the night in question. In other words, the prosecutor connected her comments about Dr. Miller to the evidence. Moreover, we note that a prosecutor is "not required to phrase arguments in the blandest of all possible terms." *People v Ullah*, 216 Mich App 669, 678; 550 NW2d 568 (1996). Under the circumstances, we simply cannot find plain error, much less *outcome-determinative* plain error, in connection with the challenged comments.

Defendant next argues that the prosecutor committed misconduct requiring reversal by arguing facts not in evidence during closing arguments. Defendant first contends that the prosecutor improperly stated, "before the [d]efendant shot at [Brown] for the first time, he had pulled the slide."<sup>7</sup> Pulling the slide gave him time to think about it. Pulling the slide shows premeditation and deliberation." Defendant contends that there was no evidence that *defendant* pulled the slide of the gun because the gun had been in the possession of different people on the night of the shooting.

Defendant did not object to these statements by the prosecutor, and we therefore review this issue using the plain error doctrine. *Watson, supra* at 586. While it is true that there was no evidence that defendant pulled the slide for the first shot at Brown, it is a reasonable inference from the evidence that defendant pulled the slide before shooting Brown a second time.<sup>8</sup> Therefore, the prosecutor's statement that defendant had "time to think about it" holds credence. Under the circumstances, we conclude that the prosecutor's error simply did not affect the outcome of the case. *Id.*

Defendant additionally contends that the prosecutor erred in stating, "This doctor [Dr. Miller] said it didn't matter to him that Roosevelt Corwin has now said everything at the preliminary examination was a lie."<sup>9</sup> Once again, defendant failed to object to the challenged statement by the prosecutor, and our review is for outcome-determinative plain error. *Id.*

In his appellate brief, defendant does not focus on the prosecutor's comment about Dr. Miller but instead argues that there was no evidence that "everything" Corwin stated at the preliminary examination was a lie. However, Corwin, in admitting that he lied at the preliminary

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<sup>7</sup> The prosecutor, in referring to "pulling the slide," was referring to "cocking" the gun.

<sup>8</sup> A witness at trial testified that the gun used in the shooting was a semiautomatic pistol that needed to be "cocked" before each shot.

<sup>9</sup> Corwin testified at trial that he lied at the preliminary examination in order to portray defendant, whom he considered a brother, in a favorable light. Dr. Miller testified that he based his opinions regarding defendant's level of intoxication on, in part, the preliminary examination testimony. He stated that he would need to know the specifics of which testimony had changed before deciding whether his ultimate conclusion about defendant's intoxication level remained proper in light of the changed testimony.

examination, stated, “you know I lied and I know I lied and – okay, you know I was lying and I’m not lying any more, so you can keep throwing up lies that I said and I’m telling you right now I said them.” Given Corwin’s broad statements about lying at the preliminary examination, we simply cannot conclude that the prosecutor’s statement about “everything” being a lie amounted to outcome-determinative plain error. Reversal is unwarranted.

Defendant next argues that the trial court erred in prohibiting defense counsel from asking Francis Doerr if defendant looked scared when Doerr gave him a ride after the shooting. As noted earlier, we review a trial court’s evidentiary rulings for an abuse of discretion. *Bulmer, supra* at 34. Here, even assuming that an abuse of discretion occurred, reversal is unwarranted. It does not affirmatively appear to us “that it is more probable than not that the error was outcome determinative.” *Mateo, supra* at 495-496. Doerr testified that defendant was “fidgety and nervous acting[.]” It is difficult to discern how an additional statement from Doerr that defendant was scared would have contributed to a determination of defendant’s guilt or innocence. Defendant states that “if [d]efendant was scared, that would add evidentiary support to his claim of self-defense.” This assertion is patently without merit, given that Doerr saw defendant after the shooting and after defendant had left the scene of the shooting. Reversal is not warranted.<sup>10</sup>

Defendant next argues that the prosecutor committed misconduct requiring reversal by asking leading questions of Roosevelt Corwin and improperly introducing evidence of defendant’s bad character. Once again, defendant did not object at trial to the instances of alleged prosecutorial misconduct, and our review is for outcome-determinative plain error. *Watson, supra* at 586.

Defendant first complains that the prosecutor asked Corwin, “Sort of a gentle guy, isn’t he?” in reference to Lloyd Hines. Any error on the part of the prosecutor with regard to this question did not amount to outcome-determinative plain error, given that Hines’s temperament was not a crucial element at trial. Defendant next complains that the prosecutor asked Corwin, “Bad temper on [defendant] here?” and “[Defendant] gets nasty when people cross him, doesn’t he?” Once again, any error on the part of the prosecutor with regard to this questioning did not amount to outcome-determinative plain error. Other witnesses clearly established that defendant restrained McClurkin on the night in question and that defendant entered into a fight with Brown. David Lesoski testified that defendant ignored David’s pleas to put away the gun and instead went to confront Brown. Because evidence of defendant’s temperament was introduced through other witnesses, we find no basis for reversal. *Watson, supra* at 586-587.

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<sup>10</sup> Defendant additionally suggests that he was denied due process of law because the court allowed the prosecutor to introduce evidence similar to evidence that was not allowed to be introduced by defense counsel. Defendant’s briefing of this issue is so sparse that we deem the issue waived. See *Watson, supra* at *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001).

Defendant lastly argues that his trial attorney rendered ineffective assistance of counsel. “Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise.” *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995).

To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms and there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. [*Id.*]

Defendant first contends that his trial attorney erred by failing to object to (1) the prosecutor's alleged unjustified attacks on Dr. Miller, as discussed above; (2) the prosecutor's arguing facts not in evidence, as discussed above, and (3) the prosecutor's introduction of improper character testimony by way of leading questions, as discussed above. We disagree that defense counsel's failure to object in these circumstances amounted to ineffective assistance of counsel. Indeed, even if counsel *had* objected, there is no “reasonably probability that . . . the result of proceedings would have been different.” *Id.* Accordingly, defendant is not entitled to a reversal of his convictions.

Defendant additionally argues that defense counsel improperly expressed agreement with the jury instructions even though the trial court gave an improper instruction. Defendant argues that the trial court violated former MCR 6.414(H) by stating the following at the start of jury instructions:

Ladies and gentlemen, it's often the case that people have formed an impression from watching television that there is a transcript of everybody's testimony, so I try to remember to tell jurors before they begin deliberations that that is a myth. There is no transcript. Transcripts are created after a trial when someone orders them, and they take quite a bit of time to prepare. The only way you could hear the testimony again would be for me to ask the court reporter to read it to you from her notes. If it's absolutely necessary, I'll do that. But I would ask you, since that's quite time consuming, to rely on your collective memory before you ask me any such request.

The substance of former MCR 6.414(H) is now contained in MCR 6.414(J), which states:

If, after beginning deliberation, the jury requests a review of certain testimony or evidence, the court must exercise its discretion to ensure fairness and to refuse unreasonable requests, but it may not refuse a reasonable request. The court may order the jury to deliberate further without the requested review, so long as the possibility of having the testimony or evidence reviewed at a later time is not foreclosed.

We disagree that the trial court violated this rule. Indeed, in contrast to the situation in *People v Carter*, 462 Mich 206, 213 n 0; 612 NW2d 144 (2000), the trial court here did not foreclose the possibility of having testimony reviewed at a later time. The court stated that the court reporter's notes would be available for review if it was absolutely necessary. Defendant contends that this statement was insufficient to satisfy the court rule because “[a] request could

surely be reasonable, even if not ‘absolutely’ necessary.” We disagree with defendant’s argument. The trial court properly informed the jury that it should rely on its collective memory but that the court’s reporter’s notes would be available if needed. Defense counsel did not act unreasonably in failing to object to this instruction.

Defendant has not demonstrated that he received ineffective assistance of counsel, and he has not demonstrated the need for an evidentiary hearing with respect to the issue.

Affirmed.

/s/ Patrick M. Meter  
/s/ William C. Whitbeck  
/s/ Bill Schuette