

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRYAN MAURICE McGHEE,

Defendant-Appellant.

UNPUBLISHED
February 17, 2011

No. 295708
Wayne Circuit Court
LC No. 09-017549-FC

Before: JANSEN, P.J., and OWENS and SHAPIRO, JJ.

PER CURIAM.

Defendant appeals by right his jury trial conviction for second degree murder, MCL 750.317.¹ He was sentenced to 22 ½ to 40 years in prison. We affirm.

Defendant's conviction involves the stabbing death of William Fish on May 18, 2009, in Detroit. The prosecution alleged that defendant stabbed Fish in anger over an earlier fight that had occurred between defendant and an individual named Cameron, and in which Fish was also involved. Defendant maintained that Fish assaulted him with a knife and that he stabbed Fish in self-defense during a struggle for that knife. At trial, two men who were present with Fish during the stabbing, Benjamin Tucker and Patrick Mayo, provided their versions of the incident, as did defendant. In addition, all three men testified about the earlier fight, as did a fourth witness, Johnny McDaniel.

On November 24, 2009, after the close of proofs and closing arguments, the jury was dismissed for the remainder of the week. When they returned on November 30, 2009, the trial court provided its instructions and the jury deliberated for approximately an hour before sending out a note requesting to view the police report, the crime scene photographs, and the testimony from defendant, McDaniel and Tucker. The trial court initially sent in the photographs, but did not respond to the other requests because it was engaged in jury selection on another matter. Approximately 20 minutes later the jury again requested transcripts of the testimony of

¹ Defendant was acquitted of first-degree murder.

defendant, McDaniel, Tucker, and Mayo, as well as police reports and statements that Tucker and Mayo made to the police. The following discussion occurred:

[The Court]. This is my suggested response: “You have all the admitted exhibits. Any police reports not in evidence are not – not in evidence are not admitted evidence. The testimony of the witnesses is taken down in a system of symbols. The testimony in this case has not been transcribed into words. This takes some time to do. Please rely on your collective memories.”

Any objection to that response?

[Prosecutor]. I have no objection.

I would request that because it was five days in between the time they have heard testimony until today’s date that they started deliberating, if I could ask the Court to adjust the language that if they insist having (sic) the copy of the transcript that it’s an option still available to them.

[The Court]. I’m not gonna add that. I mean it leaves it open that it can be done.

But right now the court reporter’s in another trial so she can’t sit down and transcribe that testimony. So I am not saying I won’t do it, but we’d have to excuse her for a couple days to do it. So I mean really probably longer than that actually.

Any objection to my response?

[Defense Counsel]. No, Your Honor, not at this time.

[The Court]. Okay. I’m gonna go type that up and we’ll hand it to the jury.

Approximately an hour later, the jury returned a verdict.

Defendant’s sole argument on appeal is that the trial court’s response to the jury was erroneous and contrary to MCR 6.414(J) because the response effectively told the jurors that they would not be able to review or rehear that testimony within any foreseeable period of time. This Court reviews an unpreserved claim of error to determine whether the trial court committed plain error affecting defendant’s substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *People v Knapp*, 244 Mich App 361, 375; 624 NW2d 227 (2001).

MCR 6.414(J) provides:

Review of Evidence. 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.

This rule is also reflected in our Supreme Court's case law. See *People v Carter*, 462 Mich 206, 214 n 10, 612 NW2d 144 (2000); *People v Howe*, 392 Mich 670; 221 NW2d 350 (1974). In *Howe*, which predated the adoption of MCR 6.414, the defendant requested that the trial court reread the testimony of two witnesses. The trial court denied the request and stated that it was a short case with few witnesses and the jury would have to rely on its memory. *Howe*, 392 Mich at 674-675. The trial court also indicated that it "'frown[ed] upon the practice of having [to] read back . . . portions of the testimony of certain witnesses because it places entirely too much emphasis on the testimony of one witness.'" *Id.* at 674. Our Supreme Court noted that the "well established" general rule is that "when a jury requests that testimony be read back to it both the reading and extent of reading is a matter confided to the sound discretion of the trial judge." *Id.* at 675 (quotation omitted). It further noted that, while a trial court was given discretion "to assure fairness and to refuse unreasonable requests," it could not "simply refuse to grant the jury's request for fear of placing too much emphasis on the testimony of one or two witnesses." *Id.* at 676. It then found that, in that case, the trial court abused its discretion in refusing *Howe's* request, without determining that the request was unreasonable, or "ask[ing] the jury to resume deliberations with the knowledge that their request would again be reviewed if the jury members continued to find it necessary to rehear certain testimony." *Id.* at 677.

Defendant cites *Carter* in support of his claim that the trial court erred here. In *Carter*, our Supreme Court found that defendant had affirmatively waived a claim of error concerning the trial court's instruction. *Carter*, 462 Mich at 214-216. However, the Court agreed with the defendant's contention, and the prosecutor's concurrence, that the trial court's instruction to the jury was improper where, in response to the jury's request, the trial court explained, "[O]ne of the things the court explained to you in the beginning, that the transcripts will not be typed for some weeks and months way into the future and you must listen very carefully because you must rely on your collective memories to resolve any issues with regard to that." *Id.* at 213-214

We recognize that the instant case presents a close question, because the jury had not heard testimony in six days prior to the requests to review the testimony. However, from the statements of the trial court, it is evident that the court was specifically attempting not to foreclose preparation of the transcripts if the jury could not reach a decision without the requested testimony, but did not want to encourage the jury to ask for it again unnecessarily. The question is whether the court nevertheless plainly ran afoul of MCR 6.414(J), given the specific language the court used. We find that it did not. Certainly the trial court did not affirmatively foreclose the preparation of a transcript for the jury or to have it read to them. We also find that defendant's reliance on *Carter* is unfounded. In *Carter*, the trial court's statement that the transcript would take weeks or months to prepare was tantamount to an explicit statement that the jury would never be able to have the transcripts. While the trial court indicated that it would take time to prepare the requested transcripts in the instant case, its statement to the jury did not rise to an assertion that the jury would have to wait an unreasonable amount of time before it could review the testimony. Nor do we agree with defendant that the trial court's failure to instead inform the jury that it could have the reporter read back the testimony was plainly erroneous, because neither party suggested it, the jury did not request it as

an alternative, and the jury had not been deliberating for an appreciable period of time before the initial request.

Because the trial court did not clearly foreclose the possibility of having the testimony reviewed at a later time, we find that defendant has not shown that he is entitled to relief due to plain error in the challenged instruction.

Affirmed.

/s/ Kathleen Jansen
/s/ Donald S. Owens
/s/ Douglas B. Shapiro