STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 15, 2008
v	No. 277816 Wayne Circuit Court
REGINALD EUGENE HOLMES, Defendant-Appellant.	LC No. 06-007933-01

Before: Fitzgerald, P.J., and Talbot and Donofrio, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of felon in possession of a firearm, MCL 750.224f, carrying a concealed weapon (CCW), MCL 750.227, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. The trial court sentenced defendant to concurrent two year probation terms on both the felon in possession of a firearm and CCW convictions, and a mandatory prison term of two years for the felony-firearm conviction. While defendant has not established error in his assertions that the trial court erred in responding to the jury's request for clarification of the felony-firearm instruction or that he was denied a fair trial when the jury was inadvertently given two reports not admitted into evidence, defendant has shown that the trial court erred in handling the jury's request to be provided a transcript of the trial, thus we reverse and remand for a new trial.

Defendant first argues that the trial court erred when it responded to the jury's request to be given a transcript of the trial. The record indicates that when the trial court addressed the jury's request it did so immediately after the jury was seated and the proceedings returned to the record. At no time during this recorded process did defendant object. In *People v Howe*, 392 Mich 670, 678; 221 NW2d 350 (1974), our Supreme Court concluded that counsel's failure to object to the court's handling of a similar request was "irrelevant to the resolution of this appeal." In immediately addressing the request after counsel had been informed of the request, *Howe* reasoned, "[t]he actions of the trial judge bypassed the adversary function of defendant's counsel." *Id*. In the case at hand, however, the trial court indicated that prior to the return of the jury, the trial court had shared the jury request with both counsel. Thus, defense counsel appears to have had the opportunity to perform her adversary function. Nonetheless, there is no indication that defense counsel objected to the trial court's handling of the issue. However, there is also no indication that defense counsel affirmed the trial court's actions. Under these circumstances, we must conclude that defendant has forfeited this issue and thus we review for plain error. See *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). "To avoid

forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights" or showed prejudice in the lower court proceedings. *Id*. Defendant has the burden of persuasion regarding the third element of prejudice. *Id*. Trial court findings will be reversed only if a plain error has resulted in the conviction of an innocent defendant or when the error will affect the fairness and integrity of the judicial proceedings. *Id*.

In response to the jury's request to be provided a transcript of the trial, the trial court stated as follows:

> Ladies and gentlemen, I have the last two notes that you wrote me. . . . [The second is to] [r]equest a transcript of the testimony. The case isn't old enough to have a transcript yet, and we've only had a day and a half of testimony, altogether maybe just a day. You have to use your collective memories, your collective memories as to what you saw and what you heard. At this juncture we do not have a transcript. You may return to the jury room to continue your deliberations.

MCR 6.414(J) states as follows:

> If, after beginning deliberations, 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 refute 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.

In *Howe, supra* at 675, the jury requested that the trial court reread the testimony of two witnesses.[1] 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. *Id*. 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. The Michigan Supreme Court held that the trial court abused its discretion in refusing this request. *Id*. at 677. Our Supreme Court observed that a trial court "cannot 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. Our Supreme Court reasoned that the trial court failed to conclude that the request was unreasonable or to inform the jury that a more specific request would be granted or reconsidered at a later point. *Id*. at 677-678. Instead, the trial court simply stated that it could not grant the request. *Id*. at 678. Similarly, here, the trial court did not state that the request was unreasonable or that it was concerned about placing too much emphasis on the testimony of a few witnesses. Indeed, the jury had requested "a transcript of testimonies," which indicates that it wanted the transcript of the entire trial, not just certain portions of it.

[1] *Howe, supra* predates the adoption of MCR 6.414(J).

Defendant specifically asserts that the trial court's response foreclosed the possibility of access to the transcript in the future. The prosecutor responds that the trial court's wording that the transcript is not available "*yet*" and "[*a*]*t this juncture* we do not have a transcript" left open the possibility of the jury hearing testimony in the future. This is a close question. On the one hand, the language cited by the prosecutor does indicate the possibility of a future occurrence. On the other hand, that referenced future occurrence is not that the transcript will be provided when ready or even that the jury's request will be reconsidered on resubmission. Rather, the future event referenced seems only that a transcript will be prepared. This Court in *People v Davis*, 216 Mich App 47, 57; 549 NW2d 1 (1996), stated that when the trial court declared that the jury must rely on its memory "at this time," the trial court did not foreclose the possibility of the jury getting the requested information later. But, in *Davis*, there is no indication that the transcript in issue, the preliminary examination, was not available. *Id*. The trial court also did not reference whether the request was reasonable but was denied simply for practical reasons.

In the present case, the trial court did not present the possibility that the court reporter could read back portions of the testimony as an option. Because the jurors were left with the impression that they had to move forward without any recapitulation of the testimony, we conclude that the trial court committed plain error in denying the request without further explanation. MCR 6.414(J). This issue then turns on whether the plain error prejudiced defendant. Defendant has the burden to prove that he has been prejudiced. Where a trial court has foreclosed on the rereading of testimony, it is impossible to know the impact on the jury. *People v Smith*, 396 Mich 109, 111; 240 NW2d 202 (1976). In *Smith*, the trial court foreclosed the possibility of having testimony reread before the jury started deliberating. The Michigan Supreme Court held that it was improper to engage in "[c]onjecture about what actually went on in the jury room" and this conjecture "should not be the basis for determining whether the error was harmless." *Id*. at 111. The case was remanded for a new trial. *Id*. at 112.

While we refuse to speculate about what went on in the jury room, it is significant that the trial court instructed the jurors before proofs that they should "not take any notes while [they] are in the courtroom." If followed, and juries are presumed to follow their instructions, *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998), then the jury would not have any notes to assist it during deliberations. Further, later on the same day that it requested the transcripts, the jury sent out a note that it was "[u]ndecided on all 3 counts. There will be no anonymous [sic] decision." The next day it indicated it needed clarification about the "definition" provided for the third count, felony-firearm. The trial court responded, "The instruction on count #3 means what is says and says what it means." While we offer no opinion on the jury's request or the trial court's response, we note the transaction only because it is further evidence that the jury was continuing to have problems.

Given all of the circumstances present in the record, and being mindful that there is no way to determine what impact the trial court's response to the request for the transcript had on the jury without resorting to conjecture about what happened in the jury room, we must conclude the error was not harmless. Therefore, this case must be reversed and remanded for a new trial.

Finally, we reject defendant's assertions that the trial court erred in responding to the jury's request for clarification of the felony-firearm instruction and that he was denied a fair trial when the jury was inadvertently given two reports not admitted into evidence. With respect to the jury's request for clarification of the felony-firearm instruction, the trial court provided a

proper initial instruction, which the trial court, in essence, reiterated after the jury's request for clarification. Although the trial court could have elaborated on the definition, or alternatively could have itself reread the jury instruction, the course chosen was within the range of principled outcomes. *People v Babcock*, 469 Mich 247, 265; 666 NW2d 231 (2003). With respect to the evidentiary issue, even presuming that the evidence is material to the case, defendant has not proven that there is a direct connection between the evidence and the adverse verdict. *People v Budzyn*, 456 Mich 77, 88; 566 NW2d 229 (1997). The trial court had specifically instructed the jury before the reports were discovered that it should "only consider the evidence that has been properly admitted in the case." Again, juries are presumed to follow their instructions, and the fact that the jury brought the reports to the attention of the trial court indicates that it was following the trial court's instruction not to consider material not properly admitted. Moreover, where a curative instruction was given, the possibility of prejudice or harm to defendant's case is even less. *People v Abraham*, 256 Mich App 265, 279; 662 NW2d 836 (2003).

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

/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot
/s/ Pat M. Donofrio