STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 25, 2012
v	No. 303376 Wayne Circuit Court
TERRIO ANTWAIN BRUCE, Defendant-Appellant.	LC No. 10-009616-FH

Before: JANSEN, P.J., and BORRELLO and BECKERING, JJ.

PER CURIAM.

A jury convicted defendant Terrio Antwain Bruce of unarmed robbery, MCL 750.530, for his involvement in an August 15, 2010, robbery at the River Rouge Tobacco Shop. The trial court sentenced defendant to 5 to 15 years' imprisonment for the unarmed-robbery conviction. Defendant appeals as of right, and we affirm.

I

Defendant first argues that the trial court deprived him of his due process right to a fair trial and violated MCR 6.414(J)[1] when it refused to grant the jury's request for a copy of a transcript of the store clerk's testimony unless it deliberated in a particular manner. We conclude that defendant waived this issue.

"A defendant does not have a right to have a jury rehear testimony. Rather, the decision whether to allow the jury to rehear testimony is discretionary and rests with the trial court." *People v Carter*, 462 Mich 206, 218; 612 NW2d 144 (2000) (footnote and citations omitted). If defense counsel expresses satisfaction with the trial court's decision and instruction regarding a jury's request to rehear testimony, such action constitutes a waiver. *Id*. at 219. In the instance of a waiver, this Court will not review whether the trial court erred in its ruling because "there is no 'error' to review." *Id*.

[1] Although MCR 6.414 was in effect at the time of defendant's trial, the Michigan Supreme Court recently repealed MCR 6.414 and combined the general rules for civil and criminal jury trial procedure in MCR 2.513. See Staff Comment to 2011 Order Repealing MCR 6.414.

In this case, the trial court asked both the prosecution and defense counsel whether they were satisfied with the jury instruction regarding the jury's request for testimony. Defense counsel stated that he was satisfied with the jury instruction. This constituted a waiver of defendant's right to appellate review of the issue. See *id*.

Notwithstanding defendant's waiver, we conclude that the trial court did not plainly violate MCR 6.414(J). The applicable court rule at the time, MCR 6.414(J), stated:

> 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.

In *People v Howe*, 392 Mich 670, 676; 221 NW2d 350 (1974), the Michigan Supreme Court noted that, at times, a jury will require testimony to be read back to it to resolve a disagreement or correct a memory failure. In concluding that a jury's request appeared to have been reasonable, the *Howe* Court noted that the jury only asked to rehear the testimony of two witnesses and that the trial court did not indicate that it deemed the request unreasonable. *Id*. at 677.

Here, the jury requested to rehear the testimony of one witness: the store clerk. Further, the trial court did not indicate that the request was unreasonable; rather, it noted a lack of technology in the courtroom, the consequent difficulty involved in satisfying the jury's request, and the need for the jury to deliberate further before resorting to a rereading of the testimony. Under MCR 6.414(J) and in light of *Howe*, the jury's request was reasonable.

Although the jury's request was reasonable, the trial court did not violate MCR 6.414(J) because it did not foreclose the possibility that the jury could rehear the testimony at a later time. See MCR 6.414(J). The Michigan Supreme Court and this Court have emphasized that the deciding factor on this issue is whether the trial court completely foreclosed the possibility that the jury could rehear the testimony at a later time. See *Carter*, 462 Mich at 219; *Howe*, 392 Mich at 677-678; *People v Robbins*, 132 Mich App 616, 620-622; 347 NW2d 765 (1984). For example, in *Robbins*, this Court held that there was no error when the trial court did not grant the jury's request for testimony. *Robbins*, 132 Mich App at 620-622.[2] The trial court told the jury that it would take five hours to replay the testimony and that the jury should "'trade notes.'" *Id.* at 620. The trial court stated that, if the jury still had a problem, it could make another request to

[2] *Robbins* relied on the standard for jury requests from *Howe*. See *Robbins*, 132 Mich App at 620-622. The Michigan Supreme Court in *Carter* found that the rule from *Howe* is consistent with MCR 6.414(H). See *Carter*, 462 Mich at 211 n 5; *Howe*, 392 Mich at 676-678. MCR 6.414(H) previously stated the same standard that MCR 6.414(J) stated at the time of trial in this case. See *Carter*, 462 Mich at 210-211. Therefore, *Robbins* is also consistent with MCR 6.414(J).

rehear testimony. *Id*. The *Robbins* Court concluded that there was no error in the jury instruction because the trial court left open the possibility that the jury could rehear the testimony at a later time. *Id.* at 621. The *Robbins* Court did not discuss the trial court's specific directions to the jury or the judge's comments about how long it would take to replay the testimony. See *id.* at 620-622.

In this case, about 45 minutes after being excused to deliberate, the jury returned to the courtroom with a few requests. The trial court acknowledged and accommodated the jury's request to see a surveillance videotape that was admitted into evidence and played during trial as well as a copy of the definition of all charges. The jury also requested a copy of the transcript of Houssam Zaitoun, the store clerk who was at the tobacco shop during the robbery and injured by the men involved in the robbery. The trial court responded as follows:

> *THE COURT*. [H]ere's what I'm going to advise you, all right. *If you go back into the jury room and you talk amongst yourselves and you feel that there's some sort of portion of the record that was unclear to you or you can't recollect, okay, then the Court can a [sic] read back, okay.* But there's no transcript.
>
> Again, I told you this in the beginning. If we were technology sound, the transcript would have been generated as it was being, you know, being testified to. But we don't have that ability here.
>
> *JUROR.* I think we're going to need a read back.
>
> *THE COURT*. Well, you need to talk--see, here's what I'm trying to tell you, sir. You need to talk to your panel.
>
> *JUROR.* We did.
>
> *THE COURT*. Okay, but you haven't been out that long, so this is what I'm going to do. When you go back in that room whatever it is, the testimony whatever the gentleman's name is. You know, take a moment to write down on the board ten salience [sic] points. Okay, and I know you [sic] probably going to tell me you already did. Okay, but take the time to go through that, because there are 12 of you, and everyone has heard something. Some might have heard more than others. But it's amazing, you got to go through that process first, okay. Because this court reporter is hardly equipped to do the read back, okay. But that will be the last resort. *If you need it and that's something after you've [sic] through and you've exhausted all the other ways, because she's set up differently than the court reporter I'm used to, okay.*
>
> I told you this is such an antiquated system, it's not even--it's just unfortunate. With this being said, take the time, okay, as much time as necessary.
>
> * * *
>
> *And then after you've taken the time and it doesn't work, and you still have questions, then we'll do a read back.* And I'm going to tell you, it's very difficult because we tried it on her in court and it's not easy. Okay, but we'll do it. *I'll accommodate you any way in any time, but you have to please put forth the effort*

first.

> And I'm not suggesting that you haven't made some effort, but you haven't been out that long, okay, so.

The trial court's statements demonstrate that the court did not foreclose the possibility that the jury could rehear the testimony at a later time. Instead, the trial court expressly stated that there was a possibility that the jury's request for a read-back would be granted after further jury deliberation. Therefore, there was no error under MCR 6.414(J). See *Carter*, 462 Mich at 216; *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

II

Defendant also argues that he was denied effective assistance of counsel because defense counsel failed to object to the trial court's jury instruction regarding the jury's request for a copy of the store clerk's testimony. Specifically, defendant argues that defense counsel's acquiescence in the jury instruction fell below an objective standard of reasonableness and that, but for defense counsel failing to object, the outcome of the proceeding would have been different. We disagree.

"Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Because there was no evidentiary hearing on this issue at the trial-court level, our review is for errors apparent on the record. See *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009).

The United States and Michigan Constitutions provide for the right to effective counsel. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). To prevail on an ineffective-assistance-of-counsel claim, a defendant must show (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms and (2) a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Id.* "'Counsel is not obligated to make futile objections'" in order to provide effective assistance. *People v Milstead*, 250 Mich App 391, 401; 648 NW2d 648 (2002), quoting *People v Meadows*, 175 Mich App 355, 362; 437 NW2d 405 (1989). Additionally, there is a strong presumption that defense counsel's actions were sound trial strategy, and a defendant's argument must overcome this presumption. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000).

Defense counsel's conduct did not fall below an objective standard of reasonableness because an objection to the trial court's jury instruction would have been futile. See *Odom*, 276 Mich App at 415; *Milstead*, 250 Mich App at 401. As previously discussed, there was no error under MCR 6.414(J) because the trial court did not foreclose the possibility that the jury could rehear the testimony at a later time. Therefore, any objection to this instruction on the basis of MCR 6.414(J) would have been futile because there was no error on which to base the objection. Additionally, defendant has not overcome the strong presumption that defense counsel's decision was sound trial strategy. See *Toma*, 462 Mich at 302. Defense counsel may not have wanted the jury to rehear Zaitoun's testimony, particularly because Zaitoun testified that defendant was one of the men to fight him during the robbery and that defendant stated "shoot him, shoot him" during the altercation. Zaitoun also later identified defendant in a police photograph lineup as one of the men who participated in the robbery. Zaitoun's testimony provided evidence of

defendant's guilt, and defense counsel may have acquiesced to the jury instruction as part of a trial strategy. See *id*. Accordingly, defense counsel's failure to object to the trial court's jury instruction did not fall below an objective standard of reasonableness. See *Odom*, 276 Mich App at 415.

Furthermore, defendant has failed to meet his burden of establishing a reasonable probability that, but for defense counsel's conduct, the result of the proceeding, i.e., the jury's verdict, would have been different. See *id.* Defendant does not explain how defense counsel's failure to object to the jury instruction affected the proceedings at the trial-court level. Defendant has not provided evidence that the jury would have found differently had defense counsel objected and the jury heard Zaitoun's testimony for a second time. Indeed, Zaitoun's testimony, if read back to the jury, would be substantial evidence of defendant's guilt. Furthermore, Terance Seaton identified defendant at the scene of the robbery, and most of defendant's testimony corroborated Zaitoun's testimony.

Accordingly, defendant has not established a claim of ineffective assistance of counsel.

Affirmed.

/s/ Kathleen Jansen
/s/ Stephen L. Borrello
/s/ Jane M. Beckering