

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DERRICK LYNELL HEWLETT,

Defendant-Appellant.

UNPUBLISHED

May 5, 2011

No. 296044

Muskegon Circuit Court

LC No. 09-058167-FC

Before: SHAPIRO, P.J., and FITZGERALD and BORRELLO, JJ.

PER CURIAM.

After a jury trial, defendant Derrick Lynell Hewlett was convicted of felony murder, MCL 750.316; armed robbery, MCL 750.529; conspiracy to commit armed robbery, MCL 750.157a and MCL 750.529; possession of a firearm by a felon, MCL 750.224f; carrying a concealed weapon, MCL 750.227; and three counts of felony-firearm, MCL 750.227b. Defendant appeals as of right. For the reasons set forth in this opinion, we affirm.

The sole issue presented on appeal is whether the trial court denied defendant a fair trial by failing to provide the jury with a written copy of the elements of the charged crimes after they had asked for one. Generally, this Court applies a de novo standard of review when it reviews jury instructions that involve questions of law and reviews a trial court's determination of whether an instruction is applicable to the facts of a case for an abuse of discretion. *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). This Court applies a de novo standard of review when it reviews the question of whether a defendant has been denied a fair trial or deprived of his liberty without due process of law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002); *People v Steele*, 283 Mich App 472, 478; 769 NW2d 256 (2009), lv den 485 Mich 996 (2009). However, this Court reviews this unpreserved issue for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 763-764.

In this case, the trial court received a note from the jury about 25 minutes after the jury began its deliberations. The note stated: "Can we have a copy of all the counts including the elements that were read by the judge?" The trial court, with the attorneys and defendant present, then went back on the record and read the jury's note. The trial court then engaged in the following exchange with the parties:

THE COURT: I think we have agreed I will just tell them that we don't have copies that we're going to send in. If they need to have the elements re-read, I will reread them to you if they can't recall what they were and need a rereading.

As far as the counts themselves, those are on the Verdict Form.

MR. BADER: Right.

MR. BEASON: Right.

THE COURT: All right. I will have the jury brought in, and I will tell them that.

After the jury returned to the courtroom, the trial court instructed the jury as follows: As far as just the counts themselves, your Verdict Form lists all the eight counts. You know what the counts are.

We don't have a written copy of the elements to send to you. We just ask you to rely on your collective memories. If you're not sure what those elements are, just send a note and I will reread them to you if you want that done.

So, we just ask you to rely on your collective memories; and if there is a problem and can't recall, if you want a particular count or counts re-read to you, I am willing to do that. So just send a note to that effect if you find that necessary.

All right. We will have you go back to the jury room and continue your deliberations.

Neither party objected to the trial court's instructions as read to the jury. The jury spent another four hours deliberating before it reached its verdict. The jury did not ask the court to reread the elements of the crimes charged.

The exchange between the court and the parties above indicates that defendant expressed satisfaction and approval of the trial court's decision to deny the jury's request for a written list of the elements. With the attorneys and defendant present, the court stated "we have agreed I will just tell them that we don't have copies that we're going to send in. If they need to have the elements re-read, I will reread them" Moreover, counsel for both parties expressed their satisfaction and approval of the trial court's decision when they each replied to the court's proposed instructions by saying "Right." Based on the record of the proceedings in this matter, we find that defendant has waived his right to raise this issue. A party waives his rights and extinguishes any error where he expresses satisfaction and approval of a trial court's decision. *People v Carter*, 462 Mich 206, 219-220; 612 NW2d 144 (2000).

Notwithstanding defendant's waiver, we find that the trial court did not plainly err. After denying the jury's request for a copy of the written elements, the court instructed the jurors to rely on their collective memories to remember the elements. The court instructed the jury that it would reread its instructions to the jury if they sent a note to the court indicating that they had a

problem remembering the elements using their collective memories. The court's decision to deny the jury's request and its instruction to the jury was consistent with the practice recommended by this Court in *People v Cavanaugh*, 127 Mich App 632, 641-643; 339 NW2d 509 (1983), where we held that repeating instructions in open court is preferred to providing a jury with written instructions where the instructions are voluminous. Moreover, the court did not err in instructing the jury to deliberate further before potentially rereading the instructions. See also, *People v Wright*, 41 Mich App 518, 523; 200 NW2d 362 (1972) ("The law is clear that judicial discretion is not abused where the jury is directed to deliberate further on questions posed by it to the court, so long as the possibility of having testimony read at a later time is not ruled out.") It was not incumbent on the trial court to reinstruct the jury on the elements at the time the jury requested a written copy of the elements because the jury did not state that they did not remember the elements or understand the court's instructions. See *People v Walker*, 162 Mich App 60, 63; 412 NW2d 244 (1987) (jurors are presumed to be competent). Following their request, the jury continued to deliberate and reached a verdict despite the court's instruction that it would reinstruct the jury if they could not remember the elements using their collective memories. Jurors are presumed to be competent and understand and follow a court's instructions. *People v Mette*, 243 Mich App 318, 330-331; 621 NW2d 713 (2000); *Bordeaux v Celotex Corp*, 203 Mich App 158, 164; 511 NW2d 899 (1993). Nothing in the record demonstrates that the trial court instructed the jury on the elements of the crimes charged in a manner that "creates doubt as to whether the jury understood and appreciated the court's instructions." *Martin*, 392 Mich at 563.

Affirmed.

/s/ Douglas B. Shapiro
/s/ E. Thomas Fitzgerald
/s/ Stephen L. Borrello