2012 IL App (1st) 102030-U

SIXTH DIVISION
9/7/12

No. 1-10-2030

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 10 CR 412
	)	
BOBBY FORD,	)	Honorable
	)	William Hooks,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE Hall delivered the judgment of the court.
Justices KARNEZIS and ROCHFORD concurred in the judgment.

O R D E R

¶ 1 *Held:* The trial court acted properly by exercising its discretion in rejecting the jury's request for transcripts; affirmed.

¶ 2 Following a jury trial, defendant Bobby Ford was convicted of retail theft and sentenced to three years' imprisonment. On appeal, defendant asserts that the trial court erred when it failed to exercise its discretion in responding to the jury's request for transcripts. We affirm.

¶ 3 At trial, defendant proceeded *pro se*. The evidence revealed that on November 28, 2009, an employee from the electronics department at the Target store located at 8650 South Cottage Grove in Chicago contacted Timothy Bell, a loss prevention specialist, and told him to watch defendant, who was pushing a cart with a duffle bag inside. Bell saw defendant through

surveillance monitors put a television, which was wrapped with an anti-theft device called a "spider wire," into his cart. Another security officer, Kelly Morris, continued to conduct camera surveillance while Bell went to the sales floor to watch defendant. Bell saw defendant walk into the men's department and cut the spider wire. Defendant then purchased some food and walked out of the store. At that point, Bell and two other security guards, Terry Sumpter and Stephen Gearin, stopped defendant and escorted him into the security office. Defendant did not produce a receipt for the merchandise and Bell and defendant had a verbal altercation where they cursed and threatened each other. Bell then took the television to a register and obtained a receipt indicating that its value was $299.99. After the police were called, Officer Keeynan Wrigley arrived at the store and Morris told him about the incident. Defendant was subsequently arrested.

¶ 4 After the State rested its case, defendant called Officer Wrigley to testify. Wrigley acknowledged that he was not at the store during the incident, did not personally observe any of defendant's actions, and the store employees relayed to him what had occurred. Wrigley further acknowledged that he testified at the grand jury proceedings that defendant concealed a television set in his duffle bag and attempted to leave the store without paying for it. According to Wrigley, his testimony was based on the information that was provided to him by the store employees. Defendant attempted to move the grand jury testimony into evidence, but the trial court denied the request.

¶ 5 Defendant testified that as he was walking through the store, he noticed that Bell was following him. Defendant became angry because he thought he was being racially profiled and defendant and Bell began to argue. Defendant purchased the television, put the receipt in his bag, and walked through the store for about an hour. Defendant then walked out of the store and was stopped by security guard Stephen Gearin, who took the television and defendant's belongings. Gearin brought defendant to the security room, and, about 10 minutes later, Gearin

returned the items to defendant and apologized for the inconvenience. Defendant bought some food and, as he was about to exit the store, security brought him back into the security office. When he was asked to produce a receipt for the television, he indicated that it was in the bag. When security looked in the bag, however, the receipt was not there.

¶ 6 During deliberations, the jury sent a note to the trial court stating, "may we see the transcript of the testimony?" The trial court asked the State and defendant to explain their positions regarding the jury's request. The State responded that the trial court should tell the jury that they have the evidence and should continue to deliberate, and defendant stated that the jury should see the transcripts. After the court told defendant that "there is no transcript," defendant indicated that he believed the jury was requesting a transcript of the grand jury testimony. The trial court responded that,

> "[i]f that's the transcript, that transcript is not physical. That transcript was used to cross examine a police officer ***. They don't get a copy of the transcript. If they are talking about the transcript of the other witnesses, they don't get that either. *** I will tell you that if they need the transcript of the proceedings, I will deny that and I will say basically you have all the evidence on this matter. Continue to deliberate. *** If they're going [*sic*] what you used in cross examination, I will give the same instruction."

The following colloquy then occurred between the trial court and defendant:

> "THE COURT: are you requesting that a transcript of the whole proceedings or portion of the proceedings be provided?
>
> DEFENDANT: A portion of it.

THE COURT: Not concerning the attempted impeachment that you made. I mean of the actual testimony of certain witnesses. So you would go along with that response?

DEFENDANT: I will.

THE COURT: Also, in fact, if they wanted the transcript of the testimony of the grand jury, you want them to have that, too?

DEFENDANT: Yes.

THE COURT: You have made your record on that. I am going to overrule that request by you ***."

¶ 7 In responding to the jury, the trial court stated, "You have all the evidence on this matter. Continue to deliberate." The jury later found defendant guilty of retail theft and the court sentenced him to three years' imprisonment.

¶ 8 On appeal, defendant contends that the trial court committed reversible error when it failed to exercise its discretion in response to the jury's request for transcripts. Defendant specifically maintains that because the trial court did not ask the jury which transcripts it desired, the court could not determine if the requested material would assist the jury in its deliberation.

¶ 9 Initially, the State correctly observes that defendant forfeited this issue by failing to include it in his posttrial motion. Nevertheless, defendant asks this court to review the issue under the plain error doctrine, which allows us to review an unpreserved error where the evidence is closely balanced or where fundamental fairness requires. *People v. Davis*, 405 Ill. App. 3d 585, 590 (2010). The first step in a plain error analysis requires us to determine whether any error occurred at all (*People v. Thompson*, 238 Ill. 2d 598, 613 (2010)), and we find no error here.

¶ 10 The decision whether to grant or deny a jury's request for transcripts of testimony rests within the sound discretion of the trial court. *People v. Kliner*, 185 Ill. 2d 81, 163 (1998). Absent an abuse of that discretion, the trial court's determination will not be disturbed on review. *Kliner*, 185 Ill. 2d at 163.

¶ 11 Here, in denying the jury's request for transcripts, the court stated, "[y]ou have all the evidence on this matter. Continue to deliberate." In explaining its decision to the parties, the trial court stated that, "there is no transcript." Furthermore, when defendant indicated that he believed the jury wanted the grand jury testimony, the court responded, "that transcript is not physical."

¶ 12 We have previously held that a trial court exercises its discretion when it denies a jury's request for transcripts for the reason that they are unavailable. See *People v. Shaw*, 258 Ill. App. 3d 119, 122 (1994) (finding that the trial court exercised its discretion where it declined the jury's request for transcripts because they were unavailable); *People v. Whitley*, 49 Ill. App. 3d 493, 500 (1977) (where the trial court denied the jury's request for a transcript because it was unavailable, the reviewing court held that the trial court implicitly recognized that it had the discretionary authority to furnish one to the jury). Therefore, the court's statements in this case show that it expressly exercised its discretion in denying the jury's request because the transcripts were unavailable. In addition, we note that even if the grand jury transcripts were physically available, the trial court did not have the ability to provide those transcripts to the jury because they were not in evidence. See *People v. Williams*, 173 Ill. 2d 48, 87 (1996) (stating that "[w]here documents have not been admitted into evidence, the trial judge is without discretion to provide them to the jury during deliberations").

¶ 13 Nevertheless, defendant maintains that because the trial court never asked the jury for clarification regarding which transcripts it wanted, the court could not have understood the jury's

note, and thus failed to exercise its discretion in responding to the jury's request. Defendant, however, ignores the court's statements to the parties where it plainly indicated that the jury's request would be denied regardless of which transcripts it desired. In discussing the trial transcripts, the trial court told the parties that, "if [the jury] need[s] the transcript of the proceedings, I will deny that and I will say basically you have all the evidence on this matter. Continue to deliberate." The court further indicated that if it was the grand jury testimony the jury desired, it would give the jury the same instruction. Therefore, the court clearly explained to the parties that the jury's request would be denied regardless of whether it wanted trial or grand jury transcripts, and any further inquiries of the jury by the court into this matter would have been unnecessary.

¶ 14 In reaching this conclusion, we find *People v. Queen*, 56 Ill. 2d 560 (1974) and *People v. Jackson*, 26 Ill. App. 3d 618 (1975), relied on by defendant, distinguishable from the case at bar. In both cases, the trial courts' responses to the juries' notes were found to be in error because it was clear that they mistakenly believed they were without discretion to consider the juries' requests. *Queen*, 56 Ill. 2d at 565 (in denying the jury's request for transcripts, the trial court stated, "I cannot have any testimony of any witnesses read to you"); *Jackson*, 26 Ill. App. 3d at 629 (trial court failed to ascertain from the jury the specific testimony that it wished to review, and failed to fulfill its duty of determining whether a review of the requested transcript would assist the jury). Here, however, the court did not indicate that it lacked discretion to inquire into the jury's note. It simply stated that the transcripts did not exist, the jury had all of the evidence, and it should continue to deliberate. See *People v. Abrego*, 371 Ill. App. 3d 987, 996-97 (2007).

¶ 15 Finally, defendant contends that *People v. Franklin*, 135 Ill. 2d 78 (1990), is instructive regarding the action a court should take when a jury makes a general request for transcripts. In *Franklin*, after the jury sent a note to the trial court requesting copies of certain transcripts, the

trial court replied with a note inquiring as to which portions of the transcript it wished to review. The jury responded that it wanted to see specific portions of the transcripts of one person's testimony. After discussing the matter with the parties, the court denied the jury's request, stating that the jury must rely on its collective memory of the testimony. Our supreme court found that no abuse of discretion occurred because the circuit court, in denying the jury's request, noted that the excised portions of the testimony that the jury requested would have only confused the jury. *Franklin*, 135 Ill. 2d at 105. Defendant maintains that, unlike the case at bar, the circuit court in *Franklin* properly denied the jury's request for transcripts because it did so only after learning what testimony the jury specifically requested. However, defendant's argument fails because the trial court in this case clarified for the parties that the transcripts were unavailable and, regardless of which transcripts the jury wanted, their request would be denied.

¶ 16 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 17 Affirmed.