

Third District Court of Appeal

State of Florida, July Term, A.D. 2009

Opinion filed December 16, 2009.
Not final until disposition of timely filed motion for rehearing.

No. 3D07-3046
Lower Tribunal No. 06-18894

Steven Hazuri,
Appellant,

vs.

The State of Florida,
Appellee.

An Appeal from the Circuit Court for Miami-Dade County, Peter R. Lopez,
Judge.

Carlos J. Martinez, Public Defender, and Robert Kalter, Assistant Public
Defender, for appellant.

Bill McCollum, Attorney General, and Lunar Claire Alvey, Assistant
Attorney General, for appellee.

Before COPE, SHEPHERD, and SUAREZ, JJ.

SHEPHERD, J.

Steven Hazuri appeals his conviction for aggravated battery with a weapon. The only issue on appeal is whether the trial court abused its discretion in failing to advise the jury they could receive a “readback” of trial testimony in response to a request sent during deliberations for transcripts. We conclude the trial court had no duty to volunteer this information and thus did not abuse its discretion in declining to do so. We therefore affirm Hazuri’s conviction.

Hazuri was tried for armed robbery and aggravated battery with a weapon. After a couple hours of deliberation, the jury sent a note to the court stating the jurors were unable to reach a verdict. The parties agreed the jury should be sent home for the evening and return the next day to continue its deliberations. The next morning, after an hour of deliberations, the jury sent a note to the court requesting trial transcripts. The following transpired:

THE COURT: Back on the record. Note for the record the presence of the defendant, his attorney, the assistant state attorney. Counsel, we have a note from the jury. Could they get transcripts from the trial. State, suggestions.

[ASSISTANT STATE ATTORNEY]: My only suggestion is that we tell them they must rely on their own recollection of the testimony.

THE COURT: [Defense counsel].

[DEFENSE COUNSEL]: My answer is you should inform the jury that they are allowed to have whatever, you know, portion of the transcript read back to them if they have a question about some evidence, but to have a set of transcripts from the trial, absolutely not.

THE COURT: There are no trial transcripts of moment. Certainly portions of the record could be read, however, I do believe that the accurate and correct response is that they must rely on their own collective recollection of the evidence and we will answer the question that way.

[DEFENSE COUNSEL]: You are not going to advise them that they have a right to have the transcript read back?

THE COURT: They don't have a right. It is within my discretion.

[DEFENSE COUNSEL]: Would you note my objection for the record.

THE COURT: I will note your objection, counselor. I will note it for the record.

[DEFENSE COUNSEL]: You are just going to send the note back?

THE COURT: Yeah. Okay. Okay. There you go. Okay.

Hazuri argues the trial court abused its discretion in refusing to advise the jurors that although they could not have a copy of any transcripts, they were entitled to have portions of the transcript read back to them. Florida Rule of Criminal Procedure 3.410, governing "readbacks," provides as follows:

After the jurors have retired to consider their verdict, if they request additional instructions or to have any testimony read to them they shall be conducted into the courtroom by the officer who has them in charge and the court may give them the additional instructions or may order the testimony read to them. The instructions shall be given and the testimony read only after notice to the prosecuting attorney and to counsel for the defendant.

However, the jury in this case did not ask for a “readback.” Rather, the jury asked a specific question. The court’s purported answer¹—the jury “must rely on their own recollection of the evidence”—was fair and legally accurate. Florida Rule of Criminal Procedure 3.400 states:

(a) . . . The court may permit the jury, upon retiring for deliberation, to take to the jury room:

- (1) a copy of the charges against the defendant;
- (2) forms of verdict approved by the court, after being first submitted to counsel;
- (3) all things received in evidence other than depositions. If the thing received in evidence is a public record or a private document which, in the opinion of the court, ought not to be taken from the person having it in custody, a copy shall be taken or sent instead of the original.

Nowhere does the above-quoted rule contain a provision allowing the jury to receive transcripts of trial testimony in the jury room. See Janson v. State, 730 So. 2d 734, 735 (Fla. 5th DCA 1999); cf. Barnes v. State, 970 So. 2d 332, 339 (Fla. 2007) (holding transcript of testimony at prior trial which was admitted in evidence could not be taken to jury room); Young v. State, 645 So. 2d 965, 967 (Fla. 1994)

¹ We do not have the written response returned to the jury and defense counsel did not ask that the written response be read into the record for our benefit—which may be reason enough to affirm the conviction in this case, see Dade County Bd. of Pub. Instruction v. Foster, 307 So. 2d 502, 502 (Fla. 3d DCA 1975) (“It is incumbent for the appellant, under Florida Appellate Rules, to bring the record to the court sufficient to demonstrate error.”)—but based upon the record we do have, we know it was defense counsel who inserted “readback” into the dialogue.

(holding videotaped witness testimony could not be taken back to jury room for unrestricted view during jury deliberations). Thus, the trial court was bound to refuse the jury's request, and its further answer that the jury "must rely on their own recollection" was true in relation to the question posed. Upon giving such an answer, the trial court was under no obligation—as defense counsel suggested—to inform the jurors that a "readback" of trial testimony may be available upon request.

The assertion by the defense that the trial court's legally accurate answer created a misimpression in the minds of the jury that any further request for a "readback" also would be rejected is unpersuasive. It is true that "while the trial court has the discretion to deny a jury's request to read back testimony, it may not mislead the jury into thinking that a readback is prohibited." Avila v. State, 781 So. 2d 413, 415 (Fla. 4th DCA 2001). However, in this case, nowhere in the colloquy between counsel and the court can there be found any statement that the court would disobey Rule 3.410 and deny a "readback" if requested. In fact, the trial judge expressly stated to the contrary. Because no transcripts were to be forthcoming, it was entirely correct to instruct the jury they "must rely on their own recollection of the evidence" See Coleman v. State, 610 So. 2d 1283, 1286 (Fla. 1992) (approving instruction to jurors that they must "rely on their recollection of the evidence" in response to jury question pertaining to testimonial

fact evidence); Infantes v. State, 941 So. 2d 432, 434 (Fla. 3d DCA 2006) (“We find no abuse of discretion in the trial court’s refusal to reread the first officer’s testimony and instructing the jury to rely on its collective memory.”).

We find the authorities cited in the dissent inapposite, as they are all soundly based on the presence of legal error in the trial court’s formulation of its own limitations. In two of the cases—Huhn v. State, 511 So. 2d 583, 591 (Fla. 4th DCA 1987) and Biscardi v. State, 511 So. 2d 575, 580 (Fla. 4th DCA 1987)—the trial court preemptively advised the jury in identical terms that “there really is no provision . . . to have [] testimony read back.” This advice to the jury directly contravened Florida Rule of Criminal Procedure 3.410. In Avila, the third case relied upon by the dissent, the jury sought “[to] review[] the timetable presented by the testimonies of five specific alibi witnesses” in the case. Avila, 781 So. 2d at 415. After an additional written exchange with the jury, the trial court concluded the jury, in fact, had requested a “readback,”—which involved “a full readback of five witnesses’ testimonies [that the trial court anticipated] would take a full day to complete”—but declined the request on the erroneous impression that it was prohibited from providing a “readback” of the testimony of just selected witnesses. Id. at 414-15. This, of course, was error.

In our case, the jury requested “transcripts.” The trial court did not abuse its discretion in advising the jury that it could not be given copies of the transcripts and must therefore rely upon its own recollection of the testimony.

We affirm the conviction.

SUAREZ, J., concurs.

COPE, J. (dissenting).

Defendant-appellant Steven Hazuri appeals his conviction of aggravated battery with a weapon. He requests a new trial based on the trial court's response to a jury question. His point is well taken.

Defendant was charged with armed robbery and aggravated battery with a weapon. At the conclusion of the trial, the jury retired to deliberate. After a few hours of deliberating, the jury sent a note saying that the jurors were unable to reach a verdict. The jury was sent home for the evening and returned the next morning to continue its deliberations.

The jury sent a note requesting trial transcripts. The following transpired:

THE COURT: Back on the record. Note for the record the presence of the defendant, his attorney, the assistant state attorney. Counsel, we have a note from the jury. Could they get transcripts from the trial. State, suggestions.

[ASSISTANT STATE ATTORNEY]: My only suggestion is that we tell them they must rely on their own recollection of the testimony.

THE COURT: [Defense counsel].

[DEFENSE COUNSEL]: My answer is you should inform the jury that they are allowed to have whatever, you know, portion of the transcript read back to them if they have a question about some evidence, but to have a set of transcripts from the trial, absolutely not.

THE COURT: There are no trial transcripts of moment. Certainly portions of the record could be read, however, I do believe that the accurate and correct response is that they must rely on their own collective recollection of the evidence and we will answer the question that way.

[DEFENSE COUNSEL]: You are not going to advise them that they have a right to have the transcript read back?

THE COURT: They don't have a right. It is within my discretion.

[DEFENSE COUNSEL]: Would you note my objection for the record.

THE COURT: I will note your objection, counselor. I will note it for the record.

[DEFENSE COUNSEL]: You are just going to send the note back?

THE COURT: Yeah. Okay. Okay. There you go. Okay. We will be in recess.

Florida Rule of Criminal Procedure 3.410 addresses a jury request to review the evidence. It authorizes the jury to request that testimony be read. The rule states:

Rule 3.410. Jury Request to Review Evidence or for Additional Instructions

After the jurors have retired to consider their verdict, if they request additional instructions or to have any testimony read to them they shall be conducted into the courtroom by the officer who has them in charge and the court may give them the additional instructions or may order the testimony read to them. The instructions shall be given and the testimony read only after notice to the prosecuting attorney and to counsel for the defendant.

“While the trial court has the discretion to deny a jury’s request to read back testimony, it may not mislead the jury into thinking that a readback is prohibited.”

Avila v. State, 781 So. 2d 413, 415 (Fla. 4th DCA 2001). In Avila, the jury requested transcripts of the testimony of four alibi witnesses. The judge told the jury that there were no transcripts and that the jury should rely on its collective recollection. The court did not mention that a readback of the testimony was

available. The Fourth District reversed, saying that the court “may have confused the jury as to whether a readback of testimony was permissible” Id. at 416; see also Huhn v. State, 511 So. 2d 583, 591 (Fla. 4th DCA 1987) (error to instruct the jury that there was no provision to have any testimony read back); Biscardi v. State, 511 So. 2d 575, 580-81 (Fla. 4th DCA 1987) (same); cf. Cedars of Lebanon Hosp. Corp. v. Silva, 476 So. 2d 696, 700, 703 (Fla. 3d DCA 1985) (new trial order affirmed where trial court’s admonition to the jury that it could not be the jury’s “pen pal” “in effect prohibited the jury from asking . . . questions necessary to allay the jury’s confusion.”).

The State relies on Infantes v. State, 941 So. 2d 432 (Fla. 3d DCA 2006). In that case there was neither a defense objection to the trial court’s response to the jury’s request for transcripts, nor a request for an instruction about the possibility of a readback. Id. at 434.

In this case the defense timely requested that the jury be informed that a readback of testimony was permissible. The instruction requested by the defense should have been given.

With all due respect, much of the majority opinion is niggling nitpicking. The majority opinion finds dispositive the fact that the jury note asked for transcripts. According to the majority, since no transcripts were in existence, it follows that the question could be answered with a simple “no.”

The majority opinion overlooks the fact that jurors are composed of lay persons. If they knew the technical details of the law, then they would have written a better note. But the substance of the question was whether the jury could review the **testimony**. Defense counsel quite properly said that under rule 3.410, a jury may request to have “testimony read to them,” and the court may so order.*

It seems clear that under the Fourth District decisions in Avila, Huhn, and Biscardi, the defendant is entitled to relief. The defense objection was timely and appropriate.

There should be a new trial.

* The suggestion in footnote one of the majority opinion that we do not know what the trial court told the jury is contradicted by the rest of the majority opinion. As quoted by the majority opinion, the trial court said, “I do believe that the accurate and correct response is that they must rely on their own collective recollection of the evidence and we will answer the question that way.”