

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

UNPUBLISHED
January 17, 2013

v

MOHAMAD KAMEL DIA,

Defendant-Appellee.

No. 308606
Wayne Circuit Court
LC No. 11-007051-FH

Before: DONOFRIO, P.J., and FORT HOOD and SERVITTO, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of assault with a dangerous weapon (felonious assault), MCL 750.82.¹ He filed a motion for new trial, alleging that the trial court erred by failing to sua sponte provide the duty to retreat instruction, and the trial court granted the motion. The prosecution appeals by leave granted² from this order granting defendant's motion for a new trial. We reverse.

This case stems from an altercation that occurred between defendant and members of a lawn-cutting crew in May 2011. After a fight ensued over grass clippings on defendant's driveway, defendant struck one of the crew members in the hand with a wooden piece from a chair. Following his conviction and sentencing, defendant filed a motion for a new trial claiming the trial court committed two instructional errors. Relevant to this appeal is defendant's claim that the trial court erred in failing to instruct the jury on the absence of a duty to retreat. After reviewing the trial transcripts, the trial court held that it erred by failing to provide the duty to retreat instruction and granted defendant's motion for a new trial on the same day.

On February 15, 2012, the prosecution filed a delayed application for leave to appeal, arguing that the trial court abused its discretion in granting defendant's motion for a new trial

¹ Defendant was sentenced to 18 months' probation, 100 hours of community service, participation in an anger management program, and a restitution amount to be determined. His sentence is not at issue on appeal.

² *People v Dia*, unpublished order of the Court of Appeals, entered May 24, 2012 (Docket No. 308606).

because defendant waived his right to raise the claim of instructional error. On March 23, 2012, this Court entered an order vacating the January 13, 2012, order granting defendant's motion for a new trial and, in lieu of granting leave to appeal, remanded the case to the circuit court for "the appropriate analysis." *People v Dia*, unpublished order of the Court of Appeals, entered March 23, 2012 (Docket No. 308606). Specifically, this Court instructed the trial court to, first, determine whether defendant waived any objection to the trial court's failure to instruct the jury, sua sponte, regarding the duty to retreat. *Id.* Second, if waiver did not apply, the trial court was to determine if defendant's claim satisfied the requirements of the forfeiture analysis. *Id.*

On remand, defendant's trial counsel testified that he failed to object to the court's jury instructions regarding duty to retreat because he was unaware of the instruction. The trial court then made its ruling orally on the record and, in relevant part, stated:

And so, the determination of whether he waived it, the analysis, I believe, that's correct to apply in this particular case I think could be caught in the lyrics that were once sang to us by the Parliament Funkadelics in the song And I Betcha. And one of the lyrics was, you can't know what's going on when you sleep. And I betcha.

Certainly, sometimes it's referred to as you can't miss what you can't measure. And in this particular case, you can't know, you can't waive what you don't know exists. And because I find that the testimony of Mr. Servia [sic] was pretty straight forward and clear, that I think a waiver is a knowingly and a knowledgeable giving up or relinquishing of a right, he wasn't even aware, based on his testimony, that the instruction existed, let alone did he choose not to give it as a trial tactic to try to prevail in the trial or to invoke a motion to set aside the verdict, to get another opportunity to try the case.

On May 24, 2012, this Court reinstated the trial court's January 13, 2012, order granting a new trial for the purpose of reviewing the merits of the trial court's rulings. This Court also granted the prosecution's application for leave to appeal, "limited to the issues raised in the application, MCR 7.205(D)(4), as well as on the issues raised during the remand proceedings." *People v Dia*, unpublished order of the Court of Appeals, entered May 24, 2012 (Docket No. 308606).

The prosecution argues the trial court abused its discretion in granting defendant's motion for a new trial because defendant waived his right to raise instructional error claims by approving of the jury instructions as given at trial. This Court reviews a trial court's decision to grant a motion for a new trial for an abuse of discretion. *People v Grissom*, 492 Mich 296, 312; 821 NW2d 50 (2012). Claims of instructional error are reviewed de novo, and the trial court's determination that a particular jury instruction is applicable is reviewed for an abuse of discretion. *People v Dobek*, 274 Mich App 58, 82; 732 NW2d 546 (2007).

The trial court abused its discretion in granting defendant's motion for a new trial because it incorrectly concluded that "you can't waive what you don't know exists." At trial, after instructing the jury, the court asked both counsel, "Any objections to the instructions by the Court from either one of you?" Defense counsel replied, "No objections, you Honor. But I

believe I had one item --[.]” That “one item” was an additional instruction regarding the prosecution’s burden to prove beyond a reasonable doubt that defendant did not act in self-defense. Thus, besides the inclusion of the burden of proof instruction, defense counsel expressed satisfaction with the instructions given.

“Waiver has been defined as the intentional relinquishment or abandonment of a known right.” *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000) (internal quotation omitted). When a defendant fails to object or request a specific jury instruction, that defendant waives any claim of instructional error and this Court will grant relief only when necessary to avoid manifest injustice. *People v Sabin (On Second Remand)*, 242 Mich App 656, 657-658; 620 NW2d 19 (2000).

Michigan courts have consistently held that when defense counsel states that there are no objections to the jury instructions, counsel expresses his approval of the instructions and thereby waives any later claim of instructional error. See *People v Chapo*, 283 Mich App 360, 372-373; 770 NW2d 68 (2009); *People v Matuszak*, 263 Mich App 42, 57; 687 NW2d 342 (2004); *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002). For instance, in *People v Kowalski*, 489 Mich 488, 496-497; 803 NW2d 200 (2011), the defendant claimed the trial court erred in omitting an element of the charged offense from the jury instructions. Throughout trial, however, defense counsel repeatedly stated there were no objections to the jury instructions. *Id.* at 504. At the close of trial, after instructing the jury, the trial court asked if there were any objections and defense counsel answered, “None by defense, your Honor.” *Id.* On appeal, the Supreme Court held that, because defense counsel “explicitly and repeatedly approved the instruction, defendant has waived the error.” *Id.* at 503. The Court added, “When defense counsel clearly expresses satisfaction with a trial court’s decision, counsel’s action will be deemed to constitute a waiver.” *Id.*

In *Kowalski*, Justices Cavanaugh and Marilyn Kelly concurred in the result only disagreeing with the majority’s “hasty presumption” that a waiver occurred simply because defense counsel stated multiple times he had no objection to the instructions. *Id.* at 513 (Cavanaugh, J., concurring). The concurrence advocated for a more nuanced approach to determine whether waiver occurred, an approach that erred against finding waiver and focused on defense counsel’s awareness of the right and his intention to “consciously refrain[] from objecting as a tactical matter.” *Id.* (Cavanaugh, J., concurring) (quotation marks and citations omitted). In response, the majority rejected the position advocated by the concurrence, stating that its “waiver analysis consider[ed] the entire record,” which included defense counsel’s discussions of the instructions with the court, agreement with them because he believed they mirrored his proposed instructions, and repeated approval throughout trial. *Id.* at 504 n 26. The majority added, “[T]he record clearly demonstrates waiver—an intentional relinquishment of a known right—because counsel’s affirmative statements were repeated, express, and unequivocal and concerned instructions that counsel had more than ample time to fully review and consider.” *Id.*

The concurrence in *Kowalski* is notable because it is similar to the analysis the trial court engaged in on remand from this Court. The trial court’s focus on awareness was rejected by a majority of the *Kowalski* Court. In *Kowalski*, the defense counsel expressly stated on the record that he had no objections to the jury instructions as given. Here too, defense counsel stated there

were no objections, besides the addition of an instruction regarding the burden of proof. See also *Id.* at 504-505 (“The distinction . . . between counsel stating, ‘I approve of the instructions,’ and counsel stating, ‘I have no objections,’ is unavailing.”). In both *Kowalski* and this case, defense counsel discussed the jury instructions with the court and had ample opportunity to request additional instructions. *Id.* at 504 n 26. Therefore, because defense counsel “explicitly . . . approved the instruction, defendant has waived the error.” *Id.* at 503.

Defendant relies on *People v Gonzalez*, 468 Mich 636; 664 NW2d 159 (2003), for the argument that the trial court properly engaged in a plain error analysis. *Gonzalez* is distinguishable because the defense counsel in that case did not expressly approve of the instructions as given to the jury, but rather, merely failed to object to a particular instruction’s absence. *Id.* at 639 (“Significantly, defendant’s attorney neither requested a cautionary instruction regarding accomplice testimony nor objected to the trial court’s failure to give sua sponte the cautionary instruction.”). Unlike *Gonzalez*, here, defense counsel expressly approved of the jury instructions as given to the jury. This is the difference between waiver and forfeiture. *People v Carines*, 460 Mich 750, 763 n 7; 597 NW2d 130 (1999) (“Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right.”)

The trial court incorrectly analyzed whether defendant was barred by waiver from raising his claim of instructional error. After instructed by this Court to conduct the “appropriate analysis” regarding waiver, the trial court conducted an evidentiary hearing to determine defense counsel’s thought process during trial. This Court is unable to locate any case in which a trial court permitted a defense counsel to testify regarding why he approved of jury instructions in connection with the issue of waiver. Instead, the Supreme Court has stated that the focus of the inquiry is on the trial record. *People v Buie*, 491 Mich 294, 316; 817 NW2d 33 (2012) (“Because an objection must be on the record, the focus should be on what transpired at trial[.]”). A review of the trial record demonstrates that defendant waived his right to raise a claim of instructional error by affirmatively approving the jury instructions as given. The trial court abused its discretion in concluding that defendant did not waive his instructional error claim and in granting defendant’s motion for a new trial.³

Reversed.

/s/ Pat M. Donofrio
/s/ Karen M. Fort Hood
/s/ Deborah A. Servitto

³ In light of this disposition, we decline to address the prosecution’s second claim on appeal regarding whether the trial court conducted the proper forfeiture analysis. We also decline to address the additional issues raised in defendant’s appellee brief, as our review is “limited to the issues raised in the application, MCR 7.205(D)(4), as well as on the issues raised during the remand proceedings.” *People v Dia*, unpublished order of the Court of Appeals, entered May 24, 2012 (Docket No. 308606).