STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 14, 2013
v	No. 305872 Wayne Circuit Court
BRENT MORRIS, Defendant-Appellant.	LC No. 01-001816-FH

Before: MURRAY, P.J., and MARKEY and WHITBECK, JJ.

PER CURIAM.

Defendant appeals his jury trial conviction of gambling activity, MCL 432.218(2). The trial court sentenced defendant to 7 to 25 years' imprisonment, as a fourth habitual offender, MCL 769.12. He appeals as of right.[1] We affirm.

Defendant first argues that the trial court's mid-deliberation change of a jury instruction was error that prejudiced defendant. "This Court reviews de novo claims of instructional error." *People v Dupree*, 284 Mich App 89, 97; 771 NW2d 470 (2009) aff'd 486 Mich 693 (2010). "Jury instructions that involve questions of law are . . . reviewed de novo. But a trial court's determination whether a jury instruction is applicable to the facts of the case is reviewed for an abuse of discretion." *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006) (quotation marks and citations omitted).

In *People v Clark*, 453 Mich 572, 583; 556 NW2d 820 (1996), the Court held that:

> The pertinent rule in criminal trials is MCR 6.414(F),[2] which provides:

[1] This Court granted defendant an appeal of right based on a federal court order granting defendant's petition for a writ of habeas corpus. *People v Morris*, unpublished order of the Court of Appeals, entered September 1, 2011 (Docket No. 305872).

[2] This was the relevant court rule at the time of defendant's trial. This language can now be found under MCR 2.513(N)(1).

> Before closing arguments, the court must give the parties a reasonable opportunity to submit written requests for jury instructions. Each party must serve a copy of the written requests on all other parties. The court must inform the parties of its proposed action on the requests before their closing arguments. After closing arguments are made or waived, the court must instruct the jury as required and appropriate, but with the parties' consent, the court may instruct the jury before the parties make closing arguments. After jury deliberations begin, the court may give additional instructions that are appropriate. [Footnote added.]

"Clarity in instructions and understanding by counsel of the exact nature of the charge is critical, because counsel shape their arguments to conform to the law as defined by the instructions." *Clark*, 453 Mich at 584. "It is the duty of the circuit judge to see to it that the case goes to the jury in a clear and intelligent manner, so that they may have a clear and correct understanding of what it is they are to decide[.]" *People v Anstey*, 476 Mich 436, 453; 719 NW2d 579 (2006) (quotation marks and citations omitted).

The first jury instruction, which the parties had agreed to, stated:

> First, the defendant knowingly, claimed, collected, took, or attempted to take money or something of value from a gambling game after acquiring knowledge not available to all players.
>
> Second, that the amount the defendant knowingly claimed, collected, took, or attempted to take was greater than the amount actually won.
>
> Third, that when the defendant did so, the defendant did so with the intent to defraud the casino of its money.

The revised jury instruction provided after the case was submitted to the jury stated:

> First, the defendant knowingly, claimed, collected, took, or attempted to take money or something of value from a gambling game and/or after acquiring knowledge not available to all players.
>
> Second, that the amount the defendant knowingly, claimed, collected, took, or attempted to take was greater than the amount he actually won.
>
> Third, that when the defendant did so, the defendant did so with the intent to defraud the casino of its money.

The trial court erred by changing the jury instruction after defense counsel gave his closing argument, for in doing so counsel was unable to understand "the exact nature of the charge" before his closing arguments, so that he could conform his arguments to the instructions. *Clark*, 453 Mich at 584. Defense counsel argued in his closing argument that the prosecution failed to prove beyond a reasonable doubt that defendant placed his bets based on information

not available to all players. Therefore, at least in part, defense counsel relied on the original instruction, and the trial court's modification of the instruction after the case was submitted to the jury was error. *Anstey*, 476 Mich at 453.

"[W]here the trial court errs in misleading or misinforming counsel regarding the ultimate instructions that will be given to the jury and prejudice results, a new trial is required." *Clark*, 453 Mich at 587 (footnote omitted). However, "not every instance of this type of instructional error will require reversal." *Id*. (footnote omitted). "[R]eversal is required only if the error was prejudicial." *Id*. at 587-588. There is a rebuttable presumption that preserved nonconstitutional error is harmless, unless a defendant is able to show that the error more probably than not was outcome determinative. *People v Lukity*, 460 Mich 484, 491-496; 596 NW2d 607 (1999). Here, defendant failed to show that the error, more probably than not, was outcome determinative.

The trial court's error did not prejudice defendant because the jury would have likely convicted defendant under the original jury instruction. Under the original instruction, the prosecution had to prove that defendant (1) "knowingly, claimed, collected, took . . . money or something of value from a gambling game after acquiring knowledge not available to all players," (2) "that amount defendant knowingly, claimed, collected, took . . . was greater than the amount he actually won," and (3) he "intend[ed] to defraud the casino." First, the jury must have found "that [the] amount defendant knowingly, claimed, collected, took . . . was greater than the amount he actually won," and that he had the intent to defraud the casino because it convicted him under the revised instruction which included this same language. Second, the prosecution presented videotaped evidence that defendant placed a bet after the outcome of the game was decided. Defendant argues that all the players knew the outcome of the roll. However, the distinguishing feature is that, unlike the other players, defendant had knowledge of the outcome before he placed his bet.

Furthermore, read as a whole, the jury instructions made it clear to the jury that it was to determine if defendant cheated at the game of craps, and the elements were accurately stated to the jury. This Court reads jury instructions as a whole, and "will not reverse where the jury instructions fairly presented the issues to be tried and sufficiently protected the defendant's rights." *People v Eisen*, 296 Mich App 326, 330; 820 NW2d 229 (2012) (quotation marks and citation omitted).

Defendant next argues the trial court violated MCR 6.414(H) [3] by informing the jury that it could not obtain a transcript of a witness's testimony until a week later. "This Court reviews decisions regarding the rereading of testimony for an abuse of discretion." *People v Davis*, 216 Mich App 47, 56; 549 NW2d 1 (1996). "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), citing MCR 6.414(H).

[3] At the time of defendant's trial MCR 6.414(H) was in effect.

MCR 6.414(H) provided:

> 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.

"[A] trial judge abuses his discretion when: (1) he denies a request to rehear testimony, *and* (2) forecloses the possibility that such a rehearing *will ever be granted*." *People v Robbins*, 132 Mich App 616, 621; 347 NW2d 765 (1984). (Emphasis added.)

A trial court violates MCR 6.414(H) when it forecloses an opportunity for the jury to review transcripts, which can occur when it tells the jury "the transcripts will not be typed for some weeks and months way into the future and you must listen very carefully because you must rely on your collective memories to resolve any issues with regard to that." *Carter*, 462 Mich at 213 (footnote omitted). In a footnote, the Supreme Court stated:

> While it is true that trial transcripts often are not prepared until well after trial, we caution against instructing the jury in this manner as such instruction forecloses to the jury the possibility of later reviewing the requested testimony, e.g., by having the court reporter read back the testimony, and consequently, violates the court rule. However, we also note that, given that the jury made the request for the testimony of four witnesses only fifteen minutes into deliberations, the trial court could have properly refused the request and instructed the jury to continue deliberating had it done so in a manner which did not foreclose the possibility of having the testimony reviewed at a later time. [*Carter*, 462 Mich at 213-214 n 10.]

Here, the trial court did not violate MCR 6.414(H). The trial court informed the jury:

> The testimony of that particular witness has not been prepared. You must rely on your collective memories as to what his testimony was. I'm not closing out the possibility of getting it, but it would probably be one day next week before I could get it to you. But you will rely on your collective memories. And if you can reach a verdict without that, then you will do so. Otherwise, you let me know that you cannot reach a verdict without it and I will have it prepared by Wednesday or Thursday of next week.

Defendant argues that the trial court's statement to the jury *effectively* foreclosed the option of obtaining the transcript, but that is neither the standard nor factually accurate. Unlike the trial court in this case, the trial court's statement in *Carter* that the transcript would not be available for several weeks at the earliest, completely foreclosed the possibility of obtaining the transcript because the trial judge then ordered the jury to rely on its collective memory *instead* of the required transcript. *Carter*, 462 Mich at 213. And, again unlike in our case, the trial judge in *Carter* did not state that the transcript could be obtained if the jury found it was necessary. *Id.*

In this case, the trial court specifically told the jury that, if necessary, it would obtain the transcript as soon as possible. No error occurred.

Next, defendant argues that a witness's unsolicitated comment during trial was so egregious that the trial court's instruction could not cure its prejudicial effect. This Court "review[s] for an abuse of discretion a trial court's decision on a motion for a mistrial." *People v Bauder*, 269 Mich App 174, 194; 712 NW2d 506 (2005). "A trial court should grant a mistrial only for an irregularity that is prejudicial to the rights of the defendant and impairs his ability to get a fair trial." *Id*. at 195 (quotation marks and citation omitted). When the irregularity is an unsolicited comment by a witness, a trial court should only grant a mistrial "where the comment is so egregious that the prejudicial effect cannot be cured." *Id.*; *People v Gonzales*, 193 Mich App 263, 266; 483 NW2d 458 (1992).

The witness's comment was not so egregious that the trial court could not cure its prejudicial effect. *Bauder*, 269 Mich App at 195. On cross-examination, one of the prosecution's witnesses commented that defendant was wanted in many states. The prejudicial effect of this one isolated comment was minimal, particularly because the jury was already properly aware of defendant's past convictions and other similar bad acts. Therefore, the trial court's immediate instruction that the jury should disregard the witness's comment, and the defense attorney's follow-up questions regarding her lack of knowledge about the statement, cured any prejudicial effect.

Affirmed.

/s/ Christopher M. Murray
/s/ Jane E. Markey
/s/ William C. Whitbeck