IN THE SUPREME COURT OF FLORIDA

CASE NO. SC10-61
DCA CASE NO. 3D07-3046

STEVEN HAZURI,

Petitioner,

-vs-

STATE OF FLORIDA

Respondent.

ON APPEAL FROM
THE THIRD DISTRICT COURT OF APPEAL OF FLORIDA

RESPONDENT'S BRIEF ON THE MERITS

BILL McCOLLUM
Attorney General
Tallahassee, Florida

RICHARD L. POLIN
Miami Bureau Chief
Florida Bar No. 0230987

and

FORREST L. ANDREWS, JR.
Assistant Attorney General
Florida Bar No. 17782
Attorneys for the State of Florida
Office of the Attorney General
444 Brickell Avenue, Suite 650
Miami, FL 33131
Telephone:(305) 377-5441
Facsimile: (305) 377-5655

LUNAR C. ALVEY
Florida Bar No. 0173473
Assistant Attorney General

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INTRODUCTION

The Petitioner, Steven Hazuri, was the Appellant below, and the Respondent, the State of Florida, was the Appellee below. In this brief, Steven Hazuri will be referred to as "Petitioner", and the State of Florida will be referred to as "Respondent."

The symbol "R." refers to the record on appeal in the Third District Court of Appeal, and the symbol "T." refers to the trial transcript.

STATEMENT OF THE CASE AND FACTS

Appellant was charged by information with robbery, using a deadly weapon or firearm, and aggravated battery/deadly weapon. (R. 1-4).

The following evidence was introduced at Petitioner's trial:

Curtis Williams testified that on December 27, 2003 he walked to a store to buy a soft drink near the intersection of N.W. 70th Street and 17th Avenue. (T. 157). He was carrying $150-$200 which he earned from his job doing lawn work. (T. 157-158). After purchasing the drink, he left the store and was approached by an individual he knew who asked for some money. (T. 157). Mr. Williams gave the individual a couple dollars and started walking south on 17th avenue. (T. 158).

While walking, he heard something coming up behind him. (T. 158). Mr. Williams testified that "[s]omeone hit me with something that went off and shot me in the face. At the time I didn't know I was shot. The hit was what I really felt. After then [sic] I turned around, it was the defendant over there, the guy over there who shot me." (T. 158).

Mr. Williams knew Petitioner from the neighborhood store by his nickname, "Dirty." (T. 159). Mr. Williams went on to say that Petitioner "got off his bicycle, threw the bicycle down, he hit me with the gun and then he searched me. ... I said, 'Dirty, why did you have to do that?' He checked my pockets, took my money and

got on the bicycle and fled off." (T. 159). Petitioner was alone during the offense. (T. 170).

Mr. Williams then indicated where and how he was hit and where the bullet hit. (T. 160). He did not know he was really shot, but he felt the hit and saw a few drops of blood. (T. 160). Mr. Williams walked to the corner and flagged down a City of Miami Police officer who advised him to lie down. (T. 161). He told the officer, "Dirty shot me." (T. 161). Although Appellant's appearance had changed at trial, Mr. Williams identified him as Dirty. (T. 162).

After receiving a description of Dirty, an officer brought an individual to Mr. Williams to identify. (T. 162). Mr. Williams stated that that was not the man who shot and robbed him because "I know the guy's face cause I know I had just faced him face-to-face." (T. 162).

Mr. Williams eventually had surgery for his injuries, but the bullet remained lodged inside his face. (T. 163). Mr. Williams had been convicted of a felony or a crime involving dishonesty 10 times, has used drugs and bought drugs a couple of blocks away from where the incident occurred. (T. 166). He stated that he never bought drugs from Petitioner, did not owe him any money and did not know anyone named Rico. (T. 166). He was not on drugs at the time of the incident. (T.

167). He did not have a fight or argument with Petitioner prior to that day, or have any ill-will toward him. (T. 167).

After his surgery, Williams moved to Port Saint Lucy, Florida. (T. 170). Upon his return to Miami, he went to the Miami Police Department to get the case number for this incident "in case if I see this guy I can call the cops and have him arrested." (T. 171).

On June 9, 2006, Mr. Williams went to the USA Flea Market on 79th Street and 27th Avenue with his girlfriend. (T. 172). While eating pizza, he spotted a person who he thought was Petitioner. After determining "that was him," Mr. Williams went to look for a police officer. (T. 172). He called 911, but stated that he was put on hold for a while and eventually hung up. (T. 173). He then received assistance from security guards at the flea market who said they would detain Petitioner if he had a case number until the police came. (T. 174). Petitioner was in a barber shop getting his haircut. (T. 174-175). When Mr. Williams pointed Petitioner out, "he jumped out of the chair. And he tore every rack down trying to get out of there." (T. 175-176). A scuffle ensued in which 7-8 security officers attempted to apprehend Petitioner. (T. 176). "When they were trying to get him to the ground, he picked up a chair and some kinda way, hit one of them some kinda

way." (T. 176). Petitioner was eventually subdued by the security guards. (T. 176).

Petitioner then stated to Mr. Williams, "[t]hat's why pussy motherfucker I shot you and robbed you…. I should of kilt [sic] you." (T. 176, 197).

Mr. Williams was "100 percent sure" that Petitioner was the individual that shot and robbed him. (T. 177).

On cross-examination, Mr. Williams denied telling Officer Kennedy that he had been accosted by two black males or that he had been shot in the right side. (T. 185). He also denied having encountered Petitioner in a drug hole. (T. 191). The description Mr. Williams gave police of the assailant was 18 years old, dark skinned male, dreadlocks, black shirt. (T. 192). The defense elicited that Petitioner is not dark-skinned nor does he have a Jamaican accent, but Mr. Williams asserted that he knew him by face. (T. 193). There were also some differences between what Mr. Williams said Petitioner said to him when apprehended by the security guards in court, and what he told the police Petitioner said. (T. 197-198).

At the beginning of the proceedings on the second day, the trial court brought up the issue of jurors taking notes and made the following statement:

> You are certainly entitled to take notes. On the issue of notes, if you are in the jury room and you are deliberating and your recollection is different than what somebody else has taken on their note pad, you are to rely on your recollection of what

> happened, not what somebody else has put on their note pad. Therefore, you are free to deliberate. You may rely on your recollection of the evidence, not what somebody puts on the note pad.

(T. 208).

The trial court also discussed jurors having questions:

> Questions from the jury is permitted. Let me give you the framework. We will try and answer it. If there are any objections from the lawyers, sometimes I have to rule on the legal issue. Sometimes a question that the jury may ask might be objectionable as well as I may have to make a legal ruling at that time. Wait until all the questions have been asked on direct or cross and redirect. At that point if there is still a question in your mind, write it down and raise your hand before I discharge the witness and I'll ask the jury do you have any questions, give it to my bailiff who will give it to me. If it is something legally permissible as a question, we will be more than happy to ask the question and continue on.

(T. 208-209).

The trial resumed with Officer Joseph Kennedy taking the stand. (T. 209). Officer Kennedy was on patrol on December 27, 2003 when he was dispatched to the intersection of northwest 17th Avenue and 67th Street at about 9 p.m. (T. 210-211). Mr. Williams walked up to him holding his face saying he was just robbed. (T. 211-212). Mr. Williams told him that Dirty shot him. (T. 213). The basic information that he got from Mr. Williams regarding the assailant was: "a black

male, dreads, practically 6 feet, about 200 pounds. He goes by the name of Dirty. He fled on a bicycle." (T. 215).

Michael Maze, supervisor of security at the flea market, testified that on June 9, 2006, Mr. Williams approached him and other security guards with a paper from the police department and told him that a guy who robbed him was sitting in a barber chair. (T. 230-232). Approximately eight security guards went to the booth and surrounded it. (T. 233).

They asked Petitioner to go come with them upstairs, but he refused. (T. 234-236). Mr. Williams then came by and said "That's the one who robbed me." (T. 235).

Petitioner said, "You ain't got nothing on me," and "I should have kilt [sic] you when I had the chance." (T. 236). He then got up out of the barber chair and tried to run. (T. 237). Petitioner then hit Mr. Maze with a folding metal chair on the head. (T. 237). Mr. Maze then tackled Petitioner and he was handcuffed and taken upstairs.

Security guard Damien Brown, after describing the incident, heard Petitioner say, "I should have kilt [sic] him." (T. 257-265). He did not recognize Petitioner in the courtroom. (T. 267).

The State then rested its case and the defense moved for a judgment of acquittal which was denied. (T. 276-278).

Appellant took the stand and told the jury that he had seven felony convictions. (T. 279). On December 27, 2003, he was acting as a lookout at a drug hole located at 70th Street and 17th Avenue operated by his ex-friend Rico. (T. 280). Rico had a dark-skinned complexion, was 18 years old, had dreads, 6 foot, 200 pounds. (T. 280).

Mr. Williams was a regular customer of the drug hole and just left it. (T. 282-283). Petitioner lent his bicycle to Rico and remained near the drug hole to perform his job as a lookout. (T. 284). Rico returned the bicycle around 10:00 p.m. and Petitioner worked at the drug hole until 12 or 12:30. (T. 285, 295). Petitioner stated that his nickname is not Dirty. (T. 287).

On June 9, 2006, Petitioner went to the flea market to get a haircut. (T. 287, 289). He denied robbing and shooting Mr. Williams. (T. 291-292).

On cross-examination, Petitioner alleged that Rico robbed Mr. Williams because Mr. Williams owed Rico money and when Rico returned to the drug hole he said, "Man, I had got my money." (T. 298-299).

The defense then rested its case and renewed its motion for judgment of acquittal which was denied. (T. 314-316). After closing arguments, the judge

instructed the jury and gave the rules for deliberation. (T. 318-361). The jury then retired to deliberate.

According to the transcript, about an hour and fifteen minutes after beginning to deliberate, a note was received from the jury stating that "[w]e can not agree on a verdict." (R. 73; T. 362). With the parties agreement, the trial court decided to break for the evening and give an Allen[1] charge the following day. (T. 362-364).

The jury continued its deliberations the next day. (T. 368). After approximately an hour, the jury sent in another note asking, "[c]ould they get ***transcripts from the trial***." (T. 369) (emphasis added). The State suggested that they be told that they must rely on their own recollection of the testimony. (T. 369). Defense counsel stated:

> 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.

(T. 369).

The trial court responded out of the jury's presence:

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[1] Allen v. United States, 164 U.S. 92 (1896).

> There are no trial transcripts of moment. Certainly portions of the record could be read, however, I do believe 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.

(T. 369).

When defense counsel questioned whether the court was going to tell the jury it could not have the transcript read back, the trial judge replied, "They don't have a right. It's within my discretion." (T. 369-370). When defense counsel asked if the judge was going to send the note back, the judge said, "Yeah. Okay, okay, there you go. Okay. We will be in recess." (T. 370). It is unclear if the judge actually responded to the jury.

After taking a lunch break and continuing its deliberations, the jury announced that it had reached a verdict. (T. 372-373). The jury found Petitioner not guilty of armed robbery and guilty of aggravated battery with a deadly weapon. (T. 373, R. 78-81). Petitioner was sentenced to a twenty-five year minimum mandatory in State prison under the 10/20/Life law concurrent with a fifteen year minimum mandatory as a prison release reoffender. (R. 132-135, 155).

Petitioner appealed his conviction and sentence to the Third District Court of Appeal and argued that the trial judge abused his discretion when he refused to inquire what portion of the transcript the jury wanted re-read prior to telling the

jury that they could not have any testimony re-read but instead, had to rely upon their own recollection. Hazuri v. State, 23 So. 3d 857 (Fla. 3d DCA 2009).

On December 16, 2009, the Third District Court of Appeal affirmed Petitioner's conviction as follows:

> Steven Hazuri appeals for 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 that 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 of 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's 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.

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 answer -- 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 of prior trial which was admitted in evidence could not be taken to jury room); Young v. State, 645 So. 2d 965, 967 (Fla. 1994) (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 as 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 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.

Hazuri, 23 So. 3d at 857 (Footnote and dissent omitted) (emphasis added).

Thereafter, Petitioner filed a brief on jurisdiction and initial brief on the merits in this Court.

Respondent's brief follows.

SUMMARY OF THE ARGUMENT

The jury in this case did not request a read back of trial testimony; it requested "the trial transcripts." Since it is impermissible to allow trial transcripts inside the jury room, and the trial transcripts were unavailable, the trial court did not abuse its discretion in ruling that the jury had to rely on its collective recollection of the evidence.

Fla. R. Crim. P. Rule 3.410 provides a trial court with discretion to read back trial transcripts. Based on the plain language of that rule, there is no burden placed upon the trial court to inform the jury that it can request read backs of trial transcripts.

Therefore, the Third District Court of Appeal properly affirmed the trial court's ruling denying the jury's request for trial transcripts.

ARGUMENT

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY NOT ADVISING THE JURY THAT IT MAY REQUEST READ BACKS OF TRIAL TESTIMONY BECAUSE FLA. R. CRIM. P. RULE 3.410 IMPOSES NO BURDEN TO DO SO.

a) The Jury Did Not Request a Read Back of the Trial Transcripts.

Petitioner argues that the trial court abused its discretion by leading the jury into believing that a read back is prohibited and by failing to advise the jurors that they could receive a read back of trial testimony.

Significantly, the jury in this case did not request a read back of trial testimony; rather "it was defense counsel who inserted 'readback' into the dialogue." Hazuri v. State, 23 So. 3d 857, 859 (Fla. 3d DCA 2009). The jury's precise request was "[c]ould they get transcripts from the trial." (T. 369). It is apparent that the trial court interpreted this question as a request to receive transcripts in the jury room.

However, it is firmly recognized that a jury is not entitled to receive trial transcripts in the jury room. See, Janson v. State, 730 So. 2d 734, 735 (Fla. 5th DCA 1999); 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) (holding videotaped

witness testimony could not be taken back to jury room for unrestricted view during jury deliberations); Fla. R. Crim. P. Rule 3.400, Florida Statutes (2008) (providing that court may permit the jury to take a copy of the charges against the defendant, verdict forms, and all things received in evidence other than depositions into the jury room. Also, court must provide jury with a copy of written instructions in jury room.).

The North Carolina Supreme Court dealt with a similar issue in State v. Abraham, 451 S.E. 2d 131, 152 (N.C. 1994). In Abraham, during its deliberations, the jury submitted a note to the court asking, "[c]an we get copies of the transcripts?" Id. at 152. The trial court did not interpret this as a request for a read back and responded, "[i]t is not possible for you to have transcripts to take into the jury room. You are going to have to rely on your individual, and collective recollection as to what transpired." Id.

Florida and North Carolina have very similar statutes pertaining to jury read backs. Under North Carolina law:

> If the jury after retiring for deliberation requests a review of certain testimony or other evidence, the jurors must be conducted to the courtroom. The judge in his discretion, after notice to the prosecutor and defendant, may direct that requested parts of the testimony be read to the jury and may permit the jury to reexamine in open court the requested materials admitted into evidence. In his discretion the judge may also have the jury review other evidence relating to the

> same factual issue so as not to give undue prominence to the evidence requested.

N.C.G.S. § 15A-1233(a) (1988).

The North Carolina Supreme Court held that the trial court did not abuse its discretion since N.C.G.S. § 15A-1233(a) "does not give the trial court authority, discretionary or otherwise, to provide copies of trial transcripts to jurors." Abraham, 451 S.E. 2d at 152.

Similarly, in the instant case, the jury did not ask for a read back but specifically requested "transcripts from the trial." Since copies of the trial transcript are not permitted in the jury room, the trial court rendered legally accurate advice and did not abuse its discretion in ruling that the "accurate and correct response is that [the jury] must rely on their own collective recollection of the evidence." (T. 369).

b) Rule 3.410 Imposes No Burden Upon a Trial Judge to Advise the Jury That it Could Request a Read Back.

Fla. R. Crim. P. Rule 3.410 provides:

> 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 additional instructions ***or may order*** the testimony read to them....

(emphasis added).

By its plain language, this rule applies only when the jury requests a read back and it imposes no obligation upon a trial judge to inform the jury that it could request read backs of trial testimony.

"Under this rule, the trial court has wide latitude in the area of the reading of testimony to the jury. In this respect, the trial court may provide a limited, or partial, readback of testimony specifically requested by the jury, as long as that testimony is not misleading." Avila v. State, 781 So. 2d 413, 415 (Fla. 4th DCA 2001); see also, Coleman v. State, 610 So. 2d 1283, 1286 (Fla. 1992); Rigdon v. State, 621 So. 2d 475 (Fla. 4th DCA 1993); Biscardi v. State, 511 So. 2d 575 (Fla. 4th DCA 1987); compare, Diaz v. State, 567 So. 2d 18, 19 (Fla. 3d DCA 1990); Davis v. State, 760 So. 2d 977, 978 (Fla. 3d DCA 2000) ("We find that the trial court erred by instructing the jury that the law did not allow the court to read back testimony.") rev'd on other grounds State v. Davis, 791 So. 2d 1085 (Fla. 2001).

Discretion is abused only when the judicial action is arbitrary, fanciful, or unreasonable. Parker v. State, 904 So. 2d 370, 379 (Fla. 2005) quoting State v. Coney, 845 So. 2d 120, 137 (Fla. 2003). In other words, discretion is abused only where no reasonable person would take the view adopted by the trial court. Id.

Courts have consistently found no abuse of discretion "even where the trial judge has, without much consideration, entirely rejected the jury's request for a read back." Francis v. State, 808 So. 2d 110, 130 (Fla. 2001); McKee v. State, 712 So. 2d 837, 838 (Fla. 2d DCA 1998) (no abuse of discretion where trial judge did not read back requested testimony but instead instructed the jury to rely on their own memory); Jackson v. State, 107 So. 2d 247, 252 (Fla. 1958).

Here, the trial court's ruling did not mislead the jury into believing that a read back is prohibited because the jury never requested a read back. Further, as the Third District Court of Appeal pointed out, there is no evidence in the record to suggest that the court's ruling was received by the jury. Hazuri, 23 So. 3d at 858, fn. 1. Although the trial court indicated that it was going to send the note back to the jury, presumably with its ruling on it, the written response was not made part of the record on appeal and defense counsel did not request that it be read into the record. Id.

Moreover, the jury was not brought back into the courtroom to hear the judge's response. Since Petitioner has failed to demonstrate that the jury was even

aware of the judge's response, there is no way that the jury could have been mislead into believing that read backs are prohibited.[2]

Therefore, Petitioner has waived this issue by failing to provide a proper record on appeal. Dade County Bd. Of Pub. Instruction v. Foster, 307 So. 2d 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."); Brice v. State, 419 So. 2d 749, 750 (Fla. 2d DCA 1982) (It is an Appellant's duty to provide an adequate record to the appellate court.); Pierson v. Sharp, 283 So. 2d 880 (Fla. 4th DCA 1973); see also, Starks v. Starks, 423 So. 2d 452 (Fla. 1st DCA 1983) (Absent transcript of the hearing at which the trial court determined not to be bound by prior custody award by Texas court or suitable stipulated statement of the

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[2] Although Petitioner does not raise this claim in the instant appeal, failure to answer the question on the record before the jury rendered its verdict not constitute reversible error either. See e.g., Dailey v. State, 791 So. 2d 586 (Fla. 3d DCA 2001); McCaskill v. State, 344 So. 2d 1276, 1278 (Fla. 1977) (Where trial counsel neither requested charges be reduced to writing nor objected to failure of trial judge to do so, failure of trial judge to provide written instructions to jury, in violation of this rule, was not prejudicial error); Alexander v. State, 778 So. 2d 1017 (Fla. 4th DCA 2000) (While a judge has an obligation to make a reasonable effort to review the question and provide an answer to the jury, it is not reversible error when circumstances prevent its answer before the jury arrives at a verdict.).

evidence which could act as a substitute for the transcript, District Court of Appeal could not ascertain with certainty whether the lower court erred, and thus, the lower court's order would be affirmed even though uncontroverted statement of facts in appellant's brief suggested the lower court may have erred in applying the "Uniform Child Custody Jurisdiction Act"); Donatello v. Kent, 297 So. 2d 581 (Fla. 2d DCA 1974) (Appellant had the responsibility to provide the reviewing court with the record and could not complain on appeal that portions of the record not provided would indicate that he had not been given the opportunity to develop his defenses with respect to issues which were not properly reflected by pleadings but which were apparently determined by the trial court.).

Petitioner relies on Roper v. State, 608 So. 2d 533, 534 (Fla. 5th DCA 1992) in an attempt to support his position that the trial judge should have advised the jury that it could request a read back. In that case, the jury asked "to 'see' the victim's cross-examination testimony." The Fifth District concluded that the trial court abused its discretion and stated that "[a]t the very least, the trial judge should have apprised the jury that a method was available to have the cross-examination, or specific portions of it, read to them." Id. at 535.

Roper is distinguishable from this case because the jury's request pertained only to one witness's cross-examination. Also, the judge's instruction ("there is no

way that you can see [the victim's] cross-examination") clearly led the jury to believe that read backs were prohibited. Therefore, instead of exercising proper discretion in determining whether to read back the testimony, the trial judge narrowly focused on the word "see" as opposed to "hear." Id.

Here, however, the jury made a general reference to "the transcripts" in their entirety. Furthermore, the trial court did not "side-step" the issue of a read back because the jury did not request a read back. Rather, the jury asked if it could have the transcripts in the jury room. Since this is prohibited under Florida law, the trial judge was under no obligation to inquire which transcripts the jury desired. In addition, the judge gave a direct, legally accurate response to the jury's question.

Furthermore, a trial judge merely has to answer questions of law, not anticipate and inquire into a jury's possible procedural concern. See, Coleman, 610 So. 2d at 1286. "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." Hazuri, 23 So. 3d at 859; see e.g., Brown v. State, 493 So. 2d 80, 82 (Fla. 1st DCA 1986) (no requirement that a trial court instruct a jury about a jury about the exercise of its inherent pardon power.

Imposing a duty upon the trial judge to inform the jury that it could request a read back, as advocated by Petitioner, is contrary to rule 3.410 and would strip the

trial court of its discretion which is conferred by rule 3.410 and recognized by all Florida Courts.

Moreover, such a mandate runs the risk of prejudicing the defense where the jury's request that a defense witness's testimony be read back is denied, or where a request that a defense and state witness's testimony be read back is granted only as to the state witness. It is undesirable to place the trial judge in such a situation, especially in a case such as this, where the jury was not foreclosed from asking further questions. This is precisely why trial judges are given discretion to deny a particular request.

The remaining cases relied upon by Petitioner are distinguishable from the instant case because they involve clear statements from the trial judge which may have mislead the jury to believe that read backs were prohibited. For instance, in Avila, it was "evident" that the jury sought a read back of the testimonies of four named alibi witnesses in order to review the timing of events. 781 So. 2d at 414. The trial judge, who was involved in another trial and anticipated that the read back would take a full day to finish, denied the request under the belief that it was prohibited from providing a partial read back. Id. The trial judge stated, ***"[w]e do not print transcripts***, we have no such transcripts, there are no printed transcripts." Id. at 415 (emphasis added).

The Fourth District concluded that "such a statement may have confused the jury as to whether a read back of testimony was permissible." Id. at 416. Also, the trial judge's ruling was due in part to the fact that it was involved in a separate jury trial at the time of the request. Id. Clearly, a decision made in this context (presence of an obvious conflict of interest), cannot be the product of careful judgment.

Next, in Barrow v. State, 27 So. 3d 211, 215 (Fla. 4th DCA 2010)[3], the jury requested "all the transcripts of the witnesses' testimonies." Both of the attorneys asked that the judge tell the jury that it could request read backs but the judge stated, "I don't do read backs," and denied the request. Id.

Although a trial judge is not bound by the attorneys' recommendations, the Fourth District cited the court's failure to do so as an abuse of discretion. Id. at 218. Also, the judge's stated policy, "I don't do read backs," is a clear-cut refusal to exercise discretion. Here, on the other hand, there is nothing in the record to indicate that the trial court refused to exercise discretion. In fact, the judge

[3] This case is currently pending before this Court in case number SC10-529.

expressly recognized that permitting a read back was within his discretion but declined to exercise it.

In Huhn v. State, 511 So. 2d 583, 588 (Fla. 4th DCA 1987), while instructing the jury, the trial court advised the jurors that they could not take the instructions back to the jury room, and that there was no provision for it either to reinstruct the jury, have any testimony read back, or recall any witnesses.

The Fourth District held that these remarks could reasonably be understood to mean that the trial judge was prohibited from having testimony read back. Id. at 591.

In the instant case, the trial judge gave no such preemptive instructions that were intended to deter any requests to have testimony read back or lead the jury to believe that read backs were prohibited. Compare, Davis, 760 So. 2d at 977 rev'd on other grounds by Davis, 791 So. 2d at 1085 (court's instruction to jury that "[t]he law doesn't allow us to [read back testimony]" "was obviously intended to deter any requests to have testimony read back."); Biscardi, 511 So. 2d at 580 (trial court abused its discretion by stating that "there is really no provision" to have testimony read back.).

Moreover, as the Third District Court of Appeal concluded, "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." Hazuri, 23 So. 3d at 859. In fact, the trial judge was not opposed to providing portions of the record, however, the jury did not ask for portions or even point out which part of the trial they were having trouble with.

If the trial court truly believed that it lacked the ability to provide the requested transcript, there would be no basis for making the statements, "[c]ertainly portions of the record could be read" and "[i]t is within my discretion." (T. 369-370).

Thus, based upon the record, the jury requested a transcript and not a read back of the testimony of any of the witnesses. Accordingly, the trial court did not abuse its discretion in denying the request and instructing the jury to rely on its collective recollection. Furthermore, since granting a read back is within the discretion of the trial court, and rule 3.410 does not impose a burden on the trial court to do so, there is no duty to sua sponte advise the jury that it could request a read back.

c) *Even if the Trial Court Erred, Such Error Was Harmless.*

Petitioner contends that reversible error occurred because the trial court led the jury to believe that read backs were prohibited. (Initial Brief, pg. 9). The mere

possibility that a conviction could have rested on an erroneous instruction is insufficient to establish fundamental error.

Fundamental error is the type of error that "reaches down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." McDonald v. State, 743 So. 2d 501, 505 (Fla. 1999) quoting Urbin v. State, 714 So. 2d 411, 418, n.8 (Fla. 1998); see also, Section 924.051(1)(a), Florida Statutes (2008) ("Prejudicial error means an error in the trial court that harmfully affected the judgment or sentence.").

Given the circumstances of this case, the trial court's ruling on the jury's request, if error, was at most, harmless. The burden is on the State, as beneficiary of the error, to prove "that there is no reasonable possibility that the error contributed to the conviction." State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986) citing Chapman v. California, 386 U.S. 18, 24 (1967).

In Smith v. State, 990 So. 2d 1162 (Fla. 3d DCA 2008), for example, the instruction given to the jury was as follows:

> I will caution you, as I did earlier in the trial, that we do not have a simultaneous transcript of these proceedings. If you have a question regarding the facts, I will tell you that the jury must rely upon its recollection of the evidence. We cannot reopen the case or give you any further evidence to clear up any doubts. If you have a question regarding the law, the answer that I will give is that the jury has all the law that pertains to this case in those instructions. There are no other laws that apply to this

case.

Id. at 1164.

While finding such an instruction to be error, the Third District held that that the error was not fundamental because it did not vitiate the defendant's right to a fair trial. Id.

Likewise, courts in other jurisdictions, for similar reasons, have specifically found that an erroneous read back instruction, even over the objection of counsel, is subject to harmless error analysis.

In United States v. White, 23 F. 3d 404 (4th Cir. 1994), the defendant was charged with, and convicted of, conspiracy to possess with intent to distribute more than 50 grams of cocaine base; distribution of more than 50 grams of crack cocaine; and attempted murder of a potential government witness. During the course of giving the jury its instructions, the district judge explained that the verdict:

> must be unanimous. Each of you must agree to it. Do not be concerned that each of you cannot remember everything that was said. That is why we have 12 jurors instead of one. No one juror is expected to remember everything, but some of you will remember parts of it, and that will remind others of other parts of it; and, collectively, you can recall what went on in the case and what the evidence was. And it will have to be your recollection, ***since it will not be permissible to begin reading back to you portions of the testimony***.

Id. (emphasis supplied).

Defense counsel objected to "the Court prohibition against read-backs." The court responded that "the problem with that is that if they want one thing to be read back that is favorable to the Government, then you want something that is balancing, and before you know it you have got the whole trial read back to them." Id. On appeal, the defendant argued that the blanket prohibition of read backs was reversible error. Id.

The Fourth Circuit Court of Appeals found that although the trial court's instruction had been erroneous, such an error was harmless:

> Unlike a deficient reasonable-doubt instruction, "which vitiates *all* the jury's findings" and which results in *no* valid verdict or "object upon which harmless error scrutiny can operate," … ***the read-back prohibition does not fundamentally alter the fact-finding process***. Other errors affecting the jury's deliberative process have been categorized as trial errors that are amenable to review for harmless error. Each juror, after proper instructions, found that each fact necessary to show each element of each offense of conviction was proved beyond a reasonable doubt. ***The read-back prohibition simply does not approach the few acknowledged structural errors in terms of the latter group's fundamental role in our system of justice or in the importance to the fact-finding function***.
>
> Of course we have no way of knowing whether the jury in White's trial would have asked for a read-back of any testimony, just as a reviewing court can never know with absolute certainty what weight a jury put on an erroneously admitted piece of evidence. It is difficult, and no doubt sometimes nigh impossible, to gauge the effect on a jury's

> verdict of, say, a coerced confession, but we are bound to do so when presented with such a case. The difficulty of applying the harmless error test in some (or even most) cases, however, is an inadequate basis for declaring a per se rule for all cases. In turning to our review of the effect of the error in this case, we recognize that the difficulty of review increases as the length and complexity of the trial increase.
>
> White's trial lasted one day (half as long as the trial in *Criollo*) and he was the only defendant. The trial judge's decision to prohibit any read-backs was announced *after* all the evidence had been presented. Four of White's coconspirators, including his own brother, testified for the government, and, collectively, they told a consistent story. White and his girlfriend testified in his behalf. The defense was not based on fine distinctions-Eric testified that he had never met Brooks or Taj Parker, that he had nothing whatsoever to do with the two trips to Virginia, that he never ordered the shooting of Robinson, etc. On appeal, White points to nothing, either in general or in particular, that might have generated confusion among the jurors. Accordingly, we hold that the error was harmless beyond a reasonable doubt. (Emphasis added) (citations omitted).

Similarly, in this case, the State submits that there is no reasonable possibility that any error contributed to the verdict in light of the totality of the circumstances.[4] DiGuilio, 491 So. 2d at 1135.

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[4] A similar issue is raised in Johnson, SC09-966 which is currently pending before this Court.

Here, after a brief trial and several eyewitnesses' detailed accounts, the jury heard Mr. Williams testify that he knew Petitioner before this incident and that Petitioner hit him with a gun. (T. 158-159). When the gun discharged, a bullet struck Mr. Williams in the face. (T. 158). The bullet could not be removed following surgery. (T. 163). Moreover, the jury was able to view photographs which depicted the extent of Mr. Williams' injuries. (R. 37-43).

Also, the jury heard evidence which established Petitioner's consciousness of guilt in that when he was confronted by the Mr. Williams and the security officers, he attempted to flee and stated that he should have killed Mr. Williams. (T. 175-176, 197, 236). Significantly, the jury did not ask to have any of this testimony read back and did not identify any limited portions of the testimony that the trial court could even consider.

Given those circumstances, the trial court's ruling, which is doubtful on the state of the record whether the jury was even aware of it, did not undermine confidence in the result or render the proceedings unfair, and any error was harmless.

Indeed, given the fact that the jury acquitted on the armed robbery charge, either the jury did not have any problems with the aggravated battery charge, or, if

there was any problem with respect to a desired read-back, the jury resolved that doubt in favor of the Petitioner. As this Court noted in DiGuilio:

> The test of whether a given type of error can be properly categorized as per se reversible is the harmless error test itself. If application of the test to the type of error involved will always result in a finding that the error is harmful, then it is proper to categorize the error as per se reversible. If application of the test results in a finding that the type of error involved is not always harmful, then it is improper to categorize the error as per se reversible.
>
> If an error which is always harmful is improperly categorized as subject to harmless error analysis, the court will nevertheless reach the correct result: reversal of conviction because of harmful error. By contrast, if an error which is not always harmful is improperly categorized as per se reversible, the court will erroneously reverse an indeterminate number of convictions where the error was harmless.

491 So. 2d at 1135.

Here, the Petitioner's argument would lead to an absurd result, requiring reversal even in those cases where a defendant received an otherwise fair trial, and where there is no request for a read back. The State further notes that even if a jury is, in fact, discouraged from requesting a read back that it might have otherwise requested, the jury still has the ability to become deadlocked and not reach a verdict at all, because the absence of a read back impairs the ability of one or more jurors to join in a verdict. The deadlock can then be conveyed to the court, along

with the reason for it, and the court can then determine whether it will provide the read back after all or eventually declare a mistrial.

Thus, the jury, even after such an instruction, still holds considerable power to avoid rendering a verdict in the absence of a read back that the jury deemed necessary. If jurors cannot agree among themselves as to what a particular witness said or did not say on a critical point, the most likely result, absent a read back, is going to be such a deadlock.

Consequently, once the jury reaches a unanimous verdict, the jurors are polled and they indicate that they individually concur that that is the verdict. (T. 373-374); Fla. R. Crim. P. Rule 3.450, Florida Statutes (2008). At the time of such polling, if any juror, as a result of the absence of a desired read-back, has doubts about the validity of the verdict and that juror's own vote, the juror again has an opportunity to note that, so that the court can decide whether or not to accept the verdict.

Petitioner additionally argues that the trial court's failure to advise the jury that it could request a read back affected the outcome of the trial because "the jury was having a hard time reaching a verdict." (Initial Brief, pg. 21). The fact that the jury did not immediately reach a unanimous verdict does not mean that a read back was necessary. Indeed, even if the trial court asked the jury which testimony

it wanted read back, the court still could have denied the request, again leaving the jury without any transcripts.

Since the same ruling could result even if the trial judge inquired, Petitioner cannot argue that reversible error, especially per se reversible error, occurred in this case.

Finally, Petitioner argues that "[w]hen a jury asks to have testimony read back to aid their deliberations and a trial judge wrongfully refuses to even consider what testimony the jury was interested in rehearing it will always be impossible to conclude beyond a reasonable doubt that the improper instruction by the trial judge telling the jury to rely upon their own recollection of the evidence did not contribute to the jury verdict." (Initial Brief, pg. 20).

This conclusory argument assumes too much. First, it assumes that the jury, if advised of the right to a read back, would have exercised that right. However, giving this instruction may have the opposite effect. That is, it would mislead the jury into believing that it had a "right" (as urged by defense counsel) which implies that it is entitled to a read back if requested. This is contrary to both rule 3.410 and the numerous Florida cases interpreting it. Therefore, the trial court's ruling in this case is entirely consistent with Florida law; a trial judge has the discretion to grant a read back and there is no mandatory duty to advise the jury of this option.

Petitioner's argument also ignores the fact that even if the jury was so advised, the court still could have denied the request, thus leaving the jury in the same position as if it was not so advised: without any transcripts. Accordingly, merely advising the jury it could request a read back did not affect the jury's verdict.

Based on the foregoing, this Court should not apply a per se rule of reversal because it is an extreme remedy that would be inconsistent with the tenor of rule 3.410. Furthermore, there is no reasonable probability that the trial court's failure to advise the jury that it could request a read back affected the outcome of the jury's verdict. Therefore if there was any error, it was harmless.

CONCLUSION

Based on the foregoing, this Court should affirm the decision of the Third District Court of Appeal.

Respectfully Submitted,

BILL McCOLLUM
Attorney General
Tallahassee, Florida

RICHARD L. POLIN
Miami Bureau Chief
Florida Bar Number 230987

and

FORREST L. ANDREWS, JR.
Florida Bar Number 17782
Assistant Attorney General
Office of the Attorney General
Department of Legal Affairs
444 Brickell Avenue, Suite 650
Miami, FL 33131
(305) 377-5441 (phone)
(305) 377-5655 (facsimile)

LUNAR C. ALVEY
Florida Bar Number 0173473
Assistant Attorney General
Office of the Attorney
Department of Legal Affairs
444 Brickell Avenue, Suite 650
Miami, FL 33131
(305) 377-5441 (phone)
(305) 377-5655 (facsimile)

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed this 31st day of August, 2010, to Robert Kalter, Esq., Office of the Public Defender, 1320 NW 14th Street, Miami, Florida 33125.

_____
FORREST L. ANDREWS, JR.
Florida Bar Number 17782
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief is typed in compliance with the requirements set forth in Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

_____
FORREST L. ANDREWS, JR.
Florida Bar Number 17782
Assistant Attorney General