STATE v. BOYD

257 Kan. 82 (1995) | Cited 23 times | Supreme Court of Kansas | March 10, 1995

The opinion of the court was delivered by

Defendant Dennis Boyd appeals his jury convictions of twocounts of attempted second-degree murder, K.S.A. 21-3402 andK.S.A. 1992 Supp. 21-3301, and one count of battery, K.S.A.21-3412. The Court of Appeals in an unpublished opinion filedJuly 22, 1994, reversed the convictions and remanded the

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case for a new trial based on the trial court's failure toprovide a sufficient response to requests by the jury for witnesstestimony. The Court of Appeals found that issue dispositive ofthe case and did not address several other alleged trial andsentencing errors asserted by defendant. We granted the State'spetition for review, and we now reverse the decision of the Courtof Appeals and remand the case to that court for furtherproceedings.

The sole issue before this court on the petition for review iswhether the trial court committed reversible error in respondingto the jury's request for a read-back of certain testimony. Thefacts will be greatly summarized and limited to those necessaryto decide the issue before the court.

Defendant lived with Debra Moore and her three children:Antonio, age seven at the time of trial; Brittany, age five; andTajiha, age four. Antonio and Tajiha were the biological childrenof Boyd. Chris Lockhart was the father of Brittany. On June 29,1992, defendant struck Debra several times during a fight attheir home. Brittany and Tajiha were also home at the time. Debraescaped through a bedroom window and ran to seek help. Shereturned some time later with two police officers and found thetwo little girls stabbed in the stomach. Both children werehospitalized with life-threatening wounds that would have beenfatal absent emergency care. Brittany was in the hospital forabout a week and Tajiha was hospitalized three to four weeks.Fortunately, both survived. Defendant was charged with two countsof attempted first-degree murder of the two girls and one countof battery for the beating administered to Debra.

Brittany was interviewed by Wichita police detectives twicewhile in the hospital, and she subsequently testified at thedefendant's trial. Detective Lawson, one of the detectives whointerviewed Brittany in the hospital, also testified at trial. Atthe time of his first interview with Brittany, she was inintensive care and not very responsive. Later, at a secondinterview, she was much more alert and responsive to theofficers' questions.

Brittany testified that defendant stabbed her and Tajiha.Although she sometimes referred to both defendant and her naturalfather, Chris Lockhart, as "Daddy," her testimony was clear that

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she was referring to defendant as the person who did thestabbing. There was no evidence or testimony that Chris Lockhartwas involved in the crimes in any way.

The defendant claimed he was not present, did not live there,and knew nothing about the fight and stabbings. All of thoseassertions were clearly contrary to other credible evidence. Heclaimed an alibi but produced no alibi witnesses, although hemaintained he had several.

During jury deliberations, the jury made the following request: "Request the Transcript "1. On the scene testimony of the officer that responded to the call and drove Debra to the House on June 29, 1992. (What the officer heard from the time he entered the house until EMS Transported the Children.) "2. We request the transcript of Brittany's testimony the first time she was interviewed in the hospital by detective? Lawson? "3. The end of Brittany's testimony as to who else was at the house when she was hurt? "4. The closing remarks of the defense attorney as it relates to drug use. The paragraph before and after the statement. "5. We would like to request Brittany's opening comments up through the first 3 or 4 questions. [Jury foreman's signature] "Did Brittany make a comment about being stabbed before she was asked the question."

In response to the jury's first request the judge had the courtreporter read back a portion of the testimony of the officer whofirst accompanied Debra into the house and discovered thevictims. The court denied the jury's second request, stating:"Your request for a copy of Brittany's transcript must be deniedbecause it was never marked as an exhibit and the transcriptitself did not become an exhibit or part of the evidence, so Icannot allow you to have that." No response was made to the thirdrequest as it had been crossed out by the jury with "O.K."written beside it before submission to the court. The judgedenied request number four, explaining to the jury that theattorneys' closing arguments did not constitute evidence admittedat trial. In response to inquiry five and the question followingthe jury foreman's signature, the following testimony of Brittanywas read to the jury:

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"Q. Okay. Brittany, did you ever get hurt on your stomach; yes or no? "A. (The witness shook her head.) "Q. Can you answer out loud for me. "A. No. "Q. Okay. Did you ever have to go to the hospital? "A. (The witness nodded.) "Q. Yes or no? "A. Yes. "Q. Why'd you have to go to the hospital? "A. 'Cause I got stabbed."These were the first substantive questions asked of Brittany. Allpreceding questions were merely qualifying questions directed toher because of her young age. The defendant's assertion of errorhinges around the trial court's response to requests two andfive.

The defendant and his counsel were present during the entireproceedings and, after the jury was excused to return to the juryroom, the court inquired: "THE COURT: Record should reflect the jury's departed. Mr. Loeffler, anything else we need on the record? "MR. LOEFFLER: Nothing, your Honor. "THE COURT: Anything else on behalf of the State? "MS. BARNETT: No, your Honor. "THE COURT: All right. We're in recess. "MR. LOEFFLER: Thank you, your Honor."At no time during the read-back proceedings or thereafter diddefendant object to the court's answers or seek any clarificationof the jury's requests or of the responses given by the court.Likewise, the jury made no further inquiry of the court and wasapparently satisfied with the information provided to it. Shortlyafter the jury had reconvened, it brought in a verdict of guiltyto two counts of attempted second-degree murder and one count ofbattery.

We now turn to the issue of whether the trial court committedreversible error in its responses to the jury's requests for aread-back of trial testimony. K.S.A. 22-3420(3) provides:

"After the jury has retired for deliberation, if they desire to be informed as to any part of the law or evidence arising in the case, they may request the officer to conduct them to the court, where . . . the evidence shall be read or exhibited to them in the presence of the defendant, unless he voluntarily absents

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himself, and his counsel and after notice to the prosecuting attorney." (Emphasis added.)

The Court of Appeals in reversing the trial court reliedheavily on our recent decision in State v. Myers, 255 Kan. 3,872 P.2d 236 (1994). Myers was before this court on a petitionfor review of an unpublished opinion of the Court of Appeals. InMyers, we adopted several portions of the Court of Appeals'unpublished opinion and included them in our opinion. Thedefendant, before this court, also relies primarily on Myers.In Myers, the jury requested the police reports of three policeofficers or, in the alternative, copies of the testimony of thethree officers. The jury also requested the testimony of Dr.Logan, a defense witness. The trial court responded: "Here's youranswer. The answer's no, please reread your instructions." 255Kan. at 4.

As noted by the Court of Appeals, the record did not reflect"`whether the defendant, his counsel, and the prosecutingattorney were present at the time the jury questions were askedand answered.'" 255 Kan. at 4. The Court of Appeals' decision inMyers hinged largely on the fact that the record was silent onwhether the defendant and his counsel were present. In discussingwhether the defendant waived any objection to the response to thejury's requests, this court stated: "The Court of Appeals noted that the record did not reflect `whether the defendant, his counsel, and the prosecuting attorney were present at the time the jury questions were asked and answered.' The State does not argue waiver. Myers failed to object to the response to the jury's questions. The Court of Appeals reasoned that, even if the State had advanced such a claim, `we would not be able to consider it

because we would have to assume, without knowing, that the defendant and his counsel were present and were given the opportunity to object. The record does not indicate anything either way on that issue. We are not comfortable foreclosing an important issue based on assumptions.'" 255 Kan. at 4.

In Myers, this court, in considering the jury's request,adopted the Court of Appeals' observation

"`that the jury's question was somewhat confusing. It asked for copies of the testimony. We realize at that point no transcript or copies of the testimony existed and the jury's request could not be granted in a literal sense. The jury intended, by its question, to request a "read-back" of the testimony identified.

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"`However, terms such as "transcript" and "read-back" are lawyer terms and a lay jury would not necessarily understand the terms. There is also no reason to assume the jury understood that no transcript is available until the court reporter transcribes the testimony taken in open court, that this transcription will not occur unless requested, and that the request for transcription usually occurs for appellate purposes after the trial is concluded and verdict returned. We can neither expect nor require lay jurors to speak proper legalese, nor can we expect them to ask questions in that format. "`We think a jury's request must be interpreted on a common-sense basis. What is obvious about this jury's request is that it wanted an opportunity to read or hear the requested testimony one more time before it reached a decision. It is far too simplistic to write off a jury's request as asking only for a transcript which was not available. At the very least, the trial court was obligated to make a meaningful response to the jury's question and advise it of its right to be given a read-back of the testimony.'" 255 Kan. at 5.

The issue of the propriety of reading testimony to a jury inanswer to a jury's request was approved long ago in State v.Logue, 115 Kan. 391, Syl. ¶ 1, 223 P. 482 (1924). In State v.Sully, 219 Kan. 222, 228, 547 P.2d 344 (1976), we stated:

"Under K.S.A. 22-3420(3) jurors may, after they have retired for deliberation, request further information as to the law or evidence in the case, but such requests are generally addressed to the trial court's discretion. (ABA Standards Relating to Trial by Jury [Approved Draft, 1968] § 5.3). This rule has been applied in Kansas (see State v. Wilson, 169 Kan. 659, 220 P.2d 121)."

While K.S.A. 22-3420(3) places a mandatory duty upon the trialcourt to respond to a jury's request for further information "asto any part of the law or evidence arising in the case," themanner and extent of the trial court's response rest in the sounddiscretion of the trial court.

In State v. Redford, 242 Kan. 658, 750 P.2d 1013 (1988), thedefendant appealed his convictions of several crimes perpetuatedagainst the victim, Donna. During deliberations the juryrequested that the

testimony of Donna and Redford be read tothem. Donna's testimony was unavailable due to illness of thecourt reporter. A different reporter, who took Redford'stestimony, was able to read back his testimony. The jury returneda verdict prior to hearing Donna's testimony. On appeal thedefendant claimed error because the testimony of both witnesseswas not read to the jury. The court found no error and in doing

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so stated: "The means by which the court complies with a juryrequest to have testimony read back is subject to itsdiscretion." 242 Kan. at 668.

In Myers, we discussed the decisions in Redford and Statev. Ruebke, 240 Kan. 493, 731 P.2d 842, cert. denied 483 U.S. 1024(1987), which also applied the discretionary standard to themanner in which the court responds to the jury's requests. Indoing so we stated: "K.S.A. 22-3420(3) states that the testimony `shall be read.' A trial court is required to accede to a jury's request to read back testimony. We do not believe, however, that such a strict construction forecloses all trial court discretion as to the manner of acceding to the request. Both Ruebke and Redford are consistent in the view that the trial court has the discretion to control the read-back. The trial court is free to clarify the jury's read-back request where the read-back request is unclear or too broad, or the read-back would jeopardize the manageability of the trial. Discretion rests with the trial court to clarify and focus the jury's inquiry." 255 Kan. at 8.

Thus, our cases are consistent that a trial court may notignore a jury's request submitted pursuant to K.S.A. 22-3420(3)but must respond in some meaningful manner or seek additionalclarification or limitation of the request. It is only when thetrial court makes no attempt to provide a meaningful response toan appropriate request or gives an erroneous response that themandatory requirement of K.S.A. 22-3420(3) is breached. Once thetrial court attempts to give an enlightening response to a jury'srequest or seeks additional clarification or limitation of therequest, then the standard of review as to the sufficiency orpropriety of the response is one of abuse of discretion by thetrial court.

In Myers, we also considered the issue of waiver based uponno showing of any objection by the defendant. We stated:

"Does Myers' failure either to object or show prejudice require that his convictions be affirmed? The mandatory directive in K.S.A. 22-3420(3) moves the trial court's response out of the realm of discretion; consequently, Myers need not show prejudice. No discussion among the trial court and counsel concerning the merit of the jury's request is in the record. The presence of Myers or his counsel at the hearing on the request should not be implied. Myers has not waived his right to raise the issue on appeal." (Emphasis added.) 255 Kan. at 9.

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Both the Court of Appeals and this court in Myers based theirdecisions not only on the fact that K.S.A. 22-3420(3) mandates ameaningful attempt to comply with the jury's requests, or atleast seek clarification or limitation thereof, but also on thefact that there was no showing that the defendant and his counselwere present when the court refused to furnish the requestedinformation. Both courts> recognized that they would not implythat the defendant was present and, absent a showing that thedefendant was present, the courts> would not assume the defendantwaived any objection to the trial court's denial of the request.The converse of such holding is that under appropriatecircumstances a defendant may be deemed to have waived anyobjection to a trial court's response to a read-back request.

In the case now before the court the record clearly showsdefendant participated in the proceedings and was given theopportunity on the record to voice any objections or to suggest adifferent response. He did not do so. The time-honored rule thatan issue not presented to the trial court may not be raised forthe first time on appeal, State v. Ji, 251 Kan. 3, 17, 832 P.2d 1176(1992), also applies to jury requests under K.S.A.22-3420(3). As the State points out, a timely objection isnecessary to give the trial court the opportunity to correct anyalleged trial errors. See State v. Wolfe, 194 Kan. 697, 699,401 P.2d 917 (1965). Clearly, the defendant had the opportunityto object and to inform the trial court of his dissatisfactionwith the ruling while the court still had a chance to correct anyerror. By failing to object, the defendant waived his right toraise the issue on appeal.

As with most rules there may be circumstances which create anexception. We have recognized an exception to the requirementthat an issue must be raised in the trial court to be consideredon appeal in exceptional circumstances, where consideration ofthe issue is necessary to serve the ends of justice or prevent adenial of fundamental rights. State v. Edwards, 252 Kan. 860,863-64, 852 P.2d 98 (1993).

The defendant argues exceptional circumstances are present inthis case because he has been denied his fundamental right to afair trial. The Court of Appeals in the instant case stated:

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"It is clear that a defendant has a fundamental right to have his or her guilt or innocence adjudicated by a jury. The jury process cannot be compromised in any way. Myers, 255 Kan. at 6. The issue of failure to provide a requested read-back may be heard for the first time on appeal to prevent the denial of fundamental rights."

Although we find no denial of defendant's fundamental rightshere, we will, out of an abundance of caution, consider themerits of defendant's arguments relating to the sufficiency ofthe trial court's responses.

Even if the record here supported a finding of exceptionalcircumstances, which it does not, the

responses of the court tothe jury's requests do not constitute an abuse of discretion orjustify a reversal of the convictions. The trial judge did notrefuse to answer the jury's requests as was done in Myers butto the contrary did respond, apparently to the satisfaction ofboth defendant and the jury.

The Court of Appeals based its decision on the trial court'sresponse to the jury's request number two for the "transcript ofBrittany's testimony the first time she was interviewed in thehospital by detective? Lawson?" The trial court explained tothe jury that it was not entitled to the transcript because thetranscript was not admitted into evidence. The Court of Appealsheld the trial court erred in failing to recognize that what thejury really wanted was a read-back of the testimony of theofficer regarding the hospital interview. The officer apparentlyused a transcript from the interview during his testimony. Whileit is easy to read a cold record and speculate on what the jurymay or may not have wanted in its somewhat ambiguous request, itis a different situation entirely for the trial judge who has allthe parties and the jury before him. Obviously, the trial judgehad no problem with the request and responded to the jury. Thejury did not seek further information, and the defendant did notobject to the response when he had every opportunity to do so.The trial judge had the opportunity to observe the demeanor andreaction of the jury and the parties, neither of which isavailable to us from the printed page. While in hindsight itmight have been better if the trial court had explained to thejury that it could have portions

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of the officer's testimony read in lieu of the transcript of hisinterview with Brittany, we do not find the response as being solacking or negative as to constitute an abuse of discretion or tobe an infringement upon the defendant's fundamental rights.

Request number one asked for the testimony of the policeofficer who first entered the house with Debra. The trial courthad the reporter read to the jury the part of the testimony thatthe court deemed relevant to the request. Request number threedid not require a response as it was stricken out by the jury andthe court appropriately made no response. Request number foursought a portion of closing argument, and the trial court wascorrect in denying the request on the grounds that argument isnot evidence in the case. In doing so, the court did explain itsreasons to the jury. The defendant raises no serious argumentconcerning the trial court's response to requests one and four orthe lack of a response to number three. Request number five forBrittany's opening comments and the subsequent question relatingto her testimony about being stabbed were answered by reading tothe jury the first several substantive questions and answers,which also included the stabbing testimony. In oral argumentbefore this court, defense counsel asserted that the response waserroneous because it did not comply literally with the juryrequest for "the first three or four questions." Such an argumentis totally frivolous considering the first four questions werelimited to Brittany's name and age.

The trial court did not refuse to answer the jury's requests orgive a totally inadequate or erroneous response and therefore didnot breach the mandatory requirements of K.S.A. 22-3420(3) asheld and

discussed in Myers and as later recognized in Statev. Bruce, 255 Kan. 388, 396-97, 874 P.2d 1165 (1994). As to themanner in which the trial court responded to the jury requests,and the extent of such response, the test is whether the trialcourt abused its discretion. We find no abuse of discretion here.In addition, the defendant made no objection to the procedurefollowed or the responses given by the trial court and cannot nowbe heard to complain for the first time on appeal. For all theforegoing reasons we reverse the Court of Appeals.

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As there were other issues raised on appeal which were notaddressed by the Court of Appeals and were not included in thepetition for review before this court (See Supreme Court Rule8.03[g][1] [1994 Kan. Ct. R. Annot. 50]), we reverse the Court ofAppeals and remand the case to the Court of Appeals for furtherproceedings on the other issues.