FILED
AUG 27 1986
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed August 27, 1986
vs.	)	336
DAN RAY FEDKENHEUER,	)	6-118 85-969
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Polk County (No. 27619) - Ray Fenton, Judge.

The defendant appeals from his conviction, following a jury trial, for the crime of assault with intent to commit sexual abuse. **AFFIRMED.**

Charles L. Harrington, Appellate Defender, and John P. Messina, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General; Rebecca L. Claypool, Assistant Attorney General; and A. Patricia Houlihan, Assistant Polk County Attorney, for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson and Schlegel, JJ.

DONIELSON, J. 337

The defendant, Dan Ray Fedkenheuer, appeals his conviction, following a jury trial, for the crime of assault with intent to commit sexual abuse. Defendant's appeal rests on his contention that the trial court erred by responding to a note from the jury in the defendant's absence. We affirm.

During its deliberations, the jury sent a note to the court asking for copies of the testimony of two witnesses, the victim and a psychologist who gave testimony relating to the defendant's defenses of intoxication and diminished responsibility. After consulting with counsel for both sides, the court responded to the jury's note with a message that the jurors would have to rely on their memories because the testimony was not typed. The defendant's attorney approved this response by telephone, but the defendant asserts on appeal that he was not personally told about the jury's note or given any opportunity to express his wishes about the nature of the response. This error was not complained of during the trial by the filing of a motion for a new trial.

According to Iowa Rule of Criminal Procedure 25(1), in felony cases, the accused shall be present "at every stage of the trial." Also, Iowa Rule of Criminal Procedure 18(5)(g) provides in part that:

> After the jury has retired for deliberation, . . . if it desires to be informed on any point of law, arising in the cause, it must require the officer to conduct it into court, and, upon its being brought in, the information may be given, in discretion of the trial court . . . . Where the court gives the jury additional instructions, this shall appear of record. Provided, that the procedures described in this section shall take place in the presence of defendant and counsel for the defense and prosecution, unless such presence is waived.

Recent cases have held it necessary that all communications between the court and jury be given in the presence of the defendant and counsel. State v. Williams, 341 N.W.2d 748, 751 (Iowa 1983); State v. Folck, 325 N.W.2d 368, 374 (Iowa

1982). Thus, the defendant had the right to be present when the trial court was responding to the jury's note. That right was violated when the trial court responded to the jury's note in the absence of the defendant. However, we conclude that this error was harmless.

Defendant contends that his absence from the communication between the court and jury deprived him of input on a decision that had an important effect on the outcome of the trial. The Iowa Supreme Court has held that all communications between court and jury must be given in the presence of the defendant. Williams, 341 N.W.2d 748, 751 (Iowa 1983). A violation of this rule raises a presumption of prejudice which constitutes a reversible error unless the record shows the instruction had no influence on the jury's verdict prejudicial to the defendant. State v. Snyder, 223 N.W.2d 217, 221-22 (Iowa 1974). Since there was a presumption of prejudice, the burden rested on the state to show that the defendant had not been prejudiced by the communication between the court and jury in his absence. The State met this burden of proof; therefore, we hold the error not to be prejudicial.

During the time the jury was deliberating, the jurors requested a copy of the testimony of the victim and the psychologist. The court, after conferring with each party's counsel, answered that the testimony was unavailable because it was not yet typed up. No indication whatsoever exists that had defendant been present, the trial court would have done or said anything different from what was said and done. Nor can a contention be made that the court's statement was improper; its response merely told the jurors that because transcripts of the testimony were unavailable, they would have to rely on their memories.

Therefore, we conclude that even though the court's communication with the jury in the defendant's absence was a violation of Iowa Rule of Criminal

Procedure 18(5)(g) and 25(1), the error was not prejudicial. Hence, we affirm the defendant's conviction.

AFFIRMED.

Oxberger, C.J., concurs; Schlegel, J., dissents.

SCHLEGEL, J. (dissenting)

I respectfully dissent. 349

Although the point is repeatedly made that a defendant has a right to be present at every stage of trial, the failure of the trial courts to assure defendants that right at the time of deliberations of the jury, continues without adherence to that rule.

Here, we say that the defendant didn't preserve the error (because error it was), since he didn't move for a new trial. I cannot overlook the fact that counsel appointed to represent defendant, consulted by the judge in a telephone conversation, agreed to the response to the jury's request without consulting his client. We are in the same situation as is involved in those cases where the defense counsel cannot be expected to appeal on the grounds of his ineffective assistance. Here, counsel dismissed the request by the jury to see the testimony of the expert upon whom he apparently relied to buttress the only defense he urged, without consulting with his client. The importance of the jury's request, considering the fact that it wanted to hear or read the testimony of the expert who testified to support the defense of diminished responsibility because of alcohol consumption, cannot be lessened, merely because the trial court chose not to give it the importance it deserved. It does not reflect well upon our respect for the defendant's right to be present, to hold that his counsel failed to preserve the issue by a motion for new trial, or to hold that it was harmless error in any event, since the trial court would have done nothing different, had defendant been present.

As to this latter point, it is of interest to note that the Iowa Supreme court has consistently held that a violation of the rule concerning the requirement of the defendant's presence raises a presumption of prejudice which constitutes reversible error, placing the burden upon the State to show that the defendant

had not been prejudiced by the communication between the court and jury in his absence. To be sure, the court cannot be accused of saying anything that directed the jury to find him guilty. The court merely didn't allow defendant to be present to suggest that perhaps an alternative to the judge's answer would be helpful to the jury during its deliberations. Provision for reading of parts of testimony from the reporter's notes, is not unheard of. We do not know whether the court might have proceeded in a different manner. To conclude otherwise is speculation. With a record of the defendant's presence, we could determine if the court properly exercised its discretion, in whatever action it took. How we can hold that the State met its burden of proof that the defendant was not prejudiced totally escapes me. The State has done nothing to support that burden. It must rely upon an obviously prejudiced view of the court's possible action.

Because of the importance of the issue, and of the adherence to the rule in question, I would reverse, and would remand for new trial.