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IN THE COURT OF APPEALS OF IOWA

No. 3-467 / 92-1507

ROBERT TODD GRIFFIN,

Appellant,

vs.

STATE OF IOWA,

Appellee.

Appeal from the Iowa District Court for Muscatine County, James R. Havercamp, Judge.

Griffin appeals the district court's denial of his application for postconviction relief. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Ahmet S. Gonlubol, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General; Sheryl A. Soich, and James Kivi, Assistant Attorneys General; and Richard R. Phillips, County Attorney, for appellee.

Heard by Oxberger, C.J., and Sackett and Habhab, JJ..

000208

HABHAB, J.

The previous decision in this cause filed on the 29th day of November, 1993, was vacated by this court in its order of the 1st day of December, 1993. The opinion that follows is substituted in lieu thereof.

On September 7, 1990 Griffin was charged with the second degree burglary of a Muscatine video store and escape[1]. At trial, a police officer identified Griffin as the person he had attempted to apprehend when he saw the person exiting the store after hours carrying a cash box. Griffin and several of his witnesses testified that on the night of the burglary he was with friends at a bar in Muscatine and while there he entered into a fight with Jeff Swank.

On November 28, 1990 the jury found Griffin guilty of second degree burglary. Griffin appealed his conviction. In a per curiam decision, the Iowa Supreme Court affirmed Griffin's conviction and preserved his claim of ineffective assistance of counsel for postconviction proceedings.

On December 3, 1991 Griffin filed an application for postconviction relief. The district court denied his application following a hearing. Griffin appeals. We affirm.

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1. The trial court granted defendant's motion to sever the escape charge from the burglary charge. Defendant pled guilty to the escape charge. The escape charge is not the subject of this appeal.

000209

I. **Jury Communications.**

Griffin asserts that the court's note to the jury in his and his counsel's absence violated Iowa Rule of Criminal Procedure 18(5)(g). During jury deliberations the court answered a note from the jury in the absence of Griffin, Griffin's counsel and the State's attorney. The jury's note contained six questions.

The trial court responded to the note by stating that it could not answer any of the jury's questions. Griffin argues that the trial court erred in failing to notify him and the attorneys before answering the note. He further argues that the error was without prejudice because two of the jury's questions, relating to evidence presented at trial, could have been satisfied by reading portions of the transcript to them.

Defendant's right to be present is derived from the sixth amendment and implemented by Iowa Rule Criminal Procedure 18(5)(g). State v. Gardner, 490 N.W.2d 838, 842 (Iowa 1992). Rule 18(5)(g) provides in part:

> After the jury has retired for deliberation, if there be any disagreement as to any part of the testimony, or 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 required may be given, in the discretion of the trial court. Where further information as to the testimony which was given at trial is taken by the jury, this shall be accomplished by the court reporter or other appropriate official reading from the reporter's notes. 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

000210

> of defendant and counsel for the defense and prosecution, unless such presence is waived.

Iowa R. Crim. P. 18(5)(g). Also, Iowa Rule of Criminal Procedure 25 provides that in felony cases the defendant shall be present "at every stage of the trial" with exceptions not applicable here. See also Gardner, 490 N.W.2d at 842.

Our supreme court has addressed the problems raised by communication between judge and jury in the absence of defendant and defense counsel in several recent cases. See id.; State v. Meyers, 426 N.W.2d 614, 616 (Iowa 1988); State v. Griffin, 323 N.W.2d 198, 201 (Iowa 1982). It has held that absence of defendant and defense counsel gives rise to a presumption of prejudice necessitating reversal unless the record affirmatively shows the instruction had no influence on the jury's verdict prejudicial to the defendant. Gardner, 490 N.W.2d at 842; Meyers, 426 N.W.2d at 616; Griffin, 323 N.W.2d at 201.

In the present case the jury's note read as follows:

> 1. Is the door circled the same door, same style or a different type door. Was it replaced.
>
> 2. Why they didn't ask Jeff Swank if he remembered the type of clothes Todd had on the night of the fight.
>
> 3. Why Shelly Kopf was not called as a witness.
>
> 4. Map of Muscatine - a phone book.
>
> 6. Did they fingerprint the cash box.
>
> 8. Why wasn't Reeds called in to testify.

000211

Questions 5 and 7 were scratched out. There seems to be no dispute with regard to Question 2, 3, 4, and 8. The district court's response was the only answer it could have given under the circumstances, whether defendant was present or not. We therefore find the court's error in failing to secure defendant's and counsel's presence or their waiver to presence was without prejudice as it relates to those four questions. Gardner, 490 N.W.2d at 842-43; Williams, 341 N.W.2d at 751.

However, Griffin claims questions 1 and 6 show juror disagreement about the evidence. Griffin argues question 1, regarding the condition of the door shown in the photograph of the video store shows jury disagreement on whether Griffin could have stepped through the door as testified to by Officer Gries. Griffin states both of these questions could have been answered by reading portions of the transcript to the jury. We disagree. As to question 1, in response to the State's question "What did the cleanup include?" the store owner testified that the front door glass was shattered. When the pictures of the storefront were introduced into evidence, neither the store owner or the police officer were asked if the pictures accurately represented the storefront at the time of the burglary. As to question 6, Officer Gries testified that they attempted to lift fingerprints from a beer bottle found outside the store, but that the "store itself was not examined for fingerprints due to the numerous people

000212

working there and customers going in and out touching things."

In Meyers our supreme court reversed and remanded for a new trial when the trial court failed to comply with rule 18(5)(g) in the presence of defendant and counsel. Meyers, 426 N.W.2d at 617-18. In Meyers, the jury specifically asked to see the trial transcript. Id. at 615. When unsuccessful in that request, it next asked to see specific portions of the transcript. Id. Our supreme court stated that the "jury's request to review the transcript or portions thereof relates directly to evidence presented at trial and signals possible disagreement by jurors concerning it." Id.

We find this case distinguishable from Meyers. In the present case, in examining the jury note, we find the jury was not requesting to review the transcript or portions thereof, but was requesting additional information from the trial judge. We find the jury note did not signal the jury was confused about the evidence. The trial court responded by stating there was no further evidence to be presented. What the court said was not improper. Its innocuous response properly told the jury the court could not give additional evidence. See Gardner, 490 N.W.2d at 842-43 (court's error in responding to a jury note was without prejudice when jury was requesting deposition and admission that was not part of the admitted record).

000213

Although we believe and strongly suggest that it is a better and safer practice for the trial court to always secure the presence of defendant and his or her counsel when receiving and responding to juror notes and inquiries, we find under the circumstances of this case, the trial court's error was without prejudice.

II. Ineffective Assistance of Counsel.

Griffin also reasserts his claim that he was denied his Sixth Amendment right to effective assistance of counsel. Specifically, Griffin argues that his postconviction counsel was ineffective for failing to raise the issue regarding trial counsel's failure to challenge the rebuttal testimony of Jeff Swank. Griffin contends that because he had filed a notice of alibi defense the State was required, pursuant to Iowa Rule of Criminal Procedure 10(a), to give him notice of all rebuttal witnesses. He claims that he was not notified prior to the testimony of Jeff Swank, who contradicted Griffin's alibi defense. Swank testified that his fight with Griffin had occurred over a month prior to the date of the video store burglary.

Griffin requests us to preserve this claim of ineffective assistance of counsel for a second postconviction hearing pursuant to Iowa Code Chapter 663A (1991). We find that because the State Appellate Defender's office handled both Griffin's direct appeal and this present action, we find Griffin is entitled to raise

000214

this issue in a new application for postconviction relief. Jones v. Scurr, 316 N.W.2d 905, 911 (Iowa 1982).

We therefore preserve defendant's ineffective assistance of counsel claim for a later proceeding.

AFFIRMED.