IN THE COURT OF APPEALS OF IOWA

No. 7-014 / 95-2132

STATE OF IOWA,
Plaintiff-Appellee,

vs.

PETER ANTHONY GUTTILLA,
Defendant-Appellant.

Appeal from the Iowa District Court for Johnson County, Stephen C. Gerard, II, District Associate Judge.

Defendant appeals from judgment and sentence entered, following jury trial, for operating while intoxicated, second offense, in violation of Iowa Code section 321J.2 (1993). **AFFIRMED.**

Clemens A. Erdahl of Tindal, Erdahl, Goddard & Nestor, Iowa City, for appellant.

Thomas J. Miller, Attorney General, Ann E. Brenden, Assistant Attorney General, J. Patrick White, County Attorney, and Janette C. Waterhouse, Assistant County Attorney, for appellee.

Heard by Sackett, P.J., and Cady and Streit, JJ.

STREIT, J.

Defendant appeals from judgment and sentence entered, following jury trial, for his second offense of operating a vehicle while intoxicated. He contends the trial court violated Iowa Rule of Criminal Procedure 18(5)(g) by addressing the jury during deliberations without the presence of or consultation with trial counsel.

Peter Guttilla was charged with operating while intoxicated, second offense. At trial, he asserted a necessity or sudden emergency defense. The court instructed the jury of this defense in jury instructions 13 and 14.

The case was submitted to the jury at 10:14 a.m. on September 19, 1995. Guttilla waived his right to be personally present for the verdict, and consented to a sealed verdict. At approximately 1:30 p.m., the jury submitted a written question to the court regarding "what the effect would be of the jury finding the Defendant's decision to drive being reasonable under the circumstances where the jury also found there were other reasonable options available to the Defendant."[1] Without consulting the prosecutor and/or defense counsel, the judge went into the jury room, without the court attendant, and informed the jury to re-read instructions 13 and 14. At approximately 2:44 p.m. the jury returned a guilty verdict.

---

[1] The jury's original written question was misplaced, and the question as set forth herein is based upon the judge's recollection as contained in the bill of exceptions and the court attendant's testimony . There is, however, no dispute over whether this was actually the content of the question.

The court signed a bill of exceptions detailing the events. Guttilla moved for a new trial, and the court combined that hearing with the sentencing hearing. After hearing testimony from the court attendant and counsel's arguments, the court denied the new trial motion. It stated "I don't feel that what I said had any impact on the deliberation of the jury except to put them back where they were to make a decision based upon the evidence and the instruction that they had been given."

Guttilla appeals. He contends under rule 18(5)(g), the jury's question involved a point of law arising in the case which required counsel's presence because he did not waive that right. The State contends the question did not address a point of law, counsel waived his presence, and, regardless, Guttilla was not prejudiced by the court's response because it was the only appropriate response.

We review for errors of law. Iowa R. App. P. 4; *State v. Meyers*, 426 N.W.2d 614, 615 (Iowa 1988).

Rule 18(5)(g) provides "if the jury . . . desires to be informed on any point of law, [or] the court gives the jury additional instructions, this shall appear of record." Unless such presence is waived, the defendant and counsel for the defense and prosecution shall be present. Iowa R. Crim. P. 18(5)(g). "[A]bsence [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." *State v. Snyder*, 223 N.W.2d 217, 221-222 (Iowa 1974); *see also State v. Griffin*, 323 N.W.2d 198, 201 (Iowa 1982).

Defense counsel informed the court he would be in his office that morning, but was required to be in Des Moines in the afternoon. He stated he would call at 1:15 p.m. to check on the status of the case. Defense counsel checked in at 1:10 p.m. and informed the court attendant he would call every one-half hour thereafter to check if the jury had any questions. The court attendant believes she relayed this information to the court.

In the bill of exceptions, the court stated it was not aware defense counsel was calling every one-half hour. Although there is testimony by the court attendant which states otherwise, we find even though defense counsel was not present, the error was harmless beyond a reasonable doubt.

The jury wanted to know the effect of its finding that there were other reasonable options. Jury instruction 14 states, in part, that if it found there were other options reasonably available to Guttilla, then "the State has carried its burden of disproving the defense of necessity, and you should find the Defendant guilty." Defendant would argue if defense counsel had been present, the wording of the instructions could have been changed to make it clearer for the jury. [2]

---

[2] Apparently defense counsel disagreed at trial with the court about the wording of instruction 14—he wanted to use the words "realistic option" rather than "reasonable option."

The court instructed the jury to re-read instructions 13 and 14. The response given by the judge for the jury to review the jury instructions is somewhat similar to *State v. Williams,* 341 N.W.2d 748 (Iowa 1983). In *Williams*, the jury wrote a message indicating it was unanimous on a lesser offense, but was split on the principal charge. *State v. Williams,* 341 N.W.2d at 751. It inquired as to what it should do. *Id.* The court, without consulting counsel, responded in writing for it to review the jury instructions and that the verdict must be unanimous. *Id.* The court determined that although the defendant was not present, any error was harmless. *Id.* "The communication was not an instruction on the law and had no bearing on the evidence the jurors were to consider." *Id.*

We find the communication in this case was not an instruction on the law and there was no prejudice based on the court's actions. We do not believe, had the court contacted defense counsel, the wording of the instruction would have been changed.

At the same time, we do not, however, condone the court's handling of the situation. Judges should take all precautions to stay out of the jury room during deliberations. Judges should let their court attendant perform the role of liaison to prevent any suspicion of improper exchange.

AFFIRMED.