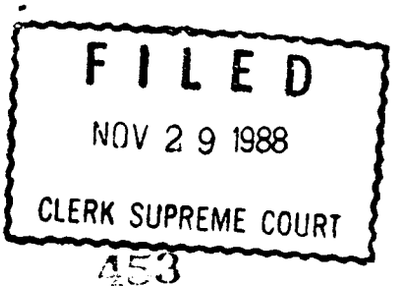
IN THE COURT OF APPEALS OF IOWA



STATE OF IOWA,	)	
Plaintiff-Appellee,	)	
vs.	)	
EDWARD OTTESON,	)	8-459 87-913
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Polk County (32734 & 22215), Theodore H. Miller, Judge.

Defendant appeals from his conviction by a jury of first-degree murder. **REVERSED AND REMANDED FOR A NEW TRIAL.**

Raymond E. Rogers, Acting Appellate Defender, and James F. Whalen, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Richard J. Bennett, Assistant Attorney General, for plaintiff-appellee.

Considered by Schlegel, P.J., and Hayden and Habhab, JJ.

HAYDEN, J.

Defendant Edward Otteson was convicted by a jury of first-degree murder.

On appeal Otteson contends the trial court erred by: (1) failing to notify the defendant or counsel for either side of communications received from the jury after deliberations had begun; (2) admitting into evidence, over Otteson's objection, a videotape of the crime scene containing close-ups of the victim's body that were unnecessarily gruesome and inflammatory; (3) overruling a motion for a mistrial after the prosecutor improperly focused the jury's attention on Otteson's exercise of his constitutional right to remain silent and to consult counsel; and (4) refusing to grant a new trial based on the absence of an impartial jury.

The charge against the defendant arose out of the death of Leroy Sparks. The body of Mr. Sparks was discovered on August 2, 1986, lying in a grassy area adjacent to the river, near the Southwest Ninth Street bridge in Des Moines. Sparks had been beaten and his wallet was missing. The cause of death was caused by two severe blows to the head. We reverse and remand for a new trial.

We review for errors of law. Iowa R. App. P. 4.

I. Communication between Judge and Jury. Defendant claims the trial judge erred in not notifying defendant or his counsel of communications received from the jury after the jury had commenced deliberations.

The record shows the jury communicated with the court during deliberations and this was not revealed to defendant or to either attorney. The record fails to disclose specifically what the communication was or what the jury inquired about. The trial judge does not remember what the communications from the jury were. No record was made on any matter relating to any communication or inquiry by the jury to the trial court. For the purpose of this issue on appeal, we presume the communications between the jury and the judge were prejudicial to the defendant.

Iowa Rule of Criminal Procedure 18(5)(g) reads as follows:

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

The defendant's right to be present during trial proceedings derives from the sixth amendment of the United States Constitution. The right is implemented in Iowa Rule of Criminal Procedure 25. State v. McKee, 312 N.W.2d 907, 914 (Iowa 1981).

In assessing the impact of an improper communication between the trial court and the jury in the absence of a defendant and counsel, the Iowa Supreme Court has held such error "gives rise to a presumption of prejudice necessitating reversal unless the record affirmatively shows the communication had no influence on the jury's verdict prejudicial to the defendant." State v. Snyder, 223 N.W.2d 217, 221-22 (Iowa 1974). The absence of prejudice may appear from the whole record and need not be established by evidence directed toward this specific point. State v. Griffin, 323 N.W.2d 198, 201 (Iowa 1982) (citations omitted).

Recently, in State v. Meyers, 426 N.W.2D 614, 715 (Iowa 1988), the Iowa Supreme Court addressed a similar issue. The defendant in Meyers was charged with sexual abuse of his stepdaughter. A jury trial was held. During jury deliberations, the jury foreman sent a note to the judge asking if the jury could have access to the trial transcript. In response, the judge sent back a note stating "Ladies & Gentlemen of the Jury: In response to your request . . . it is impossible for a trial transcript to be provided to you." The judge then attempted unsuccessfully to reach the defense counsel. The judge did not attempt to locate the defendant.

Shortly thereafter, the jury foreman sent a second note to the judge requesting to see specific portions of the

transcript. Without attempting to reach counsel for either party, the judge denied the request and instructed the jury that they "may have only the exhibits that have been admitted into evidence." The jury later convicted the defendant of third-degree sexual abuse.

The Iowa Supreme Court reversed and remanded for a new trial due to the court's failure to comply with rule 18(5)(g) in the presence of defendant and counsel. Employing a harmless error analysis, the court distinguished Meyers from State v. Williams, 341 N.W.2d 748, 751 (Iowa 1983), in which the written communication between the judge and jury was found to be harmless because "it was not an instruction on the law and had no bearing on the evidence the jurors were to consider." The court also distinguished Meyers from State v. Folck, 325 N.W.2d 368 (Iowa 1982). In Folck, the court found an erroneous communication between the judge and jury to be harmless, due to the fact that upon the jurors' second request for certain trial testimony, the judge called the jury into the courtroom and, with defendant and counsel present, had the court reporter read the requested testimony to the jury.

In Meyers, the court found it significant the jurors' request to review the transcript related directly to evidence presented at trial and signaled possible disagreement by the jurors concerning it. Citing State v. Griffin, 323 N.W.2d 198, 201 (Iowa 1982), the court further

stated that the practice of conducting all jury matters in the presence of the defendant and counsel provides counsel the opportunity to argue for or against the giving of additional information to the jury, puts the parties on notice of the jury's request, and provides for an adequate record on appeal.

In State v. Register, 112 N.W.2d 648, 653 (Iowa 1962), the Iowa Supreme Court held:

> Where the record affirmatively shows the communication had no tendency to influence the verdict a reversal is not required. If the record shows affirmatively defendant has been prejudiced there would be reversible error; likewise where the record is silent as to the possibility of prejudice, it would be presumed to be so and a new trial should be granted.

In the present case the attorneys do not know and the trial court is not sure what requests the jury made to the court. There is indication by some of the jurors requests were made for testimony be reread, on clarification on points of law, on definition of first-degree robbery, regarding degree of guilt and inquiry about one of the instructions. Some of these jurors indicated the judge's reply was "reread the instructions."

Upon reviewing the court file the trial court found a note that a verbal inquiry was made by the jury through the court attendant regarding jury instruction number 39. This instruction related to the forms of verdict submitted. The trial court thought the jury's inquiry was very minor or he would have contacted the parties. The trial judge

indicated he probably advised the jury to reread the instructions. The trial judge also found a written note signed by 11 jurors about a matter not connected to the trial of defendant.

As can be seen, the record is unclear what the jury's inquiries were actually about or what responses if any were given by the trial court. The record is clear the jury communicated with the trial judge. The record is also clear neither the defendant nor either attorney was notified and given an opportunity to argue for or against the giving of additional information on any matters relating to the jury's inquiries.

In a case involving an alleged violation of rule 18(5)(g), the Iowa Supreme Court held in Griffin, 323 N.W.2d at 200, "the trial court has discretion whether, and to what extent, a jury inquiry should be answered; but it has no discretion in deciding whether defendant and counsel need be present.

The trial court in this case violated rule 18(5)(g) and committed error. We must determine whether the resultant presumption of prejudice is overcome beyond a reasonable doubt by the evidence and proceedings in the record. See State v. Meyers, 426 N.W.2d at 617, and State v. Griffin, 323 N.W.2d at 201.

The State urges this court to find any prejudice to defendant is overcome by the asserted overwhelming evidence

in the record of defendant's guilt. We cannot do this here. There is absent in this record what specific inquiries were made by the jury and what the trial judge's response, if any, were to the inquiries and requests in those communications. For this court to hold defendant's prejudice was overcome by the evidence and proceedings in this record would be mere speculation and not beyond a reasonable doubt.

We are guided by the Iowa Supreme Court's admonition that trial courts should generally conduct all matters involving jury inquiry in the presence of the defendant and counsel.

> There is good reason for this practice. It provides an adequate record on appeal; it allows counsel an opportunity to argue for or against the giving of additional information to the jury; and it gives the parties, both the defendant and the State, notice of the jury's request which otherwise might go undisclosed.

See Meyers, at 617 and Griffin at p.201 (emphasis added).

We conclude the case must be reversed and remanded for a new trial due to the court's failure to comply with rule 18(5)(g) in the presence of defendant and counsel.

II. Admission into Evidence a Videotape. At trial, the State offered into evidence a videotape portrayal of the crime scene. Defendant's attorney made a timely objection to the tape. Defendant's grounds for objection were the video tape was duplicitous to other photos, shows graphic detail of the body, and it would inflame the passions of the jury. The trial court overruled

defendant's objection and the jury was permitted to view the video tape.

The video tape depicted close-up portrayals of the victim's body, the surrounding area of the crime scene, and items of property which police officer's found in their investigation.

The admission or rejection of the video tape is determined by its relevancy. See State v. Coburn, 315 N.W.2d 742, 746 (Iowa 1982). Here the video tape pictures were gruesome and grisly but were no less relevant evidence to illustrate medical testimony, show the nature and ferociousness of the attack as bearing on the issues of malice and intent to kill, to show the manner and means by which the victim was killed, and to show the condition of the body at the murder scene. See State v. Hickman, 337 N.W.2d 512, 516 (Iowa 1983); State v. McGhee, 280 N.W.2d 436, 441 (Iowa 1979); State v. Hall, 235 N.W.2d 702, 720 (Iowa 1974).

The basic test is relevancy of the pictures. Death pictures are not ordinarily excluded because they are gruesome, for murder is by nature a gruesome business. Trial courts have discretion in determining whether the value of pictures as evidence outweighs their grisly nature. Hickman, 337 N.W.2d at 516.

We hold the video tape's portrayal of the victim's body, scene of the area, and other objects relevancy

outweighs any prejudice to defendant. The trial court did not abuse its discretion in admitting it.

III. Because of our holding in division I above, we do not address defendant's assignments of error as to the prosecutor's misconduct and failure to have an impartial jury.

REVERSED AND REMANDED FOR NEW TRIAL.

Schlegel, P.J., concurs; Habhab, J., dissents.

HABHAB, J. (dissenting)

I respectfully dissent. Before setting forth my reason, I do concur with that part of the majority's opinion that trial courts should generally conduct all matters involving jury inquiry in the presence of defendant and counsel. Under Iowa Rule of Criminal Procedure 18(5)(g), the procedure involved in giving additional information or instructions must take place in the presence of defendant and counsel for the defense and for the prosecution unless such presence is waived. There was clearly a violation of that rule in this case.

But the crucial question is whether the error is of such importance that defendant should have a new trial. I do not believe it is under the circumstances of this case.

When I review the entire record, I find that the error was harmless beyond a reasonable doubt. Any prejudice that may have resulted is overcome by the overwhelming evidence in the record of defendant's guilt.

It is clear that although the type of communication that took place here is presumptively prejudicial, it is equally clear that this presumption may be overcome by a showing that whatever error occurred was harmless. Jackson v. Hutto, 508 F.2d 890, 892 (8th Cir. 1975). I believe that the presumption was overcome and that the error was harmless. I would affirm the trial court.