IN THE COURT OF APPEALS OF IOWA

No. 6-218 / 94-1145

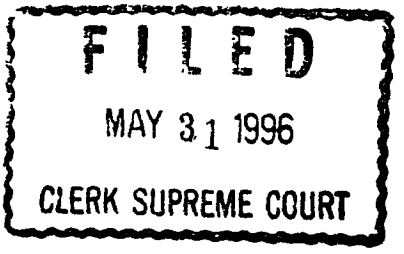
STATE OF IOWA,

Plaintiff-Appellee,

vs.

RONNIE ROGERS,

Defendant-Appellant.



Appeal from the Iowa District Court for Black Hawk County, James C. Bauch, Judge.

Defendant appeals from judgment and sentences, following jury trial, entered upon his convictions of possession with intent to deliver, failure to affix a drug tax stamp, and driving while license suspended. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Sharon R. Stevens, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Julie H. Brown, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Ray Walton, Assistant County Attorney, for appellee.

Considered by Sackett, P.J., and Habhab and Huitink, JJ. Vogel, J., takes no part.

SACKETT, P.J.

Defendant Ronnie Rogers appeals from judgment and sentences, following jury trial. entered upon his convictions of possession with intent to deliver, failure to affix a drug tax stamp, and driving while license suspended in violation of Iowa Code sections 124.401(1)(c), 453B.12, and 321A.32 (1993). He contends the district court erred in refusing to permit his trial attorney to make a record addressing what he labels juror misconduct. He further contends his trial attorney was not effective because he did not make a timely request to make a record. We affirm.

Defendant was stopped for speeding. Defendant was searched and an officer found $183, Zigzag rolling papers, and a bag of what was later determined to be 3.23 grams of crack cocaine. No drug tax stamps were affixed to the crack cocaine. Defendant was charged with possession with intent to deliver, failure to affix drug tax stamps, and two counts of driving while license suspended. The driving while suspended charges were severed, and the possession and tax stamp charges proceeded to trial.

Defendant's defense was he had no intent to deliver the cocaine. During jury deliberations, a juror sent the following note to the judge:

> During the trial I recognized one of the people in the jury audience, Sam Jones, and this has an influence on how I feel about the trial and evidence. This is influencing my vote. I am unsure of what to do next. [signed Jim Bolin]

The court consulted with attorneys for the defendant and the state and proposed an answer ultimately given the juror. Defendant's attorney made no objection. The following instruction was given:

> You are to decide this case based upon the evidence presented in Court and not any other factors! Review the instructions as a whole and the evidence.

When the jury announced it had reached a verdict, defendant's trial attorney asked the judge about questioning juror Bolin concerning any external pressures. The trial judge did not give defendant's trial attorney the opportunity to question the juror about external pressures.

The jury found defendant guilty of possession with intent to deliver and of failure to affix a drug stamp to the cocaine. Defendant pleaded guilty to one count of driving while license suspended. The court imposed sentence and entered judgment.

Defendant first contends he should not have been denied the request to question juror Bolin and his trial attorney did not effectively represent him in failing to make further objection when juror Bolin's question was first delivered to the judge.

Defendant advances the trial court erred in refusing to allow his trial attorney an opportunity to make a record and question juror Bolin. The State's brief does not address the issue of whether the failure of the trial court to allow defendant's attorney to make a record was error, relying instead on a failure to preserve error argument and

a lack of prejudice if defendant should succeed on the ineffective assistance of counsel claim.

We disapprove of a district court's refusal to allow counsel to make an offer of proof or a record. *See State v. Lange*, 531 N.W.2d 108, 114 (Iowa 1995). An offer of proof or a record first gives the district court a more adequate basis for its evidentiary ruling. Second, it provides a record for appellate review. Without a record, the reviewing court cannot base error on speculation as to the answers that would have been given to questions had the district court permitted the offer. *State v. Ritchison*, 223 N.W.2d 207, 212-13 (Iowa 1974). Offers of proof are so important we require them to preserve error. *Id.* We will not presume prejudice when the answer to the question is not obvious. *State v. Windsor*, 316 N.W.2d 684, 688 (Iowa 1982). Nor will we consider error preserved unless the whole record makes apparent what is sought to be proven. *In re Estate of Herm*, 284 N.W.2d 191, 197 (Iowa 1979). A district court's refusal to permit offers of proof is usually error. *State v. Harrington*, 349 N.W.2d 758, 760 (Iowa 1984); *see also Lange*, 531 N.W.2d at 114; *Parish v. Denato*, 262 N.W.2d 281, 286 (Iowa 1978); *State v. Bedwell*, 417 N.W.2d 66, 70 (Iowa 1987). However, a refusal to allow an offer of proof or record is not reversible error when the reviewing court is able to determine what the contents of the offer of proof would have been. *See Harrington*, 349 N.W.2d at 760-61.

Here, had the record been made, the trial judge would have had the benefit of it in making his ruling and it would be available to us on appeal. The judge stated on the record he was not aware of what Sam Jones had to do with the case. While we recognize the juror's testimony might be incompetent,[1] we cannot even make this determination where defendant was precluded from making any record on whether there may have been external information the jury utilized during deliberations. It is important to the integrity of our system that jurors chosen to decide a person's fate be free of preconceived biases. We cannot guess on this record how juror Bolin would have answered questions on Sam Jones' influence if asked. The failure of the trial court to allow a record limits our ability to address the issue on appellate review.

We need not decide if the trial court erred in not allowing the record to be made as error was not preserved. Trial counsel agreed to the judge's first response to the jury and did not request to make any record at that time. The response given by the trial court to the jury to decide the case on the presented evidence and not other factors was an appropriate response.

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[1] To impeach a verdict on the basis of jury misconduct, three conditions must be met: (1) evidence from the jurors must consist only of objective facts as to what actually occurred in or out of the jury room bearing on misconduct; (2) the acts or statements complained of must exceed tolerable bounds of jury deliberation; and (3) it must appear the misconduct was calculated to, and with reasonable probability did, influence the verdict. *State v. Cullen*, 357 N.W.2d 24, 27 (Iowa 1984); *see also State v. Harrington*, 349 N.W.2d 758, 762-63 (Iowa 1984); *State v. Christianson*, 337 N.W.2d 502, 504-06 (Iowa 1983); *Crowley v. Glessner*, 328 N.W 2d 513, 514 (Iowa 1983); *State v. Folck*, 325 N.W.2d 368, 371-73 (Iowa 1982); *State v. Rouse*, 290 N.W.2d 911, 915-17 (Iowa 1980); *Harris v. Deere & Co.*, 263 N W.2d 727, 729-34 (Iowa 1978).

When the matter again came to the trial court's attention just before the jury announced its verdict, defendant's attorney merely inquired about making a record, seeking the trial court's advice. No specific request was ever made to make a record or an offer of proof that would have called for the trial court ruling. We agree with the State error was not preserved on the issue raised on appeal.

The next question, therefore, is whether trial counsel was ineffective in failing to request the opportunity to make a record.

To succeed on an issue of ineffective assistance of counsel, defendant must show he was prejudiced by his counsel's actions. *State v. Risdal*, 404 N.W.2d 406, 408 (Iowa 1987). Defendant cannot show prejudice in view of the overwhelming evidence of his guilt. *See State v. Holland*, 485 N.W.2d 652, 656 (Iowa 1992).

AFFIRMED.