IN THE COURT OF APPEALS OF IOWA

No. 2-495 / 91-1825

FILED
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CLERK SUPREME COURT

STATE OF IOWA,

Appellee,

vs.

SCOTT EDWARD ANDERSON,

Appellant.

Appeal from the Iowa District Court for Black Hawk County, Roger R. Peterson, Judge.

Defendant appeals from his conviction, following a jury trial, of burglary in the second degree. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Shari Barron, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Thomas D. McGrane, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Linda A. Hall, Assistant County Attorney, for appellee.

Heard by Donielson, P.J., and Sackett, J., and McCartney, S.J.*

*Senior Judge from the 2nd Judicial District serving on this court by order of the Iowa Supreme Court.

McCARTNEY, S.J.

Defendant Scott Edward Anderson was charged with burglary in the second degree, in violation of Iowa Code section 713.5 (1991). He was convicted of that crime after a jury trial. He has appealed. We affirm.

On the evening of April 13, 1991, Anderson was at a bar in Waterloo, Iowa. Several people testified Anderson was intoxicated. There was evidence he drank about ten or eleven bottles of beer. Anderson gave his car keys to a friend, Shane Brock. Brock gave the keys to a bar employee when he left the bar at 1:45 a.m., April 14.

At approximately 3:15 a.m. police officers responded to a report that someone had broken into Sally's Beauty Salon, which was a few blocks from the bar. The officers found the glass front door of the shop was broken. Anderson was behind the front counter. There was a cut on one of Anderson's fingers and there was blood on the floor, the front counter, and the cash register keys. Anderson was arrested and taken to police headquarters.

Anderson first told police officers he was an employee of the beauty shop who had lost his key. He also told the officers a friend had pushed him through the door. He then told them he was cold and had broken into the store to use the phone. Anderson was, however, employed by Iowa Beef Processors (IBP). He was paid about $473 on April 13, and had about $300 with him when he was arrested.

Kathye Bedard, the manager of the beauty shop, was called to the shop. She found that the cash register, which was also a computer, had been activated. No cash was regularly kept in the cash register overnight, and she reported that nothing had been taken from the shop.

The trial commenced on August 6, 1991. Anderson was present for the proceedings on that day. The jury returned on August 7 to continue its deliberations. On the morning of the 7th, the jury sent a note to the court asking that it be allowed to review the testimony of Bedard. Anderson was not present in the courthouse on that day, and apparently had gone to work. His counsel told the court that he, the counsel, had told Anderson to remain for the deliberations. The court concluded that Anderson had voluntarily waived his right to be present. The court was buttressed in this conclusion because a court attendant stated that in visiting with Anderson that the defendant acknowledged being told by his attorney to stay but that he, Anderson, had to leave. The court then called the jury back into the courtroom, and had the court reporter read Bedard's testimony to the jury. The jury later returned with a verdict of guilty.

The court entered judgment on October 15, 1991. Anderson was sentenced to a term of imprisonment not to exceed ten years. The sentence was suspended and Anderson was placed on probation for a period not to exceed five

years. Anderson was also ordered to pay restitution to the beauty shop. Anderson has appealed.

Anderson contends his constitutional rights were violated because he was not present when the court held a meeting concerning the jury's request and allowed Bedard's testimony to be read to the jury.

A defendant's right to be present during trial proceedings derives from the Sixth Amendment to the United States Constitution. State v. Meyers, 426 N.W.2d 614, 616 (Iowa 1988). The absence of defendant or defense counsel gives rise to a presumption of prejudice necessitating reversal unless the record affirmatively shows no prejudice resulted to the defendant. Id. Because this issue involves a constitutional right, we review the record de novo. State v. Davis, 446 N.W.2d 785, 787 (Iowa 1989).

Like any personal constitutional guarantee, a defendant's right to be present at trial can be waived. State v. Hendren, 311 N.W.2d 61, 62 (Iowa 1981). Because waiver of a constitutional right is involved, the trial should not proceed in a defendant's absence unless it is established his right to be present has been effectively waived. Id.

We affirm the district court's ruling that Anderson voluntarily waived his right to be present during the jury deliberations in this case. Anderson knew the jury had not yet returned a verdict and the case was still in process.

However, he chose to leave the courthouse and go to work. He did this although told to stay by his attorney. Anderson has not set forth any reasons necessitating his departure from the courthouse.

Furthermore, even if Anderson had not voluntarily waived his right to be present, we find he has not shown any prejudice. A judge's communication with a jury outside the presence of the defendant is not prejudicial where the communication was not an instruction on the law and had no bearing on the evidence the jurors were to consider. See State v. Williams, 341 N.W.2d 748, 751 (Iowa 1983); State v. Lockheart, 410 N.W.2d 688, 697 (Iowa App. 1987).

We affirm Anderson's conviction for the crime of burglary in the second degree.

AFFIRMED.

Donielson, P.J., concurs; Sackett, J., specially concurs without opinion.