

FILED

JAN 25 1979

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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STATE OF IOWA,

)

Appellee,

)

Filed January 25, 1979

vs.

)

ROBERT EUGENE BEESLEY,

)

692

Appellant.

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61517

Appeal from the Muscatine District Court - R. K. Stohr, Judge.

Defendant appeals murder conviction on grounds of prejudice due to trial court's giving jury a copy of Black's Law Dictionary during its deliberations. - Reversed and remanded. for new trial.

J. W. Conway, of Gillett, Conway & Allison, of Muscatine, for appellant.

Thomas J. Miller, Attorney General, Ann Fitzgibbons, Assistant Attorney General, and David W. Newell, Muscatine County Attorney, for appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

Defendant Robert Eugene Beesley appeals his conviction by jury of the crime of second degree murder in violation of § 690.1, The Code, 1977. On appeal Beesley alleges trial court erred in overruling his motion for judgment notwithstanding the verdict and a new trial on the ground that prejudice resulted from trial court's giving a copy of Black's Law Dictionary to the jury during its deliberations. He further argues that: 1) permitting the jury to have a copy of Black's Law Dictionary constitutes giving an additional instruction which § 784.2, The Code, 1977, requires to be given in open court; 2) communicating with the jury in defendant's absence violates defendant's right to be personally present at trial as required by § 777.19, The Code, 1977; and 3) communicating with the jury in the absence of defendant's counsel is a violation of defendant's right to counsel guaranteed by the sixth and fourteenth amendments to the Constitution of the United States. We reverse.

I. The State maintains that there is no record to permit review of the issues involving § 784.2 and § 777.19 because the record does not show Beesley and his counsel were absent at the time of trial court's communication with the jury. The only record of this matter in the original proceedings is a juror's affidavit which states that, following the jury's communication it was having difficulty with some of the legal terms given in the instructions, the trial court allowed the bailiff to give a copy of Black's Law Dictionary to the jury.

On November 27, 1978, defendant filed his petition to amend the record pursuant to Rule of Appellate Procedure 10(d). On November 28, 1978, the State filed its resistance thereto. Also on November 28, 1978, this court issued its order asking counsel for defendant, counsel for the State, and the trial court for their recollections of the jury's request for a dictionary, the trial court's response to that request, and whether defendant or his counsel had notice of trial court's intent to give the dictionary to the jury or whether defendant or his counsel was present at the time such action was taken. Responses from all three provide this court with a sufficient record to establish the facts that the jury asked for a dictionary during its deliberations, that trial court ordered the bailiff to give a copy of Black's Law Dictionary to the jury, that trial court did not notify defendant or his counsel, and that neither defendant nor his counsel were present at the time such action was taken. After consideration of the issues raised by the State's resistance, it is our conclusion that the record in this case should be supplemented as provided by Rule 10(d).

II. The supplemental record, however, does not allow defendant to assert matters, even of a constitutional dimension, for the first time on appeal. *State v. Ubbenheim*, 263 N.W.2d 710 (Iowa 1978); *State v. Washington*, 257 N.W.2d 890 (Iowa 1977). We believe defendant's motion, which stated he was "prejudiced" by the jury's use of Black's Law Dictionary during its deliberations, is too general to preserve the issues involving § 784.2 and § 777.19 and the right to counsel.¹ The motion neither alerted trial court to these issues nor adequately informed the prosecutor with sufficient specificity. See *Washington*, *supra*, at 895. We agree with the State's contention that defendant has asserted these issues for the first time in his written brief and argument on appeal and, thus, has preserved nothing for this court to review. Therefore, we do not decide whether giving Black's Law Dictionary to the jury constituted giving an additional instruction.

III. Resolution of the issue of prejudice, which defendant has preserved on appeal, depends on two factors: 1) the proper standard regarding which party has the burden of proof on that issue; and, 2) whether the burden has been met in this case.

Defendant argues that *State v. Snyder*, 223 N.W.2d 217, 221 (Iowa 1974), states the proper standard. This standard gives rise to a presumption of prejudice necessitating reversal unless the record affirmatively shows defendant has not been prejudiced. *Snyder*, *supra*, at 222. The problem with defendant's reliance on *Snyder* is that the standard in that case was applied in the context of preserved error with regard to the trial court's giving an additional instruction in the absence of the defendant in violation of § 777.19, The Code.

The State asserts that the proper standard is enunciated in *In re Estate of Cory*, 169 N.W.2d 837 (Iowa 1969), and requires the defendant affirmatively to show he was prejudiced by the jury's use of Black's Law Dictionary and that "it must appear the misconduct was calculated to, and it is reasonably probable it did, influence the verdict."

¹The relevant text of defendant's motion (App. p. 436) states:

"Par. 2.

"That at trial the Defendant was prejudiced sufficiently to warrant a new trial, for the following:

"(A) That during the deliberation by the jury, a copy of Black's Law Dictionary was used by the jury. Specific reference should be made to the attached [juror's] Affidavit."

(Citations omitted.) Cory, supra, at 846. Cory, however, is a civil case involving contest of a will, not a criminal case involving a defendant charged with a felony.

We believe that State v. Kirk, 168 Iowa 244, 257, 150 N.W. 91, 95 (Iowa 1914), cited by trial court in its ruling on defendant's motion, more accurately states the rule to be applied in this case.

"If what occurred, [providing jury with a copy of the Code] however, amounted to misconduct and was of such a character that it likely did influence the result of the trial or this may be said to have been reasonably probable, it is enough, regardless of any such showing of such influence in fact, to invalidate the verdict and exact a new trial."

The court in Kirk found providing the jury with a copy of The Code to be prejudicial and, with apparent approval, cited cases from other jurisdictions where the deciding court condemned the lower court's action of allowing jurors to have access to statutes, session laws, treatises, or reports on the subject involved in the trial. Kirk, supra, 168 Iowa at 261, 150 N.W. at 96.

In State v. Register, 253 Iowa 495, 505, 112 N.W.2d 48, 53 (Iowa 1962), the Supreme Court referred to the universal condemnation of private communications between the trial court and jurors. In discussing the question of prejudice in both the context of § 784.2, The Code, and private communications between judge and jury, the court said "[i]f 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."

We believe the record here establishes a reasonable probability that the use of Black's Law Dictionary by the jury did influence the result in the case. Once the dictionary was in the jury's hands, there was no control over its use or misuse. The juror's affidavit stated that the jurors "used the dictionary for assistance in understanding terms such as (emphasis supplied) 'malice aforethought' and 'premeditation'." There is no way of knowing what other use or uses the jury may have made of the law dictionary and there is a danger that the jury could have made its own determination of the law to be applied to the case.

It is the duty of the jury to return a verdict according to the evidence and the instructions of the court. Allowing it to obtain information as to the law from any outside

source renders it impossible to know whether the verdict is in response to those instructions. Kirk, supra, 168 Iowa at 262, 150 N.W. at 96. This is sufficiently prejudicial to defendant to require reversal of defendant's conviction and remand of the case for new trial.

REVERSED AND REMANDED FOR NEW TRIAL.