COURT OF APPEALS
DECISION
DATED AND FILED

March 6, 2018

Diane M. Fremgen
Acting Clerk of Court of Appeals

Appeal No. 2017AP943-CR **Cir. Ct. No. 2015CF403**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

ROMAN D. LOVELACE,

DEFENDANT-APPELLANT.

APPEAL from judgments and an order of the circuit court for Milwaukee County: STEPHANIE ROTHSTEIN, Judge. *Affirmed*.

Before Brennan, P.J., Brash and Dugan, JJ.

¶1 BRASH, J. Roman D. Lovelace appeals from judgments of conviction, entered upon a jury's verdict, as well as an order denying his postconviction motion seeking a new trial. Lovelace argues that his constitutional and statutory rights to be present during all stages of the trial were violated when

the trial court responded to a jury question without consulting the parties. The State argues that Lovelace forfeited his claim on this issue because he failed to object to the trial court regarding its response, but that in any event the error was harmless. We affirm.

BACKGROUND

¶2 Lovelace was charged with burglary as a party to a crime and obstructing an officer for an incident that occurred in January 2015. Milwaukee police officers received a call regarding a burglary in progress at a residence in the city of Milwaukee. When the officers arrived, they observed that the front door of the house had been forced open, and that Lovelace and his co-defendant, Matthew L. Appleton, were breaking windows in the house in an attempt to flee. Lovelace jumped out a broken window and fled on foot, but an officer caught him and took him into custody. Appleton was also arrested, and pled guilty to burglary in May 2015. Lovelace proceeded to a jury trial.

¶3 The trial took place on January 11 and 12, 2016. Prior to closing arguments, the trial court read to the jury instructions relevant to deliberations, including the instructions for the charges of burglary and being a party to a crime. *See* WIS JI—CRIMINAL 1421 and 400. Written copies of those instructions were then placed in a notebook and provided to the jury for deliberations. Additionally, the jury was instructed to communicate any questions to the court only by written note.

¶4 Deliberations began on January 12, 2016, and continued on January 13, 2016. During deliberations, the jury submitted three notes[1] to the court with questions relating to the case; Lovelace's argument on appeal relates to the second note. In that note, the jury asked the trial court to "explain how [b]urglary [and] party to a crime relate" and whether they are "two separate charges or one in the same." The court sent a written response instructing the jury to review the jury instructions in the notebook that was provided at the beginning of deliberations.

¶5 A CCAP entry in the case docket sheet dated January 13, 2016, states that three questions were received from the jury, that the "[p]arties [were] notified," and that "[w]ritten responses to each question [were] returned to the jury room."[2] This entry was made while the trial court was off the record, and the trial court never made any reference on the record about its receipt of the jury notes.

¶6 The jury found Lovelace guilty of both counts for which he was charged—burglary as a party to a crime and obstructing an officer. He was sentenced in February 2016 to five years for the burglary conviction—two years of initial confinement and three years of extended supervision—and six months for the obstruction conviction.

¶7 Lovelace filed a postconviction motion seeking a new trial. He argued that the trial court violated his statutory and constitutional rights to be

[1] There were a total of four notes submitted to the trial court by the jurors, but in the first note they simply asked whether they could take a lunch break; the other three notes were questions relating to the case.

[2] We generally take judicial notice of CCAP records. CCAP is an acronym for Wisconsin's Consolidated Court Automation Programs. The online website reflects information entered by court staff. *See* ***Kirk v. Credit Acceptance Corp.***, 2013 WI App 32, ¶5 n.1, 346 Wis. 2d 635, 829 N.W.2d 522.

present at all stages of the trial when it responded to the jury's question regarding the burglary charge as a party to a crime without either party being present. The trial court denied Lovelace's motion, concluding that "even if the court did not consult the parties before responding to the jury's question, such action was not prejudicial or harmful to the defendant's case." This appeal follows.

DISCUSSION

¶8 On appeal, Lovelace reiterates his argument that the trial court's response to the jury question without the parties being present violated his constitutional and statutory rights to be present during all stages of the trial, along with his constitutional right to counsel.

¶9 In response, the State first contends that there is nothing in the record indicating that Lovelace timely objected to the trial court's handling of the jury question, and thus Lovelace has forfeited this claim. "[F]orfeiture is the failure to make the timely assertion of a right." ***State v. Pinno***, 2014 WI 74, ¶56, 356 Wis. 2d 106, 850 N.W.2d 207.

¶10 The State points to our supreme court's conclusion in ***Pinno***: that a constitutional right may be forfeited by a defendant if that defendant fails to object to a judicial decision relating to that constitutional right, as long as the defendant is aware of the court's action that is affecting that right. ***Id.***, ¶7.

¶11 In this case, it is not completely clear whether Lovelace was aware of the judicial action—the response to the jury question outside the presence of the parties—that is related to his constitutional right to counsel. Here, there is only the CCAP entry, made off the record, indicating that the parties were notified of the jury questions; however, the trial court never stated for the record when and

how the parties were notified of the jury notes. Thus, we cannot affirmatively conclude that Lovelace was aware of the court's action in responding to the note.[3]

¶12 We therefore analyze the merits of Lovelace's argument. Every defendant has the "'right to be represented by counsel at all critical stages of the trial,"' as guaranteed by both the Sixth Amendment to the United States Constitution and article I, section 7 of the Wisconsin Constitution. ***State v. Carter***, 2010 WI App 37, ¶¶18-19, 324 Wis. 2d 208, 781 N.W.2d 527 (citation omitted). A "critical stage" is "'any point in the criminal proceedings when a person may need counsel's assistance to assure a meaningful defense."' ***Id.***, ¶18 (citation omitted).

¶13 Also included in a defendant's constitutional rights is the "'right to be present at any stage of the criminal proceeding that is critical to its outcome if [the accused's] presence would contribute to the fairness of the procedure."' ***Id.***, ¶19 (citation omitted; brackets in ***Carter***). Additionally, in Wisconsin, defendants also have a statutory right to be present during all stages of a trial. *See* WIS. STAT. § 971.04(1)(2015-16).[4] "The interpretation and application of constitutional and statutory provisions are questions of law that we review *de novo*." ***State v. Alexander***, 2013 WI 70, ¶18, 349 Wis. 2d 327, 833 N.W.2d 126.

¶14 In ***Alexander***, our supreme court stated that the test for determining whether a defendant's presence is constitutionally required during a criminal

[3] We encourage the trial court to make a complete record of all communications with the parties and the jury, including its responses to jury questions, as opposed to relying on CCAP entries.

[4] All references to the Wisconsin Statutes are to the 2015-16 version unless otherwise noted.

proceeding is "whether his [or her] absence would deny him [or her] a fair and just hearing." ***Id.***, ¶1. The court noted several factors that may be considered by the trial court in making this determination, including "whether the defendant could meaningfully participate, whether he [or she] would gain anything by attending, and whether the presence of the defendant would be counterproductive." ***Id.***, ¶30.

¶15 For example, in ***Alexander*** the court concluded that the defendant's constitutional rights were not violated when the trial court had discussions in chambers with two of the jurors regarding their respective connections to a witness and an acquaintance of the defendant who was in the gallery. ***Id.*** The court opined that the defendant's presence would not have helped to resolve the issue because the defendant presumably would not have had anything to contribute to those conversations. ***Id.*** Furthermore, the court stated that the defendant's presence may have "actually hinder[ed] the proceeding" because the jurors would likely have been deterred from speaking frankly if he had been there. ***Id.***

¶16 In the present case, a review of these factors indicates that Lovelace's presence when the trial court answered the jury's questions was not constitutionally required. *See* ***id.*** We can think of no meaningful contribution that Lovelace could have made to the trial court's response. Furthermore, he has not provided any explanation as to what he would have gained by being present when the court determined its response. In short, he has not demonstrated that this communication with the jury was a "critical stage" in the proceedings. *See* ***Carter***, 324 Wis. 2d 208, ¶¶18-19.

¶17 Nevertheless, in ***Alexander*** the supreme court reiterated that even if the defendant's presence was not constitutionally required during those discussions with the jurors, the defense attorney's presence *was* required. ***Id.***, 349

Wis. 2d 327, ¶24. In fact, the State concedes that Lovelace's trial counsel should have been afforded the opportunity to confer with the trial court regarding its response to the note.

¶18 However, the State points out that our supreme court addressed a very similar issue in ***May v. State***, 97 Wis. 2d 175, 180, 293 N.W.2d 478 (1980). In ***May***, the jury submitted a question to the trial court regarding the elements of conspiracy, which the court answered without notifying or conferring with the parties. ***Id.*** The supreme court found that it was error for the trial court to answer the jury's question without notifying counsel, but that the defendant had not suffered any prejudice as a result because the trial court had correctly answered the question. ***Id.*** at 183-84. Therefore, it found the error to be harmless. ***Id.*** at 185.

¶19 We apply that analysis here. "Generally, an error is harmless if there is no reasonable possibility that it contributed to the conviction." ***State v. Tulley***, 2001 WI App 236, ¶7, 248 Wis. 2d 505, 635 N.W.2d 807. A reasonable possibility exists if it is "sufficient to undermine confidence in the outcome of the proceeding." ***Id.*** "The burden of proof is on the beneficiary of the error to establish that the error was not prejudicial." ***Id.***

¶20 We again point out that while there is a CCAP entry regarding the jury notes that says the parties were notified, the trial court never explained on the record when that notification was done or what it entailed. Furthermore, the State concedes that the trial court should have conferred with Lovelace's trial counsel prior to responding to the note.

¶21 However, the State calls attention to the non-substantive nature of the trial court's response to the jury note: it directed the jurors to review the jury

instructions that were previously agreed upon by the parties and read to the jury on the record prior to closing arguments. The State argues that there is not a reasonable possibility that the error—the trial court's failure to confer with trial counsel—contributed to the verdict. *See* ***id.*** We agree, and therefore find that this error was harmless. Accordingly, we affirm the judgments of conviction and the trial court's denial of Lovelace's postconviction motion.

By the Court.—Judgments and order affirmed.

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