

IN THE COURT OF APPEALS OF IOWA

No. 1-598 / 10-1453
Filed August 10, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ERIC TERRELL BURKETT,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Bruce B. Zager, Judge.

A defendant contends that the district court erred in proceeding with trial after he failed to show up on the third morning of trial. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and David Arthur Adams, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Linda J. Hines, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Joel Dalrymple, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Vaitheswaran and Tabor, JJ.

VAITHESWARAN, J.

The State charged Eric Burkett with first-degree burglary in connection with a home break-in in Waterloo. The case proceeded to a jury trial. On the third day of trial, Burkett did not appear. The district court made a record concerning his non-appearance, found it was voluntary, and proceeded with the remainder of trial in Burkett's absence. A jury found Burkett guilty of the lesser-included offense of attempted burglary in the first degree.

On appeal, Burkett acknowledges that Iowa Rule of Criminal Procedure 2.27(2)(a) authorizes a court to proceed with trial where a defendant who was present "[i]s voluntarily absent after the trial or other proceedings has commenced." He also does not take issue with the district court's finding that his absence was voluntary. Instead, he contends,

Assuming for the sake of argument that [his] absence could be deemed voluntary, the district court erred when it failed to make a determination as to whether the public interest in proceeding clearly outweighed the defendant's right to be present and the public's interest in a fair trial with the defendant present.

Burkett cites a federal Seventh Circuit Court of Appeals opinion as authority for this argument. See *United States v. Watkins*, 983 F.2d 1413, 1419 (7th Cir. 1993) ("[I]f we determine that the court found proper waiver, we must consider whether the court appropriately exercised its discretion in concluding that there was a controlling public interest to continue the trial in the defendant's absence." (citations and internal quotations omitted)).

The State responds that error was not preserved on this issue. We agree. Burkett's attorney objected to proceeding with the trial in the defendant's

absence, but did not advance the present argument that the court should have considered the public interest in proceeding with trial. See *State v. Finnegan*, 784 N.W.2d 243, 248 n.3 (Minn. 2010) (“[T]he issue of whether we should adopt the federal balancing approach is not before us in this appeal. Finnegan did not argue the adoption of the federal balancing approach to the district court during trial, and he did not argue its adoption to the district court on postconviction review.”). As the present argument was not raised or addressed in the district court, we decline to consider it on appeal. See *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) (“It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal.”).¹

We affirm Burkett’s judgment and sentence for attempted burglary in the first degree.

AFFIRMED.

Tabor, J., concurs; Sackett, C.J., specially concurs.

¹ Burkett does not alternately raise the issue under an ineffective-assistance-of-counsel rubric.

SACKETT, C.J. (concurring specially)

I concur with the majority opinion in all respects. I write specially to note that I have not considered whether or not there was sufficient evidence to support a finding Burkett's absence was voluntary as it does not appear that issue has been raised on appeal.