

**IN THE COURT OF APPEALS OF IOWA**

No. 9-897 / 08-1540  
Filed January 22, 2010

**ODELL EVERETT JR.,**  
Applicant-Appellant,

**vs.**

**STATE OF IOWA,**  
Respondent-Appellee.

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Appeal from the Iowa District Court for Black Hawk County, Richard D. Stochl, Judge.

Odell Everett appeals from the denial of his application for postconviction relief. **REVERSED.**

Nathan A. Mundy of Bartolomei & Lange, P.L.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Kim Griffith, Assistant County Attorney, for appellee State.

Considered by Eisenhauer, P.J., Potterfield, J., and Mahan, S.J.\*

\*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

**POTTERFIELD, J.****I. Background Facts and Proceedings**

The facts presented to the jury that returned a guilty verdict on the charge of first-degree robbery were summarized on direct appeal as follows:

On November 11, 2003, at approximately 3 a.m. a hold-up alarm was triggered from the Kwik Star Convenience Mart located at 1624 4th Street in Waterloo. Rysa Rice and Dawn Carlson were working at Kwik Star that night. Rice provided police dispatch with a description of the robber shortly after he left the store. She described the robber as a tall and skinny black male with a skinny face. Rice estimated the robber was six feet to six feet two inches tall, and weighed 170 to 185 pounds. She said he was wearing a green bandana, a black stocking cap, and a dark blue sweat suit. A white t-shirt extended below the individual's blue sweatshirt. Police were told the robber was armed with a knife and that he ran away from the store in a northerly direction holding the cash drawer.

Waterloo Police Officer James Oliver was patrolling in his car north of the store at the time of the robbery. After receiving the dispatch regarding the robbery, he decided to lay in wait for anyone who might come his way. A few minutes later, Officer Oliver observed a car speed down the dead-end street where he was parked and pull into a driveway. When Officer Oliver shined a spotlight on the vehicle the driver, who matched the description of the robber provided by the store clerks, immediately fled leaving the car still running. Officer Oliver yelled at the individual to stop, but his commands were ignored. The officer then gave chase on foot and called for assistance. Several other officers soon joined in the pursuit.

The foot-chase led to a cemetery. At one point during the pursuit, the suspect was almost caught when an officer was able to grab one of his pockets; however, the pocket gave way spilling cash and food stamps onto the cemetery grounds. The chase continued and officers apprehended the individual a short time later.

After the suspect was apprehended, several officers retraced the route of the foot chase. Along that path, officers found the cash and food stamps that had spilled from the individual's pockets, a black stocking cap, the cash drawer that had been removed from the Kwik Star, and loose coins. In the car from which the individual had fled, officers found a blue sweatshirt. In the individual's pockets, officers found a green bandana and a significant number of coins. The individual was wearing a white t-shirt.

The police then brought the individual back to the Kwik Star to see if the store clerks could identify him as the robber. Both store clerks identified the individual as the robber. Later, the police identified the individual they had apprehended as Odell Everett.

On November 12, 2003, the State charged Everett with first-degree robbery and interference with official acts. Everett moved to suppress the identification made by the victims of the robbery. The district court denied his motion. Following trial, a jury found Everett guilty of both charges. Everett was subsequently sentenced to twenty-five years in prison. Everett only appeals his first-degree robbery conviction.

*State v. Everett*, No. 04-1343 (Iowa Ct. App. May 11, 2005) (footnote omitted).

The store clerks gave contradictory testimony about the use of a knife during the robbery: one clerk testified the perpetrator was waving a knife; the other clerk did not see a knife and testified the perpetrator kept both hands in his pockets. During their deliberations, the jury sent a question to the district court judge asking, "Is it first-degree robbery if the defendant represents that he has a dangerous weapon, but does not actually have or show it?"

The district court judge telephoned Everett's counsel and the assistant county attorney to discuss the response to the jury's inquiry. The district court judge asked Everett's counsel whether he wanted to contact Everett to allow him to be present for discussion of the question, but counsel stated he wanted to hear the question first. Everett, who was not in custody, was not present at court or with his attorney. Nor was Everett notified that the jury had submitted a question about the elements of robbery in the first degree. The court delivered the following response to the jury without objection from either the prosecutor or defense counsel: "Please reread the instructions." Everett never gave his attorney the authority to waive his presence.

At the time of his direct appeal, Everett did not know the jury had submitted a question regarding the element of use of a weapon, an element that was critical to the charge of first-degree robbery as opposed to second-degree robbery. The issue was not raised on direct appeal, and the transcript of the telephone hearing was not included in the appendix submitted on direct appeal.

Following the denial of his appeal, Everett received the transcript of the trial and learned, for the first time, that the jury had a question about the proof necessary for first-degree robbery. On March 16, 2006, Everett filed an application for postconviction relief alleging, among other things, that the district court erred in failing to require Everett's presence when responding to this jury instruction. The postconviction court found that the district court erred in conducting such proceedings outside of Everett's presence. The postconviction court went on to state this error resulted in a presumption of prejudice that would require reversal unless the record affirmatively demonstrated the instruction had no influence on the jury's verdict prejudicial to the defendant. The postconviction court found that because the evidence against Everett was overwhelming, he was not prejudiced by his absence during the consideration of the jury question. Thus, the postconviction court denied Everett's application for postconviction relief. Everett appeals, arguing: (1) a proper reading of relevant case law and rules of criminal procedure reveals that a court's failure to require a defendant's presence during consideration of a jury's question will invalidate all further proceedings, and no prejudice need be shown; and (2) even if a showing of prejudice were necessary, the postconviction court erred in finding Everett was not prejudiced by his absence during the discussion of the jury question.

## **II. Standard of Review**

The standard of review on appeal from the denial of postconviction relief is for errors at law. *Kane v. State*, 436 N.W.2d 624, 626 (Iowa 1989). To the extent Everett's claims involve constitutional rights, our review is de novo. *Taylor v. State*, 352 N.W.2d 683, 684 (Iowa 1984).

## **III. Error Preservation**

The State argues Everett did not preserve error because he did not raise the issue of judge-jury communications on direct appeal. “[A]ny claim not properly raised on direct appeal may not be litigated in postconviction unless there is a showing of ‘sufficient reason’ or ‘cause’ for not properly raising it previously, and of actual prejudice resulting from the alleged error.” *Osborn v. State*, 573 N.W.2d 917, 921 (Iowa 1998). The State asserts Everett failed to show cause or prejudice, and therefore, his claim is waived.

### **A. Cause**

The record supports Everett's assertion that he was unaware the jury had posed a question until he received the full trial transcript after direct appeal. The rule requiring claims to be raised on direct appeal is not absolute. *Berryhill v. State*, 603 N.W.2d 243, 245 (Iowa 1999). It is not applied in a case where factual or legal matters were excusably unknown at the time of trial and appeal, and thus such a claim may be properly asserted on postconviction. *Stanford v. Iowa State Reformatory*, 279 N.W.2d 28, 33 (Iowa 1979) (noting key inquiry was whether applicant “deliberately and inexcusably” failed to pursue contentions on appeal). In this case, Everett did not know of the judge-jury communication until after

direct appeal. We find this constitutes sufficient reason for not raising this issue on direct appeal.

### **B. Prejudice**

In order to litigate this claim in postconviction without first having raised it on direct appeal, Everett must also show “actual prejudice resulted from [his] claim of error” that the district failed to require his presence when responding to the jury’s question. *Berryhill*, 603 N.W.2d at 245. To demonstrate this prejudice, Everett must show that the district court’s errors “worked to his . . . actual and substantial disadvantage, infecting the entire trial with error of constitutional dimensions.” *Polly v. State*, 355 N.W.2d 849, 855 (Iowa 1984) (citing *U.S. v. Frady*, 456 U.S. 152, 171, 102 S. Ct. 1584, 1596, 71 L. Ed. 2d 816, 832 (1982)) (emphasis omitted).

We find that the record as a whole demonstrates that the district court’s failure to require Everett’s presence when responding to the jury’s question worked to Everett’s actual and substantial disadvantage. The State’s witnesses at trial presented contradicting testimony regarding the existence of a knife during the holdup. Further, the police did not find a knife on Everett’s person or in the path along which he fled. The jury’s question suggested that the jury may have doubted that Everett actually had a knife at the time of the holdup. As the district court judge recognized when discussing with counsel how to respond to the jury’s question, if the jury did not believe Everett had a knife, it is likely they would move to the lesser-included offense of second-degree robbery. Because the evidence on the existence of a weapon, an element of first-degree robbery, was not overwhelming and the judge’s answer was not responsive to the jury’s

question, we find Everett was prejudiced by the district court's failure to require his presence when responding to the jury's question. See *Fradley*, 456 U.S. at 169-74, 102 S. Ct at 1595-98, 71 L. Ed. 2d at 831-34 (finding defendant could not prove prejudice when the record compelled the conclusion that there was "malice aplenty"); *Polly*, 355 N.W.2d at 858 (finding defendant could not prove prejudice in light of the "overwhelming evidence" of a "gruesome and savage attack").

#### **IV. Defendant's Presence During Judge-Jury Communication**

A criminal 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). This right is implemented by Iowa Rule of Criminal Procedure 2.27(1).

Iowa Rule of Criminal Procedure 2.19(5)(g) extends this right to conversations between the judge and jury; it states:

After the jury has retired for deliberation, if there be any disagreement as to any part of the testimony, or if it desires to be informed on any point of law arising in the cause, it must require the officer to conduct it into court, and, upon its being brought in, the information required may be given, in the discretion of the trial court. . . . The procedures described shall take place in the presence of defendant and counsel for the defense and prosecution, unless such presence is waived.

We agree with the postconviction court that the district court erred in conducting proceedings outside of Everett's presence.<sup>1</sup>

Everett argues that the trial court has a mandatory duty to hold all proceedings in the defendant's presence and that a failure to impose this duty automatically invalidates subsequent proceedings, without any consideration of

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<sup>1</sup> Everett's counsel testified he did not have permission to waive Everett's presence; therefore, we need not address the issue of waiver.

the resulting prejudice. We disagree. In *State v. Snyder*, 223 N.W.2d 217, 221-22 (Iowa 1974), the supreme court held that a defendant's absence from conversations between the judge and jury raises a presumption of prejudice necessitating reversal unless the record affirmatively shows the instruction had no influence on the jury's verdict prejudicial to the defendant. See also *McLaughlin v. State*, 533 N.W.2d 546, 548 (Iowa 1995); *State v. Wise*, 472 N.W.2d 278, 279 (Iowa 1991); *Meyers*, 426 N.W.2d at 616. Thus, Everett's absence raised a presumption of prejudice, and in order to avoid reversal, the State must affirmatively show the district court's actions did not have a prejudicial influence on the jury.

Everett argues that two of our supreme court's opinions regarding a defendant's constitutional right to be present when a criminal jury submits a question to the court, *State v. McKee* and *State v. Griffin*, present contradictory standards. See *State v. Griffin*, 323 N.W.2d 198 (Iowa 1982); *State v. McKee*, 312 N.W.2d 907 (Iowa 1981). In *McKee*, during jury deliberations, the jury directed a question to the court asking for a definition of "protracted injury," as it was used to define "serious injury," which was an element of first-degree sexual abuse, the crime with which McKee was charged. 312 N.W.2d at 914. Without informing McKee, the court gave the jury an instruction including dictionary definitions of "protract" and "prolong." *Id.* The supreme court found that any error in giving the jury a supplemental instruction was harmless beyond a reasonable doubt because the definitions were substantially the same as the definitions included in the original jury instructions. *Id.* at 915.



In *Griffin*, the jury sent a handwritten note to the trial judge asking for the definition of physical injury and how it differed from the definition of assault. 323 N.W.2d at 199. Without consulting the defendant, the trial judge replied, “You will have to define the terms from the language given in the instructions and reconcile the definitions as best you can by reading the instructions.” *Id.* Subsequently, the jury convicted Griffin of first-degree burglary and second-degree robbery. *Id.* The Iowa Supreme Court reversed the conviction and granted Griffin a new trial, finding the case raised “serious questions concerning the effect of the jury’s confusion over the meaning of crucial terms in the instructions.” *Id.* at 201. Finding this confusion could have influenced the result, the supreme court found the record did not disclose any facts to overcome the presumption of prejudice beyond a reasonable doubt. *Id.*

We agree with the State that *McKee* and *Griffin* reach different results because of factual and legal distinctions. The supreme court in *Griffin* distinguished that case from its previous opinion in *McKee*, saying, “Unlike *McKee*, this case raises serious questions concerning the effect of the jury’s confusion over the meaning of crucial terms in the instructions.” *Id.* The request for definitions in *McKee* did not involve confusion on a “point of law” as did the request in *Griffin* for a reconciliation of two instructions containing similar terms. *Griffin*, 323 N.W.2d at 201; *McKee*, 312 N.W.2d at 915. In *Griffin*, the court failed to ensure the defendant’s presence when responding to a jury question on a

“point of law” as required by then Iowa Rule of Criminal Procedure 18(5)(g).<sup>2</sup> *Griffin*, 323 N.W.2d at 199-200.

In analyzing error preservation, we have already decided that Everett has shown that he suffered actual prejudice from the court’s failure to require his presence during discussion of the jury’s question. Additionally, we agree with Everett that his case is factually similar to *Griffin* and apply the same legal reasoning from *Griffin* to conclude that the State has not proved that the record as a whole contains evidence to overcome the presumption of prejudice on his substantive claim. *Griffin*, 323 N.W.2d at 201 (“The absence of prejudice may appear from the whole record and need not be established by evidence directed toward this specific point.”). The jury posed a question showing confusion of the meaning of crucial terms in the instruction. Specifically, the jury demonstrated confusion regarding the requirement that the State prove beyond a reasonable doubt the legal element of first-degree robbery that the defendant possessed a weapon. The district court’s answer directing the jury to reread the jury instructions provided no remedy to the jury’s confusion regarding the point of law. Thus, it is likely the jury’s confusion influenced the result. Because we find the State has not proved the record as a whole contains evidence to rebut the presumption of prejudice, we are convinced Everett is entitled to a new trial.

**REVERSED.**

Mahan, S.J. concurs. Eisenhower, P.J. dissents.

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<sup>2</sup> Iowa Rule of Criminal Procedure 18(5)(g), has since been renumbered as Iowa Rule of Criminal Procedure 2.19(5)(g) but has not changed substantively.

**EISENHAUER, P.J.** (dissenting)

I dissent. I agree with the trial court's conclusion Everett cannot show prejudice. The evidence of the presence of a weapon was overwhelming. The witness who observed the knife described it and was certain of seeing it. The other witness, although not seeing the knife, had the distinct impression Everett had a knife when he moved his hand.