STATE OF WISCONSIN

COURT OF APPEALS

DISTRICT I

Case No. 2017AP943-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

ROMAN D. LOVELACE,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION AND ORDER DENYING POSTCONVICTION RELIEF, ENTERED IN MILWAUKEE COUNTY CIRCUIT COURT, THE HONORABLE STEPHANIE G. ROTHSTEIN, PRESIDING

RESPONSE BRIEF AND SUPPLEMENTAL APPENDIX OF PLAINTIFF-RESPONDENT

BRAD D. SCHIMEL
Wisconsin Attorney General

SARA LYNN SHAEFFER
Assistant Attorney General
State Bar #1087785

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-5366
(608) 266-9594 (Fax)
shaeffersl@doj.state.wi.us

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ISSUES PRESENTED

The State rephrases the issues on appeal.

1. A jury convicted Defendant-Appellant Roman D. Lovelace of burglary, as party to a crime, and obstructing an officer. During jury deliberations, the jury sent a note to the court inquiring, "Please explain how burglary and party to a crime relate and are they two separate charges or one in the same?" The court notified the parties of the jury's question and then responded to the jury, "Please review the instructions in the notebook for the answers you seek." The record and CCAP entries indicate that Lovelace did not object. Has Lovelace forfeited his argument that he and his counsel had a right to be present when the court communicated its note to the deliberating jury?

The postconviction court did not consider or decide this issue.

2. The trial court's response to the jury's question was to refer to the agreed-upon jury instructions, which the court had read to the jury. If Lovelace was not present, was he denied a fair and just hearing by virtue of his absence? Was he prejudiced by his counsel's absence?

The postconviction court determined that even if it did not consult the parties before responding to the jury's question, such action did not prejudice Lovelace because (1) he could not have gained anything by being present, and (2) he could not have meaningfully participated in the court's response.

INTRODUCTION

This Court should affirm the postconviction court's order that denied Lovelace's motion for postconviction relief. This Court need not address Lovelace's issue regarding the trial court's response to the jury question on the merits,

however, because Lovelace has forfeited the issue by not objecting at the trial court.

Should this Court determine the issue on the merits, it should affirm the postconviction court's decision that Lovelace was not prejudiced when the trial court answered the jury question without Lovelace or his attorney present. Lovelace could not have gained anything by being present when the court fashioned its response to the jury's question, nor could he have meaningfully participated in formulating the court's response, which merely directed the jury to review the instructions that had already been given in his presence. Finally, while the State agrees that Lovelace's counsel should have been present for the court's communication to the jury, such communication in this case did not result in prejudice to Lovelace because the judge correctly answered the jury's question. Such error was harmless. This Court should affirm.

STATEMENT OF ORAL ARGUMENT AND PUBLICATION

The State does not believe that oral argument or publication are necessary. This case can be resolved by applying well-established case law, and the State believes that the parties' briefs adequately address the issue presented.

STATEMENT OF THE CASE

A jury convicted Lovelace of burglary, as party to a crime, and obstructing an officer. (R. 33.) The evidence at trial indicated that on January 19, 2015, Lovelace and another participant intentionally broke into a house without consent of the owner in an attempt to steal from it. (R. 70:41, 43–45, 48.) When police officers arrived, Lovelace attempted to flee, despite being ordered to stop. (R. 69:6, 18, 28–30, 33.)

After the defense rested its case, the court instructed the jury. With respect to the definition of party to a crime, the court instructed the jury:

> Now, the Criminal Code of Wisconsin provides that whoever is concerned in the commission of a crime is a party to that crime and may be convicted of that crime although that person did not directly commit it. The State contends that the defendant was concerned in the commission of the crime of burglary by either directly committing it or by intentionally aiding and abetting the person who directly committed it. If a person intentionally aids and abets the commission of a crime, then that person is guilty of the crime as well as the person who directly committed it.

(R. 69:68.) The court also informed the jury that not all twelve jurors "have to agree whether the defendant directly committed the crime or aided and abetted the commission of the crime; however, each juror must be convinced beyond a reasonable doubt that the defendant was concerned in the commission of the crime in one of those ways." (R. 69:69.)

Finally, the court instructed the jury on the elements of the crime of burglary:

> Burglary, as defined by the Criminal Code of Wisconsin, is committed by one who intentionally enters a building without the consent of the person in lawful possession and with intent to steal.
>
> Before you may find the defendant guilty of this offense, the State must prove by evidence which satisfies you beyond a reasonable doubt that the following four elements were present: One, the defendant intentionally entered a building. Two, the defendant entered the building without the consent of the person in lawful possession. Three, the defendant knew that the entry was without consent. And, four, the defendant entered the building with intent to steal.

(R. 69:69–70.)

During its deliberations on January 12, 2016, the jury sent questions to the trial court. The only jury question relevant to this appeal stated: "Please explain how Burglary and party to a crime relate and are they two separate charges or one in the same?" (A-App. 19.) The jury sent the question at 4:05 p.m. (*Id.*) Twelve minutes later, at 4:17 p.m., the court responded, "Please review the instructions in the notebook for the answers you seek." (*Id.*) The jury continued to deliberate, but they had not reached a verdict by the end of the day. They were dismissed for the night and asked to return to deliberate the next day.

Deliberations resumed the next morning, January 13, 2016. (R. 71.) The record reflects that at no time on January 12 or 13, 2016, did Lovelace's counsel object to the trial court's response, "Please review the instructions in the notebook for the answers you seek." (A-App. 19.) Further, CCAP indicates that the court notified the parties before providing a written response to the jury. (*See* R-App. 107, entry 57 (providing: "Three jury questions received and filed. Parties notified. Written responses to each question returned to the jury room.").)

The jury ultimately found Lovelace guilty of burglary, as party to a crime, and obstructing an officer. (R. 71:3–4.)

Lovelace moved for postconviction relief, requesting a new trial. (R. 47.) He argued that the trial court's response to the jury question violated his statutory and constitutional right to be present during all stages of the trial because the record reflected that the court did not confer with the parties before responding. (R. 47:1–9.)

The court denied his motion. (R. 53.) It held 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." (R. 53:3.) The court determined that Lovelace "could not have gained anything by being present

when the court fashioned its written response to the jury's question, nor could he have meaningfully participated in formulating the court's response, which merely directed the jury to review the instructions that had already been given in his presence." (R. 53:3.) Additionally, the court noted, Lovelace did not claim that the court *incorrectly* answered the jury's question. (R. 53:3.)

Lovelace appeals.

ARGUMENT

I. Lovelace has forfeited his claim that the trial court violated his right and his counsel's right to be present when the trial court communicated its response to the jury.

Lovelace claims that he and his trial counsel had a right to be present "during this critical stage of the trial." (Lovelace's Br. 15.) But because Lovelace failed to timely object to the trial court, he has forfeited this claim.

"The Sixth Amendment to the United States Constitution provides an accused the right to a public trial. . . . The Supreme Court has determined that the public trial right is applicable to the states based on its incorporation into the Fourteenth Amendment." *State v. Pinno*, 2014 WI 74, ¶ 40, 356 Wis. 2d 106, 850 N.W.2d 207. In *Pinno*, the Wisconsin Supreme Court held that claims of constitutional errors, even structural errors such as denial of the right to a public trial, may be deemed forfeited if a timely objection is not made. *Pinno*, 356 Wis. 2d 106, ¶¶ 7–8. The court explained that "[i]t would be inimical to an efficient judicial system if a defendant could sit on his hands and try his luck" with trial despite the structural error "only to argue after his conviction" that his constitutional rights had been violated. *See id.* ¶ 7. *See also State v. Ndina*, 2009 WI 21, ¶ 30, 315 Wis. 2d 653, 761 N.W.2d 612 (providing that "some rights are forfeited

when they are not claimed at trial; a mere failure to object constitutes a forfeiture of the right on appellate review"); and *State v. Huebner*, 2000 WI 59, ¶¶ 10–11 & n.2, 235 Wis. 2d 486, 611 N.W.2d 727 (providing that the forfeiture rule gives the parties and court notice of the issue and a fair opportunity to address the objection).

This Court should not deviate from that rule in this case. Here, CCAP clearly indicates that the parties were notified of the jury question. (R-App. 107, entry 57.) *See Kirk v. Credit Acceptance Corp.*, 2013 WI App 32, ¶ 5 n.1, 346 Wis. 2d 635, 829 N.W.2d 522 (providing that this Court may take judicial notice of CCAP entries). Lovelace points to nothing in the record or on CCAP that he ever objected to (1) not being present when the court responded, (2) his attorney not being present when the court responded, or even (3) the court's written response to the jury. (Lovelace's Br. 14.) Assuming that Lovelace was not present or that his counsel was not present to consult when the court answered the jury's question, the parties were notified, and nothing in the record or CCAP indicates that Lovelace ever objected to his absence or his attorney's absence. Had Lovelace's attorney believed that he should have been consulted, that his client should have been present, or that the court improperly answered the jury's question, an objection would have been made. That did not happen.

Accordingly, this Court should apply *Pinno* and conclude that Lovelace forfeited his claim that the trial court violated his right and his trial counsel's right to be present during the court's communication with the jury.

Should this Court determine that Lovelace did not forfeit his argument, he nevertheless loses on the merits of his claim.

II. Lovelace was not denied a fair and just hearing by virtue of his absence from the trial court's communication with the jury because Lovelace could not have gained anything by being present, and he could not have meaningfully participated in the court's response. Similarly, Lovelace has not shown that he was prejudiced by his attorney's absence because the court correctly instructed the jury.

A. Standard of review.

This case requires this Court to determine whether Lovelace and his counsel had a constitutional or statutory right to be present when the trial court responded to the jury's question. The interpretation and application of constitutional and statutory provisions are questions of law this Court reviews *de novo*. *State v. Alexander*, 2013 WI 70, ¶ 18, 349 Wis. 2d 327, 833 N.W.2d 126.

B. Legal principles: right to be present and right to have counsel present.

"Both the right to be present and the right to have counsel present are guaranteed by article I, section 7 of the Wisconsin Constitution and the Sixth and Fourteenth Amendments to the United States Constitution." *State v. Carter*, 2010 WI App 37, ¶ 19, 324 Wis. 2d 208, 781 N.W.2d 527.

In *Alexander*, the Wisconsin Supreme Court provided that "the presence of [a] defendant is constitutionally required only to the extent a fair and just hearing would be thwarted by his absence. . . . The constitution does not assure 'the privilege of presence when presence would be useless, or the benefit but a shadow.'" *Alexander*, 349 Wis. 2d 327, ¶ 22 (alteration in original) (citation omitted) (quoting another source). The test for whether a defendant's presence is required during communications with the jury "is whether his

absence would deny him a fair and just hearing." *Id.* ¶ 1. "[T]he factors a trial court should consider in determining whether a defendant's presence is required to ensure a fair and just hearing include whether the defendant could meaningfully participate, whether he would gain anything by attending, and whether the presence of the defendant would be counterproductive." *Id.* ¶ 4.

A defendant has the constitutional right to be represented by counsel at "all critical stages of the trial." *Carter*, 324 Wis. 2d 208, ¶ 18 (quoting another source). "A critical stage is any point in the criminal proceedings when a person may need counsel's assistance to assure a meaningful defense." *Id.* (quoting another source).

C. A fair and just trial was not thwarted by the court's answer to the jury's question outside of Lovelace's presence.

Lovelace asserts that he had a right to be present at "every stage of his trial," under the United States and Wisconsin Constitutions, and also under Wis. Stat. § 971.04(1)(b), which provides that a defendant shall be present "at trial." (Lovelace's Br. 10.) He relies on language in *State v. Anderson*, 2006 WI 77, ¶ 43, 291 Wis. 2d 673, 717, N.W.2d. 74, which provides that "[a] substantive step in a trial for which an accused has a right to be present includes the circuit court's communications with the jury during deliberations." The issue in *Anderson* was the propriety of "the circuit court's ex parte communications with the jury during deliberations outside the presence of the defendant and without notice to or consultation with the defendant." *Id.* ¶ 23.

But *Anderson* was overruled by *Alexander*, 349 Wis. 2d 327. The *Alexander* court noted: "*Anderson* changed what should have been a fact-specific due-process inquiry (did the communication between the judge and jury deny the defendant a fair and just hearing?) into an absolute

Confrontation Clause right to be present whenever the trial court speaks with members of the jury. We thus withdraw all language from *Anderson* intimating such a right." *Alexander*, 349 Wis. 2d 327, ¶ 28. The *Alexander* court also noted that *Anderson* never cited to case law that made clear "that a defendant has a due-process right to be present at an in-chambers meeting only if his absence would deny him a 'fair and just hearing.'" *Id*. (citing *Leroux v. State*, 58 Wis. 2d 671, 690, 207 N.W.2d 589 (1973); *Ramer v. State*, 40 Wis. 2d 79, 85, 161 N.W.2d 209 (1968)).

Finally, the *Alexander* court opined that *Anderson* was an "outlier." *Alexander*, 349 Wis. 2d 327, ¶ 29. It recognized that the United States Supreme Court has said that the "mere occurrence of an ex parte conversation between a trial judge and a juror does not constitute a deprivation of any constitutional right. The defense has no constitutional right to be present at every interaction between a judge and juror, nor is there a constitutional right to have a court reporter transcribe every such communication." *Id*. (citing *United States v. Gagnon*, 470 U.S. 522, 526 (1985)) (internal quotation marks and citation omitted).

In this case, Lovelace's absence did not result in a due process violation of his right to be present because a fair and just trial was not thwarted by the court's answer to the jury's question outside of his presence. *May v. State*, 97 Wis. 2d 175, 293 N.W.2d 478 (1980), a case analogous to the facts and arguments at issue in this case, supports the State's position. In that case, during deliberations the jury asked the trial court the following question related to delivering a controlled substance as a party to a crime: "By withdrawing from a conspiracy has a person removed themselves (sic) from aiding and abetting the commission of a crime?" *Id*. at 180. The trial court answered the question "no," without informing the defendant or his attorney. *Id*. On appeal, the defendant raised two issues: (1) whether the trial court erred in answering the

question in the absence of counsel, and (2) whether trial court erred in answering the question in the absence of the defendant. *Id.*

As to the first question, the supreme court answered that because "there was no waiver in this case, counsel should have been given the opportunity to confer with the court about the appropriate response to be given to the jury's question. It was error for the trial court to answer the question without notifying counsel." *May*, 97 Wis. 2d at 183–84. On the second question, the supreme court held that "[a] fair and just trial was not thwarted by the court's answering that question outside the defendant's presence. The question posed by the jury dealt with a question of law and the trial court answered it correctly." *Id.* at 186. Additionally, the supreme court noted that "[n]othing transpired which was prejudicial or harmful to the defendant's cause, especially in view of the fact that the trial court subsequently reread to the jury the instructions concerning party to a crime." *Id.* Therefore, the communication between the judge and jury did not constitute prejudice to the defendant and the error was harmless by any standard. *Id.* at 175.

In adopting the State's argument in its postconviction order in *this* case, the postconviction court determined:

> *May* is almost identical to the case at bar. Here, too, the jury asked a question of law. Assuming *arguendo* that the parties were not notified of the jury's question, there would still be no grounds for the relief sought by defendant. Unlike *May*, the Court in this case did not even fashion a substantive response. The Court instead directed the jury to consult the jury instructions for their answer. These are the same jury instructions that were approved by both parties. It is clear that nothing transpired which was prejudicial or harmful to the defendant's case. The jury instructions themselves could not be prejudicial to the defendant.

(R. 53:3.)

The postconviction court's determination is correct. Lovelace would not have gained anything by being present when the court provided its written response to the jury's question, nor could he have meaningfully participated in formulating the court's response, which merely directed the jury to review the instructions that had already been given. And Lovelace makes no claim in his brief that a different response to the jury's question would have been more appropriate. He provides no alternatives.

Finally, the procedure adopted by the trial court does not contravene Wis. Stat. § 971.04 because that statute "does not require the defendant to be present before the trial court can respond to every question posed by a deliberating jury." *May*, 97 Wis. 2d at 187. The jury question in *May* "related to a question of law," and yet the court *still* held that "the defendant's absence at the time of the communication did not result in a non-compliance with the provisions of sec. 971.04." *Id.* at 188. But as the postconviction court noted in this case, the court "did not even fashion a substantive response." (R. 53:3.) Rather, the trial court merely instructed the jury to review the already agreed-upon jury instructions. Therefore, Lovelace's claim that the trial court violated Wis. Stat. § 971.04 also fails.

D. The communication between the judge and the jury did not prejudice Lovelace.

Lovelace finally argues that he was entitled to have counsel present when the trial court communicated with the jurors. (Lovelace's Br. 15.) According to Lovelace, had his counsel been aware of the jury's note, "he would have had an opportunity to make arguments to the [c]ourt as to how the [c]ourt should have responded to their question." (*Id.*) The State agrees with Lovelace that his attorney should have been given the opportunity to confer with the court about its response. *See Alexander*, 349 Wis. 2d 327, ¶ 25 ("All that is

required when the court communicates with members of the jury is that the defendant's *attorney* be present.") (citing *May*, 97 Wis. 2d at 183–84). However, contrary to Lovelace's argument, this does not automatically result in reversible error.

May also addressed this issue, and the *May* court's holding applies here. In *May*, the court of appeals held that it was error for the trial court to respond to the jury's question in the absence of defense counsel when defense counsel did not waive his absence. But the court of appeals found that the error was harmless since the trial court correctly answered the question. *May*, 97 Wis. 2d at 181–82. The supreme court agreed. It provided: "Since there was no waiver in this case, counsel should have been given the opportunity to confer with the court about the appropriate response to be given to the jury's question. It was error for the trial court to answer the question without notifying counsel." *Id.* at 184. But, the supreme court held, the communication between the court and jury did *not* result in prejudice to the defendant because the court correctly answered the jury's question. *Id.*

As in *May*, the record in this case does not suggest that counsel waived his right to be present. And, as in *May*, the defendant in this case was not prejudiced because the trial court correctly answered the jury's question.[1] Therefore, such error was harmless. *See also State v. Deadwiller*, 2013 WI 75, ¶ 41, 350 Wis. 2d 138, 834 N.W.2d 362 ("[A]n error is harmless if the beneficiary of the error proves beyond a reasonable

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[1] As the postconviction court noted, "The defendant makes no claim that the [trial] court answered the jury's question incorrectly." (R. 53:3.) Additionally, in his appellate brief, Lovelace provides no explanation of how the trial court *should* have instructed the jury, other than conclusory claim that "[h]ad defense counsel been made aware of the jurors' note, he would have had an opportunity to make arguments to the [c]ourt as to how the [c]ourt should have responded to their question." (Lovelace's Br. 15.)

doubt that the error complained of did not contribute to the verdict obtained."); and *State v. Tulley*, 2001 WI App 236, ¶ 7, 248 Wis. 2d 505, 635 N.W.2d 807 ("Generally, an error is harmless if there is no reasonable possibility that it contributed to the conviction."). In this case, there is no reasonable possibility that Lovelace's counsel's absence when the trial court instructed the jury to refer to the already agreed-upon jury instructions contributed to Lovelace's conviction.

CONCLUSION

This Court should affirm the judgment of conviction and postconviction order denying relief.

Dated this 15th day of September, 2017.

Respectfully submitted,

BRAD D. SCHIMEL
Wisconsin Attorney General

SARA LYNN SHAEFFER
Assistant Attorney General
State Bar #1087785

Attorneys for Plaintiff-Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-5366
(608) 266-9594 (Fax)
shaeffersl@doj.state.wi.us

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 3519 words.

_____
SARA LYNN SHAEFFER
Assistant Attorney General

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I hereby certify that:

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Dated this 15th day of September, 2017.

_____
SARA LYNN SHAEFFER
Assistant Attorney General

Supplemental Appendix
State of Wisconsin v. Roman D. Lovelace
Case No. 2017AP943-CR

SUPPLEMENTAL APPENDIX CERTIFICATION

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is a supplemental appendix.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

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SARA LYNN SHAEFFER
Assistant Attorney General

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SARA LYNN SHAEFFER
Assistant Attorney General