STATE OF WISCONSIN COURT OF APPEALS DISTRICT I

STATE OF WISCONSIN,
Plaintiff- Respondent

vs. Appeal No. 2017AP000943 CR

ROMAN D. LOVELACE
Defendant- Appellant

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

REPLY BRIEF OF DEFENDANT- APPELLANT

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POINT I

THE CIRCUIT COURT'S WRITTEN COMMUNICATION WITH THE JURORS DURING THEIR DELIBERATIONS IN ANSWERING THEIR QUESTIONS, AS TO THE RELATIONSHIP BETWEEN BURGLARY AND PARTY TO A CRIME AND WHETHER THEY WERE SEPARATE CHARGES, VIOLATED THE DEFENDANT'S STATUTORY RIGHT TO BE PRESENT DURING ALL STAGES OF THE TRIAL AND HIS CONSTITUTIONAL RIGHT TO COUNSEL DURING THE TIME OF THOSE COMMUNICATIONS AND, THEREFORE, HE IS ENTITLED TO A NEW TRIAL.

The issue that was raised in the Postconviction Motion and the appeal to the Court of Appeals, District I, was whether the Circuit Court's written communication with the jurors in response to their note asking about whether Burglary and party to a crime were two separate crimes, had been improper because neither defense counsel nor the defendant had been present when the Court had prepared its answer to that question and sent it back to the jurors.

The state's first response in the Respondent's Brief to the arguments that had been made was that since defense counsel had not objected to this procedure, the defendant had waived this claim. That is argument is ludicrous. First of all, §805.13(1) Wis. Stats. requires that, "After the trial jury is sworn, **all** statements or comments by the judge to the jury or in their presence relating to the case **shall** be on the record." There is no exception to the statutory rule.

In the Respondent's Brief, the state said that in the CCAP notes of this case, it states, on January 13, 2016, that, "Juror deliberations resumed at 9:42 a.m. Three jury questions received and filed. Parties notified. Written responses to each question returned to the jury room." This notation specifically states that it was "Off the Record".

The CCAP notation, which had been made after the trial had been completed, was not a substitute for a record being made by a Court Reporter of the communication between the Circuit

Court Judge and the jurors in this case. Further, the note is absolutely ambiguous. It state that the parties were notified.

It does not state what they were notified of or when they were notified. It does not state that the attorneys on both sides had been given the opportunity to return to the courtroom to be present when the Court determined its response to the jurors. It does not state that defense counsel had even learned at any time during the juror's deliberations of the jurors' specific questions. It also does not state that the defendant had ever been made aware that the jurors had ever asked any questions during their deliberations or what those questions had been. It does not even state whether the prosecutor had been made aware of what those questions had been. It merely states that "Written responses to each question were returned to the jury room."

Defense counsel could not have been expected to raise an objection to the Court's communication with the jurors or the manner in which that communication had been made because there is no indication on the record that he ever knew what they were. Had the communication been placed on the record, as the statute required, this type of problem would not have existed in this case.

The state's arguments regarding the specific issues involved in whether either the defendant and/or the defense attorney were required to be present during this communication between the Court and the jurors during their deliberations were also inaccurate. In its Respondent's Brief, the state argued that according to *State v. Alexander*, 2013 WI 70, 349 Wis. 2d 327, 833, N.W. 2d 126, the defendant's presence during a proceeding during the trial is only constitutionally required to the extent that "a fair and just hearing" would be thwarted by his absence. The state also argued that under *Alexander*, the constitution does not assure the privilege of presence when presence would be "useless or the benefit but a shadow".

The problem with the state's reliance on these rulings in *Alexander* is that that case did not deal with communications between the trial court and the jurors during their deliberations. I specifically dealt with two separate conferences that the Court had had with two jurors who had recognized people in the courtroom. The defendant was not present during those conferences. The Court in *Alexander* stated that, "This case requires us to determine whether Alexancer had a constitutional or statutory right to be present during the court's in-chambers discussions with two jurors." Id. at 337.

The Court then, in dicta, began discussing cases involving communications between the trial court and the jurors during their deliberations – communications in which the defendant had not been present. In regard to that specific issue, Court stated that it was adopting the rulings set forth in *May v. State,* 97 Wis. 2d 175, 293 N.W. 2d 478 (1980). The Court, quoting from *May,* held that the defendant had not been denied "a fair and just trial" because he had been absent during the communication between the Court and the jurors during their deliberations. Id. at 341.

Specifically, the Court held that, "The question posed by the jury dealt with a question of law and the trial court answered it correctly." Id. at 341. However, the Court then held that, "All that due process and Wis. Stat. §971.04 Wis. Stats. required was that the defendant's attorney be present." Id. at 341. Therein lies the tremendous difference between *Alexander* and this case. In *Alexander,* all the while that the Court was communicating with two jurors about the persons they had seen in the courtroom, the defendant's attorney was present. In fact, the record indicated that the attorney had informed the defendant about what had been said during the conferences after they had been concluded.

In regard to the issue of the absence of counsel during a communication between the Court and the jurors during their deliberations, the Court in *May* held that, "Our rule provides that counsel has a right and a duty to be present when additional instructions are requested by the jury." Id. at 182. It also held that if counsel had not waived his right to be present during such a communication, "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 183-814.

The Court then stated that there was an exception to that rule. It stated that if the Court correctly answered the jury's question, the communication between the Court and the jurors without counsel being present was not prejudicial to the defendant and, therefore, the error would be considered to be harmless. Id. at 184.

The Court in *Alexander* stated that that would be the rule of law in cases involving communications between the Court and the jurors during their deliberations. Id. at 343. The problem was that *Alexander* did not involve that circumstance.

In the Respondent's Brief, the state conceded that, "The State agrees with Lovelace that his attorney should have been given the opportunity to confer with the court about its response." (Resp. Brief, p. 11). However, the state argued that since the Circuit Court had correctly answered the juror's question, the error in not having counsel present was harmless. However, that very narrow exception to the constitutional requirement that counsel be present when the Court communicates with the jurors during their deliberations does not apply in this case. When the jury asked their question, "Please explain how Burglary and party to a crime relate and are they two separate charges or one in the same?", and when the Court wrote on the bottom of their

note, “Please review the instructions in the notebook for the answer you seek”, the Court’s response did not answer their question.

The jurors’ question showed a very real and substantial confusion on the part of the jury as to what constituted the elements of the crime of Burglary and the connection between the crime and the doctrine of party to a crime. As it was noted in the Postconviction Motion and the appeal in the Court of Appeals, District I, if defense counsel had been present during the communication, he would have had an opportunity to give some input to the Court as to how to advise the jury and specifically, how to answer their question that, no, Burglary and party to a crime are not two separate crimes.

It would then have been up to the Court to decide whether to accept counsel’s advice as to how to answer the jurors’ question and if it decided not to accept it, counsel could have objected. Merely stating that the Court could be excused for not having counsel present when it wrote that answer to the jurors’ question on the bottom of their note does not stand constitutional muster.

It is, therefore, respectfully requested that the denial of the Postconviction Motion be reversed, that the defendant’s conviction be reversed and that a new trial be ordered.

Dated: September 29, 2017
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CERTIFICATION AS TO FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in §809.19(8)(b) and (c) Wis. Stats. for a brief produced with a proportional serif font.

The Reply Brief contains 1,545 words.

Dated: September 29, 2017

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Esther Cohen Lee
Attorney for Defendant-Appellant

CERTIFICATION AS TO COMPLIANCE WITH RULE 809.19(12)

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of §809.19(12) Wis. Stats. I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed on or after this date.

A copy of this certificate has been served with paper copies of this brief filed with the court and served on all opposing parties.

Dated: September 29, 2017

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