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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0381**

State of Minnesota,
Respondent,

vs.

Chad William Kasal,
Appellant.

**Filed February 25, 2019
Affirmed
Worke, Judge**

Ramsey County District Court
File No. 62-CR-17-1106

Keith Ellison, Attorney General, St. Paul, Minnesota; and

John J. Choi, Ramsey County Attorney, Peter R. Marker, Assistant Ramsey County Attorney, St. Paul, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Julie Loftus Nelson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Bjorkman, Judge; and Klaphake, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

WORKE, Judge

Appellant argues that he is entitled to a new trial because the district court communicated with the jury outside of open court without his consent or knowledge, and without making a contemporaneous record of the communication. We affirm.

FACTS

On June 30, 2016, L.W.-A. went to a bar where she met an acquaintance and appellant Chad William Kasal whom L.W.-A. did not know. After L.W.-A.'s acquaintance left, she and Kasal remained at the bar together.

Later, L.W.-A. and Kasal left together. L.W.-A. felt a friendly connection with Kasal. Kasal accompanied L.W.-A. when she walked her dogs and then went into her condo with her. L.W.-A. and Kasal talked and listened to music before L.W.-A. stated that she was tired and going to bed. Kasal followed L.W.-A. to her bedroom and got into bed beside her. Kasal pressed up against L.W.-A. and she could feel his erection. She told him, "No. No. This isn't going to happen[,] and "I don't want to do this. This isn't what I want to do. Don't." Kasal turned L.W.-A. onto her stomach and penetrated her anally and vaginally.

L.W.-A. "froze" and thought "how much [she] didn't want this to happen." After the assault, L.W.-A. got Kasal's phone number in order to have some of his information, and told him to get out of her house. After Kasal left, L.W.-A. texted her brother, her roommate, and a cousin, and eventually went to her brother's house.

The day after the assault, L.W.-A. went to the hospital. The sexual assault nurse examiner (SANE) noted injuries to L.W.-A.'s vagina and anus that were indicative of blunt-force trauma, and consistent with L.W.-A.'s account of a sexual assault. L.W.-A. reported the assault to police and Kasal was charged with first- and third-degree criminal sexual conduct.

At his jury trial, Kasal testified that L.W.-A. initiated romantic contact with him. Kasal testified that L.W.-A. invited him upstairs, where she undressed and got into bed. He testified that L.W.-A. initiated sex by getting on top of him. Kasal testified that L.W.-A. became irritated because he had difficulty maintaining an erection. He testified that "she jumped up out of bed and said we probably shouldn't do this. You should probably go." Kasal stated they exchanged numbers and he left.

During the course of the jury's deliberations, the district court and jury engaged each other in five written communications.

Note one: **[District court:]** The Deputy has informed me that you want a timeline. Please be more specific re your request so I can answer more completely.

Note two: **[Jury:]** How late can we go to tonight?
[District court:] How about this: we will check in with you at 6:30 to see how you are doing? Also, we have ordered food for you and will have it around 5:15 or so.

Note three: **[District court:]** How's everybody doing? What are you folks thinking re how late you might want to work?
[Jury:] We are making progress; however, we likely have a fair amount of discussion. And as far as time it seems like people think until 8:30 could work.

Thanks for pizza!
[**District court:**] Sounds Good!

Note four: [Jury:] Can we have ice?
[**District court:**] Best we can do!

Note five: [Jury:] If we were considering the possibility that some of the penetration was consensual [sic] and some was non-consensual [sic] do the personal injuries have to occur during the non-consensual [sic] intercourse in order for 1st degree to apply?
[**District court:**] You are to refer to the final instructions I have given you.

There is no indication in the record that the parties were notified of the communications, nor was anything placed on the record besides the eventual filing of the notes. The jury found Kasal not guilty of first-degree criminal sexual conduct, but guilty of third-degree criminal sexual conduct. The district court sentenced Kasal to 76 months in prison. This appeal followed.

DECISION

Kasal argues that he is entitled to a new trial because the district court violated his due-process rights by communicating with the jury outside his presence. “When an error implicates a constitutional right, we will award a new trial unless the error is harmless beyond a reasonable doubt. An error is harmless beyond a reasonable doubt if the jury’s verdict was surely unattributable to the error.” *State v. Davis*, 820 N.W.2d 525, 533 (Minn. 2012) (citation and quotation omitted).

“A defendant’s constitutional right to be present is grounded in the Confrontation Clause of the Sixth Amendment and the Due Process Clause of the Fourteenth

Amendment.” *Ford v. State*, 690 N.W.2d 706, 712 (Minn. 2005). “In jury communications, Sixth Amendment rights are not at issue because there are no witnesses to confront.” *Id.* The due process right at issue is the defendant’s right to be present at all critical stages of trial. *Id.* This right is not violated, however, “when [the district court] communicates in writing with the jury about a housekeeping matter.” *Id.* at 713. Kasal concedes that portions of the communications regarding dinner and ice constitute housekeeping matters and do not implicate his due-process right to be present.

Kasal asserts, however, that portions of the communications were substantive—as opposed to housekeeping—resulting in prejudice. Before analyzing the impact of any potential error upon the jury’s verdict, we first must determine whether the district court’s communications with the jury regarding the timeline for deliberations implicate Kasal’s right to be present.

Communications regarding timeline for deliberations

Kasal argues that any communication pertaining to the timeline for deliberations is substantive, and implicates his right to be present. The defendant must be present “for every stage of the trial,” including: “any jury questions dealing with evidence or law.” Minn. R. Crim. P. 26.03, subd. 1(1)(f). Reversible error occurs when communications from the district court to the jury can be construed to give the impression that the jury must reach a verdict. *See State v. Hendry*, 636 N.W.2d 158, 167 (Minn. App. 2001) (“In the absence of the attorneys and the defendant . . . an instruction that the jury must reach a verdict is coercive.”), *review denied* (Minn. Jan. 29, 2002); *see also Peterson v. State*, 672 N.W.2d 612, 616 (Minn. App. 2003) (“The response to ‘keep working’ could well be

interpreted to mean that the jury must reach a verdict.”), *review denied* (Minn. Mar. 16, 2004).

The communications regarding the timeline for deliberation are analogous to the communications in *Hendry*, which constitute housekeeping matters and do not implicate Kasal’s due-process right to be present. In *Hendry*, the jury asked, “[i]f we do not reach a consensus by the end of the day, what happens?” 636 N.W.2d at 166. This court concluded that this was a housekeeping question, because it did not “implicate factual or legal questions to be decided by the jury during its deliberations.” *Id.* This court further explained:

[w]hen a jury is deadlocked, and is subsequently instructed that it may not deadlock and that it must reach a verdict, this may constitute reversible error . . . Here, however, the jury asked a vague question about the district court’s sequestration procedures; it did not indicate that it was deadlocked or that it could not reach a verdict by the end of the day.

Id. at 166 n.6 (citation omitted).

The district court’s response is, however, critical. In *Hendry*, the district court did not respond to the jury’s question, and this court determined that the question itself constituted housekeeping. *Id.* at 166. In *Peterson*, the jury asked: “[w]hat happens if we can’t decide? What if we can’t all agree?” 672 N.W.2d at 615. The district court’s reply to “[k]eep working. That’s all I can say now. Keep working” was construed by this court to be a substantive instruction. *Id.* at 616.

Here, there is nothing in the communications that pertains to a potential deadlock, or what the jury is to do in the event of a deadlock. Note one is a request from the district

court for the jury to make a specific request regarding their question about timing. In note two the jury asked: “[h]ow late can we go to tonight?” The district court responded: “[h]ow about this; we will check in with you at 6:30 to see how you are doing?” Finally, in note three the district court asked: “[h]ow’s everybody doing? What are you folks thinking re how late you might want to work?” The jury responded: “we are making progress; however, we likely have a fair amount of discussion. And as far as time it seems like people think until 8:30 could work.”

As in *Hendry*, the communications pertain exclusively to the district court’s sequestration procedure and seek only to clarify when the jury will break for the evening. There is no communication regarding a deadlock. The jury merely informed the district court that it would deliberate until 8:30, which the district court approved. While “any doubt regarding whether a communication relates to a housekeeping or substantive matter should be resolved in favor of [the] defendant’s presence,” *Ford*, 690 N.W.2d at 713, the communications here regarding the timeline for deliberations fall squarely within *Hendry*’s definition of housekeeping and do not implicate Kasal’s due-process right to be present.

Request for instruction on the law

The district court erred by responding in writing outside of open court, without notice to the parties, and outside Kasal’s presence to the jury’s request for additional instruction on the law in note five. See Minn. R. Crim. P. 26.03, subd. 1(1)(f) (the defendant must be present for “any jury questions dealing with evidence or law”); see also *Id.*, subd. 20(3) (“If the jury asks for additional instruction on the law during deliberation, the court

must give notice to the parties. The court's response must be given in the courtroom."). The state, however, maintains that the error was harmless.

"Even if a defendant is wrongfully denied the right to be present at every stage of trial, a new trial is warranted only if the error was not harmless." *State v. Sessions*, 621 N.W.2d 751, 756 (Minn. 2001) (citing *State v. Schifsky*, 69 N.W.2d 89, 96 (Minn. 1955)). "When considering whether the erroneous exclusion of a defendant from judge-jury communications constitutes harmless error, we consider the strength of the evidence, and substance of the judge's response." *Id.* (citations omitted).

The evidence was sufficiently strong to support Kasal's conviction. Due to the conflicting testimony provided by L.W.-A. and Kasal, the jury had to make credibility determinations. "The assessment of a witness's credibility is exclusively the province of the jury." *State v. McCray*, 753 N.W.2d 746, 754 (Minn. 2008) (quotation omitted). The jury's verdict shows that it found L.W.-A. to be more credible.

While not required, L.W.-A.'s account was corroborated. See Minn. Stat. § 609.347, subd. 1 (2014) (stating A criminal-sexual-conduct victim's testimony does not need to be corroborated). Her brother testified that she appeared to be in a state of shock the morning following the incident. Also, the nurse testified that she observed injuries on L.W.-A.'s body consistent with sexual assault. The nurse also testified that L.W.-A.'s reaction to "freeze" during the assault was consistent with the behavior of victims of sexual assault. Finally, the jury heard evidence of text messages between L.W.-A. and Kasal in which L.W.-A. stated: "I told you no" and "[t]hat wasn't consented and you f - - king know it." Kasal's only response was "U [sic] need help." Because the evidence sufficiently

supports the jury's verdict, the district court's erroneous communication with the jury was harmless.

The substance of the district court's response also supports a conclusion of harmless error. In note five the jury asked a complicated question of law. The district court's sole response was: "You are to refer to the final instructions I have given you." No additional instructions or clarifications were given to the jury, nor were the original instructions reread or provided in any new form.

The district court's response directing the jury back to the original instructions is not prejudicial and therefore the error was harmless. *See Sessions*, 621 N.W.2d at 756-57 (stating that the defendant was not prejudiced because the district court did not provide new instructions in response to a jury question); *see also Schifsky*, 69 N.W.2d at 98 (stating that the defendant was not prejudiced because the district court only repeated part of an original instruction).

Failure to make a contemporaneous record

Kasal argues that the district court's failure to make a contemporaneous record in open court of its communications with the jury, without notice to the parties, by itself constitutes reversible error. "If no constitutional right was implicated, we will reverse only if the district court's error substantially influence[d] the jury's decision." *State v. Vang*, 774 N.W.2d 566, 576 (Minn. 2009) (quotation omitted).

Regardless of whether a communication with a deliberating jury is of a housekeeping or substantive matter, the district court should make a contemporaneous record. *State v. Martin*, 723 N.W.2d 613, 625-626 (Minn. 2006) (explaining that the

expected practice is for a district court to convene the parties and make a contemporaneous record of all communications so that the record is clear for appeal).

While it constituted error for the district court to answer the jury's questions without making a contemporaneous record in open court with notice to the parties, based on the above analysis such error is harmless. The evidence presented sufficiently supports Kasal's conviction, and the substance of the district court's responses shows that the error was harmless. While this court does not approve the actions of the district court, the verdict was not attributable to the error, and therefore Kasal's conviction is affirmed.

Affirmed.