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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1601**

State of Minnesota,
Respondent,

vs.

Greta Johnson,
Appellant.

**Filed July 28, 2009
Affirmed
Lansing, Judge**

Ramsey County District Court
File No. 62-K6-07-001676

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Considered and decided by Halbrooks, Presiding Judge; Lansing, Judge; and Shumaker, Judge.

UNPUBLISHED OPINION

LANSING, Judge

In this appeal from a conviction for offering a forged check, Greta Johnson argues that the district court committed reversible error by providing a response to a question from the deliberating jury without Johnson's presence or waiver. We agree that the court's substantive communication with the jury in these circumstances was error. Because we conclude, however, that the error was harmless beyond a reasonable doubt, we affirm.

FACTS

A jury found Greta Johnson guilty of offering a forged check on December 24, 2005, at a U.S. Bank location. The details of the banking transaction were uncontradicted at trial; only the identity of the person who presented the forged check was at issue. Johnson's appeal from the forged-check conviction also presents only one issue: whether the district court's response to a question from the deliberating jury, outside Johnson's presence and without her waiver, constitutes reversible error.

The jury began deliberations at 9:50 a.m. on March 11, 2008, the second day of trial. Less than six and one-half hours later, the foreperson sent a handwritten note to the judge stating, "[I]t is clear that we will not be able to come to a decision." The district court's typewritten reply stated: "It is far too early to consider declaring a mistrial. You should re-examine all the evidence and exhibits, and listen anew to the opinions of your fellow jurors with an eye to reaching agreement, if possible." A notation on the district court's copy of the typewritten reply says, "After consultation with attorneys by phone.

March 11, 2008 at 4:15 p.m.” The record does not indicate whether the district court’s response was delivered to the jury by a bailiff or communicated by the judge to the jury in open court. The record is similarly silent on whether Johnson was contacted.

At 9:43 p.m., about five and a half hours after the district court responded to the jurors’ communication, the jury reached a unanimous verdict finding Johnson guilty. Johnson appeals, contending that the court’s communication with the jury constituted reversible error. The state concedes error but argues that the error was harmless beyond a reasonable doubt.

D E C I S I O N

A criminal defendant has a constitutional right to be present during critical stages of trial. *State v. Sessions*, 621 N.W.2d 751, 755 (Minn. 2001). Substantive communication with a deliberating jury is a critical stage of trial that must take place in open court with the defendant present. Minn. R. Crim. P. 26.03, subds. 1(1), 19(2)(1), 19(3)(1); *Sessions*, 621 N.W.2d at 755-56. Counsel cannot, on defendant’s behalf, waive the defendant’s right to be present. *State v. Ware*, 498 N.W.2d 454, 457 (Minn. 1993).

The state concedes that it was error for the district court to engage in substantive communications with the jury without ensuring Johnson’s presence or obtaining a valid waiver of her rights. An error involving the defendant’s right to be present requires reversal unless it was harmless beyond a reasonable doubt. *Sessions*, 621 N.W.2d at 756. To be harmless beyond a reasonable doubt the verdict must surely be unattributable to the error. *Id.* “When considering whether the erroneous exclusion of a defendant from

judge-jury communications constitutes harmless error,” we consider both “the strength of the evidence and substance of the [district court’s] response.” *Id.* (citation omitted).

We turn first to the substance of the district court’s response to the jurors. In instructing juries on deliberation processes, Minnesota appellate courts have relied on an approach first outlined in the A.B.A. Standards Relating to Trial by Jury, § 5.4 (Approved Draft, 1968). *State v. Martin*, 297 Minn. 359, 372, 211 N.W.2d 765, 772 (1973); *see also* *ABA Standards for Criminal Justice Discovery and Trial by Jury* § 15-5.4 (3d ed. 1996) (setting forth revised standard and noting that revision affects style but not substance of standard); 10 *Minnesota Practice*, CRIMJIG 3.04 (2006) (embodying instruction described in A.B.A. standard). The A.B.A. standard adopted in *Martin* abrogated a previously sanctioned “*Allen* charge” that originated in an 1851 Massachusetts case, *Commonwealth v. Tuey*, 62 Mass. (8 Cush.) 1, 3-4 (1851), and was approved in *Allen v. United States*, 164 U.S. 492, 501-02, 17 S. Ct. 154, 157 (1896).

Minnesota discontinued its approval of the *Allen* charge because it contained language that overemphasized the jury’s duty to reach a verdict and appeared to impose a duty on a juror not in the majority to reevaluate without imposing a similar obligation on the majority. *Martin*, 297 Minn. at 365-71, 211 N.W.2d at 769-71. Under the A.B.A. approach adopted in *Martin*, the district court may instruct a deadlocked jury to continue deliberating but may not “require or threaten to require the jury to deliberate for an unreasonable length of time.” *Id.* at 372, 211 N.W.2d at 772. And the emphasis must be on further consideration by all jurors, whether in the minority or majority. *Id.* at 372-73, 211 N.W.2d at 772-73.

The district court's response to the jurors' communication was well within *Martin*'s strictures. Before deliberations began, the court instructed the jury, using the language outlined in *Martin*, on their duties during deliberation. When the jury sent word to the trial judge that they were deadlocked, they had been deliberating for less than six and one-half hours. On this record, the district court's statement that it was "far too early" for a mistrial might have been better phrased without using the word "far," but the response does not amount to a threat that the jury will be forced to deliberate for an unreasonable length of time. In fact, the remainder of the district court's response says only that the jurors should keep trying to reach an agreement "if possible." The jurors could not reasonably have understood this to mean they were absolutely mandated to reach a verdict. Finally, the district court asked them to "re-examine all the evidence and exhibits, and listen anew to the opinions of your fellow jurors." This language applied to all of the jurors whether they were in the majority or the minority.

We conclude that the district court's response to the jury's communication characterized the jury's duty in language drawn directly from the instruction approved in *Martin*. In essence, the communication restated the district court's earlier instruction, which was given without objection.

The second prong of the *Sessions* analysis evaluates the strength of the evidence supporting the verdict. We conclude that the state's evidence against Johnson was strong.

The U.S. Bank teller who handled the transaction identified Johnson as the person who had tried to cash the \$2,400 forged check. The teller testified that Johnson presented

the check listing a U.S. Bank customer as the payee and also presented a fake driver's license purportedly issued to the payee. The teller noted that the photograph on the driver's license was that of the woman offering the check, but the license appeared to be a forgery because it did not have a hologram. The teller and the manager called the customer who was listed as the payee and as the license holder, and the customer verified that she was not in the bank cashing a check at that time. The teller also identified Johnson at trial as the person who presented her with the forged check and the person who appeared in the driver's license photograph.

A police investigator who specializes in forgery investigations testified that he had previously had direct contact with Johnson and recognized her when he saw still images from U.S. Bank's surveillance camera. The state introduced the fake license, copies of the check, and the still shots from the surveillance camera. The jury was thus able to compare the still images from the surveillance camera to Johnson's actual image as she sat in the courtroom during trial. The jury could also compare the picture of the person on the false driver's license.

The defense attempted to establish an alibi through testimony from Johnson's daughter and Johnson's mother. Johnson's daughter testified that Johnson was in Omaha, Nebraska, on the day of the incident, preparing Christmas Eve dinner with family. On cross-examination the daughter acknowledged that she had not previously provided this information to the police when she learned about the charge. Johnson's mother testified that she could not remember Christmas Eve of 2005 and was unable to corroborate the daughter's testimony.

We conclude that the district court's error in communicating with the jury in Johnson's absence and without her waiver was harmless beyond a reasonable doubt. The district court's typewritten response accurately stated the law. Because the response only restated the initial jury instruction, which had been approved by both the prosecutor and the defense, the district court's response to the juror's communication would almost certainly have been the same if Johnson had been present, and, therefore, the verdict is surely unattributable to the district court's error in communicating with the jury. We further conclude that the strength of the evidence of Johnson's guilt confirms that the error was harmless beyond a reasonable doubt.

Affirmed.