

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 7, 2007

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2005AP2969-CR

Cir. Ct. No. 2002CF816

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

DAVID A. GLEBKE,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Racine County: ALLAN TORHORST, Judge. *Reversed and cause remanded.*

Before Snyder, P.J., Nettesheim and Anderson, JJ.

¶1 PER CURIAM. David Glebke appeals from a judgment of conviction of armed burglary, possession of drug paraphernalia, criminal damage to property, three counts of theft of a firearm, and three counts of possession of a firearm by a felon, all as a habitual offender. He also appeals from the order

denying his postconviction motion alleging ineffective assistance of trial counsel. We conclude it was error for the trial court to answer a jury question and send an exhibit to the jury without Glebke or his counsel present. The trial court's conduct was not harmless error because it effectively instructed the jury how to decide an element of the offense. We reverse the judgment and order and remand for a new trial.¹

¶2 Among other items, firearms stolen from the home of Glebke's ex-wife were recovered in Glebke's possession. During deliberations the jury requested pictures of the firearms and asked what types of firearms were recovered. Without securing the presence of the prosecutor, Glebke, or Glebke's trial counsel, the trial court provided the jury with picture exhibit two and told the jury that "recovered were two shotguns one air gun." The trial court's communication to the jury was not on the record. Before the jury returned to the courtroom to deliver its verdict the trial court informed the parties that while they were unavailable, the jury sent out a request and question and the trial court responded. Glebke's trial counsel did not object to the trial court's action on the jury's question and did not move for a mistrial.

¶3 Although there was no objection to the trial court's communication with the jury in Glebke's absence, the alleged error is treated as a direct challenge in the appellate court, not as a claim of ineffective assistance of counsel. *State v.*

¹ We need not address Glebke's claims that trial counsel was ineffective for not moving to suppress evidence seized at his apartment and for not objecting to the armed burglary jury instruction. Evidentiary and instructional issues can be raised before the new trial.

Anderson, 2006 WI 77, ¶64, 291 Wis. 2d 673, 717 N.W.2d 74.² The defendant’s constitutional right to be present at trial includes the right to be present during the trial court’s communications with the jury during deliberations. *Id.*, ¶43. The State concedes that the trial court’s communication with the jury without the presence of Glebke or defense counsel was error.³

¶4 When a circuit court communicates with the jury outside the presence of the accused or defense counsel, the conviction will not be reversed if the error was harmless. *Id.*, ¶¶45, 76. “The burden of persuasion is on the State, the beneficiary of the error, to prove that the error was harmless.” *Id.*, ¶45. An error is harmless when it is demonstrated beyond a reasonable doubt that the error complained of did not contribute to the verdict. *State v. Hale*, 2005 WI 7, ¶60, 277 Wis. 2d 593, 691 N.W.2d 637.

¶5 We are not persuaded by the State’s argument that Glebke was not prejudiced by the trial court’s answer to the jury’s question and decision to send exhibit two to the jury. The trial court’s interaction with the jury was not recorded on the record. “A factor weighing heavily in favor of the prejudicial nature of an ex parte judge-jury communication is the absence of a complete record of the communication, because a reviewing court is thus deprived of an opportunity to make an assessment of the prejudicial effect of the communication.” *Anderson*, 291 Wis. 2d 673, ¶118 (quoted source omitted).

² *State v. Anderson*, 2006 WI 77, ¶64, 291 Wis. 2d 673, 717 N.W.2d 74, was decided after the State’s brief was filed. At this court’s invitation, the State filed a supplemental letter brief addressing the impact of *Anderson*.

³ Although the trial court recalled that Glebke waived the right to be present if jury questions arose, there was no waiver on the record.

¶6 We acknowledge there was abundant evidence that weapons were stolen and found in Glebke's possession. However, as Glebke points out, the answer that two shotguns were recovered functionally instructed the jury on how to decide an element of the offense of felon in possession of a firearm. That in turn suggested to the jury that Glebke armed himself during the burglary and was guilty of armed burglary. "[A] defendant's due process and jury trial rights encompass the right to have the jury, rather than the judge, decide every element of the offense, to the requisite degree of beyond a reasonable doubt certainty." *State v. Harvey*, 2002 WI 93, ¶29, 254 Wis. 2d 442, 647 N.W.2d 189. The trial court's answer had the effect of relieving the State of its burden of proof and invaded the province of the jury. Glebke is entitled to a new trial.

By the Court.—Judgment and order reversed and cause remanded.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

