2019 IL App (3d) 170015-U

Order filed September 30, 2019

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2019

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 14th Judicial Circuit, Henry County, Illinois.
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-17-0015 Circuit No. 12-CF-300
THOMAS D. SCHAEFER,	)	
Defendant-Appellant.	)	Honorable Jeffrey W. O'Connor, Judge, Presiding.

PRESIDING JUSTICE SCHMIDT delivered the judgment of the court.
Justice Holdridge, specially concurred.
Justice McDade, concurred in part and dissented in part.

ORDER

¶ 1 *Held*: Trial counsel did not provide defendant with ineffective assistance of counsel where the record shows counsel challenged the search warrant for lack of probable cause. Defendant forfeited the claim that the State's chemical test results were inadmissible. The trial court did not err in admitting other-crimes evidence. Although the trial judge had improper *ex parte* communications with the jury, any error was harmless. We affirm.

¶ 2 The State charged defendant, Thomas D. Schaefer, with unlawful production of cannabis plants. 720 ILCS 550/8(d) (West 2012). Defendant filed a motion to suppress evidence. The trial court held a *Franks* hearing on the search warrant. *Franks v. Delaware*, 438 U.S. 154 (1978). The

court denied defendant's motion. The case proceeded to a jury trial. The State introduced 109 plants a Kewanee police officer identified as cannabis after performing industry-standard chemical tests. At the beginning of jury deliberations, the trial judge spoke to the jury off the record and outside the presence of defendant. Defendant appeals his conviction, arguing that (1) trial counsel provided ineffective assistance in failing to challenge the search warrant for a lack of probable cause, (2) the State's testing methods were insufficient to positively identify 109 plants as cannabis, (3) the trial court erred in admitting other-crimes evidence, and (4) the trial judge erred in not disqualifying himself after having *ex parte* communications with the jury. We affirm.

¶ 3 I. BACKGROUND

¶ 4 In August 2012, the State charged defendant by information with unlawful production of more than 5 but less than 20 cannabis plants. The State amended this charge to more than 50 but less than 200 cannabis plants before proceeding to trial. 720 ILCS 550/8(d) (West 2012). Police discovered defendant's alleged grow operation after executing search warrants on two Kewanee addresses—431 Dewey Street and 317 East Central Boulevard.

¶ 5 Defendant, by his first trial counsel, Anjali Dooley, filed a motion to suppress evidence. The motion contended that the search warrant executed on 431 Dewey Street included false statements made with reckless disregard for the truth. Specifically, the motion stated that "[s]aid erroneous statements, averments or omissions contained in the Affidavit in support of Complaint for Search Warrant w[ere] made with reckless disregard for the truth that denied the Defendant his right to a fair determination of probable cause prior to the issuance of a search warrant." He requested a *Franks* hearing. *Franks,* 438 U.S. 154.

¶ 6 Attorney Dooley withdrew. Attorney Charles Schierer entered his appearance.

¶ 7 In August 2015, the trial court held a *Franks* hearing on the search warrant. Officer Shawn Lay testified. He served as the affiant for the 431 Dewey Street warrant. In July 2012, a confidential informant (CI) called the Kewanee Police Department to relay information about defendant's alleged grow operation. The CI knew defendant to grow cannabis in his basement. The CI went to 431 Dewey Street to pick up planting soil from defendant. Defendant came to the door holding a small pair of scissors. The CI smelled a strong odor of raw cannabis coming from inside the home. He provided Lay with a map of 431 Dewey Street, including the grow operation in the basement. The CI described defendant's grow operation, saying defendant covered the plants with a large tent structure. The grow operation included numerous plants, a solar power watering system, and a ventilation system.

¶ 8 In August 2012, the CI told Lay that defendant was known to sell "killer weed." The CI had purchased cannabis from defendant throughout the years. He had a friend who allegedly bought cannabis from defendant on a regular basis. The CI knew defendant to grow cannabis for the last nine years. In mid-August, defendant prevented the CI and defendant's girlfriend from entering the basement of 431 Dewey Street. Defendant's girlfriend owned the house at 431 Dewey Street. He said he was renovating the home for her. Someone attempted to break into 431 Dewey Street. Defendant did not report the incident to the police but told the CI he installed cameras on the property.

¶ 9 Lay and other officers conducted intermittent surveillance on 431 Dewey Street for approximately one year. Lay contacted the United States Postal Service. No one received mail at 431 Dewey Street. Defendant's mailing address was 317 East Central Boulevard. The windows at 431 Dewey Steet were covered. Moisture collected on the windows. Lay said cannabis growers sometimes cover the windows to conceal their operations but that moisture buildup is a problem

from the necessary watering of plants. Lay contacted Ameren and the City of Kewanee to obtain bill amounts from 431 Dewey Street. He compared the bills to his own and fellow officers' bills. He determined that the water and power bills exceeded typical costs for an unoccupied home. The trial court denied defendant's motion to suppress following the conclusion of the *Franks* hearing.

¶ 10 Attorney Schierer withdrew as counsel. Attorney Maureen Williams filed her appearance. Williams filed a motion to suppress attacking the sufficiency of the warrant and asserting chain of custody issues. The trial court indicated it would bar Williams' first contention on *res judicata* grounds. It stated that chain of custody was an issue for trial.

¶ 11 In August 2016, the State tried defendant before a jury. The State first called Kewanee police officer Stephen Kijanowski. He was part of the team that executed the warrant on 431 Dewey Street. Kijanowski could smell a strong odor of raw cannabis as he entered the residence. He located a grow operation in the basement covered by a large tent. Kijanowski was part of the approximately year-long investigation leading up to the search of 431 Dewey Street. The State admitted numerous photos that Kijanowski took during the search. The photos included images of the tent, cannabis plants, watering system, chemicals, pots, fluorescent lights, as well as the upstairs of 431 Dewey Street. Kijanowski located a prescription bottle in the fridge bearing defendant's name. The State admitted some physical evidence, including cutting shears, the prescription bottle, and fluorescent light bulbs. Kijanowski described the process of bagging, tagging, and admitting the items to the evidence custodian to establish the chain of custody. The cannabis plants were not bagged and admitted until Kijanowski dried them out to prevent the plants from disintegrating. This process took five or six days.

¶ 12 Kijanowski also executed the warrant on 317 Central Boulevard. Officers found a hidden room containing another grow operation. He found more cannabis plants growing and other items

similar to what he found at 431 Dewey Street. The State admitted 109 cannabis plants recovered from 317 Central Boulevard.

¶ 13 The State played the tape of defendant's interview with Kijanowski and Lay for the jury. Defendant maintained he was working on renovating 431 Dewey Street. He claimed he was the only person who had been in that residence in five years. He was adamant that his girlfriend knew nothing about the cannabis plants at the Dewey or Central addresses. Defendant responded to the officer's question "So they're yours?" with "Well yeah." Defendant said, "If there are plants at Central they're mine." He told the officers that the amount they found would not weigh much if they are charging him by weight. He admitted that there were five strains of cannabis growing at Central Boulevard, but argued the rest of the material was inadmissible as individual plants because they were merely "clones" of the original.

¶ 14 On cross-examination, defense counsel Williams asked Kijanowski about forensic scientist Joni Little. The State objected. The trial judge and attorneys discussed the objection outside the presence of the jury. Kijanowski remembered Little telling him each cannabis plant should be individually bagged before submitting them for testing at her laboratory. Williams sought to have Little testify that the Kewanee police used incorrect procedures for testing the individual cannabis plants to challenge the chain of custody.

¶ 15 Officer Tim Pence of the Kewanee Police Department testified for the State. He tested the plants found at 431 Dewey Street and 317 Central Boulevard. Pence passed marijuana leaf technician training through the Illinois State Police. He had a lab test for the presence of cannibinoids in the basement of the Kewanee Police Department. As a preliminary matter, Pence viewed the plants under a microscope to identify if the material had the hairs that are characteristic of only a cannabis plant. Pence observed the requisite hairs so he proceeded to the

chemical portion of the test. He performed the Duquenois-Levine test on the plant material, testing each individual plant. He ground some of the plant material, added ether, and heated it to 90 degrees to extract the resin. He then added hydrochloric acid to the resin. The resin changed to a blue-violet color indicating the presence of cannabinoids. He performed a follow-up with chloroform to confirm the plant material was indeed cannabis. He said, "[i]t's widely accepted that if you perform all three of these [steps] and you get a positive result, that it's positive for cannabis." Pence identified 109 individual cannabis plants. The plants came to him in one large bag. He individually bagged each plant after testing to aid in his organization. Pence reconfirmed the chain of custody.

¶ 16 Doug Wade testified as a member of a multi-county drug enforcement unit. He completed and passed training to identify indoor cannabis cultivation units. Wade confirmed the items and photographs admitted into evidence indicated defendant engaged in the process of growing large amounts of cannabis. He also explained the process of cloning plants. He said a clone was a clipping from a "mother plant." The grower places the clipping in its own pot of dirt where it establishes roots as an independent plant. The plant shares deoxyribonucleic acid (DNA) with the mother plant although it is smaller. Wade explained some labs prefer to receive each plant individually and some prefer the plants all in one container.

¶ 17 Defendant filed a motion for a directed verdict, arguing that the State's lab report did not come from an accredited laboratory and should be struck from the record. The court denied the motion.

¶ 18 Defendant questioned State Police forensic scientist Little to make an offer of proof. She was certified to test plants for the presence of cannabinoids. At her lab, Little required officers to submit each plant individually bagged if they wanted her to test based on the number of plants. If

the officers submitted the plants in one large bag, she gave her results based on weight. The trial judge asked Little, "if we use a qualified technician, and he separates the plants and tests them one by one, is there anything wrong with that?" She responded, "[n]ot according to my policy, no." Little averred that she also initially views the alleged cannabis under the microscope and then proceeds to the Duquenois-Levine chemical tests. The court ultimately maintained its ruling to exclude Little because she could not testify to Pence's credentials, training, methodology, or results. Little supported the conclusion that State Police labs need not perform every cannabis test or they would be overrun.

¶ 19 The jury found defendant guilty of unlawful production of cannabis. Defendant filed a motion for a new trial. Defense counsel Williams withdrew as counsel. She filed a bystander report alleging that the trial judge improperly went into the jury room and spoke with the jury off the record. Attorney William Loeffel entered his appearance on behalf of defendant. He filed an amended motion for a new trial raising issues of (1) ineffective assistance of counsel for reasons other than the one defendant raised on appeal, (2) the trial court's denial of the motion to suppress, (3) the Kewanee laboratory facilities' credibility, and (4) the trial judge's *ex parte* communications with the jury. The trial court denied the motion. It did not believe it acted improperly in briefly addressing the jury. The trial judge told those present that he said "here are the exhibits, if there are any questions, write them down, and we will address them." The court sentenced defendant to 30 months' probation.

¶ 20 II. ANALYSIS

¶ 21 Defendant raises four arguments for review: (1) whether counsel was ineffective for failing to challenge the search warrant for lack of probable cause; (2) whether the cannabis, as tested and presented, was insufficient to sustain a conviction for the production of more than 50

but less than 200 cannabis plants; (3) whether the trial court erred in admitting other-crimes evidence; and (4) whether the trial judge should have disqualified himself after speaking to the jury off the record.

¶ 22 As a preliminary matter to preserve an issue for appellate review, defendant must make an objection at trial and raise the issue in a posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). This rule serves a "legitimate State interest" that tends to eliminate "unnecessary reviews and reversals." *People v. Irwin*, 32 Ill. 2d 441, 444 (1965). The reviewing court will relax the rules of forfeiture only where there is plain error. *Enoch*, 122 Ill. 2d at 189.

¶ 23 A. Ineffective Assistance of Counsel

¶ 24 Defendant contends that trial counsel provided ineffective assistance of counsel for failing to challenge the search warrant executed on 431 Dewey Street for lack of probable cause. He does not specify which of the four attorneys who represented him in this case provided ineffective assistance. In his reply, he maintains all four were ineffective. Also in his reply, he acknowledges he forfeited this issue by failing to raise it in a posttrial motion but urges this court to review it under the plain-error doctrine. He argues plain error for the first time in his reply brief. See *People v. Williams*, 193 Ill. 2d 306, 348 (2000) (reviewing a claim of plain error asserted for the first time in defendant's reply brief).

¶ 25 Plain error is possible in two situations, when: (1) the evidence is close, regardless of the seriousness of the error, or (2) the error is serious, regardless of the closeness of the evidence. *People v. Herron*, 215 Ill. 2d 167 (2005). However, before we can determine whether an error fits under either of the above categories, we must first determine whether an error actually occurred. *People v. Cosby*, 231 Ill. 2d 262 (2008).

¶ 26 Defendant asserts that counsel was ineffective for failing to challenge the search warrant on probable cause grounds. The record belies this contention. Defendant's motion to suppress evidence explicitly states that the court did not have enough information before it to make a determination of probable cause. He tries and fails to separate the purpose of a *Franks* hearing from probable cause. In *Franks*, the Supreme Court held:

> "[W]here the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit." *Franks*, 438 U.S. at 155-56.

The Court, in this statement, has inextricably linked the foundational requirement of probable cause with the attack of a search warrant's affidavit.

¶ 27 The Illinois Supreme Court similarly acknowledged this relationship in *People v. Lucente*, 116 Ill. 2d 133 (1987), and *People v. Chambers*, 2016 IL 117911. In *Lucente*, the court held that to apply *Franks* too rigidly "would permit the very evisceration of the probable-cause requirement which *Franks* seeks to prevent." *Lucente*, 116 Ill. 2d at 150. In *Chambers*, the court reaffirmed *Franks* by holding that the trial court should grant a *Franks* hearing when the

affidavit, setting aside the allegedly false statements, is insufficient to support probable cause. *Chambers*, 2016 IL 117911, ¶ 93. If, at the conclusion of a *Franks* hearing, the trial court denies a defendant's motion to suppress, it has reaffirmed the initial grant of the warrant for probable cause. A *Franks* hearing goes directly toward the presence or absence of probable cause. The trial court's ruling in this case reflects the same. Defendant's motion to suppress evidence led to his request for a *Franks* hearing. At the conclusion of the hearing, the trial judge stated, "this [motion to suppress] was for probable cause, and so, motion denied."

¶ 28 None of defendant's four attorneys failed to challenge the search warrant for lack of probable cause. Dooley filed the motion to suppress. Schierer argued the motion. Williams attempted to file another motion to suppress but the court indicated it would not hear the motion. Loeffel raised the denial of the motion to suppress in his posttrial motion. Trial counsel cannot be ineffective for failing to take action when the record demonstrates all four attorneys took affirmative action on the matter. Therefore, we do not find error.

¶ 29 B. Results of Cannabis Testing

¶ 30 Defendant challenges Pence's accreditation for cannabis testing, as well as his methods for testing the plant material. Defendant argues that his conviction should be reduced to a misdemeanor because he admitted to producing 5 cannabis plants, but the evidence presented through Pence was insufficient to sustain a conviction for the production of more than 50 but less than 200 plants. Defendant maintains that the court should have allowed Little to testify as an expert.

¶ 31 Defendant forfeited this claim by failing to object to the admission of 109 cannabis plants at trial. See *Enoch*, 122 Ill. 2d at 186. In his brief, defendant urged this court to find that counsel was ineffective for failing to object to the admission of the 109 cannabis plants if we determined

defendant forfeited the issue. We decline to do so. Defendant sunk his own ship. In his recorded police interview during which officers advised defendant of his right to remain silent, defendant admitted that the plants found at 317 Central Boulevard belonged to him. He maintained that he only conceded ownership of five cannabis plants because the rest were merely clones. This is a distinction without a difference. Defendant can cite to no Illinois case where a "clone" did not constitute a plant for the purposes of section 8(d) of the Cannabis Control Act (720 ILCS 550/8(d) (West 2012)). The statute states, "[i]t is unlawful for any person knowingly to produce the cannabis sativa plant or to possess such plants unless production or possession has been authorized [by law]." Defendant, at oral argument, insisted that the plants could not count toward the total count due to lack of evidence establishing whether they had roots. Looking at the photographs admitted into evidence at trial, one can see that the plants are fully developed to the point of having roots. Defendant additionally contends that the Kewanee Police Department's testing facility was not accredited, again failing to cite any statutory requirement reflecting the same. The State Police certified Officer Pence to test for the presence of cannabinoids.

¶ 32 This case is similar to *People v. Kramer*, 204 Ill. App. 3d 1011 (1990). In *Kramer*, the reviewing court reversed and remanded for an illegal search of the defendant's apartment. *Id.* at 1017-18. However, the reviewing court found that the State presented sufficient evidence to find proof beyond a reasonable doubt that defendant produced or possessed the number of plants required by the statute. *Id.* at 1019. The State presented testimony of an officer who visually identified the plants as cannabis. The court heard the lab evidence which included a positive chemical analysis for the seized plant material. *Id.* The State also introduced photos of the plants. *Id.* The court in *Kramer* distinguished *People v. Park*, 72 Ill. 2d 203, 211 (1978), on which defendant relies. In *Park*, an officer found an envelope containing what appeared to be dry

marijuana. *Id.* at 206. The State charged the defendant based on weight. *Id.* An officer testified the substance was marijuana based on "feel, smell, texture and looks." *Id.* at 207. The court in *Park* stated that the positive identification of cannabis requires both microscopic and chemical analysis. *Id.* at 211. The court in *Kramer* said, "[t]he issue here, the identification of individual, intact plants, is fundamentally different from the question of positively [identifying] *** suspected dry plant material, as apparently was at issue in *Park*." *Kramer*, 204 Ill. App. 3d. at 1018. The State's evidence, both Pence's results and defendant's taped admission, was sufficient to support a conviction of the production of more than 50 but less than 200 cannabis plants.

¶ 33 C. Other-Crimes Evidence

¶ 34 Defendant argues that the State improperly introduced other-crimes evidence during his trial. The State admitted 109 plants from 317 Central Boulevard into evidence. The State also elicited testimony about the search of 431 Dewey Street. Defendant maintains that the evidence concerning 431 Dewey Street did not serve as the basis of the charges. It was therefore inadmissible.

¶ 35 The amended charging information does not specify at which address defendant is alleged to have produced cannabis. Defendant acknowledged that he forfeited this issue. *People v. Denson*, 2014 IL 116231, ¶ 18. He urges this court to review the issue under the plain-error doctrine. There cannot be plain error where there is no reversible error. *Cosby*, 231 Ill. 2d at 273. The trial court's decision to admit evidence, including other-crimes evidence, is in the sound discretion of the trial court and will not be reversed absent an abuse of discretion. *People v. Illgen*, 145 Ill. 2d 353, 364 (1991). A trial court abuses its discretion when its ruling is arbitrary, fanciful, or unreasonable. *People v. Chambers*, 2011 IL App (3d) 090949, ¶ 10.

¶ 36 "Other-crimes evidence is admissible *** to prove *** any material fact other than propensity that is relevant to the case." *People v. Donoho*, 204 Ill. 2d 159, 170 (2003). Here, the State introduced evidence from 431 Dewey Street to show the progression of the case against defendant culminating in officers' search of 317 Central Boulevard. Therefore, defendant's contention that evidence from 431 Dewey Street was irrelevant to the case is incorrect. The State's evidence does not show propensity as defendant cannot point to anywhere in the record specifying that the State's charges were attributable to only 317 Central Boulevard. The charges against defendant stemmed from culmination from the two searches and all evidence collected. The trial court did not abuse its discretion in admitting evidence collected from 431 Dewey Street.

¶ 37 D. Trial Judge's *Ex Parte* Communication with the Jury

¶ 38 Finally, defendant argues that the trial judge should have disqualified himself after his *ex parte* communications with the jury. The State maintains that defendant waived this argument regarding the *ex parte* communications. The State points out that defense counsel did not object at the time of the alleged error. It is well settled that both an objection at trial and a written posttrial motion raising the issue are necessary to preserve an alleged error for review. See *Enoch*, 122 Ill. 2d at 186. Our supreme court has "determined that application of the waiver rule is less rigid where the basis for the objection is the trial judge's conduct." *People v. Kliner*, 185 Ill. 2d 81, 161-62 (1998). We therefore address defendant's claim of alleged judicial impropriety.

¶ 39 Our supreme court has established certain principles in examining communications between a jury and a trial court. A defendant has a constitutional right to appear and participate at all proceedings involving his substantial rights. See *People v. Childs*, 159 Ill. 2d 217, 227 (1994). An *ex parte* communication between the judge and the jury following the jury's retiring

to deliberate deprives the defendant of his constitutional rights. See *id.* at 227. A jury verdict will not be set aside where it is apparent that no harm or prejudice resulted from an *ex parte* communication. *Id.* The State has the burden of proving that any error in the *ex parte* communication is harmless beyond a reasonable doubt. *Id.* at 228.

¶ 40 The State reiterated the trial judge's explanation for briefly entering the jury room at the beginning of deliberations. The judge said he told the jury to write down any questions that arose and he would try to answer them. Defendant does not dispute that this was the substance of the judge's *ex parte* communications. Rather, he says it is redundant because the trial judge already instructed the jury as such. Although the judge did err in communicating with the jury off the record and outside the presence of defendant, his communication did not prejudice defendant. Such improper communications were harmless beyond a reasonable doubt.

¶ 41 III. CONCLUSION

¶ 42 For the foregoing reasons, we affirm the judgment of the circuit court of Henry County.

¶ 43 Affirmed.

¶ 44 JUSTICE HOLDRIDGE, specially concurring:

¶ 45 I join in the majority's judgment and analysis regarding the issues of defense counsel's effectiveness, the sufficiency of the cannabis testing, and the trial court's admission of so-called "other crimes" evidence. I also join Justice Schmidt's judgment that the trial court's improper *ex parte* communication with the jury was harmless beyond a reasonable doubt under the circumstances presented in this case.

¶ 46 I do not agree with the majority's conclusion that the defendant waived the cannabis testing issue by admitting to the police that all of the plants recovered at the house were his and that some of them contained cannabis or by failing to object to the admission of the 109 plants at

trial. To convict the defendant of the crime charged, the State had to prove beyond a reasonable doubt that the defendant produced more than 50 cannabis plants. 720 ILCS 550/8(d) (West 2012). Challenges to the sufficiency of the evidence are not waived or forfeited unless the defendant affirmatively agrees or stipulates to the sufficiency of the State's evidence. *People v. Harris*, 2015 IL App (4th) 14069, ¶ 38. In this case, the defendant never stipulated to producing 50 or more plants containing cannabis, and he never admitted as much to the police. He stipulated to producing only a misdemeanor amount of cannabis, and he challenged the State's claim that he produced more than 50 cannabis plants, both to the police and during trial. He argued that the State's testing procedures which purported to show the presence of cannabis in more than 50 plants were unreliable because the plants could have been contaminated when they were placed in the same bag with cannabis plants prior to testing. Thus, in my view, the defendant did not waive or forfeit his challenge to the sufficiency of the State's evidence against him. However, because I agree with the majority that the defendant's challenge to the State's cannabis testing procedures fails on the merits, I join in the majority's ultimate judgment on this issue.

¶ 47 JUSTICE McDADE, concurring in part, dissenting in part:

¶ 48 The majority has found the assistance provided by defendant's trial counsel was not ineffective, the State's testing methods were sufficient to positively identify the recovered evidence as cannabis, and the trial court did not err in admitting evidence of other crimes. I agree with those conclusions and concur in that part of the decision. The majority has also found that the trial judge's improper *ex parte* contact with the jury at the beginning of deliberations was error, but it was harmless. I respectfully dissent from this finding, not because I disbelieve the judge's recounting of the contact, but because I do not believe the State *proved* harmlessness.

¶ 49 To reiterate the law of Illinois on this issue: *ex parte* communication between the trial judge and the jury after the jury retires to deliberate violates a defendant's constitutional right to appear and participate at all proceedings involving his substantial rights. See *supra* ¶ 39. I do not believe the State can practically and rationally sustain its burden of proving a contact harmless *beyond a reasonable doubt* by simply regurgitating the unconfirmed account of the person who initiated it, even when that person is a judge. There should, at minimum, be some requirement that the State verify with at least some members of the jury—preferably with all of them—that the nature and content of the contact was actually as represented. That did not happen in this case. I would find that the failure to confirm what was said in the jury room arguably affirmatively creates doubt or, at best, leaves doubt unresolved.