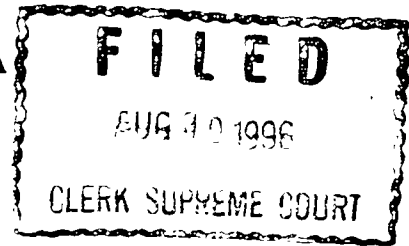


IN THE COURT OF APPEALS OF IOWA

No. 6-312 / 95-989



STATE OF IOWA,
Appellee,

vs.

PETER CARR,
Appellant.

Appeal from the Iowa District Court for Black Hawk County, George L.
Stigler, Judge.

Peter Carr appeals his conviction, following a bench trial, for second-degree
sexual abuse in violation of Iowa Code sections 709.1 and 709.3 (1993).

AFFIRMED.

Linda Del Gallo, State Appellate Defender, and Patricia Reynolds, Assistant
State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Martha E. Boesen, Assistant Attorney
General, Thomas J. Ferguson, County Attorney, and Shawn Wehde and Jeff Harris,
Assistant County Attorneys, for appellee.

Considered by Cady, P.J., and Streit and Vogel, JJ.

STREIT, J.

The defendant, Peter Carr, appeals his conviction of sexual abuse in the second degree in violation of Iowa Code sections 709.1 and 709.3 (1993). Carr claims his counsel's failure to move for judgment of acquittal amounted to ineffective assistance of counsel. We affirm.

On September 26, 1994, Carr entered the home of Heather Brollier, with whom he had previously cohabitated. Carr put a knife to Brollier's neck and inquired with whom she was having sexual relations. Brollier repeatedly refused to discuss the matter. Carr poured a glass of liquid on her. While Brollier was changing her shirt, Carr attacked her, removing her pants and underwear. During a brief struggle Carr laid on top of Brollier and kissed her on the neck and chest. Brollier screamed and cried. Carr relented and got up. After dressing, Brollier sat down. Carr again inquired about her sexual activities, placing the knife on Brollier's knee and sliding it up her inner thigh, within a few centimeters of her pelvic area. Carr put down the knife and Brollier was able to kick the knife out of reach. Brollier attempted to escape, but Carr picked her up and carried her across the room. Carr placed his mouth on Brollier's vagina and continued even after she asked him to stop. Carr got on top of Brollier, undid his pants, and despite Brollier's resistance performed vaginal intercourse. During this act, Carr placed his hand, and then a blanket, over Brollier's face, presumably in an attempt to muffle her screams. Through a crafty subterfuge, Brollier was able to alert a friend to her predicament and this friend called the police.

When the police arrived, the knife was in Carr's back pocket. After the police had arrested Carr on an outstanding warrant for forgery, Brollier told an officer that Carr had raped her. Brollier was taken to a hospital, where doctors noted contusions on her right breast and marks left by the knife on her right upper thigh.

Carr claims he received ineffective assistance of counsel because of the failure to move for a judgment of acquittal. To succeed in his claim, Carr must show counsel failed to perform an essential duty and prejudice resulted. *Meier v. State*, 337 N.W.2d 204, 206 (Iowa 1983). The defendant must show there is a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different. *Gehring v. State*, 382 N.W.2d 151, 153-54 (Iowa 1986).

Sexual abuse in the second degree is defined in part as when "[d]uring the commission of sexual abuse the person displays in a threatening manner a dangerous weapon." Iowa Code § 709.3 (1993). Carr's claim is rooted in the argument there was insufficient evidence that he displayed a dangerous weapon in a threatening manner during the commission of sexual abuse.¹ Carr's argument is that to be guilty of sexual abuse in the second degree the State must prove he was holding a knife to Brollier at the very instant he was engaging in sexual intercourse.

¹ Carr also claims his counsel was ineffective for failure to move for judgment of acquittal because the State failed to prove sexual abuse had occurred. The trial court, however, sitting as finder of fact, found Carr guilty beyond a reasonable doubt. Carr's challenge on this ground is essentially a sufficiency of the evidence challenge, where we review the evidence in a light most favorable to the State. *State v. Dallen*, 452 N.W.2d 398, 399 (Iowa 1990). There is clearly sufficient evidence to support the district court's ruling.

This argument is based on *State v. Phanhsouvanh*, 494 N.W.2d 219 (Iowa 1992). In *Phanhsouvanh*, the defendant pointed a gun at the victim, threatened her, and eventually forced her to engage in oral and vaginal intercourse. *Id.* at 220. The victim was unable to remember if the defendant had put the gun down during the sexual abuse. *Id.* Defendant appealed his conviction for second-degree sexual abuse based on a special interrogatory where the jury answered they did not find beyond a reasonable doubt that the defendant displayed a firearm in a threatening manner during commission of the offense. *Id.* at 222. Defendant claimed this was inconsistent with the jury's guilty verdict on the charge of sexual abuse in the second degree. *Id.* The court disagreed, finding the jury could have convicted the defendant on the basis of an alternative ground of second-degree sexual abuse, using or threatening to use dangerous or deadly force, that would be consistent with the interrogatory answer. *Id.* at 222-23.

Phanhsouvanh is clearly distinguishable from the instant case. In the present case, for example, there was no finding that Carr did not use a dangerous weapon while committing sexual abuse. To the contrary, there is substantial evidence Carr did use a dangerous weapon; at least enough for the district court, sitting as finder of fact, to reasonably conclude Carr used a dangerous weapon.

In addition, *Phanhsouvanh* does not stand for the proposition that the defendant must have the dangerous weapon in his hand while performing sexual acts;

the court was merely attempting to resolve an apparent inconsistency in the jury's findings.

Carr used a dangerous weapon during the chain of events that culminated in sexual abuse. Brollier's kicking the knife under the love seat did not eliminate the weapon from the scene and the acts committed. Carr held a knife to his victim's neck and her pelvic area and then sexually abused her. Merely setting the knife down, leaving it close at hand, while completing the sexual abuse is clearly not sufficient to remove the use of the knife from the crime of sexual abuse. The knife was at the ready had Brollier been able to sufficiently resist Carr. The knife was surely in the back of Brollier's mind while Carr was abusing her. In this case, the knife is inseparable from the sexual abuse.

The evidence clearly shows that a motion for judgment of acquittal would have been futile. Thus, we find Carr has failed to provide sufficient evidence that trial counsel was ineffective for failure to move for judgment of acquittal. We affirm Carr's conviction of sexual abuse in the second degree in violation of Iowa Code sections 709.1 and 709.3.

AFFIRMED.