FILED
MAR 24 1994
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 4-044 / 93-85

**STATE OF IOWA,**

Appellee,

**vs.**

**KARL RAYMOND KNUTSON,**

Appellant.

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Appeal from the Iowa District Court for Johnson County, L. Vern Robinson, Judge, and Sylvia A. Lewis, District Associate Judge.

Defendant appeals his convictions of burglary in the second degree, assault with intent to commit sexual abuse causing injury, false imprisonment, and carrying weapons, in violation of Iowa Code sections 713.5, 709.11, 710.7 and 724.4 (1991). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Patricia J. Cone-Fisher, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Chris Odell, Assistant Attorney General, J. Patrick White, County Attorney, and Janet M. Lyness, Assistant County Attorney, for appellee.

Considered by Hayden, P.J., Sackett, J., and Schlegel, S.J..*

*Senior judge from the Iowa Court of Appeals serving by order of the Iowa Supreme Court.

**HAYDEN, P.J.**

Police officers Steve Clark, Lisa Dighton, and Douglas Vance responded to a call of a broken window at a motel in the early morning hours of April 9, 1992. Upon arrival at the scene, the officers received two versions of precipitating events. Gertrude Enid Mattson claimed she had escaped from the motel room after Karl Knutson had assaulted her, placed her in restraints, shocked her several times with a stun gun, and threatened her with sexual assault. At that time Mattson, who was Knutson's stepmother, was seventy-two years old. Karl Knutson told officers he and Mattson had engaged in consensual sadomasochistic activity. Knutson claimed he broke through the window of Mattson's motel room when he returned to her locked room and heard her choking. Mattson testified she locked out Knutson and he forced his way in through the window. Pursuant to Knutson and his father's consent the police searched the vehicle which was owned by Knutson's father. During the search police found a stun gun which had a 120,000-volt capacity, several restraint straps, undergarments, and a sleep mask. Three guns were also found in the vehicle: two pistols were inside a green bag on the floor in front of the driver's seat, and one gun was in the trunk. Knutson was charged with burglary in the first degree, assault with intent to commit sexual abuse causing injury, false imprisonment, and carrying weapons.

The carrying-weapons charge against Knutson was severed and tried separately. Knutson testified the two pistols found in the green bag were always unloaded and kept inside a latched, black bag behind the front seat whenever he was driving. The district court overruled Knutson's motion for judgment of acquittal. Knutson was convicted of carrying weapons. He received a two-year term on the conviction.

I. Carrying Weapons. On appeal Knutson contends the district associate judge erred in failing to grant his motion for a judgment of acquittal on the carrying-weapons charge.

The offense of carrying weapons is defined under Iowa Code section 724.4:

> Except as otherwise provided in this section, a person who goes armed with a dangerous weapon, concealed on or about the person, or who, within the limits of any city, goes armed with a pistol or revolver, or any loaded firearm of any kind, whether concealed or not, or who knowingly carries or transports in a vehicle a pistol or revolver, commits an aggravated misdemeanor.

Iowa Code § 724.4 (1991). One affirmative defense to this offense, however, provides:

> [a] person who for any lawful purpose carries or transports an unloaded pistol or revolver in a vehicle inside a closed or fastened container or securely wrapped package which is too large to be concealed on the person or inside a cargo or luggage compartment where the pistol or revolver will not be readily accessible to any person riding in the vehicle or common carrier.

Iowa Code § 724.4(f) (1991); see State v. Erickson, 362 N.W.2d 528, 531 (Iowa 1985) (citation omitted). The State need not prove this exception fails to apply, unless substantial evidence in the record supports a finding it

does apply. State v. Bohi, 428 N.W.2d 679, 680 (Iowa App. 1988) (citations omitted).

Knutson contends there was insufficient evidence to support a conviction on the carrying-weapons charge. In reviewing a challenge to the sufficiency of the evidence, we view the evidence in light most favorable to the State, including legitimate inferences and presumptions which may fairly and reasonably be deduced from the evidence in the record. State v. Mills, 458 N.W.2d 395, 397 (Iowa App. 1990) (citations omitted). We will uphold a verdict where there is substantial evidence in the record to support the charge. State v. Conyers, 506 N.W.2d 442, 444 (Iowa 1993).

Upon receiving consent from Knutson's father and Knutson, Officer Clark searched the passenger compartment, and Officer Vance searched the trunk of the vehicle. Officer Clark found a green bag lying on the floor in front of the driver's seat of the vehicle. The officer testified the bag contained an unloaded .357 caliber Derringer pistol and another unloaded .357 pistol. He stated there was no way to close the bag nor was it closed when he found it in the vehicle. Defendant admitted the pistols belonged to him and he had driven the vehicle with the weapons inside. Knutson, however, testified he did not place the green bag in that location and denied driving the vehicle with the bag in that location. Knutson claimed he kept the green bag inside a black bag which had a snap lock on top. Defendant admitted such a black bag into evidence and

contended it was in the vehicle when the officers searched it. He stated he kept the black bag inside the car behind the front seat. During their search the officers found no black bag in the passenger compartment of the vehicle. Officer Vance found only a black and brown bag in the trunk. Knutson claims the bag found by Officer Vance was not the one in which he kept the weapons. Knutson denied ever storing the guns in the black bag in the trunk of the vehicle.

There was sufficient evidence for the jury to conclude Knutson was carrying weapons in violation of section 724.4. It is the task of the fact finder, the jury in this case, to resolve questions of fact and assess the credibility of witnesses. Mills, 458 N.W.2d at 397 (citation omitted). In this case the jury chose to believe the State's witnesses. The district associate judge properly overruled Knutson's motion for judgment of acquittal. We affirm on this issue.

II. Following a trial on the remaining counts, Knutson was convicted of second-degree burglary, assault with intent to commit sexual abuse causing injury, and false imprisonment. The trial court overruled his motions for new trial. Knutson was sentenced to a ten-year term on the burglary charge, to be served consecutive to a five-year term on the assault charge, and a concurrent sixty-day term on the false-imprisonment charge. Knutson appeals, alleging the following errors have been made.

A. Motion in Limine. The district court granted Knutson's motion in limine, precluding the State from presenting evidence about the three guns found during the search of the vehicle. The manager of the motel where the assault occurred, however, testified he saw a police officer pull a "regular pistol" from the vehicle. When the motel manager again took the stand, he described the stun gun police had taken from the vehicle. The motel manager gave the following testimony in response to the State's questions:

> Q. I think when we concluded yesterday, we were talking about you seeing the police search the Knutson car, is that right? A. Yes.
>
> Q. You remembered seeing a stun gun in that car. I think that's what we were talking about when we left off. A. Yes.

The district court overruled Knutson's motion for mistrial.

Knutson argues the trial court erred in overruling his motion for mistrial after a witness testified he saw police remove a pistol from the vehicle. A trial court has broad discretion in ruling on motions for mistrial. State v. Brown, 397 N.W.2d 689, 699 (Iowa 1986) (citation omitted). We review a denial of a motion for mistrial on an abuse of discretion. Id.

The record shows defendant continued to refuse the trial court's offer to admonish the jury about the motel manager's reference to a pistol. In light of the clarification regarding the item the manager saw the police officer pull from the vehicle and defendant's rejection of

the court's offer to admonish the jury we find no abuse of discretion in the trial court's refusal to grant Knutson's motion for mistrial. We affirm on this issue.

B. Evidentiary Rulings. Knutson sought to introduce evidence Mattson and his father were "confidentially" married in order to allow Mattson to continue collecting alimony from her former husband. The district court ruled Knutson could ask Mattson about her relationship to Knutson's father to rebut testimony Mattson told police she was not related to Knutson. The court, however, ruled testimony and exhibits relating to Mattson's former dissolution decree were irrelevant and inadmissible. We find no abuse of discretion in the trial court's evidentiary rulings regarding this evidence and testimony. We affirm this evidentiary ruling.

On appeal Knutson also claims the trial court erred in denying his request to admit a photograph of Mattson. Knutson asked to introduce a picture of Mattson photographing herself in a black negligee. The picture was allegedly taken in the 1970s. Knutson argued the picture was similar to another photo Mattson allegedly had sent to him recently. Knutson had been unable to locate the recent photo but argued the older photograph was relevant to the issue of consent regarding the 1992 incident. The court ruled Knutson was free to testify about any photos he received from Mattson, but the photo would not be admitted.

The admissibility of a photograph is within the sound discretion of the trial court. State v. Watts, 441 N.W.2d 395, 397 (Iowa App. 1989) (citation omitted). Knutson sought to introduce the older photograph as evidence of consent in the recent incident. Irrelevant evidence is evidence which has no logical tendency to establish any material proposition. State v. Mark, 286 N.W.2d 396, 410 (Iowa 1979) (citations omitted). The trial court did not abuse its discretion in refusing to admit the photograph. We affirm the trial court's decision regarding the admission of this evidence.

C. Motion for Mistrial. Knutson contends the trial court erred in overruling his motion for mistrial. Knutson moved for a mistrial during trial and cited several bases for the motion.

At trial Officer Vance, in describing Mattson's emotional state at the motel, testified she kept telling him to check Knutson's "past history." Mattson's statements provided no further details of any such "past history." Knutson argues these vague references to his past history warranted a mistrial.

Knutson also claims Mattson's testimony about seeing items in defendant's father's vehicle which horrified her was sufficient to justify a mistrial. Defendant claims Mattson's statement reinforced the motel manager's statement he saw an officer pull a gun from the vehicle.

In addition Knutson cites as prejudicial testimony Officer Vance's statement he had previous contact with Knutson at another trial. The record shows Vance's reference to "another trial" was amended during the trial to explain he meant the prior contact with defendant had been at a deposition.

In order to properly preserve error regarding the trial court's decision on a motion for a mistrial, objections must be made at the earliest time after the grounds for the objection become apparent. State v. Jirak, 491 N.W.2d 794, 796 (Iowa App. 1992); see State v. Washington, 356 N.W.2d 192, 194 (Iowa 1984) (citation omitted). In this case defendant's objections did not follow the question or the answer but were raised later in the trial. The record clearly shows Knutson failed to timely object to this testimony by Officer Vance and Mattson. Defendant's objections to the disputed evidence were not made at the earliest time after the grounds for objection became apparent. Defendant failed to preserve any error regarding the introduction of this evidence. We do not address these claims on appeal. Knutson now contends his trial counsel's delay in objecting to this testimony constituted ineffective assistance. The record is insufficient for this court to address the ineffectiveness claim, and we preserve it for postconviction proceedings. See State v. Evans, 495 N.W.2d 760, 765 (Iowa 1993) (citations omitted).

Knutson's motion for a mistrial was also based on the possibility any number of jurors could have read two newspaper articles which referred to the charge against defendant for carrying weapons. The court offered to ask jurors if they had read anything but defendant rejected the court's offer. A trial court has broad discretion in ruling on a motion for mistrial. Brown, 397 N.W.2d at 699 (citations omitted); State v. Jirak, 491 N.W.2d 794, 796 (Iowa App. 1992). Ordinarily abuse of discretion is found upon the denial of a mistrial only where there is no support in the record for the trial court's determination. Jirak, 491 N.W.2d at 796 (citations omitted). The trial court did not abuse its discretion in refusing to grant a mistrial on this basis. We affirm on this issue.

D. Jury Instructions. Knutson argues the trial court erred in refusing to submit his proposed jury instructions on consent as a defense against the assault charge. In both proposed instructions Knutson contends he and Mattson were voluntary participants in sadomasochistic activity. Defendant properly objected to the court's ruling at trial.

We review decisions regarding jury instructions for an abuse of discretion. State v. Cunningham, 463 N.W.2d 887, 889 (Iowa App. 1990). Generally a defendant is entitled to have instructions submitted which relate his theory of defense if a timely request is made, evidence in the record supports such a theory, and the instruction presents a correct declaration of law. State v. Stewart, 445 N.W.2d

418, 421 (Iowa App. 1989) (citations omitted); see United States v. Sanchez, 963 F.2d 152, 157 (8th Cir. 1992) (citation omitted). Knutson requested the two jury instructions based on Iowa Code section 708.1. He contended there was no assault if he and Mattson were voluntary participants in sadomasochistic activity. The State argues defendant's proposed jury instructions were not a correct statement of the law. The State cites State v. Collier in support of its argument.

Iowa Code section 708.1 defines assault. The section provides:

> A person commits an assault when, without justification, the person does any of the following:
>
> 1. Any act which is intended to cause pain or injury to, or which is intended to result in physical contact which will be insulting or offensive to another, coupled with the apparent ability to execute the act.
>
> 2. Any act which is intended to place another in fear of immediate physical contact which will be painful, injurious, insulting, or offensive, coupled with the apparent ability to execute the act.
>
> 3. Intentionally points any firearm toward another, or displays in a threatening manner any dangerous weapon toward another.
>
> Provided, that where the person doing any of the above enumerated acts, and such other person, are voluntary participants in a sport, social or other activity, not in itself criminal, and such act is a reasonably foreseeable incident of such sport or activity, and does not create an unreasonable risk of serious injury or breach of the peace, the act shall not be an assault.

In Collier this court concluded the legislature did not intend sadomasochistic activity to be a "sport, social or other activity" under section 708.1 so as to justify an

instruction on consent as a defense. State v. Collier, 372 N.W.2d 303, 307 (Iowa App. 1985). We hold the trial court did not abuse its discretion in refusing to submit defendant's proposed jury instructions. We affirm on this issue.

Costs of this appeal are assessed to Knutson.

**AFFIRMED.**