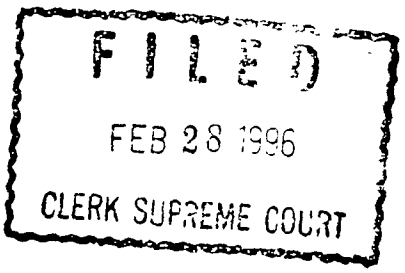
IN THE COURT OF APPEALS OF IOWA

No 5-702 / 94-1695



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STATE OF IOWA,

Appellee,

vs.

JAMES RALPH NOTT,

Appellant

Appeal from the Iowa District Court for Muscatine County, J. L Burns, Judge.

Defendant appeals his conviction, following a jury trial, of first-degree burglary, first-degree sexual abuse, and willful injury **AFFIRMED.**

William A. Price, Des Moines, and Jeanne K Johnson, Des Moines, for appellant

Thomas J. Miller, Attorney General, Thomas S Tauber, Assistant Attorney General, Richard R. Phillips, County Attorney, and Dana Christiansen, Assistant County Attorney, for appellee.

Considered by Hayden, P J , and Sackett and Huitink, JJ.

HAYDEN, P.J.

At about 3 a m on November 3, 1993, Judy Jens was dragged from her bed, beaten about the head, and anally sexually assaulted The assailant kept Judy facing away from him, and Judy later testified he sounded as if he was attempting to disguise his voice The attacker then placed a blanket over Judy's head, pushed her out the bedroom door and down the stairs from behind, and fled out the front door

The police were summoned, and Judy gave them the name of her daughter's (Jody Nott) former boyfriend and her daughter's husband (James Nott, the defendant) as possible suspects Judy told police her assailant reeked of cigarette smoke and grunted each time he hit her She could not describe his appearance other than by saying his hair was worn straight across his forehead. Judy later testified during the assault she thought, "James, why?" She also testified she had heard Nott in the past make the grunting sounds she heard on the night of the attack when Nott would hit his pit bull.

The police interviewed Jody's former boyfriend and confirmed his alibi for the night of Judy's assault. The police also interviewed Jody and her husband, James Nott, the defendant. They claim James was at a bar drinking on the night in question and arrived home shortly after 2 a.m. A baseball hat found at Judy's home after the assault held a hair consistent with James' hair. DNA testing indicated semen left on Judy's person was consistent with one percent of the Caucasian population, including James

Serological examination of the semen shows the person who was the source had a blood type consistent with forty-one percent of the Caucasian population, forty-two percent of African Americans, and twenty-five percent of Hispanics, including Nott

On March 24, 1994, James Nott was arrested and charged with first-degree burglary, first-, second-, and third-degree sexual abuse, willful injury, and aggravated assault. Nott did not waive speedy trial, which was then set for June 13, 1994 On June 6 the State moved to dismiss the trial information pursuant to Iowa Rule of Criminal Procedure 27, alleging the State's DNA witness was not able to attend on the scheduled trial date The district court dismissed the information in the interests of justice. The State immediately filed a second trial information again charging Nott in Judy's attack. Nott's motion to dismiss the charges as violating his speedy trial rights was overruled.

Nott orally moved in limine to exclude any testimony by Judy contending her daughter, Jody, had complained to Judy about Nott liking sexual intercourse from behind. Nott also moved to exclude any statements allegedly made by Jody asking Judy to say whatever she could to get Nott acquitted The court sustained the motion because the anticipated testimony was hearsay and "those questions should not be asked in front of the jury unless and until somebody else testified which opens the door to that." No such testimony was given by Judy in the State's case in chief. Nott later moved to exclude any testimony by his witness, Jody, relating to discussions with her

mother about Nott and Jody's sexual practices The district court, however, stated it would allow testimony about conversations concerning sexual practices similar to what occurred in this case stating "if they talked about sexual practices which are similar to what occurred in this particular case, then that is relevant and ought to be admitted "

On cross-examination, the State asked Jody if she had ever complained to Judy about Nott's sexual practices Nott objected on the basis the question exceeded the scope of direct The district court overruled the objection, and Jody denied any such complaints In rebuttal, Judy was asked whether she and Jody had discussed Nott's sexual practices Nott objected on grounds the rebuttal was irrelevant and improper The objection was overruled. Judy then testified Jody had complained to her on at least three occasions about James liking to engage in anal sex which hurt She also testified she told Judy "to tell him if he didn't quit that it's the same as raping your wife "

Nott motioned for a directed verdict on the charges of first-degree sexual abuse and willful injury for lack of evidence establishing serious injury. With respect to her injuries, Judy testified the attack left her extremely bruised and with a sore neck and a broken finger. She testified she had to wear a cervical collar for a few months following the assault and her finger never healed completely The "chip fracture" to her finger required a splint. Evidence indicated, at the time of trial, Judy was still unable to perform some common tasks with the finger and the finger fell about two degrees short of being fully extensible. Judy suffered additional injuries such as a sprained

right wrist and a deep cut to her right index finger which severed a nerve causing numbness for two or three months The district court denied Nott's motion for directed verdict for lack of evidence establishing serious injury

The case went to jury on the charges of first-degree burglary, first-degree sexual abuse, willful injury, and their respective lesser-included offenses Nott was found guilty of first-degree burglary, first-degree sexual abuse, and willful injury. The district court imposed sentence on the burglary (twenty-five years) and sexual abuse (life) convictions

Nott appeals

I. Admission of Evidence of Prior Sexual Acts.

We review for an abuse of discretion In order to show an abuse of discretion, one generally must show that the court exercised its discretion "'on grounds or for reasons clearly untenable or to an extent clearly unreasonable.'" *State v. Blackwell*, 238 N W 2d 131, 138 (Iowa 1976) (quoting *Weeks v. Burnor*, 326 A.2d 138, 140 (Vt 1974))

Nott claims the district court abused its discretion by admitting evidence of alleged prior sexual acts between him and his wife. Nott argues such testimony is irrelevant and, even if relevant, its probative value is substantially outweighed by its prejudicial effect on the jury Nott also argues his objection to cross-examination of Jody Nott concerning prior sexual acts with Nott should have been sustained because

such questioning was outside the scope of direct examination Nott argues the prosecution's conduct in questioning Jody was akin to the improper practices which the Iowa Supreme Court condemned in *State v. Turecek*, 456 N W 2d 219, 223-25 (Iowa 1990) Nott further claims the rebuttal testimony of Judy Jens was irrelevant and improper rebuttal as it has no direct tendency to explain, repel, controvert, or disprove evidence produced by the other side

We determine the district court did not abuse its discretion in finding the testimony at issue was relevant and its probative value was not substantially outweighed by the danger of unfair prejudice With respect to relevancy, the district court stated, "if they talked about sexual practices which are similar to what occurred in this particular case, then that is relevant and ought to be admitted." The court accepted the State's argument the testimony was relevant to the issue of identity. With respect to whether the probative value of the testimony was substantially outweighed by unfair prejudice, we note Nott has the burden to establish the trial court abused its discretion in this "balancing process." *State v. Plaster*, 424 N W 2d 226, 232 (1988). Although we may have come to a different conclusion with respect to these issues if placed in the district court's position, we find no abuse of discretion. Finding the testimony relevant and finding any potential prejudice did not *substantially* outweigh the probative value of the testimony was not an exercise of discretion "'on grounds or for reasons clearly untenable or to an extent clearly unreasonable.'"

The State concedes the cross-examination of Jody was beyond the scope of the direct However, the State claims the court, in the exercise of discretion, may permit inquiry into additional matters as if on direct examination Iowa R Evid. 611(b) We cannot say the district court abused its discretion in allowing cross-examination beyond the scope of direct which the court found probative on the issue of identity and which was designed to impeach the witness Again, although we may have come to a different conclusion, we cannot say the decision was an abuse of discretion The district court did not exercise its discretion "'on grounds or for reasons clearly untenable or to an extent clearly unreasonable '" *Blackwell*, 238 N W 2d at 138 (quoting *Weeks*, 326 A 2d at 140)

Additionally, we do not find the rebuttal testimony was irrelevant or improper. In the defense's oral motion in limine, the court stated the victim could not testify about the conversations with her daughter because the statements were hearsay However, the court stated if Jody was asked the question and denies making the statements to her mother, someone else could testify about the statements for impeachment purposes. The court went on to state, if the conversation is admissible later for impeachment purposes, it would have to be brought in as rebuttal after Jody testified; and, if Jody testified it would be on behalf of the defense and not in the State's case in chief. We find the rebuttal testimony of Judy was not irrelevant or improper. Her testimony was not used as substantive evidence, but to impeach Judy and attack her credibility Iowa

Rule of Evidence 613(b) permits the State to show the witness made out-of-court statements inconsistent with the witness's testimony under oath

Lastly, with respect to the *Turecek* issue raised by Nott, we find error was not preserved. A defendant is bound on appeal by the objection he made at trial, without amplification, change, or embellishment. *State v. Hepperle*, 530 N W 2d 735, 738-39 (Iowa 1995) In this case, Nott objected to the State's cross-examination of Jody only on the basis the questioning exceeding the scope of the direct examination, not on the basis the State violated *Turecek*. Furthermore, even if error was preserved, we find the State's actions do not fall within the conduct prohibited by *Turecek*. In *Turecek*, the court stated, "The right given the State to impeach its own witnesses is to be used as a shield and not a sword . . The State is not entitled under rule 607 to place a witness on the stand who is expected to give unfavorable testimony and then, in the guise of impeachment, offer evidence which is otherwise inadmissible." *State v. Turecek*, 456 N.W.2d 219, 225 (Iowa 1990). *Turecek* dealt with the situation where the State attempted to impeach *its own* witness for the primary purpose of placing before the jury substantive evidence which was otherwise inadmissible. *Id.* *Turecek* merely prevents the State from calling Jody as a witness, under the guise of impeachment, merely to introduce inadmissible hearsay. In the case at bar, however, the State was questioning a *defense witness* for the primary purpose of attacking her credibility. As such, *Turecek* does not apply to this situation.

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II. Sufficiency of the Evidence.

Our scope of review is on assigned error only Iowa R App P 4 The standard of review in challenging the sufficiency of the evidence is well established *State v. Lampman*, 342 N W 2d 77, 81 (Iowa App 1982) We will uphold a verdict where there is substantial evidence in the record tending to support the charge *State v. Conyers*, 506 N.W 2d 442, 444 (Iowa 1993); State *v. Aldape*, 307 N W.2d 32, 39 (Iowa 1981) Substantial evidence means evidence which would convince a rational fact finder that the defendant is guilty beyond a reasonable doubt. *State v. LeGear*, 346 N.W 2d 21, 23 (Iowa 1984), *Hall*, 371 N W 2d at 188

When reviewing a challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the State, including legitimate inferences and presumptions that fairly and reasonably may be deduced from the evidence in the record *State v. Propp*, 532 N W 2d 784, 785 (Iowa 1995), *State v. Bass*, 349 N W 2d 498, 500 (Iowa 1984); *State v. Hall*, 371 N W 2d 187, 188 (Iowa App. 1985). Direct and circumstantial evidence are equally probative so long as the evidence raises "a fair inference of guilt and [does] more than create speculation, suspicion, or conjecture." *State v. Casady*, 491 N.W 2d 782, 787 (Iowa 1992), *State v. Hamilton*, 309 N W 2d 471, 479 (Iowa 1981). It is necessary to consider all the evidence in the record, and not just the evidence supporting the verdict, to determine whether there is substantial evidence to support the charge. *Bass*, 349 N.W 2d at 500; *Hall*, 371 N.W.2d at 188.

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At the close of the State's case-in-chief, defense counsel made a motion for directed verdicts of acquittal to the charges of first-degree sexual assault and willful injury. Nott claimed the State failed to establish the victim sustained a serious injury. The trial court overruled the motion. Defense counsel later made a motion in arrest of judgment and a motion for new trial on the same basis. These motions were also denied. Nott now appeals arguing there is insufficient evidence the victim suffered serious injury.

According to the jury instructions, a serious injury is: "a bodily injury which creates a substantial risk of death or which causes serious permanent disfigurement or extended loss or impairment of the function of any bodily part or organ." In this case the State attempted to prove a "serious injury" by proving Judy suffered a bodily injury which caused "extended loss or impairment of the function of any bodily part or organ." We determine there was sufficient evidence to convince a rational fact finder Judy suffered a "serious injury."

Judy suffered from a neck injury which required the use of a neck brace continually for two or three months after the assault and intermittently thereafter. Evidence indicated this injury caused persistent pain and interfered with Judy's ability to perform household tasks. The fracture of her left middle finger required a splint. This injury also caused persistent pain and interfered with Judy's ability to perform common tasks. At trial, Judy testified her finger was still crooked and had lost strength

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making it difficult to open door handles or kitchen cupboards Furthermore, a medical report indicated Judy suffered from a "persistent deformity" in the finger and the finger fell two degrees short of being fully extensible As such, the jurors rationally could have found either of these injuries was sufficient proof Judy suffered a loss or impairment of function

III. Speedy Trial.

We review for an abuse of discretion In order to show an abuse of discretion, one generally must show that the court exercised its discretion "'on grounds or for reasons clearly untenable or to an extent clearly unreasonable'" *State v. Knox*, 464 N W 2d 445, 446 (Iowa 1990). *Blackwell*, 238 N W 2d at 138 (Iowa 1976) (quoting *Weeks*, 326 A.2d at 140) Nott claims the district court abused its discretion in dismissing the charges against Nott without prejudice and then permitting the State to refile the same charges. Nott claims the dismissal and refiling violated his right to a speedy trial

Under Iowa Rule of Criminal Procedure 27(1), the district court has discretion to dismiss any pending criminal prosecution "in furtherance of justice" *Knox*, 464 N W.2d at 446. Such a dismissal does not bar another prosecution for the same offense when, as here, the offense charged is a felony Iowa R. Crim. P 27(1); *Knox*, 464 N.W.2d at 446. A dismissal under rule 27(1) starts the proceedings anew, for speedy trial purposes. *State v. Fisher*, 351 N.W 2d 798, 801 (Iowa 1984). Our supreme court

has stated proper reasons for dismissal without prejudice include "facilitating the State in gathering evidence, procuring witnesses, or plea bargaining." *State v. Brumage*, 435 N W 2d 337, 340 (Iowa 1989) However, the State is not able to use rule 27(1) to "escape from a statutory speedy trial predicament engendered by its own mishandling of a criminal case." *State v. Florie*, 411 N W 2d 689, 693 (Iowa 1987)

We determine the district court did not abuse its discretion in dismissing the case under rule 27(1) without prejudice The dismissal was proper because it permitted the State to procure a witness. Despite Nott's arguments to the contrary, we do not believe the unavailability of Special Agent Mertens was due to any mishandling of the case by the State. Special Agent Mertens had a scheduling conflict which would not allow him to testified at the scheduled trial date. Although the State had previously postponed the case to accommodate another witness, we cannot say such rescheduling was "mishandling" of the case by the State Furthermore, we do not believe the State was required to use an alternative to live testimony such as a discovery deposition, videotape, or telephonic deposition as suggested by Nott. Special Agent Mertens' testimony was a very important piece of evidence connecting Nott with the crimes charged. The jury was entitled to hear live testimony, see the result of live cross-examination, and evaluate Special Agent Mertens' demeanor.

We find the district court did not exercise its discretion "'on grounds or for reasons clearly untenable or to an extent clearly unreasonable." As such, we determine

the trial court did not abuse its discretion in dismissing the case under rule 27(1) without prejudice

IV. Ineffective Assistance of Counsel.

Ordinarily, our review of postconviction relief proceedings is for errors of law *Hinkle v. State*, 290 N W 2d 28, 30 (Iowa 1980) However, when a postconviction petitioner asserts violation of constitutional safeguards--such as ineffective assistance of counsel--we make our own evaluation based on the totality of the circumstances This is the equivalent of de novo review. *Id.* Generally, ineffective assistance of counsel claims are preserved for postconviction to allow trial counsel an opportunity to defend the charge *State v. Mulder*, 313 N.W 2d 885 (Iowa 1981); *State v. Nebinger*, 412 N W.2d 180, 191-92 (Iowa App 1987)

Where the record on direct appeal is not adequate to permit us to resolve the issue, we preserve the defendant's claim for postconviction proceedings so the facts may be so developed.. *State v. Koenigham*, 356 N.W 2d 237, 238 (Iowa App. 1984) This also gives the allegedly-ineffective attorney the opportunity to explain his or her conduct. *State v. Coil*, 264 N.W.2d 293, 296 (Iowa 1978). We conclude there is an inadequate record for us to adjudicate defendant's claim without counsel's explanation for his conduct. We therefore preserve defendant's ineffective assistance of counsel claim for a later proceeding.

AFFIRMED.

Huitink, J., concurs; Sackett, J., concurs in part and dissents in part.

SACKETT, J. (concurring in part, dissenting in part)

I concur in part and dissent in part. I agree with the majority in all respects except I find the evidence of sexual practices prejudicial and irrelevant.