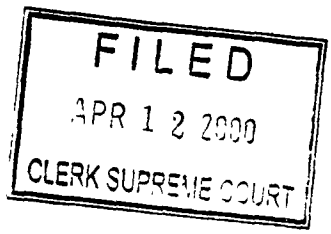
IN THE COURT OF APPEALS OF IOWA

No. 0-074 / 98-2013
Filed April 12, 2000



STATE OF IOWA,
Appellee,

vs.

CORD D. CHRISTENSON,
Appellant.

Appeal from the Iowa District Court for Polk County, Richard G. Blane II, Judge.

Defendant appeals his convictions for first-degree kidnapping, first-degree burglary, and second-degree sexual assault. **AFFIRMED IN PART, VACATED IN PART.**

Linda Del Gallo, State Appellate Defender, and Dennis D. Hendrickson, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney General, John P. Sarcone, County Attorney, and James Ward, Assistant County Attorney, for appellee.

Heard by Sackett, C.J., and Vogel and Hecht, JJ.

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VOGEL, J.

On appeal from his convictions for first-degree kidnapping, first-degree burglary, and second-degree sexual assault, Cord Christenson contends:(1) the court erred in allowing a stun gun to be demonstrated at trial and in failing to grant his motion for new trial; (2) his counsel was ineffective in failing to move to suppress statements based on Sixth Amendment grounds and in allowing details of a previous burglary to be admitted into evidence; and (3) the sexual abuse conviction should have been merged with the kidnapping conviction. We affirm in part, vacate in part.

Background facts. On April 28, 1998, the jury returned a verdict finding Christenson guilty of kidnapping in the first-degree, in violation of Iowa Code sections 710.1 and 710.2 (1997), a class A felony; guilty of burglary in the first degree, in violation of Iowa Code sections 713.1 and 713.3 (1997), a class B felony; and guilty of sexual abuse in the second degree, in violation of Iowa Code sections 709.1 and 709.3 (1997), a class B felony. He was subsequently sentenced to life in prison for the kidnapping conviction and twenty-five years in prison each for the burglary and sexual abuse convictions; all sentences were ordered to run concurrently.

The victim, Bekki Lyons, was the former girlfriend of Christenson. Lyons testified that on the morning of February 4, 1998, Christenson broke into her home, used a stun gun on her several times, and raped her. He then forced her to pick up her son from school and travel with him to Kansas City. Once in Kansas City, he drove to a bus station. Giving her the stun gun for her protection, he left Lyons and her son and they drove back to Des Moines where she

reported the incident to the police. Christenson's testimony was a strikingly different version. He claimed Lyons invited him into her home, and all events after that point were completely consensual. He cast doubt on Lyons's story, in that she had no fewer than seven opportunities to escape or alert someone for help during the ride to Kansas City.

*I. **Demonstration of the stun gun.*** At trial, the prosecution, over objection by Christenson's counsel, activated the stun-gun for the jury. In allowing the demonstration, the court stated:

> [I]f there's a question I'd say whether or not a weapons trigger will activate the hammer, you can certainly do that type of an experiment in front of the jury without the gun being loaded. For the record too, Mr. Ward demonstrated the item and when that was done, according to the Court's view, I guess I'm going to say I'm about 12 to 15 feet from Mr. Ward, the Court heard a repetitive clicking sound that was not overly loud. And although it's been represented to me that you can see an arc I'll have to say from this distance I was looking and did not see any kind of light or arcing emitted, so it's not as though if it's used we're going to get large sparks, the sound is not so definite that it's going to, you know, cause anyone to jump or anything like that. I guess from that standpoint I don't – that the demonstration is such that it would be any different than like I said, showing that a hammer will cause the firing pin in a weapon to go forward. I guess to me at this point it's not so prejudicial that it outweighs the effect, and under 403 I think – Rule 403 I think the demonstration appears to be appropriate as long as it's done and it can be done once. The other thing is that I will not allow the battery in there so that the jury can take it back and do their own demonstration.

Christenson contends the demonstration of the stun gun was an abuse of the trial court's discretion. Admission or exclusion of demonstrative evidence rests largely within the trial court's discretion. *Mel Foster Co. Properties, Inc. v. American Oil Co.*, 427 N.W.2d 171, 176 (Iowa 1988); *Schuller v. Hy-Vee Food Stores, Inc.*, 328 N.W.2d 328, 331 (Iowa 1982). Therefore, we will not interfere

unless the trial court has abused that discretion. *State v. Thornton,* 498 N.W.2d 670, 674 (Iowa 1993). Demonstrative evidence is usually received if it affords a basis for a reasonable inference on a point in issue. *State v. Henderson,* 268 N.W.2d 173, 179 (Iowa 1978); *State v. Williams,* 62 N.W.2d 742, 748 (Iowa 1954).

Christenson argues that under Iowa Rule of Evidence 403, such a demonstration was more prejudicial than probative and was cumulative of other evidence. Rule 403 provides relevant evidence can be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice" or if it is cumulative of other evidence. The State contends the demonstration was not unduly prejudicial as the stun gun, when operated, produced only a brief clicking noise and emitted a blue electric current that may or may not have been seen by the jurors. The State also argues the stun gun is not a familiar weapon to many people, giving the brief demonstration a strong probative value. We agree with the State and find the trial court's ruling on the limited demonstration of the stun-gun was not unduly prejudicial to Christenson and, therefore, was not an abuse of the trial court's discretion.

Christensen also contends the demonstration of the stun-gun was cumulative of evidence already admitted as Lyons had already testified that she had been zapped with a stun gun several times. The State asserts the purpose of the demonstration was not merely to reinforce Lyons' testimony but to lend credence to her story that Christenson kept her in great fear and her actions that day were not consensual. We agree that the demonstration served a purpose other than to simply reinforce testimony that was already in evidence. It was not,

therefore, needlessly cumulative. Accordingly, we affirm the trial court's decision to allow the stun gun demonstration.

II. Motion for new trial. Christenson contends the trial court abused its discretion in failing to grant a new trial. A district court is given "unusually broad discretion" in ruling on a motion for a new trial based on newly discovered evidence. *State v. Miles,* 490 N.W.2d 798, 799 (Iowa 1992). This broad discretion is particularly appropriate as it is important to distinguish between the unavoidable, legitimate claims and those proposed in desperation by a disappointed litigant. *Id.* From its closer vantage point, the presiding trial court has a clearer view of this crucial question, and we generally yield to its determination. *Id.* In order to prevail on such a motion, the defendant must show that the evidence (1) was discovered after the verdict, (2) could not have been discovered earlier in the exercise of due diligence, (3) is material to the issues in the case and not merely cumulative, and (4) probably would have changed the result of the trial. *Id.* (citing *Jones v. State,* 479 N.W.2d 265, 274 (Iowa 1991)).

Sometime after the close of evidence, Christenson's attorney had a chance meeting with police cadet VanDeBoe, who was the first person Lyons spoke to at the police station the day she reported the incident. Christenson claims Cadet VanDeBoe would provide new and potentially exculpatory information that may change the outcome of the trial. VanDeBoe submitted an affidavit and testified at the hearing on the motion for new trial. His testimony was that Lyons told him she had purchased the stun gun and had it for her protection. Lyons' trial testimony was that Christenson gave it to her for her protection when he allowed her and her son to travel back to Des Moines. Cadet VanDeBoe,

however, admitted he was uncertain about what Lyons said to him about the stun-gun. Christenson's own trial testimony was that he had purchased the stun-gun. On the question of physical trauma, Cadet VanDeBoe stated he did not see any marks on Lyons during his contact with her at the police station. However, he was merely the officer on duty at the window when Lyons arrived and not the officer who filed the report. Photographs, taken by the Des Moines Police Department later the same evening, documented the marks which were visible on Lyons' neck and on one wrist.

Both the State and Christenson agree the potential testimony of Cadet VanDeBoe meets the first two requirements of Iowa Rule of Criminal Procedure 23(2). They differ as to whether the last two apply. Christenson alleges the testimony is not merely cumulative but serves to discredit Lyons' testimony on several points. The State argues the testimony would be merely cumulative and that Cadet VanDeBoe's statements do not contradict Lyons' overall testimony. After reviewing the affidavit and testimony of Cadet VanDeBoe, we agree with the trial court that any evidence Cadet VanDeBoe would have provided would not have changed the result of the trial. We find no abuse of discretion in denying Christenson's motion for new trial.

III. Ineffective Assistance of Counsel. Christenson contends his trial counsel was ineffective on two grounds: 1) failure to suppress interrogation statements which were allegedly obtained in violation of his Sixth Amendment right to counsel; and 2) failure to object to details of a prior burglary committed by Christenson against Lyons that were admitted into evidence at the trial.

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, 890 (Iowa 1981); *State v. Nebinger,* 412 N.W.2d 180, 191-92 (Iowa App. 1987). We depart from this preference if the record on direct appeal is sufficient to evaluate the merits of a defendant's ineffective assistance of counsel claim. *Id.* If not, we preserve the claim for postconviction proceedings so the facts may be developed. *State v. Koenighain,* 356 N.W.2d 237, 238 (Iowa App. 1984). This also gives the allegedly-ineffective attorney an opportunity to explain his or her conduct. *State v. Coil,* 264 N.W.2d 293, 296 (Iowa 1978).

Because the record does not contain sufficient information, we preserve these issues for postconviction relief.

IV. Kidnapping and sexual abuse convictions should have merged. Christenson alleges these two charges should have been merged because the elements of first-degree kidnapping necessarily include the elements of second-degree sexual abuse. The State concedes this issue. Therefore, we vacate Christenson's sexual abuse conviction.

We therefore affirm Christenson's convictions on first-degree kidnapping and first-degree burglary, vacate his conviction on second-degree sexual abuse, and preserve his ineffective assistance of counsel claims for post conviction proceedings.

AFFIRMED IN PART, VACATED IN PART.