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**IN THE COURT OF APPEALS OF IOWA**

No. 3-579 / 92-1120

**STATE OF IOWA,**

Appellee,

**vs.**

**TODD SHANE JACKSON,**

Appellant.

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Appeal from the Iowa District Court for Polk County, Rodney Ryan, Judge.

Jackson appeals his conviction, following a jury trial, of attempted murder in violation of Iowa Code section 707.11 (1991). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Shari Barron, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Richard J. Bennett, Assistant Attorney General, John P. Sarcone, County Attorney, and James W. Ramey, Assistant County Attorney, for appellee.

Heard by Schlegel, P.J., and Hayden and Sackett, JJ.

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HAYDEN, J.

The State charged Todd Shane Jackson with attempted murder in violation of Iowa Code section 707.11 (1991). The State alleged Jackson raped Diane Pittman and stabbed her sixteen times. As a result of the stabbing, Pittman lost a kidney and her lungs collapsed. A jury trial was held on this matter in April 1992. The jury found Jackson guilty as charged, and the district court sentenced him to up to twenty-five years.

Jackson appeals. He contends the trial court erred in allowing the jury access to an audiotape player to replay his taped confession during jury deliberations. Jackson argues allowing the jury unlimited access to replay the taped confession unduly emphasized that testimony. He further suggests the taped confession is similar to a deposition, which cannot be given to the jury during deliberations under Iowa Rule of Criminal Procedure 18(5)(e).

I. The trial court has considerable discretion to determine whether exhibits are to be taken by the jury during deliberations. State v. Jackson, 387 N.W.2d 623, 629 (Iowa App. 1986) (citing State v. Thompson, 326 N.W.2d 335, 337 (Iowa 1982); State v. Baumann, 236 N.W.2d 361, 366 (Iowa 1975)). Reversal is warranted only if the trial court abuses its discretion in sending evidence to the jury room and prejudice results. Id. (citation omitted).

At trial the State introduced an audiotape of a statement defendant gave to police after the stabbing incident. The tape was offered into evidence and admitted. The State also offered into evidence a tape player. The court admitted the tape player for the limited purpose of allowing the jury to listen to the tape of defendant's statement. The court overruled defendant's objections to the admission of the tape and tape player. The tape was then played once for the jury in the courtroom. At the close of the trial the court instructed the jury a confession, unless made in open court, will not warrant a conviction unless accompanied with other proof that the defendant committed the offense. See Iowa R. Crim. P. 20(4).

Jackson contends the trial court, sua sponte, suggested the tape and tape player be admitted into evidence. The record clearly reveals, however, both items were properly offered by the State and then admitted into evidence by the court over the objections of defendant.

> MR. RAMEY: At this time, Your Honor, the State would move to submit in for the limited purpose of playing the tape Exhibit 16A, and Exhibit 16, I believe was moved into evidence earlier.
>
> THE COURT: Yes. The objection is overruled. Exhibit 16 is admitted. Exhibit 16A is offered.
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> MR. McCARTHY: Same objection as previously urged, Your Honor.
>
> THE COURT: All right. The objection is overruled. The machine is admitted for the sole purpose of allowing the tape to be heard by the jury.

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The issue on appeal is whether the trial court abused its discretion in allowing the jury access to a tape player to replay Jackson's taped confession during jury deliberations.

Iowa Rule of Criminal Procedure provides, in pertinent part:

> Upon retiring for deliberations the jury may take with it all papers and exhibits which have been received in evidence, and the court's instructions. Provided, however, the jury shall not take with it depositions, nor shall it take original public records and private documents as ought not, in the opinion of the court, to be taken from the person having them in possession.

Iowa R. Crim. P. 18(5)(e).

In State v. Triplett the issue was whether the trial court erred in permitting a tape recording of defendant's confession to be taken to the jury room and played during deliberations. State v. Triplett, 248 Iowa 339, 347, 79 N.W.2d 391, 396-97 (1956), cert. dismissed, 357 U.S. 217 (1958); see Jonathan M. Purver, Permitting Documents or Tape Recordings Containing Confessions of Guilt or Incriminating Admissions to be Taken into Jury Room in Criminal Case, 37 A.L.R.3d 238, 246 (1971). Defendant argued, inter alia, permitting the record to be played in the jury room gave undue prominence to this testimony. Id. at 347, 79 N.W.2d at 396. At the time Triplett was decided a code section similar to rule 18(5)(e) existed. Iowa Code section 784.1 (1954) provided the similar guidelines on items permitted to be taken into the jury deliberation

room. In Triplett our supreme court determined the trial court did not err. Id. at 349, 79 N.W.2d at 397; see Baumann, 236 N.W.2d at 366 (in affirming trial court's denial of jury request to replay tape of conversation between defendant and undercover police officer, court cited Triplett and stated "[i]n so holding, we do not intend to say that tape recordings of conversations may never be taken to a jury room and played by a jury during its deliberations).

The Iowa Supreme Court cited State v. Gensmer, 51 N.W.2d 680 (Minn. 1951), cert. denied, 344 U.S. 824 (1952), in support of its decision. In Gensmer defendant's recorded statement, which he made before trial, and a soundscriber were introduced into evidence. Gensmer, 51 N.W.2d at 685. The trial court allowed the items to be taken into the jury room. Id. at 686. The defendant contended the trial court's action constituted error. Id. The Minnesota Supreme Court determined there was no error necessitating a reversal. Id. The court found the mechanized version of defendant's statement was a modern substitute for a statement in longhand. Id., cited in Triplett, 248 Iowa at 348-49, 79 N.W.2d at 397.

The submission of exhibits to the jury is a matter resting within the discretion of the trial court. State v. Baumann, 236 N.W.2d 361, 366 (Iowa 1975). Defendant must show he was prejudiced by the trial court's action. While trial judges should continue to be aware of the potential

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for overemphasizing the importance of such evidence and should prevent such exhibits into the jury if unduly prejudicial, we think that decision is best left to the sound discretion of the trial court. In the absence of an abuse of discretion to the prejudice of defendant, we will not disturb its decision on appeal. We determine there is no clear abuse of discretion on behalf of the trial court. Defendant also has failed to show he was prejudiced by the jury's ability to review the taped confession during deliberations. We affirm on this issue.

II. Jackson further maintains his trial counsel rendered ineffective assistance by (1) failing to object to the introduction of a police officer's written report on hearsay grounds, and (2) failing to make two offers of proof.

Generally, ineffective assistance of counsel claims are preserved for postconviction to allow trial counsel an opportunity to defend the charge. We preserve Jackson's ineffective assistance claims for possible postconviction proceedings.

**AFFIRMED.**