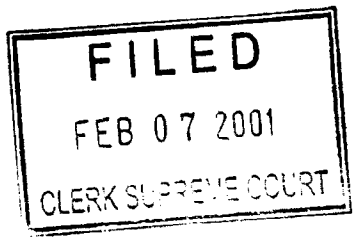
IN THE COURT OF APPEALS OF IOWA

No. 0-791 / 99-2001
Filed February 7, 2001



STATE OF IOWA,
Plaintiff-Appellee,

vs.

LINCOLN DUANE BELKEN,
Defendant-Appellant.

Appeal from the Iowa District Court for Dickinson County, Frank B. Nelson, Judge.

Lincoln Duane Belken appeals from the judgment and sentence entered upon his convictions for first-degree kidnapping and second-degree sexual assault. **REVERSED AND REMANDED.**

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

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, and Edward Bjornstad, County Attorney, for appellee.

Heard by Streit, P.J., and Vogel and Mahan, JJ.

PER CURIAM

Lincoln Belken appeals his conviction for first-degree kidnapping and second-degree sexual abuse. He claims (1) the testimony of the State's rebuttal witness should have been excluded; (2) the testimony of one of the State's DNA experts should have been excluded; (3) his sexual abuse conviction should have merged into his kidnapping conviction; and (4) his trial attorneys were ineffective. Because we agree with Belken's first claim, we reverse and remand.

I. Background Facts & Proceedings.

Belken was charged with first-degree kidnapping and second-degree sexual abuse in August 1998. The charges stemmed from a July 1998 incident in Dickinson County in which a motorist raped a female pedestrian after offering her a ride.

At trial Belken's wife, Jennifer, testified Belken was with her when the rape occurred. The State attempted to impeach the credibility of Jennifer's alibi testimony through the rebuttal testimony of Jennifer's boss, Wanda Garloff. The State asked Garloff, "Did Jennifer Belken tell you she was not certain that Lincoln Belken had not committed [the kidnapping and rape]?" She replied, "Yes, she was."[1]

Belken and his attorneys should have learned of Garloff's potential impeachment testimony from Deputy Sheriff Loebach's deposition. Belken

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[1] Garloff's *voir dire* testimony was more clear:

> I said Jen, most of the kids here think, you know, [Belken] could have done it. And she says, well, I don't know if he did or he didn't. And I says, well, do you have any doubt and she says, I'm not sure.

deposed the deputy shortly before trial. The deputy said he had several conversations with Garloff. When questioned about the content of those conversations, he did not disclose Garloff had told him Jennifer had expressed uncertainty as to Belken's innocence.

The State acknowledges the deputy was asked open-ended questions that should have elicited testimony about relevant conversations he had ever had with Garloff. Moreover, the county attorney who prosecuted Belken was aware of Garloff's potential impeachment testimony at least by the weekend immediately prior to the Monday on which Jennifer testified. Nothing in the record suggests he informed Belken and his attorneys of the deputy's nondisclosure before they called Jennifer as a witness.

Belken was convicted of kidnapping and sexual abuse. He appeals.

II. The Merits.

Belken claims Garloff's testimony should have been excluded as a sanction for Deputy Sheriff Loebach's failure to disclose Garloff's potential impeachment testimony. He argues that had this information been properly and timely disclosed when the deputy was deposed or at least when the county attorney first learned of it, he would not have called his wife, Jennifer, as a witness. We review for an abuse of discretion. *State v. Gates*, 306 N.W.2d 720, 725 (Iowa 1981) ("Discovery matters are committed to the sound discretion of the trial court, and are reviewable only upon an abuse of that discretion.").

Belken deposed the deputy pursuant to Iowa Rule of Criminal Procedure 12(1). Rule 12(1) states the following:

> A defendant in a criminal case may depose all witnesses listed by the state on the indictment or information or notice of additional witnesses in the same manner and with like effect and with the same limitations as in civil actions except as otherwise provided by statute and these rules.

The rule does not specify how a trial court should address a situation like that presented by the deputy's nondisclosure.

Other sections of the Iowa Rules of Criminal Procedure show a trial court has broad discretion in fashioning sanctions for failure to comply with the rules' discovery requirements. For example, rule 12(4) states the following:

> If the defendant . . . does not disclose to the prosecuting attorney all of the defense witnesses . . ., the court may order the defendant to permit the discovery of such witnesses, grant a continuance, or enter such other order as it deems just under the circumstances. It may, if it finds that no less severe remedy is adequate to protect the state from undue prejudice, order the exclusion of the testimony of any such witnesses.

Rule 13(6)(c) makes a comparable statement:

> If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule or with an order issued pursuant to this rule, the court may upon timely application order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing any evidence not disclosed, or it may enter such other order as it deems just under the circumstances.

We find a trial court has similar discretion in fashioning sanctions when a law enforcement officer fails to properly disclose all relevant and material information while being deposed by a criminal defendant. Here, the trial court should have exercised its broad discretion to exclude Garloff's testimony. *Cf. State v. Veal*, 564 N.W.2d 797, 811 (Iowa 1997) ("In choosing a sanction, the trial court must consider: '(1) the circumstances surrounding the violation; (2) the

prejudice, if any, resulting from the violation; (3) the feasibility of curing any prejudice; and (4) any other relevant consideration.'") (citations omitted). The deputy was asked questions that should have prompted him to disclose Jennifer's alleged statements to Garloff. The deputy promised he would notify the attorneys involved in the case if he recalled any additional pertinent information following the deposition. The trial court found the deputy "was given every opportunity" to disclose Jennifer's statements. His nondisclosure of these statements warranted a serious sanction.[2]

Despite the State's arguments to the contrary, the admission of Garloff's testimony was highly prejudicial to Belken. *See State v. Traywick*, 468 N.W.2d 452, 454-55 (Iowa 1991) ("When an alleged error is not of constitutional magnitude, the test of prejudice [for harmless error purposes] is whether it sufficiently appears that the rights of the complaining party have been injuriously affected or that the party has suffered a miscarriage of justice.") (citations omitted) (brackets original). The State argues Garloff's testimony was too ambiguous to be given any significant weight. Given the nature and timing of Garloff's rebuttal testimony, the jury may very well have believed Garloff had testified at trial Jennifer was uncertain about Belken's innocence. If so, Garloff's

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[2] The Iowa Supreme Court has stated, in another context, "knowledge on the part of the police within the prosecutor's jurisdiction is attributed to the prosecutor's office, based on the investigatory, law-enforcement 'team' relationship presumed to exist." *Hamann v. State*, 324 N.W.2d 906, 910 (Iowa 1982). The county attorney's culpability in the deputy's nondisclosure may not have extended beyond their "team relationship." Nevertheless, when the county attorney decided to introduce Garloff's testimony, his "zeal [may have] exceeded his judgment." *See State v. Johnson*, 222 N.W.2d 483, 488 (Iowa 1974).

testimony undermined the credibility of Belken's most important witness: Jennifer's uncertainty was inconsistent with her complete-alibi testimony. More significantly, Garloff's testimony also allowed the jury to hear of Belken's own wife's opinion concerning his guilt. If offered for that purpose alone, we would disapprove of allowing the jury to hear such prejudicial testimony even if there had been no discovery violation in this case. *See State v. Myers*, 382 N.W.2d 91, 97 (Iowa 1986) ("A witness is not permitted to express an opinion as to the ultimate fact of the accused's guilt or innocence."). When Garloff's testimony was offered as impeachment despite the discovery violation in this case, allowing her testimony prevented Belken from receiving a fair trial. *Cf.* Iowa R. Evid. 403.

The State also argues Belken would have been convicted even if Garloff had never taken the stand given the strength of the rest of its case. This, however, appears to be a closer case than the State opines. For example, the State's evidence included DNA evidence, the victim's identification of Belken and his car, and a shirt and gun found where Belken had access to them that resembled the shirt and gun the victim had described to law enforcement officers. On the other hand, Belken's evidence included the victim's misidentification of him and his car, the lack of a positive identification of the assailant's clothing and gun, and several alibi witnesses. In light of this somewhat conflicting evidence, we are not prepared to find Belken has not "been injuriously affected" or has not

"suffered a miscarriage of justice" from the admission of Garloff's highly prejudicial testimony.[3] *See Traywick*, 468 N.W.2d at 454-55.

The trial court's gut reaction regarding Belken's motion on this matter has proven to be prophetic:

> Well, I guess I'm not going to preclude [Garloff] from testifying, but I—I really think you're making a very—possibly serious mistake in calling her . . . . And I guess you're prosecuting, we'll let you do what you feel you need to do, but I—I really am concerned about it. We've been here for a long time and I certainly don't want to have to do this again.

We find allowing Garloff's testimony was an abuse of discretion.[4] We reverse and remand for a new trial.

REVERSED AND REMANDED.

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[3] Belken argues the trial court should have excluded the DNA evidence presented by expert Jami Harman. Because this issue may resurface on remand, we now find Belken's arguments regarding the issue are without merit. Even so, we are not prepared to find the purported strength of the State's case against Belken sufficiently mends the damage that has been wrought by the deputy's nondisclosure of Jennifer's statements.

[4] We do not address any of the issues Belken has raised on appeal other than those discussed previously. We note the State concedes Belken's sexual abuse conviction should have merged into his kidnapping conviction.