IN THE COURT OF APPEALS OF IOWA

No. 7-313 / 06-0259
Filed June 27, 2007

STATE OF IOWA,
Plaintiff-Appellee,

vs.

TONY WALKER,
Defendant-Appellant.

Appeal from the Iowa District Court for Pottawattamie County, Timothy O'Grady, Judge.

Defendant-appellant appeals his conviction, following a jury trial, of kidnapping in the first degree and sexual abuse in the second degree. **CONVICTION AFFIRMED; SENTENCE AND NUNC PRO TUNC ORDER VACATED; REMANDED FOR RESENTENCING.**

Mark C. Smith, State Appellate Defender, and Robert Ranschau, Assistant State Appellate Defender for appellant.

Thomas J. Miller, Attorney General, Thomas Tauber, Assistant Attorney General, Matthew D. Wilber, County Attorney, and Jon Jacobmeier, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Vogel and Miller, JJ.

SACKETT, C.J.

Defendant-appellant Tony Walker was convicted of first-degree kidnapping and second-degree sexual abuse in violation of Iowa Code sections 710.5, 709.1(1) and 709.3(1) (2005) following a jury trial. Walker appeals, contending he was denied effective assistance of counsel and the district court erred in several ways. First, he argues that his trial attorney provided ineffective assistance of counsel by not objecting to the term "victim" in the jury instructions. He claims the trial court erred by (1) not granting him a new trial because the jury's verdict was contrary to the weight of the evidence, (2) only merging one sexual abuse charge with the kidnapping charge, and (3) in imposing a special sentence under Iowa Code chapter 903B.1 through a nunc pro tunc sentencing order. We affirm the conviction, vacate the original sentence and nunc pro tunc order, and remand for resentencing.

BACKGROUND. The defendant-appellant is Marissa's great-uncle. Marissa was eighteen at the time of the incident and often spent time with the defendant. She viewed him as a father figure and they often went fishing together. On July 11, 2005, Marissa went with the defendant to his apartment so he could assist her in obtaining and completing insurance forms. Shortly after arriving at the apartment, the defendant tried to kiss Marissa. After she resisted him, he threatened her with a knife and forced her into his bedroom. For approximately the next sixteen hours the defendant kept Marissa restrained by tying nylon rope around her wrists or ankles and by threatening her with the knife. The defendant kissed and fondled Marissa about her face, breasts, and genitalia in the bedroom. Twice during this period, the defendant tied ropes

around Marissa's ankles and drove her out in the country. At one point he led her through a heavily weeded, muddy area where he ordered her to take off her clothes, lay in the weeds, and he again fondled Marissa with his fingers and tongue. After threatening to kill her, the defendant poked Marissa with the knife and her finger was injured. Later, a suspicious officer pulled the defendant over while he was driving with Marissa in the country. The defendant instructed Marissa not to say anything to the officer. When the officer asked Marissa if she was there of her own free will, she responded, "uh-huh." The defendant finally agreed to take Marissa to her friend's house after she let him cut a lock of her hair and after she wrote a note promising to visit him as often as possible. After confiding the incident to her friend, the police were called.

On July 22, 2005, the defendant was charged with first-degree kidnapping and two counts of second-degree sexual abuse. The jury found the defendant guilty on these charges. At sentencing, one count of sexual abuse was merged with the kidnapping charge. The defendant was sentenced to life imprisonment for the kidnapping charge. For the remaining sexual abuse conviction, the court sentenced the defendant to serve, concurrent with the kidnapping sentence, no more than twenty-five years in prison. Six months after the sentencing, the district court issued a nunc pro tunc order stating that under Iowa Code chapter 903B.1, the defendant was also subject to a special sentence of life in prison with eligibility for parole to be served after completing the twenty-five year sexual abuse sentence that was not merged into the kidnapping conviction.

INEFFECTIVE ASSISTANCE OF COUNSEL. Ineffective assistance of counsel claims can be evaluated on direct appeal if the record is sufficient. *State*

v. Hildebrant, 405 N.W.2d 839, 840-41 (Iowa 1987). The denial of effective counsel is a denial of due process and is reviewed de novo. *Hinkle v. State*, 290 N.W.2d 28, 30 (Iowa 1980). We evaluate the claim under the totality of the circumstances. *State v. Lane*, 726 N.W.2d 371, 392 (Iowa 2007).

To establish this claim, the defendant must prove by a preponderance of the evidence (1) that his counsel was ineffective and (2) that he was prejudiced by his counsel's errors. *Ledezma v. State*, 626 N.W.2d 134, 142-43 (Iowa 2001). Under the first prong, we presume that the attorney performed competently but also analyze whether the attorney's conduct conformed to "prevailing professional norms." *Strickland v. Washington*, 466 U.S. 668, 688-89, 104 S. Ct. 2052, 2065, 80 L. Ed. 2d 674, 694-95 (1984); *Ledezma*, 626 N.W.2d at 142. The defendant must prove that his counsel "performed below the standard demanded of a reasonably competent attorney." *Strickland*, 466 U.S. at 688, 104 S. Ct. at 2064-65, 80 L. Ed. 2d at 693-94; *Ledezma*, 626 N.W.2d at 142. Under the second prong, the defendant shows prejudice when he proves by a preponderance "that the decision reached would reasonably likely have been different absent the errors." *Strickland*, 466 U.S. at 696, 104 S. Ct. at 2069, 80 L. Ed. 2d at 699; *Ledezma*, 626 N.W.2d at 143-44. There must be a reasonable probability that the jury would have found a reasonable doubt of guilt had the attorney performed properly. *Strickland*, 466 U.S. at 695, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698; *Ledezma*, 626 N.W.2d at 143. The prejudice requirement can be evaluated without first examining the attorney's conduct. *Taylor v. State*, 352 N.W.2d 683, 685 (Iowa 1984). "If it is easier to dispose of an ineffectiveness

claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." *Id.*

Walker contends that his attorney was ineffective by not objecting to use of the term "victim" in three jury instructions. Each of these instructions explained the elements of first or second degree kidnapping and informed the jurors that the State must prove that "[t]he defendant knew he did not have the consent of the *victim* to do so." (emphasis added). These instructions were copied from the uniform jury instructions. Our courts are reluctant to disapprove of uniform jury instructions. *State v. Weaver*, 405 N.W.2d 852, 855 (Iowa 1987); *State v. Jeffries*, 313 N.W.2d 508, 509 (Iowa 1981). However, uniform instructions have required a conviction to be reversed when they contain an incorrect statement of the law and the instructions as a whole do not adequately explain the material issues to the jury. *See, e.g.*, *State v. Monk*, 514 N.W.2d 448, 450-51 (Iowa 1994) (reversing conviction when uniform instruction on elements of sexual abuse would have allowed a jury to convict without finding any sexual contact because the instructions only required "an act" rather than a "sexual act").

In a federal wire fraud and money laundering case, the Eighth Circuit considered whether use of the term "victim" in a jury instruction was prejudicial to a defendant's rights by suggesting that the defendant was guilty. *United States v. Washburn*, 444 F.3d 1007, 1013 (8th Cir. 2006). The court stated,

> a number of courts have determined that the use of the term "victim" in jury instructions is not prejudicial to a defendant's rights when . . . the instructions taken as a whole clarify the government's burden of proving all elements of the crime.

Id. (citations omitted).

In applying these standards to the present case, we find that the defendant has failed to show the use of the term "victim" in three of the jury instructions was prejudicial to him. Viewing the totality of the circumstances and the instructions as a whole, there is not a reasonable likelihood that the jury would have reached a different result. Each of the challenged instructions made clear that lack of consent was a required element that the State needed to prove. In each challenged instruction, the four elements of kidnapping were listed. Although Marissa was referred to as "the victim" in regard to the third element of lack of consent, her specific name was used in reference to each of the other elements of kidnapping within these specific instructions. Overall, these instructions properly informed the jury that the State had to prove the defendant committed each element of the offense against his accuser. Furthermore, all of the other instructions in the record refer to the accuser by her name. We do not, however, sanction using "victim" in a jury instruction as we recognize the use of the word can mislead or prejudice a defendant. The jury instructions, as a whole, clearly identified the accuser by name and required the State to prove each element.

MOTION FOR A NEW TRIAL. We review appeals from a denied motion for a new trial under an abuse of discretion standard. *State v. Reeves*, 670 N.W.2d 199, 202 (Iowa 2003). The defendant asserts that the jury's verdict was contrary to the weight of the evidence and thus the district court erred in denying his motion for a new trial. District courts have broad discretion in deciding whether to grant a new trial. Iowa R. App. P. 6.14(6)(*c*); *Reeves*, 670 N.W.2d at 202 (Iowa 2003). To establish that the court has abused this discretion, one

"must show that the district court exercised its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable." *Reeves*, 670 N.W.2d at 202 (citing *State v. Atley*, 564 N.W.2d 817, 821 (Iowa 1997)). An appellate court does not re-weigh the evidence, but instead examines whether the district court properly evaluated the motion for a new trial. *Id.* at 203. The district court has a duty to grant a new trial if mistake, prejudice, or other cause led the jury to a verdict that is contrary to the evidence. *Id.* However, a district court should not insert its own judgment of the evidence and "when the evidence is nearly balanced, or is such that different minds would naturally and fairly come to different conclusions thereon, [the district court] has no right to disturb the findings of the jury . . . ." *Id.* (quoting *State v. Oasheim*, 353 N.W.2d 291, 294 (N.D. 1984)).

The defendant argues that the court should have found the jury's conviction of the defendant for kidnapping and sexual abuse was against the weight of the evidence. Defendant's argument is supported by the facts that no DNA evidence was presented, no physical trauma to Marissa's genitals was detected, and Marissa did not try to escape. The jury's verdict is supported by the testimony of Marissa, the emergency room physician, police officers, and other witnesses. This testimony was corroborated by physical evidence such as the rope, Marissa's insect bites, and her injured finger. On the motion for a new trial, the district court can evaluate the evidence and witness credibility to determine if "the evidence preponderates heavily against the verdict." *State v. Ellis*, 578 N.W.2d 655, 658-59 (Iowa 1998). The transcript from the motion for a new trial proceeding shows that the district court thoroughly evaluated the

evidence and found that the weight of the evidence supported the jury's verdict. The court noted that witness testimony was actually consistent with the lack of DNA evidence since the defendant never ejaculated on his accuser. The district court did not abuse its discretion in denying the defendant a new trial.

MERGER. The defendant next contends that the district court's failure to merge both counts of sexual abuse into the kidnapping conviction violates principles of double jeopardy and is an illegal sentence. A claim of double jeopardy is preserved for appeal if the attorney objects at sentencing. *State v. Halliburton*, 539 N.W.2d 339, 343 (Iowa 1995). The defendant's attorney did not object to the sentence so we cannot consider this claim on appeal. However, claims that sentences for multiple offenses should have been merged under Iowa Code section 701.9 (2005) do not need to be preserved for appeal. *Id.* We review these claims for errors at law. *State v. Lambert*, 612 N.W.2d 810, 815 (Iowa 2000).

The Iowa Code provides:

> No person shall be convicted of a public offense which is necessarily included in another public offense of which the person is convicted. If the jury returns a verdict of guilty of more than one offense and such verdict conflicts with this section, the court shall enter judgment of guilty of the greater of the offenses only.

Iowa Code § 701.9 (2005).

Under this statute, if the greater offense cannot be committed without also committing the lesser offense, then the offenses merge and only the greater offense conviction will stand. *State v. Finnel*, 515 N.W.2d 41, 43 (Iowa 1994). We must compare the elements of each offense to determine whether merger is required. *Id.* First-degree kidnapping is defined as: "Kidnapping is kidnapping in

the first degree when the person kidnapped, as a consequence of the kidnapping, suffers serious injury, or is intentionally subjected to torture or sexual abuse." Iowa Code § 710.2 (2005).

Sexual abuse is defined as:

> Any sex act between persons is sexual abuse by either of the persons when the act is performed with the other person in any of the following circumstances:
>
> 1. The act is done by force or against the will of the other. If the consent or acquiescence of the other is procured by threats of violence toward any person or if the act is done while the other is under the influence of a drug inducing sleep or is otherwise in a state of unconsciousness, the act is done against the will of the other.

Iowa Code § 709.1(1) (2005).

Second-degree sexual abuse occurs when: "1. During the commission of sexual abuse the person displays in a threatening manner a dangerous weapon, or uses or threatens to use force creating a substantial risk of death or serious injury to any person." Iowa Code § 709.3(1) (2005).

The Iowa Supreme Court has applied the merger test to these offenses several times. *See State v. Morgan*, 559 N.W.2d 603, 611-12 (Iowa 1997); *State v. Mitchell*, 450 N.W.2d 828, 830-31 (1990); *Lamphere v. State*, 348 N.W.2d 212, 218 (Iowa 1984); *State v. Williams*, 334 N.W.2d 742, 743-44 (Iowa 1983); *State v. Davis*, 328 N.W.2d 301, 307-08 (Iowa 1982); *State v. Newman*, 326 N.W.2d 788, 792-93; *State v. Holderness*, 301 N.W.2d 733, 739-40 (Iowa 1981). In *Morgan*, the court explained when a sexual abuse conviction must be merged into the kidnapping conviction and when both convictions can stand. *Morgan*, 559 N.W.2d at 611-612. The determining factor is how the charges were presented to the jury. *Id.*; *State v. Flanders*, 546 N.W.2d 221, 224-25 (Iowa Ct.

App. 1996). In *Morgan*, although there was evidence that more than one sexual assault was committed, the State presented the crime as one continuous event and the jury was given one instruction on abuse and one instruction on kidnapping. *Morgan*, 559 N.W.2d at 611-12. Therefore, the convictions merged. *Id.* at 612. However, the State can "convict a defendant of both kidnapping in the first degree and sexual abuse if the case is presented to the jury in that way and the jury makes findings accordingly." *Newman*, 326 N.W.2d at 793. The court explained, "[a] defendant should not be allowed to repeatedly assault his victim and fall back on the argument his conduct constitutes but one crime." *Id.*

In this case, there was evidence that at least one incident of sexual abuse occurred at the defendant's apartment and another was committed when the defendant drove Marissa out to the country. The State questioned Marissa about each sexual encounter with the defendant. Although the sexual abuse occurred over one continuous period, the State presented evidence of multiple acts of sexual abuse. The jury was given instructions on two counts of second-degree sexual abuse and the jury found the defendant guilty of two acts of sexual abuse. One count of sexual abuse was properly merged into the kidnapping conviction. However, the district court was not required to merge the other sexual abuse conviction when the State presented, and the jury found, that a separate act of sexual abuse had been committed. The district court explained this reasoning at the sentencing proceeding. Therefore, the district court did not err in failing to merge both sexual abuse convictions.

IMPOSITION OF SPECIAL SENTENCE BY NUNC PRO TUNC ORDER. The defendant's last claim of error concerns the district court's modification of its

sentence by a nunc pro tunc order. The defendant claims the district court did not have authority to modify the sentence after he filed a notice of appeal. He also claims that his sentence cannot be modified by a nunc pro tunc order. Appellate review of illegal sentence claims is for errors at law. *State v. Davis*, 544 N.W.2d 453, 455 (Iowa 1996).

The Iowa Rules of Criminal Procedure provide two methods to correct errors in sentencing orders. First, clerical errors can be corrected by a nunc pro tunc order. Iowa R. Crim. P. 22(3)(*g*); *State v. Suchanek*, 326 N.W.2d 263, 265-66 (Iowa 1982). Another rule permits courts to correct an illegal sentence at any time. Iowa R. Crim. P. 23(5)(*a*); *Suchanek*, 326 N.W.2d at 265. If a sentence is illegal, the proper procedure is to vacate the original sentence and enter a new sentence. *Id.* at 266. A sentence can be illegally lenient. "[W]hen a sentencing court departs-upward or downward-from the legislatively authorized sentence for a given offense, the pronounced sentence is a nullity subject to correction, on direct appeal or later." *State v. Draper*, 457 N.W.2d 600, 605 (Iowa 1990).

In this case the additional special sentence was mandated by statute:

> A person convicted of a class "C" felony or greater offense under chapter 709 . . . *shall* also be sentenced, in addition to any other punishment provided by law, to a special sentence committing the person into the custody of the director of the Iowa department of corrections for the rest of the person's life, with eligibility for parole as provided in chapter 906. The special sentence imposed under this section shall commence upon completion of the sentence imposed under any applicable criminal sentencing provisions for the underlying criminal offense and the person shall begin the sentence under supervision as if on parole.

Iowa Code § 903B.1 (Supp. 2005) (emphasis added).

The district court's original sentence for second-degree sexual abuse was illegally lenient because it failed to add the mandated special sentence. This

type of error is considered an illegal sentence. *See Draper*, 457 N.W.2d at 605-06. The sentence could not, however, be corrected by nunc pro tunc order. *Freeman v. Ernst & Young*, 541 N.W.2d 890, 893 (Iowa 1995) ("The function of a nunc pro tunc order is not to modify or correct a judgment but to make the record show truthfully what judgment was actually rendered – 'not an order now for then, but to enter now for then an order previously made.'"); *State v. Steffens*, 282 N.W.2d 120, 122 (Iowa 1979) (plurality opinion) (holding a nunc pro tunc order is not available to correct a judicial, as distinguished from a clerical, error). We therefore vacate that portion of the sentence imposed by the nunc pro tunc order.

CONCLUSION. The defendant failed to prove he was prejudiced by ineffective assistance of counsel. The district court did not err in denying the defendant's motion for a new trial or by merging only one sexual abuse conviction into the kidnapping conviction. The district court did err in modifying the defendant's sentence by nunc pro tunc order.

CONVICTION AFFIRMED; SENTENCE AND NUNC PRO TUNC ORDER VACATED; REMANDED FOR RESENTENCING.