

IN THE SUPREME COURT OF IOWA  
Supreme Court No. 13-1997

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STATE OF IOWA,  
Plaintiff–Appellee,

vs.

MONIQUE TAQUALA HOWSE,  
Defendant-Appellant.

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APPEAL FROM THE IOWA DISTRICT COURT  
FOR BLACK HAWK COUNTY  
THE HON. JEFFREY HARRIS, JUDGE

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**APPLICATION FOR FURTHER REVIEW**  
(Iowa Court of Appeals Decision: March 11, 2015)

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## **QUESTIONS PRESENTED FOR REVIEW**

**Whether a stun gun that is inoperable at the time of trial qualifies as a dangerous weapon under Iowa Code section 702.7.**

**Whether a legal challenge to the statutory elements of a crime must be raised before the close of evidence in a bench trial.**

**TABLE OF CONTENTS**

QUESTIONS PRESENTED FOR REVIEW ..... 2

STATEMENT SUPPORTING FURTHER REVIEW ..... 4

STATEMENT OF THE CASE ..... 7

ARGUMENT.....10

**I. The Court of Appeals Erred When It Decided this Court’s Decision in *Geier* Was Not Controlling..... 10**

**II. The Defendant Did Not Preserve Error on Her Claim Because *Anspach* and *Abbas* Were Not Meant to Apply to Post-Trial Legal Challenges. ....17**

CONCLUSION..... 24

CERTIFICATE OF COMPLIANCE..... 26

## STATEMENT SUPPORTING FURTHER REVIEW

A panel of the Court of Appeals reversed the defendant's conviction because it concluded a "stun gun" is not a dangerous weapon. *State v. Taquala Monique Howse*, Sup. Ct. No. 13-1997 (Iowa Ct. App. March 11, 2015) [Hereinafter, "slip op."]. This Court should grant further review because the Court of Appeals decision is in conflict with a controlling decision of this Court, because only the Supreme Court can resolve the ambiguous distinction between sufficiency and elemental challenges, and because whether stun guns are dangerous weapons is an issue of broad public importance.

First, the Court of Appeals decision directly conflicts with this Court's published and controlling decision in *State v. Geier*, 484 N.W.2d 167 (1992). In *Geier*, this Court held that stun guns are dangerous weapons under section 702.7 of the Code. *Geier*, 484 N.W.2d at 170–72. The Court of Appeals concluded the stun gun in this case was not a dangerous weapon, without any sound basis for distinction. *See slip op.* The Court of Appeals is "not at liberty to overturn Iowa Supreme Court precedent," yet that appears to be what it has done. *State v. Hastings*, 466 N.W.2d 697, 700 (Iowa Ct. App. 1990). The State maintains *Geier* is good law, and that if this Court's

“previous holdings are to be overruled,” this Court should “ordinarily prefer” to do so itself. *See State v. Eichler*, 83 N.W.2d 576, 578 (1957).

Second, the error-preservation argument presented in the State’s brief is an issue of first impression that should be resolved by the Supreme Court. Iowa R. App. P. 6.1103(1)(b)(2). The State and the defense agree on this point. *See State’s Br.* at 3–4 (routing statement); Defendant’s Reply Br. at 3–4 (noting “the State’s specific and correct request in its routing statement that the Iowa Supreme Court retain this case”). This Court’s decisions in *State v. Anspach*, 627 N.W.2d 227, 231 (Iowa 2001) and *State v. Abbas*, 561 N.W.2d 72, 74 (Iowa 1997), have been stretched to allow criminal defendants to blindsides the State with statutory-construction arguments for the first time on appeal. Under the Court of Appeals’ logic, these defendants can obtain the benefit of an acquittal and double jeopardy, so long as the defendant calls his or her challenge one based on “sufficiency.” This is untenable. It locks the State out of any meaningful mechanism by which to challenge a trial court’s legal ruling on the construction of a statute. And it casts aside more than a century of error-preservation case law. This Court should stop the Court of

Appeals' extension of *Anspach* and *Abbas* because those cases were never intended to allow purely legal issues to be raised for the first time on appeal.

Third and finally, whether stun guns are considered dangerous weapons is an issue of broad public importance. Iowa R. App. P. 6.1103(1)(b)(4). Hundreds of thousands of Americans own stun guns. See Eugene Volokh, *Nonlethal Self-Defense, (Almost Entirely) Nonlethal Weapons, and the Right to Leap and Bear Arms and Defend Life*, 62 Stanford L. Rev. 199, 201 n. 6 (2009). These weapons are so dangerous that seven states, and dozens of municipalities, have banned the possession of stun guns outright. See *id.* at 245. According to Amnesty International, stun guns/Tasers have been responsible for more than 500 American deaths.<sup>1</sup> Given the proliferation of these weapons and the ease by which consumers may acquire them, law enforcement will continue to encounter suspects with stun guns on a frequent basis. Law enforcement will benefit

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<sup>1</sup> See Amnesty International, *USA – Stun Weapons in Law Enforcement*, <https://www.amnesty.org/download/Documents/52000/amr511292008en.pdf> (330 deaths from 2001 to 2008); Amnesty International, *USA: Stricter Limits Urged as Deaths Following Police Taser Use Reach 500*, <https://www.amnesty.org/en/articles/news/2012/02/usa-stricter-limits-urged-deaths-following-police-taser-use-reach/> (500 deaths as of Feb. 15, 2012).

from a clear decision as to whether stun guns are dangerous weapons under the Code.

## **STATEMENT OF THE CASE**

### **Nature of the Case:**

The State seeks further review of a decision of the Court of Appeals. Iowa R. App. P. 6.1103.

### **Course of Proceedings:**

The defendant was convicted of carrying weapons, an aggravated misdemeanor in violation of Iowa Code section 724.4 (2011), following a bench trial in Black Hawk County. *See* 10/16/2013 Order; App. 47.

The Court of Appeals reversed, saying the State's error-preservation argument "rang hollow" and finding that *Geier* was not controlling. *See generally* slip op. The State now seeks further review.

### **Facts:**

Following an arrest for theft, police found a "small hand-held stun gun" in a purse carried by the defendant. App. 9–11. The defendant told police the stun gun was hers and that she carried it for going to to "clubs and whatnot." App. 11–12. Officers interpreted this

to mean she carried the stun gun “for protection.” App. 12. The defendant did not have a permit for carrying the stun gun. App. 12.

Police officers with specialized training explained at trial that not all Tasers and stun guns are the same. The term “Taser” generally refers to the weapon with “probes coming out the end,” and the term “stun gun” refers to when the cartridge and probes are removed. App. 15. The particular weapon carried by the defendant was identified as a stun gun. App. 15; 16.

The function of a stun gun is “pain compliance.” App. 15. When stun guns and Taser devices are used, “every single muscle on your body tightens up, and you can’t move.” App. 15–16; 23–24. Both stun guns and Tasers cause pain, though the pain caused by a stun gun is sometimes of lesser duration than the pain caused by a Taser. App. 17. When a stun gun is used against someone, it is “basically ... like you’re getting electrocuted.” App. 25–26.

A stun gun like the one carried by the defendant can be used to incapacitate someone through use of electrical currents. App. 16. A stun gun can be used to send multiple currents to the person the weapon is used against, and this can be done “as many times as you

push the button”—at least until the battery runs out. App. 16; 23–24; 30.

Officers trained to use these weapons explained that the defendant’s stun gun was capable of inflicting injury and was capable of causing death, depending on certain prior conditions (like if the person stunned had drugs in their system or a heart condition). App. 18. “[S]tun guns and Tasers were not put on the market to kill people,” but there have been “documented deaths using Tasers and stun guns[.]” App. 19. The risk of death or injury is serious enough that officers are specifically trained to avoid the chest area to maintain a safe “heart-to-dart” distance. App. 29–30.

Officers did not test the defendant’s stun gun because there are substantial officer safety concerns when “testing” a dangerous weapon. *See* App. 17. An unknown time after the defendant’s arrest, the stun gun appeared inoperable, but it still included “all the components of a stun gun.” App. 16; 23.

The district court judge “credit[ed]” the police officers’ testimony and afforded it “great weight.” 10/16/2013 Order, p. 1; App. 45. The judge also made the following factual finding:

Serious injury and/or death can be inflicted by a stun gun administered to a person who is vulnerable because of a

weakened heart; heart condition; or drugs in the victim's system. As such, serious injury and/or death can come based upon the following:

- (a) administration of the stun to the head or neck of a potentially vulnerable victim;
- (b) prolonged administration of the stun gun to the head or neck of a victim;
- (c) a victim's prior condition(s) that would make him/her vulnerable to the stun.

App. 47.

## **ARGUMENT**

### **I. The Court of Appeals Erred When It Decided this Court's Decision in *Geier* Was Not Controlling.**

#### **Preservation of Error:**

As discussed in Division II, the defendant did not preserve error because the claims advanced in the defendant's brief were not advanced before the close of evidence below. *See State v. Rutledge*, 600 N.W.2d 324, 325 (Iowa 1999). Also for the reasons set forth in Division II, the Court of Appeals erred when it reached the question presented.

#### **Standard of Review:**

If the defendant is right that her challenge sounds in sufficiency, the evidence is viewed in the light most favorable to the State and all reasonable inferences are drawn to uphold the verdict. *State v. Leckington*, 713 N.W.2d 208, 212–13 (Iowa 2006). "A jury

[or, here, the district court] is free to believe or disbelieve any testimony as it chooses to give as much weight to the evidence as, in its judgment, such evidence should receive.” *State v. Liggings*, 557 N.W.2d 263, 269 (Iowa 1996). The district court’s findings on credibility are binding on appeal. *E.g.*, *Plymouth Farmers Mut. Ins. Ass’n v. Armour*, 584 N.W.2d 289, 292 (Iowa 1998).

**Merits:**

To the extent any sufficiency challenge is actually presented in this appeal, the Court of Appeals erred when it reversed the defendant’s conviction. This Court’s decision in *State v. Geier*, 484 N.W.2d 167 (Iowa 1992), is directly on point and should have controlled the outcome of this case.

In *Geier*, this Court interpreted the first sentence of Iowa Code section 702.7 as it applied to a “stun gun.” *Geier*, 484 N.W.2d at 170. This Court held that a stun gun was a dangerous weapon because stun guns are designed primarily for use in inflicting injury and could cause death. *Id.* at 171. “Injury” was interpreted to mean “physical pain ... or an impairment of physical condition.” *Id.* at 171 (citing the Model Penal Code).

*Geier* stands for the proposition that stun guns, as a class of weapons, fall within the reach of Iowa Code section 702.7's first definition for a dangerous weapon. *See id.* at 170–72. This legal proposition is controlling and should have been followed by the Court of Appeals.

It is a bit hard to pin down why the Court of Appeals determined *Geier* did not apply to this case. In part, it seems the Court of Appeals faulted the State for not offering “evidence as to the power of the stun gun here.” Slip op. at \*8. However, this is not fatal to any claim related to the dangerous weapon statute. To take a creative hypothetical that would embrace the first sentence of section 702.7, we can imagine a defendant arrested for carrying a flame-thrower. The State can offer evidence that flamethrowers eject flame, that the flame is designed to inflict pain, and that death can result. There is no requirement that the State track down evidence as to the heat of the flame, the velocity at which it is expelled, or any other specifications; flamethrowers are designed to inflict injury and capable of inflicting death, and they qualify as dangerous weapons. So too for stun guns.

For an example that embraces the “per se” list, consider a firearm. No one would demand the State offer evidence as to the velocity of bullets ejected from a firearm, the caliber of the bullets, or speed at which the firearm may be reloaded. Firearms as a class of weapons are dangerous, regardless of the features particular to a certain brand of firearm. The same holds true here. Stun guns, as a class of weapon, are dangerous—regardless of whether the precise voltage for a particular stun gun model appears in the record.

The Court of Appeals also suggested that the record here is thinner than in *Geier*, and that this requires reversal. Slip op. at \*8. Not so. This Court’s choice of language in *Geier* is telling. This Court said that “clearly” the evidence in *Geier* “exceed[ed] the threshold necessary to sustain the court’s finding that a stun gun is a ‘dangerous weapon.’” *Geier*, 484 N.W.2d at 171. The record here is sufficient to meet the statutory definition of a dangerous weapon, even if may not “exceed” that threshold quite so far as the record in *Geier* did.

There is ample evidence Tasers and stun guns are designed to inflict injury, as they use pain to incapacitate or deter. App. 15–16; 23–24; 16; 25–26. And the officers’ testimony also clearly recognizes that using a Taser or stun gun in the manner for which it was

designed—to stun people—is capable of causing death. App. 18; 19; 29–30. Lastly, while the officers could not give a numerical value for the voltage of the weapon, one explained that: “I know if it worked – I mean, I know it [the stun gun] would hurt if you stuck it to yourself.” App. 21–22. This approximates the evidence adduced in *Geier* and that should end the discussion. *Geier*, 484 N.W.2d at 171–72.

However, even if the Court of Appeals correctly found that this particular stun gun—compared to stun guns in general—did not fall within the reach of the first sentence of section 702.7, the Court of Appeals also erred in finding the stun gun in this case was not covered by the “per se” list of dangerous weapons in the last sentence of the statute. Since *Geier*, the General Assembly amended section 702.7 and added the following bolded language to the list of items “included but not limited to” in the statute’s definition of a dangerous weapon:

**Dangerous weapons include, but are not limited to, any offensive weapon, pistol, revolver, or other firearm, dagger, razor, stiletto, switchblade knife, knife having a blade exceeding five inches in length, or any portable device or weapon directing an electric current, impulse, wave, or beam that produces a high-voltage pulse designed to immobilize a person.**

2008 Iowa Acts, ch. 1151, § 1 (emphasis added). This language covers the stun gun at issue in this case.

In this case, a police officer testified that the stun gun used an electrical current and was designed to “incapacitate” someone. App. 16 (electrical current); App. 19 (designed to incapacitate); *accord* App. 23 (another officer testifying as to electrical current).<sup>2</sup> This meets the statutory definition of a dangerous weapon. *See* Iowa Code § 702.7 (2013). To “immobilize,” as the word is commonly understood, is to “fix in place” or “to prevent the use, activity, or movement of.” *See Immobilize*, Dictionary.com, <http://dictionary.reference.com/browse/immobilize?s=t> (last accessed Dec. 4, 2014). To “incapacitate,” as the word is commonly used, means “to deprive of ability, qualification, or strength; make incapable or unfit; disable.” *See Incapacitate*, Dictionary.com, <http://dictionary.reference.com/browse/incapacitate?s=t> (last accessed Dec. 4, 2014). The officer’s testimony that the stun gun was able to incapacitate a person is sufficient to establish that the stun

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<sup>2</sup> The State acknowledges that one of the officers, on cross examination, said that a stun gun would not immobilize someone because “if you stick it on, they jump – they jump back[.]” App. 26–27.

gun was designed to immobilize and the weapon meets the definition provided by the statute's third sentence.

Finally, it does not matter that the stun gun in this case was eventually found to be inoperable. *See State v. Wright*, 309 N.W.2d 891, 893 (Iowa 1981) (“There is nothing in our [case law] to suggest ... that a weapon had to be tested and shown to be functional in order to be dangerous.”); *State v. Hemminger*, 308 N.W.2d 17, 20 (Iowa 1981) (“[W]orking condition should never be an issue where the instrument employed has the character of a dangerous weapon.”); *State v. Nichols*, 276 N.W.2d 416, 417 (Iowa 1979) (“We hold that the State is not required to establish that a pistol was loaded at the time of the offense to prove its character as a dangerous weapon in a prosecution for robbery in the first degree.”); *State v. Mitchell*, 371 N.W.2d 432, 434 (Iowa Ct. App. 1985). Even an inoperable stun gun is a dangerous weapon for the reasons recognized in *Wright* (inoperable handgun), *Hemminger* (inoperable revolver), *Nichols* (unloaded pistol), and *Mitchell* (nunchakas without training). It is entirely possible—if not probable—that the reason the defendant's stun gun was not presently operable and capable of discharging a high-voltage current was because the batteries ran out. This is directly analogous

to an unloaded or inoperable pistol and provides no basis for relief for this defendant.

**II. The Defendant Did Not Preserve Error on Her Claim Because *Anspach* and *Abbas* Were Not Meant to Apply to Post-Trial Legal Challenges.**

**Preservation of Error:**

The State's argument in this division is based entirely on doctrine of error preservation and is addressed in the "discussion" section below.

**Standard of Review:**

The State submits that the issues presented in this appeal, if error had been preserved, concern statutory construction and should be reviewed for errors at law. *State v. Schultz*, 604 N.W.2d 60, 62 (Iowa 1999).

**Discussion:**

This Court should vacate the Court of Appeals opinion and clarify the holdings of *Anspach* and *Abbas*. Those cases were meant to exempt a defendant from the redundancy of moving for judgment of acquittal following a bench trial, given that the district court evaluates an identical question when rendering a guilty verdict. The Court of Appeals, in this case and others, has stretched those cases past their breaking point, finding that virtually any legal challenge

can be raised for the first time on appeal, so long as it is made under the guise of a challenge to the sufficiency of the evidence.

The language that has caused problems appears in *Anspach*, where this Court paraphrased the holding of *Abbas*: “When such a claim [sufficiency of the evidence] is made on appeal from a criminal bench trial, error preservation is no barrier.” *State v. Anspach*, 627 N.W.2d 227, 231 (Iowa 2001) (citing *State v. Abbas*, 561 N.W.2d 72, 74 (Iowa 1997)). The State does not quibble with the proposition that appellate challenges that truly sound in sufficiency—the facts applied to agreed-upon legal elements—need not be raised in a motion for judgment of acquittal following a bench trial. The reasoning in *Abbas* is sound, insofar as “[n]o valid purpose would be served by requiring a defendant to make a motion for judgment of acquittal in the context of a criminal bench trial” where he is challenging the adequacy of the facts. *Abbas*, 561 N.W.2d at 74. But this logic breaks down when it is extended beyond factual challenges, to situations where the parties do not agree upon the applicable legal standard.

The best way to understand this distinction is to think of a criminal jury trial. When a jury is present, legal challenges are levied at the jury instructions, which are how the judge communicates the

law to a jury. If a defendant does not challenge these legal instructions, they become the law of the case and he may not challenge them on appeal. *State v. Taggart*, 430 N.W.2d 423, 425 (Iowa 1988) (“Failure to timely object to an instruction not only waives the right to assert error on appeal ... but also ‘the instruction, right or wrong, becomes the law of the case.’” (internal citation omitted)). This kind of challenge is fundamentally different from the facts-as-applied-to-law question a judge (or this Court on appeal) considers when evaluating whether evidence is legally sufficient to allow a reasonable jury to find guilt on the agreed-upon elements. *See State v. Crone*, 545 N.W.2d 267, 270 (Iowa 1996) (holding a defendant must challenge the facts related to specific elements in a motion for judgment of acquittal to preserve error).

The defendant’s appellate claims should have been turned away by the Court of Appeals for not being raised below. The defendant says it best: “Howse’s claims in this appeal aren’t really sufficiency of the evidence claims, properly understood.” Defendant’s Reply Br. at 5. Put differently, the defendant argues that the judge got the law wrong—not that the judge misapplied the facts to agreed-upon law:

- In the first division of the defendant’s brief, she challenges the meaning of a 2008 amendment to the dangerous-weapons statute. Defendant’s Br. at 2–3.
- In her second argument, she asks this Court to change the law and “revisit or overrule *Geier*.” Defendant’s Br. at 11. This is backed up by her routing statement, where she candidly admits that her brief “contains a request for the Supreme Court to overrule previous case law[.]” Defendant’s Br. at 1.
- In her third argument, the defendant asks this Court to reinterpret the statute and add a new element to the crime of carrying weapons. Defendant’s Br. at 14–17.

These are all legal challenges—elemental challenges to questions of law—and cannot be raised for the first time on appeal. *See, e.g., Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002); *State v. Rutledge*, 600 N.W.2d 324, 325 (Iowa 1999).

The Court of Appeals dismissed the State’s concerns about *Anspach* and *Abbas* as trivial. *See* slip op. at \*6 n.1. They are not. There is a fundamental and meaningful difference between the remedy afforded to a criminal defendant following a sufficiency challenge versus an instructional or elemental challenge. If a defendant is permitted to raise a “sufficiency” claim that embraces a statutory challenge for the first time on appeal, she could be entitled to an acquittal and jeopardy would attach—meaning she cannot be retried. *State v. Dullard*, 668 N.W.2d 585, 597 (Iowa 2003) (citing *Lockhart v. Nelson*, 488 U.S. 33, 38–39 (1988)). Unlike sufficiency-

of-the-evidence errors, legal errors follow a different rule, and an appellate reversal leads to a new trial. *Dullard*, 668 N.W.2d at 597. These fears were realized in this case, when the Court of Appeals decided a “sufficiency” question based on a brief that raised purely legal issues, and then ordered an acquittal for claims the defendant admits were never raised in the district court. *See generally* slip op.

The State’s distinction between statutory/elemental claims and sufficiency claims also permits proper litigation over statutory arguments. The correct mechanism by which to raise an argument about the elements of a statute is a pre-trial motion to dismiss, a motion for preliminary ruling, or a motion to adjudicate law points. If a judge rules on a pre-trial motion so adversely to the State that it qualifies as judgment on the indictment, the State is entitled to appeal as a matter of right. *See* Iowa Code § 814.5(1)(a), (b), (d) (2013). Also, a pre-trial ruling on the elements can be brought up on discretionary review filed by either party, allowing the appellate courts to appropriately weigh in on a pure question of law. Iowa Code 814.1(2) (2013); Iowa R. App. P. 6.106. If defendants are permitted to raise a variety of statutory claims after the close of evidence and under the guise of sufficiency, the State is effectively locked out of the appellate

process. If a statutory argument about the elements prevails and requires additional proof, the State is unfairly thwarted in its prosecution because the record cannot be re-opened and a verdict has already been entered.

Respecting the distinction between statutory claims and factual sufficiency claims also honors Iowa’s long-standing commitment to the rules of error preservation. Article 5, section 4 of the Iowa Constitution establishes this Court as one “for the correction of errors at law, under such restrictions as the general assembly may, by law, prescribe[.]” Iowa Const. art. V, § 4. Under the Code, both the Supreme Court and the Court of Appeals are restricted in function to courts “for the correction of errors at law.” See Iowa Code § 602.4102 (2013); Iowa Code § 602.5103 (2013). “If a litigant fails to present an issue to the district court and obtain a ruling on the same, it cannot be said that [the appellate courts] are correcting an error at law.” *State v. Tidwell*, 2013 WL 6405367, at \*2 (Iowa Ct. App. 2013). The error-preservation requirement dates back to the founding of our state. See *Danforth, Davis & Co. v. Carter*, 1 Iowa 546, 553 (Iowa 1855). And these rules have been consistently and repeatedly reaffirmed by this Court. *E.g.*, *State v. Rutledge*, 600 N.W.2d 324, 325 (Iowa 1999)

“We do not subscribe to the plain error rule in Iowa, have been persistent and resolute in rejecting it, and are not at all inclined to yield on the point.”).

Requiring a defendant to preserve alleged legal errors in a bench-trial-sufficiency challenge furthers the purposes and policies behind our error-preservation rules. “The orderly, fair and efficient administration of the adversary system requires that litigants not be permitted to present one case at trial and a different one on appeal.” *State v. Tobin*, 333 N.W.2d 842, 844 (Iowa 1983). Yet that is precisely what happens when a defendant claims statutory error in a bench-trial verdict when he did not advance the same claim below. This unfairly hamstring the State and blindsides the district court, as a defendant’s proposed statutory construction may require proof the State never knew it needed to offer and the district court never knew to look for.<sup>3</sup>

The error-preservation requirement also ensures opposing parties have “notice and an opportunity to be heard on the issue and a

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<sup>3</sup> This not a fanciful concern. Consider the third argument in the defendant’s brief, where she argues an entirely new element—“brandishing”—should be crafted onto the crime of carrying weapons. *See* Defendant’s Br. at 14–17. If that argument carried the day as a “sufficiency” claim, the defendant would obtain an acquittal. The State should not be denied a re-trial under those circumstances.

chance to take proper corrective measures or pursue alternatives in the event of an adverse ruling.” *Id.* at 844; accord *State v. McCright*, 569 N.W.2d 605, 608 (Iowa 1997). In other words, “[i]t is not a sensible exercise of appellate review to analyze facts of an issue without the benefit of a full record or lower court determination.” *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) (quoting, in part, *Yee v. City of Escondido*, 503 U.S. 519, 538 (1992)).

It does not further the interests of justice to permit criminal defendants and the Court of Appeals to stretch *Anspach* and *Abbas* as they have. Allowing this practice to continue will allow defendants, including this one, to obtain an acquittal with a legal claim that amounts to a moving target. It is time for this Court to step in and recognize a distinction between statutory claims and sufficiency claims that sound in the facts.

## **CONCLUSION**

The State respectfully requests this Court grant the application for further review, vacate the Court of Appeals decision, and issue an opinion affirming the defendant’s conviction.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because:
  - This brief contains **4,404** words, excluding the parts of the brief exempted by Iowa R. App. P. 6.1103(4)
2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because:
  - This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Georgia font, size 14.

Dated: March 16, 2015



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**IN THE COURT OF APPEALS OF IOWA**

No. 13-1997  
Filed March 11, 2015

**STATE OF IOWA,**  
Plaintiff-Appellee,

**vs.**

**TAQUALA MONIQUE HOWSE,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Black Hawk County, Jeffrey Harris,  
District Associate Judge.

Taquala Howse appeals her conviction of carrying weapons, an  
aggravated misdemeanor, in violation of Iowa Code section 724.4 (2011).

**REVERSED.**

John Audlehelm of Audlehelm Law Office, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Tyler J. Buller, Assistant Attorney  
General, Thomas J. Ferguson, County Attorney, and Emily Zerkel, Assistant  
County Attorney, for appellee.

Considered by Danilson, C.J., and Potterfield and Bower, JJ.

**DANILSON, C.J.**

Taquala Monique Howse appeals her conviction for carrying weapons, an aggravated misdemeanor in violation of Iowa Code section 724.4 (2011). She contends the stun gun found in her purse does not qualify as a dangerous weapon and thus her conviction cannot stand. By statutory definition, “any portable device or weapon directing an electric current, impulse, wave, or beam that produces a high-voltage pulse designed to immobilize a person” is a “dangerous weapon.” Iowa Code § 702.7. Because the record does not contain evidence that the stun gun found in the defendant’s purse “produces a high-voltage pulse designed to immobilize a person,” we reverse her conviction.

**I. Background Facts and Proceedings.**

On June 23, 2013, police responded to a report of a theft at a Waterloo store. Howse was identified as a suspect and arrested. She was handcuffed, escorted by police to a squad car, and searched. Officer Kyle Jurgensen found a “small hand-held stun gun” in Howse’s purse, which Howse stated she had purchased. She stated she “carried it to clubs and whatnot.” When asked if she had a permit to carry the stun gun she said “no.” Howse was charged with carrying weapons.

At the bench trial, Officer Jurgensen testified a stun gun emits an electrical current and is able to incapacitate someone. He testified the stun gun found in Howse’s purse “appeared to be all there—all the components of a stun gun.” He had not tested the stun gun however. When asked why, he stated: “A stun gun, to me, is dangerous. I didn’t know the condition or maintenance the defendant has done with her stun gun, so I didn’t want to test it in my hand.”

The court asked, “Depending on the physiology of the victim and the number of times a stun gun might be administered, would a stun gun be capable of administering serious bodily injury and/or death?” Officer Jurgensen testified a stun gun is capable of administering serious bodily injury and, perhaps death under certain circumstances: “I mean, there would have to be some prior conditions to that. . . . You know, depends if there’s drugs in the system, heart conditions. I mean, you know, environment, everything plays a factor.” He stated that such devices were designed to incapacitate a person, though “there has been documented deaths using Tasers and stun guns, but like I said, there have been other preconditions. I mean, stun guns and Tasers were not put on the market to kill people.”

Officer Greg Erie, a field training officer, defensive tactics instructor, and Taser instructor with the Waterloo Police Department, testified he had previously examined the stun gun and “if it functioned properly” it would emit an electrical current. He testified that if one was touched with a stun gun, “it is just like being electrocuted.” He also testified that officers are taught to avoid the head and neck area when employing their stun guns because of foreseeable injuries. He distinguished a taser from a stun gun stating a taser will immobilize a person. He described the function of a stun gun as a “compliance tool”—once an individual feels the shock they jump back. Officer Erie also testified he did not “have any background with this one,” did not know how many volts this device emitted, and “couldn’t get [this device] to work.”

In closing, the State argued it had proved the three elements of the offense, that is,

First, the state has established proof beyond a reasonable doubt that the defendant violated all three elements of the offense of Carrying Weapons and that on or about June 23rd, 2013, the defendant was armed with a stun gun. The stun gun was concealed on or about the defendant's person, and the stun gun was a dangerous weapon.

. . . .  
. . . [R]egarding the third element and the fighting issue in this case, the state offered proof that a stun gun is a dangerous weapon. The defendant herself admitted she carried the stun gun for purposes of defending against attack. Officer Jurgensen testified that he did not test the weapon, because it would be dangerous to do so, as well as the specialist, Greg Erie, testified that such a device is used for training police officers, and that it has the possibility of inflicting pain and injury on individuals.

The prosecutor quoted section 702.7, which defines a dangerous weapon as including "any portable device or weapon directing an electrical current, impulse, wave, or beam that produces a high-voltage pulse designed to immobilize a person." The prosecutor argued, "By so construing the language of the statute, quote, 'the legislature sought to establish a broad, flexible definition of "dangerous weapons,'" as recognized by Justice Cady in *State v. Pearson*, 547 N.W.2d 236, and that's Iowa 1996." She added the anticipated defense argument that the device was inoperable was "not determinative," citing *State v. Hemminger*. See 308 N.W.2d 17, 20 (Iowa 1981) ("The definition of 'dangerous weapon' goes to the character of the instrument utilized. Thus, working condition should never be an issue where the instrument employed has the character of a dangerous weapon." (internal citation omitted)).

Defense counsel countered with a "twofold" argument: first, "that in order to be convicted of Carrying Weapons or carrying a concealed stun gun, the State's got to show, first of all, that this is a stun gun which produces a high-voltage pulse designed to immobilize a person." And secondly, "the State [must]

prove that the device is capable of inflicting death when used in the manner for which it was designed.”

On December 5, 2013, the district court issued its ruling, which provides in part:

3. Under the terms of section 702.7 Code of Iowa, “dangerous weapons” include “any portable device or weapon directing an electric current, pulse, wave or beam that produces a high-voltage pulse designed to immobilize a person.” The State of Iowa has no affirmative burden to produce evidence as to how much high voltage a particular device will emit or produce.

4. The Iowa legislature has acknowledged the dangerous nature of taser and/or stun gun . . . .

5. The court must look to the appellate decisions which address the “dangerous weapon” language of section 702.7 Code of Iowa as it involves loaded and unloaded revolvers for guidance as well as the sole appellate decision involving an employed stun gun, *State v. Geier*, 484 N.W.2d 167 (Iowa 1992), cited by the parties as authority.

6. The court accords significant weight to the “capability requirement” outlined in the Iowa Supreme Court decision issued in *State v. Nichols*, 276 N.W.2d 416 (Iowa 1979).

7. Serious injury and/or death can be inflicted by a stun gun administered to a person who is vulnerable because of a weakened heart; heart condition; or drugs in the victim’s system. As such, serious injury and/or death can come based upon the following:

- a. administration of the stun to the head or neck of a potentially vulnerable victim;
- b. prolonged administration of the stun gun to the head or neck of a victim;
- c. a victim’s prior condition(s) that would make him/her vulnerable to the stun.

8. Based upon the credible matters presented, the court finds that the State of Iowa has presented substantial evidence to establish the essential elements of the charged offense beyond a reasonable doubt.

Howse appeals.

## II. Scope and Standard of Review.

“To the extent our review . . . requires us to interpret the meaning and scope of a particular statute, our review is for correction of errors at law.” *State v. Anspach*, 627 N.W.2d 227, 231 (Iowa 2001); accord *State v. Romer*, 832 N.W.2d 169, 174 (Iowa 2013).

“When reviewing such issues we are not bound by the trial court’s determinations of law.” Where the defendant also challenges the sufficiency of the evidence to support his conviction under the statute, “we review the evidence to determine whether a rational trier of fact could have found the defendant guilty of the offense charged” beyond a reasonable doubt. Thus, our review of all the evidence in the record is made in a light most favorable to the State.

*Anspach*, 627 N.W.2d at 231 (citations omitted); see also *State v. Jorgensen*, 758 N.W.2d 830, 834 (Iowa 2008).

## III. Discussion.

Iowa Code section 724.4(1) provides, “Except as otherwise provided in this section, a person who goes armed with a dangerous weapon concealed on or about the person . . . commits an aggravated misdemeanor.”

On appeal, Howse contends that as a matter of law or fact the stun gun found in her purse does not qualify as a “dangerous weapon” under section 702.7, and thus her conviction is not supported by substantial evidence.<sup>1</sup>

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<sup>1</sup> We reject the State’s preservation-of-error argument, which promotes form over substance. It is true, “[w]e do not review issues that have not been raised or decided by the district court.” *State v. Dewitt*, 811 N.W.2d 460, 467 (Iowa 2012). The State’s complaint that rules of preservation must be upheld or the State is “unfairly hamstr[ung]” and “blindsid[e]d” ring hollow here. Whether addressed as a matter of statutory interpretation or sufficiency of the evidence, the question argued and decided by the trial court is whether the stun gun found in Howse’s purse comes within the statutory definition of a “dangerous weapon.”

Iowa Code section 702.7 defines dangerous weapons. That provision reads:

A “dangerous weapon” is any instrument or device designed primarily for use in inflicting death or injury upon a human being or animal, and which is capable of inflicting death upon a human being when used in the manner for which it was designed, except a bow and arrow when possessed and used for hunting or any other lawful purpose. Additionally, any instrument or device of any sort whatsoever which is actually used in such a manner as to indicate that the defendant intends to inflict death or serious injury upon the other, and which, when so used, is capable of inflicting death upon a human being, is a dangerous weapon. Dangerous weapons include but are not limited to any offensive weapon, pistol, revolver, or other firearm, dagger, razor, stiletto, switchblade knife, knife having a blade exceeding five inches in length, or any portable device or weapon directing an electric current, impulse, wave, or beam that produces a high-voltage pulse designed to immobilize a person.

Section 702.7 thus provides three paths by which a weapon may be deemed dangerous: (1) a device which is “*designed primarily for use* in inflicting death or injury upon a human being or animal, *and* which is *capable of inflicting death* upon a human being when used in the manner for which it was designed” (but excepting a bow and arrow under certain circumstances); (2) a device “which is *actually used* in such a manner as to indicate that the defendant intends to inflict death or serious injury upon the other, and which, *when so used, is capable of inflicting death upon a human being, is a dangerous weapon*”; and (3) devices listed that are statutorily determined to be dangerous weapons per se, one of which is “any portable device or weapon directing an electric current, impulse, wave, or beam that produces a high-voltage pulse designed to immobilize a person.” Only the first and third are relevant to the case at hand; the second requires a device that is actually used, which has no bearing here.

In *Geier*, 484 N.W.2d at 171-72, the supreme court considered whether a stun gun fell within the definition of a “dangerous weapon” pursuant to the first path noted above (designed primarily for use in inflicting death or injury and which is capable of inflicting death) and concluded “there was sufficient evidence adduced at trial to convince a rational trier of fact that a stun gun is a ‘dangerous weapon’ under the aforementioned statutory definition.” The court noted:

Deputy Muir testified that the stun gun uses a nine volt battery to create an arc of electricity that ranges from 30,000 volts up to 65,000 volts thereby imparting a shock to the recipient. Clearly, a shock resulting from an electric charge that may range as high as 65,000 volts is a “device designed primarily for use in inflicting . . . injury,” which is described by the Model Penal Code as “physical pain . . . or an impairment of physical condition.” . . . Deputy Muir also indicated that the stun gun is capable of causing death if used in the head or neck region. Deputy Muir’s testimony exceeds the threshold necessary to sustain the court’s finding that a stun gun is a “dangerous weapon” as that term is defined in section 702.7.

*Geier*, 484 N.W.2d at 171.

The trial court here found that generally a stun gun is capable of causing death. But unlike the evidence presented in *Geier*, there was no evidence as to the power of the stun gun here. Officer Jurgensen did not test the stun gun, and Officer Erie specifically stated he had no background with this particular small stun gun and he “couldn’t get it to work.” Without some evidence of the capabilities of this particular stun gun, there is not substantial evidence to support a finding that it was “designed primarily for use in inflicting . . . injury” as was the case in *Geier*. Consequently, unless the evidence supports a finding that the stun gun was a dangerous weapon per se under the third path of section 702.7, Howse’s conviction cannot stand.

After *Geier* was decided, the legislature amended the list of per se dangerous weapons to include “any portable device or weapon directing an electric current, pulse, wave or beam that produces a high-voltage pulse designed to immobilize a person.” While we might agree in principle with the trial court that the State is not required to “produce evidence as to how much high voltage a particular device will emit or produce,” we do conclude that to qualify under the per se dangerous weapons listing, there must be *some* evidence the device “produces a high-voltage pulse designed to immobilize a person.” Here, the State’s witnesses’ testimony related to stun guns in general not this specific device. Nothing in this record establishes, even in general terms, the voltage of the device at issue—high, low, or in-between, and if it had sufficient voltage to immobilize a person.

We conclude there is not substantial evidence in this record to sustain the conviction. We therefore reverse.

**REVERSED.**



IOWA APPELLATE COURTS

## State of Iowa Courts

**Case Number**  
13-1997

**Case Title**  
State v. Howse

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