IN THE COURT OF APPEALS OF IOWA

No. 1-898 / 11-0197
Filed December 21, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

PETER LONG,
Defendant-Appellant.

Appeal from the Iowa District Court for Webster County, Kurt L. Wilke, Judge.

Peter Long appeals the district court's order enhancing his conviction of sexual abuse in the third degree to a class "A" felony under Iowa Code section 902.14 (2009). **SENTENCE VACATED AND CASE REMANDED WITH INSTRUCTIONS.**

Mark C. Smith, State Appellate Defender, and Shellie L. Knipfer, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Darrel Mullins, Assistant Attorney General, and Ricki N. Osborn, County Attorney, for appellee.

Heard by Danilson, P.J., and Tabor and Mullins, JJ.

TABOR, J.,

The question in this appeal is whether defendant Peter Long suffered prejudice by late notice of a State's witness who testified regarding his previous convictions for lascivious acts with a child for purposes of the life-sentence enhancement at Iowa Code section 902.14 (2009). Long contends the district court's decision to reopen the record and allow the State to file amended minutes of testimony at the close of the enhancement proceedings caused him surprise and undue prejudice because he relied on the State's original list of witnesses in planning his trial strategy.

Without considering whether Iowa Rule of Criminal Procedure 2.19(9) required Long to object before trial on the substantive offense, we find in this case that reopening the record and allowing the State to call a late-noticed witness to prove the enhancement unfairly undermined Long's strategy and constituted an abuse of the district court's discretion. Accordingly, we vacate the sentence and remand for the district court to determine whether the State's original evidence—offered before the reopening of the record—satisfied its burden to prove beyond a reasonable doubt that the defendant previously violated subsection (1) or (2) of Iowa Code section 709.8.

I. Background Facts and Procedures

On December 30, 1996, Peter Long entered pleas of guilty to two counts of lascivious acts with a child, in violation of Iowa Code section 709.8. The county attorney explained, "the plea bargain in this case was that the Defendant agreed to plead to Lascivious Acts with a Child, a class 'D' non-forcible felony in

Webster County, and also agreed to plead guilty to the same crime arising out of a crime in Hamilton County." The Hamilton County conviction related to Long's conduct with a girl under the age of twelve between May 1 and July 30 of 1993. The Webster County charge arose from Long's sexual contact with a girl under the age of twelve on or around April 5, 1996. On the same day as the plea, the district court sentenced Long to two indeterminate five-year terms of imprisonment, to run consecutively.

On July 15, 2010, the State charged Long with sexual abuse in the third degree as a second or subsequent offense in violation of Iowa Code sections 709.1(3), 709.4(2)(b) and 902.14. The victim was Long's twelve-year-old babysitter. He stood trial for the offense on November 30, 2010. During jury deliberations on the underlying offense, Long agreed to a bench trial for the enhancement phase. On December 1, 2010, the jury returned a guilty verdict.

At the enhancement proceeding on the same day, the State introduced certified copies of two 1996 sentencing orders from Webster and Hamilton counties. The orders showed that Long was convicted of lascivious acts with a child under Iowa Code section 709.8. The State established Long's identity as the person who committed the prior offenses through the testimony of three witnesses. Detective Jason Bahr of the Webster County sheriff's office testified to an interview with Long in which he discussed his two prior convictions of lascivious acts with a child. The State also offered a segment of the video-taped police interview into evidence. In further proving identity, the State offered the

testimony of Barbara Krug and Russ Goebel, both of whom supervised Long in their employment with the Department of Correctional Services.

After the State rested, Long moved for judgment of acquittal, alleging that the prosecutor failed to prove his prior lascivious-acts convictions qualified as enhancing offenses under Iowa Code section 902.14. He pointed out that section 902.14 applies only to convictions for lascivious acts with a child based on the first two of the four subsections listed in section 709.8. Long argued the State's failure to specify the subsection constituted insufficient evidence to prove the prior conviction for enhancement purposes. The county attorney argued that under the rules of criminal procedure, "this part of the trial is supposed to be for identity purposes only." The district court took the matter under advisement.

The next morning, the State moved to reopen the record, and the court held a hearing on the motion later that day. The State argued the defendant waived the argument concerning which subsection he was previously convicted under because he did not raise it prior to the trial on the substantive offense, citing Iowa Rule of Criminal Procedure 2.19(9). *See* Iowa R. Crim. P. 2.19(9) ("If the offender denies being the person previously convicted, sentence shall be postponed for such time as to permit a trial before a jury on the issue of the offender's identity with the person previously convicted. Other objections shall be heard and determined by the court, and these other objections shall be asserted prior to trial of the substantive offense in the manner presented in rule 2.11."). Alternatively, the State argued the case should be reopened for additional evidence, citing the seven-factor test set out in *State v. Teeters*, 487

N.W.2d 346 (Iowa 1992). The defendant countered: "They rested with an incomplete record and now they want a second bite at the apple."

Four days later, on December 6, 2010, the district court issued an order granting the State's motion to reopen the record. The court rejected the State's waiver argument, quoting from *State v. Kukowski*, 704 N.W.2d 687, 693 (Iowa 2005), "[a] defendant has the right to stand mute in a rule 2.19(9) proceeding and force the State to prove prior convictions beyond a reasonable doubt and we will not interpret the rule in a manner that could interfere with that right." The court then weighed the *Teeters* factors and concluded "the significance of the evidence compels an order to reopen the record."

On December 16, 2010, the State filed a motion to amend the trial information and supplemented the minutes of testimony by listing Tom Kierski, the court reporter for Long's 1996 guilty plea hearing. The State anticipated witness Kierski would lay foundation for introducing the transcripts of Long's guilty pleas and sentencing for the Webster County and Hamilton County lascivious acts convictions.

At a December 20, 2010 hearing, Kierski testified to being the court reporter for Long's 1996 proceedings, and read excerpts of the transcript into the record. The State entered the transcripts and Kierski's shorthand notes for both hearings into evidence. Based on evidence presented at both the December 1 and December 20 hearings, the district court enhanced Long's third-degree sexual abuse charge to a class "A" felony, and imposed a life sentence on January 3, 2011.

Long appeals the district court's order granting the State's motion to reopen the record. He contends the court abused its discretion in allowing the State to supplement the facts necessary to prove the section 902.14 enhancement.

II. Standard of Review

We review a district court's decision to reopen the record for abuse of discretion. *State v. Jefferson*, 545 N.W.2d 248, 251 (Iowa 1996); s*ee Teeters*, 487 N.W.2d at 349 ("[T]he discretion accorded [to the trial court] must necessarily be especially broad."). We will find an abuse occurs when "such discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable." *Jefferson*, 545 N.W.2d at 251 (citations omitted).

A trial court may reopen the record at any stage of the proceeding, "if it appears necessary to the due administration of justice." *Bangs v. Maple Hills. Ltd.*, 585 N.W.2d 262, 267 (Iowa 1988) (citing 75 Am. Jur. 2d *Trial* § 390, at 583). Ordinarily, a district court's decision to reopen a case will not be interfered with on appeal. *Id.* (citing 75 Am. Jur. 2d *Trial* § 390, at 586). We take this deferential approach based on the paramount perspective of the judge who is overseeing the trial:

> No rigid or fixed formula can or should be employed to determine when a motion to reopen is proper since the trial court, which has a feel for the case, can best determine what is necessary and appropriate to achieve substantial justice.

Id. (quoting 75 Am. Jur. 2d *Trial* § 386, at 583).

III. Preservation of Error

In the district court, the county attorney argued that section 902.14—like the habitual offender statute at Iowa Code section 902.8—did not create a new crime, but merely enhanced the punishment for the offender's current crime. On the trial of questions involving prior convictions under what is now rule 2.19(9),[1] the county attorney contended that "a defendant who asserts an enhancement is not applicable must interpose his objections prior to trial on the underlying charge." *See State v. Cooley,* 471 N.W.2d 786, 787 (Iowa 1991) (finding rule required Cooley to raise "other objections" prior to trial of the substantive offense); *State v. Spoonmore*, 323 N.W.2d 202, 203 (Iowa 1982) (finding the defendant waived a claim that the record did not show the crime for which he was convicted in Tennessee was a felony where he failed to make a timely objection before this trial on the underlying charge); *State v. Smith*, 282 N.W.2d 138, 143 (Iowa 1979) (giving example of "other objections" in the rule as

[1] Rule 2.19(9) reads:

> After conviction of the primary or current offense, but prior to pronouncement of sentence, if the indictment or information alleges one or more prior convictions which by the Code subjects the offender to an increased sentence, the offender shall have the opportunity in open court to affirm or deny that the offender is the person previously convicted, or that the offender was not represented by counsel and did not waive counsel. If the offender denies being the person previously convicted, sentence shall be postponed for such time as to permit a trial before a jury on the issue of the offender's identity with the person previously convicted. Other objections shall be heard and determined by the court, and these other objections shall be asserted prior to trial of the substantive offense in the manner presented in rule 2.11. On the issue of identity, the court may in its discretion reconvene the jury which heard the current offense or dismiss that jury and submit the issue to another jury to be later impaneled. If the offender is found by the jury to be the person previously convicted, or if the offender acknowledged being such person, the offender shall be sentenced as prescribed in the Code.

questions concerning "whether a triggering class 'C' or class 'D' felony is involved in the first instance"). Under those cases, the "sole issue" to be submitted to the fact finder at the enhancement phase was the defendant's identity as the person previously convicted. The county attorney contended that Long did not suffer unfair prejudice because he "put the State in this position."

The district court agreed with Long's position that "he had the right to wait to object until after the State failed to meet its burden." The court looked to the language of *Kukowski* in turning down the State's waiver argument. *See Kukowski*, 704 N.W.2d at 693. *Kukowski* noted: "[T]he prior convictions must be proven by the State at the second trial beyond a reasonable doubt, just as the current offense must be established at the first trial." *Id.* at 691. The court went on to say that generally, the State must prove the prior offenses by introducing certified records of the convictions, as well as evidence that the defendant is the same individual named in the prior convictions. *Id.*

In this appeal, Long asserts the district court was correct in its determination that *Kukowski* allowed him to "stand mute" in the rule 2.19(9) proceeding, even as to the nature of the prior convictions. In its appellee's brief, the State does not contest error preservation. Accordingly, we do not express an opinion whether the interpretation of the rule's reference to "other objections" in *Cooley*, *Spoonmore*, and *Smith* is still viable after *Kukowski*. Where the State does not resist the defendant's claim that it must prove that the prior offenses qualify under the enhancement statute, we will hold it to that burden. *Cf*. *State v. Talbert,* 622 N.W.2d 297, 300 (Iowa 2001) (finding State waived its appellate

argument that Talbert's objection to a Tennessee judgment as proof of his prior operating-while-intoxicated conviction fell into the "other objections" category by not raising that claim at trial).

IV. Analysis

We now turn to the question whether the district court erred in granting the State's motion to reopen the record to supplement its proof of Long's prior lascivious acts offenses. While we are cognizant of the district court's broad discretion in this area, our deferential standard of review does not mean we will overlook any prejudicial impact of reopening the record on the trial strategy followed by a criminal defendant.

In determining whether to reopen a case for additional evidence, Iowa courts are guided by seven factors:

> (1) The reason for the failure to introduce the evidence, (2) the surprise or unfair prejudice inuring to the opponent that might be caused by introducing the evidence, (3) the diligence used by the proponent to secure the evidence in a timely fashion, (4) the admissibility and materiality of the evidence, (5) the stage of the trial when the motion is made, (6) the time and effort expended upon the trial, and (7) the inconvenience reopening the case would cause to the proceeding.

Teeters, 487 N.W.2d at 348.

The factors break into essentially two categories: those that balance the relative fairness to each party in allowing or disallowing additional evidence, and those that involve the convenience and efficient administration of the court proceedings. While the factors ensuring the effective management of the court system are important, "efficiency must always be compatible with fairness." *See State v. Hager*, 630 N.W.2d 828, 835 (Iowa 2001) (considering guilty plea

deadlines and opining "fairness must consider the fundamental principles which drive our system of justice and the rights and liberties of each individual").

As a starting point, both parties agree that the State was not seeking any tactical advantage by waiting to introduce evidence of the 1996 guilty plea hearing until after the motion to reopen the record. The prosecution was not aware of the perceived deficiency in its proof until the defendant made his motion after the close of evidence at the rule 2.19(9) trial on the previous convictions. The defendant pointed out that the sentencing orders offered into evidence by the State did not specify a particular subsection of section 709.8. Their lack of specificity, Long argued, rendered the orders inadequate to satisfy section 902.14.

Long's previous convictions were for lascivious acts with a child, a violation of section 709.8, which reads:

> It is unlawful for any person eighteen years of age or older to perform any of the following acts with a child with or without the child's consent unless married to each other, for the purpose of arousing or satisfying the sexual desires of either of them:
> 1. Fondle or touch the pubes or genitals of a child.
> 2. Permit or cause a child to fondle or touch the person's genitals or pubes.
> 3. Solicit a child to engage in a sex act or solicit a person to arrange a sex act with a child.
> 4. Inflict pain or discomfort on the person.

Iowa Code § 709.8 (1993).[2]

In 2005, the Iowa legislature enacted an enhanced penalty for repeat offenders of particular sex crimes:

[2] The 1995 version of section 709.8 reads verbatim.

> 1. A person commits a class "A" felony if the person commits a second or subsequent offense involving any combination of the following offenses:
>
> *a.* Sexual abuse in the second degree in violation of section 709.3.
>
> *b.* Sexual abuse in the third degree in violation of section 709.4.
>
> *c.* Lascivious acts with a child in violation of section 709.8, subsection 1 or 2.

Iowa Code § 902.14 (2009). In the same 2005 act, the legislature revised section 709.8, designating subsections (1) and (2) as class "C" felonies and leaving subsections (3) and (4) as class "D" felonies.

The sentencing orders for Long's lascivious-act convictions, which predated the legislative changes,[3] did not specify which subsection he violated. At the December 2, 2010, hearing on the motion to reopen, the court suggested that it had "the ability to go into the record itself . . . to ascertain exactly what [Long] pled guilty to. Quite frankly, based upon his own statement on the tape, he's probably guilty of all four subsections." The defendant objected to the court's suggestion it could take judicial notice of the court files to see what the original charges were. For its part, the prosecutor asserted: "We're asking the Court to reopen this record to give the State the opportunity to look and make sure and to see what subsection this was referred to in this particular case."

It is this belated effort by the State to verify the basis for its enhancement that is the focus of Long's argument for reversal. Long asserts that the second

[3] Previous violations occurring before the effective date of this enhancement statute count as predicate offenses. Iowa Code § 902.14(2) ("In determining if a violation charged is a second or subsequent offense for purposes of criminal sentencing in this section, each previous violation on which conviction or deferral of judgment was entered prior to the date of the violation charged shall be considered and counted as a separate previous offense, regardless of whether the previous offense occurred before, on, or after July 1, 2005.").

and fourth *Teeters* factors—which direct the court to consider "the surprise or unfair prejudice inuring to the opponent that might be caused by introducing the evidence" and the admissibility of the evidence—both weigh heavily against reopening the record. *See Teeters*, 487 N.W.2d at 348.

Long points out that Iowa Rule of Criminal Procedure 2.19(2) requires notice of the evidence supporting an indictment or trial information. The State cannot introduce evidence if it was not included in the minutes of evidence. Iowa R. Crim. P. 2.19(2) (requiring State to disclose its witnesses at least ten days before trial). Long argues the district court's decision to reopen the record allowed the State to amend its minutes of evidence in violation of rule 2.19(2). The State counters that rule 2.19(2) does not outright bar such evidence, and that rule 2.19(3) permits the court to consider various remedies when the State provides late notice of a witness.

Long's sexual abuse trial commenced on November 30. But the State did not amend the minutes of testimony to include Tom Kierski—the court reporter for the prior lascivious-acts convictions—until December 16, four days before the hearing at which he was to testify, and more than two weeks after Long's conviction for the current offense. Long contends Kierski's testimony regarding his transcription of the guilty plea and sentencing hearing violated rule 2.19(2) and resulted in surprise and unfair prejudice. In particular, Long contends he was banking on the State's inability to prove the enhancement with the witnesses listed in the original minutes, and if the State had provided notice of the stronger

enhancement evidence before the trial on the substantive offense, he would have had the option of pursuing a plea agreement with the State.

The State filed its trial information and minutes of evidence for Long's current conviction on July 15, 2010. The list of witnesses included the twelve-year-old victim, staff from the Trinity Regional Medical Center, a DNA specialist with the Division of Criminal Investigation laboratory, and Detective Jason Bahr. The original minutes of evidence also included the Webster County clerk of court who was expected to testify regarding Long's 1996 convictions for lascivious acts. On October 28, the State filed additional minutes of testimony, including staff from the Blank Children's Hospital, as well as Barb Krug and Russ Goebel, officers from the Department of Correctional Services who supervised Long in connection with the Hamilton County lascivious-acts conviction.

Long was entitled to assess the strength of the State's proof of his prior convictions based on the witnesses listed in those timely filed minutes of evidence. *See State v. Bruno*, 204 N.W.2d 879, 886 (Iowa 1973) ("The purpose of [rule 2.19(2)'s predecessor] is to inform the defendant of the witnesses against him and the substance of their testimony."). When reviewing those witnesses, Long may have determined the State would be unable to prove he was convicted under subsection (1) or (2) of section 709.8 as required by section 902.14 and planned his defense accordingly. *See Kukowski*, 704 N.W.2d at 693 ("A defendant has the right to stand mute in a rule 2.19(9) proceeding and force the State to prove prior convictions beyond a reasonable doubt, and we will not interpret the rule in a manner that could interfere with that right.").

Once he was convicted of the underlying offense, it was too late for Long to enter plea negotiations with the State. While we do not have any information whether the State would have been willing to bargain with Long, it is the lost opportunity that creates the undue prejudice in reopening the record and allowing an additional witness. Had the State initially notified Long of its intent to call Kierski at least ten days before trial, Long would have recognized the State's ability to prove the enhancement. With that expectation, Long would have had the option of offering to plead guilty to the current offense in exchange for the State foregoing the enhancement. Instead Long chose to go to trial on the merits, relying on his estimation the State would be unable to establish the requisite prior offense for the enhancement phase through the listed witnesses.

By the time the State added Kierski's minute of testimony, Long had already been convicted for more than two weeks. By reopening the record and allowing the State to call Kierski as a witness at the enhancement stage, the court essentially derailed Long's viable trial strategy. Because the trial was divided into two phases, none of the available remedies under rule 2.19(3) would have alleviated the prejudice suffered by Long. No continuance or any other order by the judge would mitigate the resulting prejudice because Long's harm stems not from insufficient time to prepare, but from the fact he was already convicted of the underlying offense and faced a life sentence if the State could prove he had a prior qualifying offense. The only remaining alternative to protect Long from undue prejudice is to exclude the testimony of Kierski.

Although the district court has broad discretion to reopen the record, in this case, doing so upended Long's justified reliance on the original minutes of evidence. Because allowing Kierski's testimony violated rule 2.19(2), thereby resulting in surprise and unfair prejudice to Long, we find the district court abused its discretion in reopening the record.

V. Remedy

In light of our determination that the district court abused its discretion in granting the State's motion to reopen the record and allowing the State to supplement its minutes of evidence after trial on the underlying offense, the next question is what remedy is appropriate.

Long asks us to vacate the enhancement. We agree the life sentence should be vacated. We also find it appropriate to remand the matter for the district court to determine the question it first took under advisement: whether the testimony and exhibits presented by the State at the December 1, 2010 hearing was sufficient to prove that Long previously violated Iowa Code section 709.8 (1) or (2) beyond a reasonable doubt. *See Kukowski*, 704 N.W.2d at 694 ("[R]emand[ing] the case for resentencing following further proceedings on the prior convictions."). We express no opinion on the question whether the evidence offered before the reopening of the record satisfied the enhancement under Iowa Code section 902.14. If on remand, the district court determines the State's original evidence was sufficient to prove that either of Long's lascivious acts convictions qualifies as a prior offense under section 902.14, the enhanced sentence shall be reimposed. If the court determines the original evidence was

insufficient, then the court should resentence Long without the enhancement. We remand for proceedings consistent with this opinion; we do not retain jurisdiction.

SENTENCE VACATED AND CASE REMANDED WITH INSTRUCTIONS.