IN THE COURT OF APPEALS OF IOWA

No. 2-130 / 11-0564
Filed April 11, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JOEL BLANE BABB,
Defendant-Appellant.

Appeal from the Iowa District Court for Webster County, Gary L. McMinimee (trial) and Joel E. Swanson (sentencing), Judges.

Defendant appeals his conviction for third-degree sexual abuse. **AFFIRMED.**

Nicholas Sarcone and Dean Stowers of Stowers Law Firm, West Des Moines, for appellant.

Thomas J. Miller, Attorney General, Elisabeth S. Reynoldson, Assistant Attorney General, Ricki N. Osborn, County Attorney, and Jennifer Bonzer, Assistant County Attorney, for appellee.

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

EISENHAUER, C.J.

Joel Babb appeals his third-degree sexual abuse conviction. Iowa Code §§ 709.1(2), .4(2)(a) (2009) (stating victim's mental defect or incapacity precludes consent). Babb argues: (1) the court erred in instructing the jury; (2) the evidence is insufficient to support his conviction; (3) the court erred in denying his motion for an independent psychiatric examination of the victim; and (4) a videotape of the victim's physical therapy session was erroneously admitted into evidence. We affirm.

I. Background Facts and Proceedings.

In July 2007, S.P. suffered a brain injury in a car accident that killed her daughter and injured her son. S.P. spent months in a coma. After S.P. regained consciousness, she was transferred to a rehabilitation facility in Ankeny. In January 2008, S.P. became a resident on the dementia floor at Friendship Haven, a residential care facility.

On May 23, 2010, Babb was working as a certified nurse assistant (CNA) at Friendship Haven. Courtney Amonson, another CNA, and Babb transferred S.P. to her bed for an afternoon nap and filled S.P.'s water pitcher. Amonson and Babb left the room.

Shortly thereafter, around 2:20 p.m., Babb was in S.P.'s room with the lights off and the door shut. Friendship Haven rules require S.P.'s door to be left open unless staff are assisting with her personal hygiene. Amonson noticed S.P.'s door was closed and was concerned another resident had wandered into the room. Amonson knocked and opened the door. Amonson saw Babb leaning over S.P. with his underwear and pants pulled down. Babb told Amonson he

was merely adjusting his body wrap/Ace bandage. Amonson alerted other Friendship Haven staff to the incident. The police were contacted.

Officer Hayek arrived and interviewed Babb in a Friendship Haven office. Babb stated he entered the room to check S.P.'s water. Babb told officer Hayek S.P. was sleeping and he pulled his pants down, but not his underwear, in order to adjust his Ace bandage. Babb claimed he was never near S.P.'s bed.

When Detective Husske arrived, he interviewed Amonson. Subsequently, at 4:45 p.m., Detective Husske interviewed Babb. Babb consistently stated he entered S.P.'s room to fill her water and ice. Babb acknowledged S.P.'s door was closed and the lights were off. Babb's version of the incident changed during this interview. First, Babb insisted he pulled down his pants, but not his underwear, to adjust his back-support Ace bandage. Eventually, Babb admitted he walked over to S.P.'s bed and put his knee on it in order to adjust her comforter. Babb claimed S.P. grabbed his crotch, pulled his pants down, and performed oral sex on him.

On July 1, 2010, Babb was charged by trial information with third-degree sexual abuse and wanton neglect of a resident in a healthcare facility. S.P. did not testify at Babb's March 2011 trial. The jury convicted Babb of third-degree sexual abuse and acquitted him of the wanton neglect charge. Babb now appeals his conviction.

II. Jury Instructions.

For the third-degree sexual abuse charge, the jury was instructed the State must prove Babb performed a sex act with S.P. and Babb "performed the sex act while S.P. was suffering from a mental defect or incapacity which

precluded S.P. from giving consent." Sex act was defined as "any sexual contact between the mouth of S.P. and the genitals" of Babb. Additionally:

> [A] person is precluded from giving consent if the person was, at the time of the sex act, mentally defective or incapacitated to the extent that the person could not understand the nature and consequences of the sex act, *rendering the person unable to offer effectual resistance to the approach of persons who might take advantage of the weakness*.

Babb argues the district court erred in including the italicized language because it lessened the State's burden to prove mental incapacity and the language is not helpful in understanding the phrase "understands the nature and consequences."

"We review challenges to jury instructions for correction of errors at law." *State v. Marin*, 788 N.W.2d 833, 836 (Iowa 2010). Trial courts are required to instruct the jury as to the law applicable to all material issues. *Id*. at 837. However, the trial court "is not required to give any particular form of an instruction; rather, the court must merely give instructions that fairly state the law as applied to the facts of the case." *Id*. "Jury instructions must be read in their entirety and not piecemeal." *Id*. at 838.

Under *State v. Sullivan*, 298 N.W.2d 267, 271-73 (Iowa 1980), the jury instruction fairly states the law. The *Sullivan* court ruled Iowa Code section 709.4(2) "protects persons who are so mentally deficient or incapacitated they cannot give a rational consent." 298 N.W.2d at 271. The court explained:

> [The statute] protects not only completely incompetent persons but those who "while having some degree of intellectual power and some capacity for instruction and improvement, are still so far below the normal in mental strength that *they can offer no effectual resistance to the approach of those who will take advantage of their weakness*."

> In short, subsection 709.4(2) protects those who are so mentally incompetent or incapacitated as to be unable to understand the nature and consequences of the sex act. Such persons cannot give *the meaningful "consent" required* by the enactment. There is abundant authority from other jurisdictions to support our view that the capacity to "consent" in these situations presupposes . . . intelligence capable of understanding the act, its nature and possible consequences.

Id. at 272 (quoting *State v. Haner*, 186 Iowa 1259, 1262, 173 N.W. 225, 226 (1919)) (emphasis added) (citations omitted). *See State v. Farnum*, 554 N.W.2d 716, 720-21 (Iowa Ct. App. 1996) (holding the "incapacity" alternative generally applies to "low-functioning victims").

Additional support for our conclusion is found in *State v. Chancy*, 391 N.W.2d 231, 235 (Iowa 1986), where the court ruled the "key issue" under section 709.4(2) "is whether the mental strength of the victim is so far below normal that it precludes effective resistance." Under long-established case law, we find no error.

III. Sufficiency of the Evidence.

Babb challenges the sufficiency of the evidence showing S.P. suffered from a mental defect or incapacity which precluded her from giving consent at the time of the oral sex act. Babb argues a reasonable trier of fact could not have found S.P. incapable of understanding the nature and consequences of sexual activities.

We review sufficiency-of-the-evidence claims for the correction of errors at law. *State v. Leckington*, 713 N.W.2d 208, 212-13 (Iowa 2006). We apply a deferential standard and review the evidence in the light most favorable to the State. *Id*. at 213. "We will uphold a verdict if it is supported by substantial

evidence." *State v. Brubaker*, 805 N.W.2d 164, 171 (Iowa 2011). Substantial evidence is evidence that could convince a rational fact finder that the defendant is guilty beyond a reasonable doubt. *Id.*

Several Friendship Haven employees testified at trial, including Michelle Jackman, a registered nurse and the director of nursing. Jackman initially met with S.P. and her parents to determine if Friendship Haven could meet S.P.'s needs. S.P. was the first resident with a traumatic brain injury. Due to her behavior and her memory impairment, S.P. was placed on the fifth floor. Jackman explained the fifth floor nurses have special training in dementia. When S.P. became a resident, Friendship Haven brought in the Brain Injury Association of Iowa to give extra training to the fifth floor staff. Jackman opined S.P. had slightly improved her physical limitations during her stay, but mentally "she's still pretty much the same as when she came in to us."

Dana Ayala, a charge nurse on the fifth floor, testified S.P. has a secondary diagnosis of dementia caused by her brain injury. S.P.'s reflexes and interactions "are a lot slower than somebody who is a normal person." Dana explained:

> [T]oday I even asked her . . . who I am and she told me Dan, but then I said, do you know why I'm here with you and she goes, you're my waiter. Which the other day she told me I was in church with her . . . . [S]ome things she can remember, like people. She can remember her parents real well, but she doesn't do tasks. Like we got to do everything for her . . . . She needs assistance with all her cares.
>
> . . . .
>
> Q. When you have a conversation with [S.P.], explain for the jury how she is able to carry on that conversation? A. Well, you have to [ask] short questions, yes or no questions, or simple questions, nothing she [would] have to deeply think about because doesn't work like that with her.

> Q. Can she carry on a conversation like a normal adult person would be able to do? A. No, she can't.
>
> . . . .
>
> Q. Has she always been compliant with taking her medications? A. No. Her behaviors sometimes go to a younger child . . . and you just wait and come back later and she'll take them then.

CNA Amonson stated S.P.'s mental condition had not really changed during the two years Amonson assisted her at Friendship Haven. S.P. has good days and bad days, and sometimes S.P. can brush her teeth by herself. Amonson cuts S.P.'s food for her. Amonson described her other interactions with S.P.:

> Q. How many choices do you usually give [S.P.]? A. Two.
>
> Q. If you would give her four, five, six choices, do you think she would get overwhelmed? A. Yes.
>
> Q. Have you seen her get overwhelmed if she's given too much to think about? A. Yes.
>
> . . . .
>
> Q. . . . Describe the content of conversations that you have with [S.P.]? A. The content of our conversations are pretty simple. We usually just talk about what we're going to be doing or sometimes I'll just tell her maybe a funny little story about my daughter . . . but they're never very complex conversations.
>
> Q. . . . [D]oes she ever get confused about her own kids? A. Yes.
>
> Q. And explain to the jury how she'll get confused? A. She'll think that her kids are—for one, she'll think her daughter is still alive and, two, she'll think her son is much younger than what he is.

Amonson testified S.P. would comment that men on television or on the floor were cute or hot. Amonson stated S.P. had an interest in men generally and would seek attention from men, but "I don't think it's in a sexual way." Rather, "[s]he misses the attention more than the romantic relations."

Amonson also testified S.P. would kiss a male resident in the hallway and this occurred over twenty times. When the staff would stop this behavior, S.P.

would become upset and mad. Amonson believes, based on the way S.P. acts towards men, S.P. has a sex drive and misses sex. Amonson stated she had never talked to S.P. about issues concerning sexual activity. While Amonson believes S.P. understands the definitions of oral sex or intercourse, S.P. does not understand the consequences (sexual diseases, intimacy, regret, rejection) of sexual activity. Further:

> Q. . . . [Y]ou believe that [S.P.] does miss affection from males; is that true? A. Yes.
> Q. There is a no touching, kissing policy for residents on fifth floor; is that true? A. Yes.
> Q. . . . [T]hey could probably hold hands or hug, but they can't engage in sexual behavior; is that true? A. Yes.
> Q. Why is that? A. Because the residents on our floor aren't able to make decisions . . . regarding something as serious as that. I guess it's—you never really know if they really want to be doing that or not.

Kathrine Ellis, a fifth floor CNA, regularly helps S.P. with her daily living tasks of "getting dressed, bathing, eating, and enjoying life." Ellis testified S.P. knows Ellis's name and also the names of other staff members who regularly assist her. Ellis stated S.P. had improved her physical abilities while at Friendship Haven because she was not walking when she first arrived but she is now able to walk a short distance with a walker. However, Ellis has not observed any mental changes, and S.P. is not able to remember things accurately. If Ellis is walking by S.P. and she wants attention, S.P. might try to grab Ellis's hand. Ellis testified:

> Q. Now, what I'd ask you to do is to describe [S.P.] for the jury in the best way that you can? A. Well, [S.P. is] kind of child like. I know she's an adult but mentally she's more like a child . . . .
> . . . .
> Q. When you give [S.P.] choices of what she wants to wear, how is it that you formulate those choices? A. . . . So I will pick out

> two shirts and I will show them to her and I will say, would you like to wear one of these? Sometimes she'll say no, sometimes she'll point to one and say that one. If I have five shirts and I'm holding five shirts trying to give her a choice of five, that's hard for her to tell me. Basically, it's too many choices . . . so then she just won't talk. She kind of shuts down . . . .
>
> . . . .
>
> . . . [W]e set everything [for breakfast] out in front of her. You have to open up her silverware. If I set everything in front of her and didn't, she'd just sit there and she'd sit there, so you have to open all that up . . . cut anything for her and then usually she can eat on her own. You just have to cue her sometimes . . . .
>
> Q. So [S.P.], with some assistance, can feed herself; is that right? A. Correct.
>
> Q. The big thing is, is that she just gets distracted sometimes; is that right? A. Yes, she does get distracted very easily. . . .
>
> . . . .
>
> Q. . . . I assume you saw some of these situations where [S.P.] would . . . kiss another resident; is that right? A. Correct.
>
> Q. Or they would kiss her; is that right? A. Usually it's the gentleman kissing her.
>
> . . . .
>
> Q. All right. And do you also recall times when she would want staff to kiss her or she would want to kiss staff? A. Yes.
>
> Q. Okay. Do you remember her trying to do that with Mr. Babb? A. Yes.
>
> Q. And did she kiss him? A. She tried to and he turned his head and said, no.

Norma Jo Majerus[1] is a speech language pathologist for Aegis Therapies. Majerus provides clinical support and training to numerous skilled nursing facilities. Aegis was asked to develop a speech therapy plan for S.P. and to establish a functional maintenance program for S.P.'s language and cognition. As a result, Majerus assisted in evaluating S.P.'s cognitive level on November 4, 2010. Majerus described the services she provides to Friendship Haven:

[1] We find no merit to Babb's claim the district court abused its discretion by failing to exclude the testimony of Majerus. *See Chancy*, 391 N.W.2d at 233 (holding a trial court has "considerable discretion in the admission of expert testimony").

> I often come to the facility in the capacity as a clinical specialist to mentor the various physical therapy, occupational therapy, and speech, language pathology to help better serve the patients, to provide more extensive treatment, to provide guidance and support if they have patients who they have difficulty with. I also provide support to the facility in terms of developing programs around . . . specific areas they want to target like dealing with behavior programs like urinary incontinence. I might help address falls within the facility . . . .

Majerus explained cognition is "a person's ability to understand how they fit into the environment. It [is] how they are able to comprehend language, how they are able to integrate that into an appropriate response."

Majerus tested S.P., and S.P. was able to do one task on the first activity before she became agitated. On the second activity, S.P. picked up an object but did not attempt to do the task. When Majerus engaged S.P. in conversation, S.P. was alert with ninety to ninety-four percent accuracy on one-step instructions. Majerus testified:

> S.P. was only oriented to person during the evaluation. She was not oriented to the day, to the date, to the time of day. She was not oriented to place. She was not able to tell me that she was at Friendship Haven or that it was a skilled nursing facility.
>
> . . . .
>
> Q. Describe the length of her attention span to the jury? A. It varied a little bit . . . . At best, I think she was able to attend for ten minutes . . . . When we were talking on an informal basis, maybe fifteen minutes . . . .
>
> Q. So when she was actually asked to focus on the activity, it was lower? A. It was about a minute, thirty seconds at worst.
>
> Q. But when she was asked to converse with you, then it was longer? A. That's correct.
>
> Q. Now this conversation was [S.P.] leading the conversation or were you? A. I was leading the conversation. She did not initiate any topics it was . . . my asking questions and then she would respond.
>
> . . . .
>
> Q. [Were] her answers self centered? A. Yes. She talked a lot about herself . . . for example, if I asked her to name the brush, she indicated, I like to brush my hair, that's my brush . . . .

> So it was about how she would engage in that activity and that's how she was able to elaborate more about the usage . . . . She keyed in that it was hers and she talked a lot about herself.
>
> Q. Now, you talked about . . . cognitive functioning and dementia based on your training and your experiences, is that a character of lower level functioning when it's just based on yourself? A. Yes . . . .
>
> . . . .
>
> Q. . . . You talked about [S.P.'s] ability to follow directions and you described . . . she had a problem when there was more than one step involved; is that true? A. That is correct.
>
> Q. Explain to the jury, how you were looking at that? A. . . . I asked [S.P.] to follow a two step direction . . . [for example], look up and raise your hand . . . . [I]n a certain percentage she would do the last portion of the command but she ignored the first part or was not able to perform the first part and I would say about [fifty to sixty percent accurate].
>
> . . . .
>
> Q. Did she have any difficulties with being able to give you specifics of what she did throughout the day? A. Yes, she did.
>
> Q. And explain that . . . ? A. . . . [Are] there things you like to do, are there activities that you like to attend[?] [H]er response was yes. And I asked her what are those and she couldn't elaborate.

Dr. Bernhagen,[2] a psychiatrist, conducted a mental status evaluation of S.P. in April 2009, and provides ongoing medical care to S.P. while she resides at Friendship Haven. Dr. Bernhagen testified S.P. has a depressive disorder, impaired abstract thought, impaired short-term memory, "a cognitive disorder due to traumatic head injury, and impulse control disorder." Dr. Bernhagen explained:

> Q. [Did your] later dealings with [S.P.] . . . confirm your initial belief [of short-term memory impairment]? A. Yeah, I still think she has memory impairment. There are some things that she's gaining memory about, like the loss of her daughter . . . . It's not a perfect understanding and she still gets some of the events confused.

[2] We find no merit to Babb's claim the district court abused its discretion by failing to exclude the testimony of Dr. Bernhagen. *See Chancy*, 391 N.W.2d at 233 (holding a trial court has "considerable discretion in the admission of expert testimony").

> Sometimes she will say that [her daughter is] two or that she's still alive . . . .
>
> . . . .
>
> Q. . . . [W]hen you tested her orientation to person, place and time, you said that she was oriented to her person; is that right? A. Yeah. The first interview she was oriented to person. She was able to tell me her name and she knew where she was. She did not know the date, the season, the day of the week, or the year.
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> . . . .
>
> Q. Now, [S.P.] has dealt with some people at Friendship Haven [who] may testify . . . [S.P.] was not oriented to place on particular days, does that surprise you? A. No, not at all.
>
> Q. And why doesn't that surprise you? A. Well, again, people with cognitive dysfunction, the last thing to go there is usually orientation to person. But orientation to place and time, that can go pretty quickly.
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> . . . .
>
> Q. Do you believe that [S.P.'s] thinking is coherent and logical? A. No, I think a lot of times it's confused.
>
> Q. When you talk with [S.P.] during your appointments, does she seem like she is not tracking when you discuss certain things? A. Certain things, yes.

Dr. Bernhagen also testified about S.P.'s mental defect or incapacity in the context of the sexual abuse allegations, stating:

> Q. You're aware that [Babb] is alleged to have been a CNA at Friendship Haven and to have gone in [S.P.'s] room and received oral sex; is that true. A. That's my understanding, yes.
>
> . . . .
>
> Q. . . . [I]n your opinion, do you believe that [S.P.] suffers from a mental defect or incapacity which prevents her from giving meaningful consent? A. Yes, I do.
>
> Q. And what is that mental defect or incapacity that you believe she suffers from? A. She has a cognitive disorder due to traumatic head injury.
>
> Q. How do you believe that that interferes with her ability to give consent? A. Well, it interferes with her ability to reason. It interferes with her ability to understand the consequences of any actions that she might take and then it also interferes with her ability to incorporate previous historical events with current historical events and it causes significant confusion.

On cross-examination, Dr. Bernhagen testified he had not specifically asked S.P. about her understanding of sex acts. Defense counsel also questioned Dr. Bernhagen about his pretrial deposition testimony:

> Q. Is the opinion that you gave here just a few minutes ago something that you formed after you were deposed on Friday? A. Yes. After I . . . understood the nature of the questions that were going to be asked, just as the jury is going to deliberate on all the information they've been given, I've had that opportunity to think about the questions that were asked and to contemplate them and render a better opinion.
>
> . . . .
>
> Q. That's still your opinion today, she understands what oral sex means, isn't that your opinion? A. I believe she understands what oral sex is.
>
> Q. And when we say that she understands it, what we mean is she not only understands what the act is but she understands the fact that it is for the purpose of arousing or satisfying somebody's sexual pleasure, right? A. That I cannot render an opinion on.
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> . . . .
>
> Q. Her mental functioning level you scored her in your evaluation as below normal? A. That's correct.
>
> . . . .
>
> Q. And in this case [S.P.] does have a sex drive; isn't that correct? A. That's my understanding, yes.
>
> Q. And the desire for intimacy that one would have as a person with a sex drive would include a desire for some type of sexual relations? A. That's quite possible, yes.

On redirect by the prosecutor, Dr. Bernhagen testified:

> Q. Now [defense counsel] talked to you about that it's . . . not required that before one engages in sexual activity that they say . . . I could get pregnant, I could get an STD, I could have that morning after feeling, I could have a bunch of other feelings with relation to sex and it's not required; is that right? A. That's correct.
>
> . . . .
>
> Q. . . . [W]ould you agree that most consenting adults know those things? A. Yes.
>
> Q. And in this case, would you also agree that based on [S.P.'s] capacity that she doesn't understand all those things? A. Yes, I would agree with that.
>
> Q. Now, [defense counsel] said that you didn't, at your deposition, give an opinion as to [S.P.'s] mental capacity. I'm going to . . . read you the question . . . "Do you think that [S.P.] is at a

mental capacity that she has the ability to give meaning[ful] consent to a sex act," and what's your answer? A. I said no.

Q. And that is the exact same thing that you said to the jury today; is that true? A. Correct.

Q. So really your opinion hasn't changed; is that true? A. No, that's true.

. . . .

Q. So what you are telling the jury today—I just want to make sure that we're clear, is that you look at this in kind of two different ways; is that right? A. Correct.

Q. The first is the yes or no standpoint and explain for the jury what you meant on that? A. If somebody were to ask [S.P.] to participate in a sex act, she would have the ability to say yes or no. Does she have the ability to understand what the consequences are or what the ramifications are, what she's actually participating in, I can't . . . say for sure.

Q. But it's your belief that she doesn't have the capacity to consent; is that true? A. Yes.

Subsequently, during re-cross by defense counsel, Dr. Bernhagen testified:

Q. . . . Now, if you were to do an examination of [S.P.], you say there's no exam for determining whether or not she understands and can agree to . . . in an intelligent way the participation in sexual activity, you say there's no such test per se? A. To the best of my knowledge, there's no formal exam to determine that.

. . . .

Q. [The prosecutor's deposition] question was, do you think [S.P.] is at a mental capacity that she has the ability to give meaningful consent to a sex act and you said no? A. Yeah. And the key word there being meaningful.

Q. Right. What you take to mean the same thing as informed consent? A. Correct.

. . . .

Q. And when you were also asked by [the prosecutor] in the deposition . . . a series of questions . . . relating to her providing oral sex to another person and then you were asked . . . does she have the capacity to understand what that is? A. What the sex act is, yes, I believe she does. I think that's what I answered.

Q. Yeah. And you answered, yeah, I think she has the capacity to understand the nature of it, right? A. I believe so.

Q. And then you went on to say, I don't know if she has the capacity to understand the consequences, right? A. Yes.

> Q. All right. And you haven't formed an opinion on whether or not she as the ability to understand the consequences of a sex act, including oral sex? A. Correct.

Finally, we note Babb acknowledged S.P.'s mental limitations in his interview with detective Husske. The interview's audiotape was played for the jury:

> A. . . . [S.P.'s] situation is she's a person that had brain problems or whatever . . . but the rest of her body is normal.
>
> Q. Right. A. So, I mean her response to me is normal . . . .
>
> . . . .
>
> A. I mean she's a normal girl.
>
> . . . .
>
> Q. Except for the fact that she's on this floor and that she is of diminished capacity, she's not because of what has happened to her, she is not "as legally or medically normal as a standard person that has not been through this type of trauma." You believe—you understand that? A. Oh yeah.
>
> . . . .
>
> Q. And you being a caregiver you know what's going on, you do not have any diminished capacity. A. Yeah. I've told her no before.
>
> Q. Okay. I would have a problem if you said that you thought she took advantage of you . . . . A. I don't realize that she knows what she did.

"The overall purpose of Iowa's sexual abuse statute is to protect the freedom of choice to engage in sex acts." *State v. Meyers*, 799 N.W.2d 132, 143 (Iowa 2011). The statute punishes unwanted and coerced intimacy. *Id*. The unifying principle is the idea of *meaningful* consent. *Id*. (emphasis added).

The witnesses testified to S.P.'s mental limitations as a result of her undisputed brain injury. S.P. is unable to understand a complex conversation, is able to follow basic two-step directions only fifty to sixty percent of the time, and is easily distracted. S.P. "shuts down" and is unable to make a choice when presented with too many options. Mentally, S.P. is "more like a child" with lower-

level mental functioning. We view this circumstantial evidence as persuasive as direct evidence on the issue of S.P.'s capacity to consent to sexual activity. *See State v. Brubaker*, 805 N.W.2d 164, 172 (Iowa 2011).

Additionally, Dr. Bernhagen, S.P.'s treating psychiatrist, testified S.P.'s thinking is not coherent and logical. Dr. Bernhagen opined S.P. has impaired abstract thought, impaired short-term memory, a cognitive disorder due to traumatic head injury, and impulse control disorder. Defense counsel vigorously cross-examined Dr. Bernhagen. We recognize the jury is "free to reject certain evidence and credit other evidence." *State v. Nitcher*, 720 N.W.2d 547, 559 (Iowa 2006). As detailed above, Dr. Bernhagen repeatedly opined S.P. does not have the mental capacity to give meaningful consent.

Viewing the evidence in the light most favorable to the verdict, we conclude a reasonable jury could have considered the evidence adequate to prove S.P. is suffering from a mental defect or incapacity which precluded her from giving consent. Accordingly, substantial evidence supports the jury's determination S.P. was precluded from giving consent to the oral sex act due to a mental defect or incapacity.

IV. Psychiatric Examination of Victim.

The State provided Babb with S.P.'s medical and mental health records from Friendship Haven. The State did not have S.P. independently evaluated for the purposes of trial. The district court denied Babb's motions to conduct a psychiatric examination of S.P., ruling:

> Defendant [asks] this Court to order an examination to determine the alleged victim's mental capacity. The Court respectfully declines this invitation [under] *State v. Gabrielson*, 464

> N.W.2d 434, 438 (Iowa 1990) . . . . "We agree with the jurisdictions which hold that trial courts have no authority to order sexual abuse victims to undergo psychiatric examinations."
>
> . . . From [the Friendship Haven records,] any competent expert should have the foundational information to evaluate the mental state of the alleged victim and arrive at a reasoned opinion concerning the alleged victim's mental state and her ability or inability to consent to the alleged acts in question.

On appeal, Babb asserts his inability to have S.P. independently examined violates his Sixth Amendment right to a fair trial. Babb contends the district court should have used its inherent authority to compel discovery because S.P.'s capacity to consent is an element of the crime. Babb acknowledges there is no Iowa case law supporting his position, but asserts we should follow a Nebraska Court of Appeals ruling. *See State v. Doremus*, 514 N.W.2d 649, 653 (Neb. Ct. App. 1994).

We review constitutional issues de novo. *State v. Hutton*, 796 N.W.2d 898, 901 (Iowa 2011). First, we note the State did not have S.P. evaluated for purposes of trial. The Nebraska case is therefore distinguishable. *See Doremus*, 514 N.W.2d at 653 (noting State's expert "testified about matters which were at least partially based on the results of the testing he performed on the victim at the request of the prosecutor").

Second, in *Gabrielson*, the Iowa Supreme Court noted "there is no general constitutional right to discovery in a criminal case." 464 N.W.2d at 436. Next, the court determined: "[T]here is no statutory authority empowering the court in a criminal case with the ability to order victims of sexual abuse to undergo psychiatric examinations designed to evaluate the complainant's credibility." *Id*.

at 437. Finally, the *Gabrielson* court discussed common law authority to order a victim to undergo an examination and ruled:

> We agree with the jurisdictions which hold that trial courts have no authority to order sexual abuse victims to undergo psychiatric examinations. We find this to be the more persuasive view for several reasons. First, as discussed above, there is no statutory authority or common law precedent granting a trial court authority to order such psychiatric examinations of sexual abuse victims. Second, even if we were to create the authority for trial courts to order psychiatric examinations, courts would be left in the awkward position of having no method of enforcing such an order because neither the trial court nor the State has the power to compel a sexual abuse victim, a non-party to the case, to submit to a psychiatric examination ordered by the court.
>
> Finally, the interests of justice do not require that trial courts have authority to grant discovery requests by defendants for psychiatric examinations of sexual abuse victims designed to evaluate the complainant's credibility. In fact, justice compels the contrary conclusion.
>
> This court recognizes the hardships that victims of sexual abuse must endure. As a result, rules have been formulated to prevent sexual abuse victims from suffering additional trauma. If we vest trial courts with the authority to order sexual abuse victims to submit to psychiatric examinations, we will not be forwarding society's need to protect sexual abuse victims . . . .

Id. at 438 (citations omitted).

We recognize the *Gabrielson* court discussed a trial court's authority to order the defense-requested psychiatric examination in the context of an examination for the purpose of evaluating the sexual abuse victim's credibility. *See id*. at 436. We find the logic equally applicable here. Accordingly, under the circumstances of this case, the trial court correctly denied Babb's multiple requests for a psychiatric evaluation of S.P.

V. Physical Therapy Videotape.

During trial, Babb moved to exclude a short videotape of one of S.P.'s physical therapy sessions. The video shows S.P. walking down a hallway with

the help of two aides while she is using a walker. The district court partially granted Babb's motion by requiring the State to remove the sound and to stop the video before S.P. reaches her parents and they hug. The court ruled the videotape, as limited, could be admitted:

> There has been testimony about this from several witnesses. [I]t really just shows what they were all testifying to. I don't . . . think it's prejudicial in that sense. I think it just kind of demonstrates a little bit about what . . . they've been saying . . . aside from the sounds in it and . . . the hugs.

Babb argues the court erred in admitting the videotape. We review the court's decision to admit or exclude evidence for an abuse of discretion. *State v. Jordan*, 663 N.W.2d 877, 879 (Iowa 2003).

We find no abuse of discretion. The challenged videotape was relevant and probative to corroborate the witnesses' testimony describing S.P.'s limitations. *See* Iowa R. Evid. 5.401 (defining relevant evidence).

Additionally, Iowa Rules of Evidence 5.403 provides relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." *Assuming* Babb can establish the videotape's probative value is substantially outweighed by the danger of unfair prejudice, we will not reverse his conviction if "such error would be harmless." *State v. Boley*, 456 N.W.2d 674, 678 (Iowa 1990). We generally find erroneously admitted evidence to be harmless when the evidence is merely cumulative of other evidence properly admitted. *State v. Hildreth*, 582 N.W.2d 167, 170 (Iowa 1998).

Babb acknowledges "the video was cumulative" of the testimony of the Friendship Haven staff. Consequently, even if we *assume* the trial court erred in admitting the videotape, any such error is harmless. *See State v. Sowder*, 394

N.W.2d 368, 372 (Iowa 1986) (ruling "where substantially the same evidence is in the record, erroneously admitted evidence will not be considered prejudicial"); *State v. Wixom*, 599 N.W.2d 481, 484 (Iowa Ct. App. 1999) (stating cumulative evidence "cannot be said to injuriously affect the complaining party's rights").

Accordingly, we affirm Babb's conviction.

AFFIRMED.

Bower, J., concurs; Danilson, J., concurs specially.

DANILSON, J. (concurring specially)

I specially concur only to acknowledge the distinction Babb makes in respect to the reason sought for the mental examination of the sexual abuse complainant. As the majority has observed, our supreme court has determined a defendant does not have the right to obtain a mental examination to determine the credibility of a sexual abuse complainant. *State v. Gabrielson*, 464 N.W.2d 434, 436 (Iowa 1990). However, Babb sought to examine the complainant's mental competency to consent. Our supreme court has not previously addressed a defendant's right for such an examination where the State contends the complainant was not competent to consent. As Babb has argued, a few courts have permitted a mental examination under these circumstances, but generally, only if the defendant "demonstrates sufficient compelling circumstances." *Hamill v. Powers*, 164 P.3d 1083, 1087-88 (Okla. Crim. App. 2007). I do not believe the facts of this case reflect a compelling need even if our supreme court would acknowledge such a limited right. Here, the State provided to the defendant both the complainant's medical records and a video of the complainant. Moreover, Babb was not faced with a situation where for purposes of trial, the State had its own expert perform a mental examination to determine the complainant's competency to consent.