IN THE COURT OF APPEALS OF IOWA

No. 3-958 / 12-1304
Filed November 20, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ANTHONY BERTOLONE,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Scott D. Rosenberg, Judge.

Anthony Bertolone appeals his convictions to five counts of sexual abuse in the third degree. **AFFIRMED**.

Alfredo Parrish of Parrish, Kruidenier, Dunn, Boles, Gribble, Gribble, Gentry & Fisher, L.L.P., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Kyle P. Hanson, Assistant Attorney General, John Sarcone, County Attorney, and Steve Foritano and Nan Horvat, Assistant County Attorneys, for appellee.

Heard by Vogel, P.J., and Potterfield and McDonald, JJ.

VOGEL, P.J.

Anthony Bertolone appeals his convictions following a bench trial to five counts of sexual abuse in the third degree. Bertolone claims the district court erred in denying his motion for new trial based on previously undisclosed medical records because this nondisclosure violated his right to present a defense pursuant to the Sixth and Fourteenth Amendments of the United States Constitution and Article I, sections 9 and 10 of the Iowa Constitution. He further claims the district court abused its discretion when it denied his motion for post-verdict discovery, as well as asserts there was insufficient evidence supporting the guilty verdicts. Because we find the district court did not abuse its discretion in denying Bertolone's motion for additional discovery, the nondisclosure of the medical records did not prejudice him, and substantial evidence supports each count, we affirm.

I. Factual and Procedural Background

J.D. and Bertolone were fraternity brothers who lived in the same fraternity house in rooms next to one another. They formed a friendship in which Bertolone insisted on purchasing gifts for J.D. such as an iPod, and they exchanged many text messages. They went on several out of state trips, usually accompanied by other fraternity brothers and friends. Bertolone also purchased alcohol and marijuana for J.D., and J.D. testified he drank and smoked to the point of unconsciousness two to three times each month. J.D. described Bertolone as a "helicopter friend," prying too much into the details of J.D.'s daily and personal life.

Witnesses testified Bertolone was unusually fixated with J.D., as he would keep track of J.D.'s schedule and would repeatedly inquire as to where J.D. was, when he was coming back, and whom he was with. One fraternity brother who shared a room with J.D. woke up one night to see Bertolone on his hands and knees looking at J.D. as he slept. Another fraternity brother also saw Bertolone in J.D.'s room with his hands up toward J.D.'s bed.

It was difficult for J.D. to distance himself from Bertolone, as the two were involved in many of the same activities. J.D. also considered himself to be a "nice person" and so stayed friends with Bertolone, whom J.D. characterized as "socially awkward." To help him set some boundaries within the relationship, J.D. sought the help of a counselor regarding how to handle Bertolone's behaviors. However, his attempts were unsuccessful. When Bertolone's grandfather died, J.D. accompanied Bertolone to his home. Grieving from his loss, Bertolone insisted J.D. sleep in his bed. During the night he tried to put his hand on J.D.'s penis, which J.D. rebuked, and after which J.D. made a barrier in the bed. In the summer of 2010, J.D. and Bertolone attended a triathlon in Wisconsin, and when they were in the hotel room, J.D. reported Bertolone tried to "make a move" on him, which he again rebuffed.

In October and November of 2009, Bertolone contacted three acquaintances in search of sleep medications, including cyclobenzaprine. In July of 2010, J.D., another friend, and Bertolone went to the Ozarks with Bertolone's parents. Bertolone's mother asked J.D. to upload photos onto Bertolone's computer, at which point J.D. found pictures of what appeared to be his boxer shorts and penis. With family and friends present in the room, he quickly

navigated away from the photos. A few days later, on a fraternity trip to North Carolina, J.D. pretended to work on Bertolone's computer so he could further investigate the files. He found over eight gigabytes of data consisting of hundreds of photos and videos of Bertolone performing various sex acts on J.D. while J.D. was unconscious and unresponsive.[1] After phoning his father, J.D. flew home to Chicago a few days late, and shared his situation with his parents. He and his father then went to Des Moines, and informed school officials and police as to what J.D. had discovered.

On September 10, 2010, the State filed a trial information charging Bertolone with one count of sexual abuse in the third degree—which was later amended to five counts—pursuant to Iowa Code sections 709.1, 709.4(1), and/or 709.4(4) (2009). On October 6, 2010, Bertolone filed a motion to produce, to which the State responded. On February 21, 2012, Bertolone filed a supplemental motion to produce seeking J.D.'s "medical and mental health records" and also filed a *Cashen* motion.[2] The court ordered the requested medical and counseling records to be provided to both parties.

Bertolone waived his right to a jury trial, and a bench trial was held from March 19, 2012, until March 23. On May 4, 2012, the district court entered its findings of facts and conclusions of law finding Bertolone guilty of all charges. Bertolone filed a motion for new trial, which was denied. Sentencing was held on June 18, 2012.

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[1] The record includes approximately 128 photos and 131 videos. J.D. testified there were more but that was the limit he could transfer to his cell phone.

[2] This motion was made under *State v. Cashen*, 789 N.W.2d 400 (Iowa 2010), which held, under certain circumstances, a defendant is entitled to the medical and psychological records of the complaining witness.

As explained in more detail below, post-trial motions were filed, including motions for new trial and a motion for further discovery. After an appeal and a limited remand, the district court eventually denied Bertolone's post-trial motions. Bertolone now appeals.

II. Limited Remand and Motion for Further Discovery

Bertolone asserts the district court did not comply with the limited remand order because it did not specifically rule on his motion for further discovery, and that it abused its discretion when it refused to allow further discovery.

A. Standard of Review

We review actions of the district court post-remand for legal error. *State v. Cromer*, 765 N.W.2d 1, 6 (Iowa 2009). With regard to discovery rulings, they are within the sound discretion of the trial court, and are reviewable only upon an abuse of the court's discretion. *State v. Clark*, 814 N.W.2d 551, 563 (Iowa 2012).

B. Whether the District Court Complied with the Limited Remand Order

The court returned its verdict on May 4, 2012, and sentencing was held on June 18, in which J.D. and his parents submitted victim impact statements. J.D.'s statement included: "[T]o help cope with this, I had certain medications prescribed to help with the anxiety and fear." His parents' statement asserted: "We've also had insurance costs associated with psychological interventions. We expect these treatment costs to continue indefinitely." As this information had not been previously disclosed to Bertolone, Bertolone moved for a new trial and for further discovery seeking J.D.'s mental health records, primarily to test J.D.'s memory and credibility with respect to his relationship to Bertolone. To

preserve his appeal rights, Bertolone appealed his convictions to the supreme court, then sought a limited remand so the district court could rule on both the request for further discovery and his motion for new trial.

Prior to the remand order, the State agreed to provide the court with a waiver from J.D. so the mental health records could be produced for an in camera review. On July 30, after its in camera review and before the remand was granted, the court issued a ruling on the motion for further discovery. Regarding the issue of whether Bertolone was entitled to review J.D.'s mental health records, the court based its analysis on Iowa Code section 622.10, which was the legislature's response to *State v. Cashen*, 789 N.W.2d 400 (Iowa 2010), under which Bertolone made his argument.[3] *See State v. Thompson*, 836 N.W.2d 470, 479–80 (Iowa 2013). The court stated:

> Based upon this court's review of the privileged records provided to it concerning the victim, the court did not find material that was "exculpatory." The court had the advantage of being the fact-finder in this matter, and this helped in making the court's determination. However, the court finds that other portions of the records present this "gray" area mentioned above that when placed in the hands of an advocate may provide basis for potential exculpatory evidence to be found or at least explored to that end.

The court then "further found that the disclosure of the particular records or portions of the record are not so sensitive as to invade the privacy interest of the victim," and so attached in a sealed envelope the portions of J.D.'s mental health records it found to be in the "gray" area.

[3] In the supplement to his motion for further discovery, Bertolone cited Iowa Code section 622.10, noting it had a more stringent standard for the release of medical records. However, the standard he emphasized was that iterated in *Cashen*.

The limited remand was granted on August 29, 2012. The remand was granted for the "limited purpose of a hearing and ruling on Appellant's Motion for New Trial and Request for Further Discovery." A hearing was held on August 31. On September 5, the district court issued a ruling denying Bertolone's motion for new trial, and also stated: "Although Rule 2.24(2)(b)(8) does allow the Court to postpone the hearing on the motion for new trial in order that the Defendant may procure [further discovery] the Court finds that under the facts of this case and the record it is not necessary." Bertolone filed a motion to amend or enlarge, requesting the court rule on the discovery motion as well as arguing the court employed an improper standard in evaluating Bertolone's motion for new trial. On November 5, the court issued a ruling stating Bertolone's motion "has been reviewed by the Court and the motion is hereby denied."

Bertolone argues the district court did not expressly rule on the request for further discovery and thus did not comply with the limited remand order. However, we find the district court properly addressed the remand order. *See Winnebago Indus. v. Smith*, 548 N.W.2d 582, 584 (Iowa 1996) ("The authority of the court on remand is limited to the matters specified by the appellate court."). The court ruled on the issues presented, and addressed all matters raised by Bertolone. This includes both the motion for new trial and motion for further discovery. Therefore, it did not fail to carry out the remand order, and we decline to again remand the case so the district court may rule further on Bertolone's claim that the court failed to comply with the order.

C. Whether the Court Correctly Denied Bertolone's Motion for Further Discovery

Tied to his assertion the district court did not comply with the remand order is Bertolone's claim the district court abused its discretion when it denied his motion for additional discovery. Specifically, Bertolone sought: further deposition of J.D. regarding statements to his counselors, what medication he was currently taking, his use of marijuana and alcohol, possible memory problems, depositions of J.D.'s counselors, pharmacy records, and the insurance records referenced by J.D.'s parents. He also contends the court abused its discretion because: (1) the denial for additional discovery contradicts the court's previous ruling holding that various mental health records were potentially exculpatory, (2) the court did not properly weigh the fact only counsel is in a position to truly know what evidence is exculpatory, and (3) the court improperly relied on the evidence presented at trial and disregarded "the newly discovered evidence of J.D.'s dishonesty."[4]

Iowa Rule of Criminal Procedure 2.24(2)(b)(8) allows the district court discretion to extend discovery, stating:

> When a motion for a new trial is made upon the ground of newly discovered evidence, the defendant must produce at the hearing, in support thereof, the affidavits or testimony of the witnesses by whom such evidence is expected to be given, and if time is required by the defendant to procure such affidavits or testimony, the court may postpone the hearing of the motion for such length of time as, under all circumstances of the case, may be reasonable.

[4] In his notice of additional authorities, Bertolone also referenced *State v. Liggins*, Appeal No. 3-885/12-0399 (Iowa Ct. App. Nov. 6, 2013) in support of his argument. However, *Liggins* dealt with a *Brady* violation rather than a motion for additional discovery, and so is inapplicable to this case.

Given the district court's wide discretion when ruling on discovery motions, *see Griffith v. Moss*, 554 N.W.2d 571, 573 (Iowa Ct. App. 1996), the court did not abuse its discretion when denying Bertolone's motion for further discovery. Bertolone at no time demonstrated further discovery, including deposing J.D. a third time, would aid in his defense, pursuant to the requirements of rule 2.24(2)(b)(8). Moreover, in light of the overwhelming evidence against Bertolone, the district court concluded additional mental health records and depositions would not change the outcome of the trial. This is especially pertinent considering the court already reviewed in camera and then disclosed additional records, the disclosure of which, in the trier-of-fact's opinion, did not warrant a new trial.

Furthermore, the court did not abuse its discretion because its denial of the motion did not perfectly reflect its previous ruling that held some of J.D.'s mental health records were potentially exculpatory "when placed in the hands of an advocate." It simply found no need to order further discovery of J.D.'s mental health records given the already-disclosed records did not provide a basis for a new trial, as well as the fact the court found that "they are not exculpatory in and of themselves standing alone." Thus, the court did not abuse its discretion when it held "that under the facts of this case and the record [further discovery] is not necessary." Nor did the court employ an improper standard when analyzing Bertolone's claim, having been the trier of fact. Therefore, we affirm the court's denial of Bertolone's motion for further discovery.

III. Motion for New Trial

Bertolone further claims the district court should have granted his motion for new trial based on previously undisclosed mental health records—those reviewed by the district court upon Bertolone's *Cashen* motion—because this nondisclosure violated his right to present a defense pursuant to the Sixth and Fourteenth Amendments to the United States Constitution and Article I, sections 9 and 10 of the Iowa Constitution. Bertolone argues the mental health records were relevant to challenge J.D.'s credibility. He further asserts the nondisclosure prevented him from making an informed decision about the State's plea offer and prejudiced his defense strategy such that the disclosure would have probably changed the result of the trial. The State argues the records were merely impeaching and therefore immaterial, and, based on the overwhelming evidence of Bertolone's guilt, these records would not have altered the outcome of the case.

We review a ruling on a motion for new trial for an abuse of discretion. *State v. Reeves*, 670 N.W.2d 199, 202 (Iowa 2003). To establish such abuse, Bertolone must show the district court exercised its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *See id.* The district court has broad discretion when ruling on a motion for new trial, and motions based on the discovery of new evidence are "not favored and should be closely scrutinized and granted sparingly." *State v. Kramer*, 231 N.W.2d 874, 881 (Iowa 1975). To the extent Bertolone is claiming constitutional violations involving the right to present a defense, we review those claims de novo. *See Thompson*, 836 N.W.2d at 476.

To prevail on his claim the district court abused its discretion in denying the motion for new trial, Bertolone must show:

> (1) that the evidence was discovered after the verdict; (2) that it could not have been discovered earlier in the exercise of due diligence; (3) that the evidence is material to the issues in the case and not merely cumulative or impeaching; and (4) that the evidence probably would have changed the result of the trial.

See Jones v. State, 479 N.W.2d 265, 274 (Iowa 1991). For evidence to be material, the defendant does not have to prove its disclosure would have resulted in his acquittal. *Harrington v. State*, 659 N.W.2d 509, 523 (Iowa 2003). The inquiry

> [I]s not just a matter of determining whether, after discounting the inculpatory evidence in light of the undisclosed evidence, the remaining evidence is sufficient to support the jury's conclusions. Rather, the question is whether the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.

Id. (quoting *Strickler v. Greene*, 527 U.S. 263, 289 (1999) and discussing materiality in the context of *Brady v. Maryland*, 373 U.S. 83 (1963) violations).

In denying Bertolone's motion for new trial, the district court stated:

> The Court, in its prior ruling, found that the previously unknown or undisclosed records are not exculpatory. In addition, the Court does not view the records in a vacuum. The Court views these records within the totality of all the evidence presented. The Defendant may argue that the records could be used to attack the credibility of the victim. However, the evidence is so overwhelming as to each and every element of the offenses charged that any inference from these records does not rise to create a reasonable doubt as to the Defendant's guilt. Thus, there is no showing of any prejudice to the Defendant . . . . [T]here is no reasonable probability tending to create a reasonable doubt as to the Defendant's guilt.

We agree that Bertolone has failed to show these mental health records would have probably changed the result of the trial. The massive number of

videos and pictures, secretly taken by Bertolone, clearly show Bertolone sexually abusing an unconscious, unresponsive J.D. While Bertolone in his motion for new trial argued: "If J.D. was not honest about the existence of other medical or counseling data it is possible he was not being candid about the nature of the relationship," this in fact has no relation to whether Bertolone sexually abused J.D. Regardless of the nature of the relationship, sexual abuse in the third degree occurs when "[t]he act is performed while the other person is mentally incapacitated, physically incapacitated, or physically helpless." Iowa Code § 709.4(1)(d). This definition includes the situation when the victim is unconscious, as defined in Iowa Code section 709.1(1). *See State v. Weiss*, 528 N.W.2d 519, 521 (Iowa 1995). Though Bertolone's defense was that the sexual contact was consensual, the testimony along with the graphic videos and photographs very clearly portray abuse, not consent. Thus, given the overwhelming evidence of Bertolone's guilt, the newly discovered, post-abuse mental health records do not refute the evidence such that confidence in the verdict is undermined. *See Harrington*, 659 N.W.2d at 516; *see also State v. Gilroy*, 313 N.W.2d 513, 522 (Iowa 1981) (holding the district court did not abuse its discretion in denying the defendant's motion for new trial due to the overwhelming evidence of the defendant's guilt).

Nonetheless, Bertolone argues he was prejudiced because he did not have the records at the time he declined the State's plea offer, as well as when he chose to forego his right to a jury trial. He further claims the nondisclosure of these records before trial prejudiced his defense strategy because he could have called a private investigator—who had videotaped J.D. drinking to intoxication—

as a witness, and his medical expert could have reviewed these records. However, Bertolone has failed to show how these arguments in fact prejudiced him. He makes no claim he actually would have accepted the plea offer or chosen a jury trial had he possessed the mental health records prior to trial. Moreover, a bare claim that J.D.'s videotaped, post-abuse behavior "is inconsistent with having fear and anxiety" has no bearing on whether or not the sexual abuse occurred. The same analysis applies to Bertolone's argument that his expert "could have addressed [the anxiety and medication's] effect on the relationship." Therefore, Bertolone failed to show this evidence probably would have changed the result of the proceeding, and the district court did not abuse its discretion in denying his motion for new trial.

IV. Sufficiency of the Evidence

Bertolone next asserts substantial evidence does not support the guilty verdicts. Specifically, he claims the district court's finding J.D. was credible was in error, and that Bertolone was credible, rendering his testimony he and J.D. were in a consensual sexual relationship more probable. He further argues the evidence does not support each count, noting the surrounding evidence such as text messages, which he contends indicates the sexual contact was consensual. In response, the State references the overwhelming video and picture evidence showing Bertolone sexually abusing an unconscious J.D.

When the right to a jury trial is waived, we review the district court's findings as we would a jury verdict. *State v. Weaver*, 608 N.W.2d 797, 803 (Iowa 2000). Thus, we review challenges to the sufficiency of the evidence for errors at law. *State v. Hansen*, 750 N.W.2d 111, 112 (Iowa 2008). The district court's

findings of guilt are binding if they are supported by substantial evidence. *Id.* Evidence is considered substantial if a rational trier of fact could find the defendant guilty beyond a reasonable doubt. *Id.* Additionally, we view the evidence in favor of the nonmoving party, that is, the State, and make all legitimate inferences and presumptions that can fairly and reasonably be deduced from the record. *State v. Biddle*, 652 N.W.2d 191, 197 (Iowa 2002).

Upon review of the record, we find sufficient evidence supports the guilty verdict on each count. As an initial matter, "[d]eterminations of credibility are in most instances left for the trier of fact, who is in a better position to evaluate it." *Weaver*, 608 N.W.2d at 804. Thus, despite Bertolone's attacks on J.D.'s credibility, given the consistency of J.D.'s testimony along with the corroborating evidence, the district court's finding J.D. was a credible witness is supported by sufficient evidence. Furthermore, the finding Bertolone was not credible is also supported, considering Bertolone had a strong defense motive to contend he and J.D. were in a consensual sexual relationship, in addition to the video and picture evidence that was contrary to his assertions.

We also agree with the district court the video evidence "clearly indicates that the victim was incapacitated, asleep, unconscious, and/or unable to consent to any and all of the sexual activity depicted in the numerous recordings made by the Defendant." Among the 131 videos, Bertolone is seen sexually abusing J.D. in a stealth-like manner, with the lights turned off and under the bed linens. These acts are performed while J.D. is clearly asleep or otherwise unconscious, given his snoring, closed eyes, and otherwise unresponsive behavior. This evidence supports each count of sexual abuse in the third degree pursuant to

Iowa Code sections 709.1, 709.4(1), and 709.4(4), despite Bertolone's characterization of the relationship as consensual, and that it was "like any other normal gay relationship/heterosexual relationship where one person would want to have a sex [sic]. They would . . . start the act, and the other person would wake up later on, and you would finish the act." Consequently, we affirm each count of conviction.

Having considered all issues presented by Bertolone, we affirm his convictions.

AFFIRMED.