IN THE COURT OF APPEALS OF IOWA

No. 5-981 / 04-1305
Filed June 14, 2006

STATE OF IOWA,
Plaintiff-Appellee,

vs.

LISA MARIE MEYER,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Bobbi M. Alpers (Motion to Dismiss) and J. Hobart Darbyshire (Trial), Judges.

Lisa Meyer appeals her convictions and sentence for (1) sexual exploitation by a counselor or therapist, and (2) wanton neglect of a resident of a health care facility. **AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.**

Linda Del Gallo, State Appellate Defender, and Martha J. Lucey, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, William E. Davis, County Attorney, and Julie A. Walton, Assistant County Attorney, for appellee-State.

Heard by Zimmer, P.J., and Miller and Hecht, JJ.

HECHT, J.

Lisa Meyer appeals her convictions and sentence for (1) sexual exploitation by a counselor or therapist, and (2) wanton neglect of a resident of a health care facility. We affirm in part, reverse in part, and remand.

I. Background Facts and Proceedings.

During October and November of 2003, Lisa Meyer was employed as a certified nursing assistant (CNA) by Davenport Lutheran Home, a licensed nursing facility. At this time, L.L. was an eighty-six year old male resident of the nursing home under Meyer's care. L.L. was wheelchair-bound and in the advanced stages of Alzheimer's disease. Five members of the nursing home's staff testified that they witnessed Meyer touch or twist L.L.'s nipples on several occasions during the fall of 2003.[1] Each of the staff members observed L.L. act defensively to these touchings in an attempt to push Meyer's hands away. Several of these staff members also testified that Meyer had stated "[o]h, I love those nipples," and had commented that L.L. had the biggest "man nipples" she had ever seen.

Meyer's conduct was brought to the attention of Davenport police. Although Meyer denied ever touching L.L.'s nipples or breasts outside the requirements of her job description, the investigation led to the filing of two simple misdemeanor assault charges. Meyer elected to exercise her right to trial

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[1] Sarah Rentfro, a licensed practical nurse (LPN), and Theresa Lopez, a CNA, both testified to having directly observed Meyer either grab L.L.'s breast or touch L.L.'s nipple on at least one occasion. The other staff members admitted under cross-examination that they were situated in such a way that they did not directly observe any touching, but that they did see Meyer motion in a manner consistent with touching L.L.'s breast, and also observed L.L.'s defensive reaction to the apparent touching.

and appeared at the courthouse for that purpose on the appointed day. The State, however, apparently did not expect a trial on that day, and had only one witness present and available to testify. According to Meyer's trial counsel, the prosecuting attorney claimed she had taken a special interest in the case, and announced that if Ms. Meyer did not plead guilty to the two simple misdemeanor charges, those charges would be dismissed and two class 'D' felonies and two aggravated misdemeanors would be filed in their stead. After Meyer refused to plead guilty to the simple misdemeanor charges, the prosecutor acted consistent with her announced intention and filed a trial information alleging two counts of wanton neglect of a dependent adult and two counts of sexual exploitation by a counselor or therapist. The two simple misdemeanor assault charges were dismissed.

Meyer filed a motion to dismiss the new charges, alleging the new trial information alleging two felonies and two aggravated misdemeanors was intended to punish Meyer for asserting her right to trial on the simple assault charges. Following a hearing, the district court found probable cause supported the new charges and rejected Meyer's claim that the State had engaged in vindictive prosecution in violation of her right to due process.

A jury trial was subsequently held. In support of the sexual exploitation by a counselor or therapist charge, Kathie Wiebenga, a registered nurse and director of nurses for Davenport Lutheran Home, testified that while the job description for a CNA does not include the term "assessment," CNAs do report changes in resident's physical and emotional conditions that are used by other

nurses and physicians to treat residents.[2] In Wiebenga's opinion, CNAs like Meyer were involved in mental treatment of residents.

With regard to the wanton neglect charge, Wiebenga testified that Meyer's unwanted touching of L.L. could have upset or further depressed L.L., and judging from his defensive reaction, the touching may have been humiliating for him. Wiebenga opined that being subjected to this undignified treatment may have "upset him in a way where [L.L.] wouldn't want to receive care, proper care from another caregiver." Wiebenga also testified that Meyer should have been aware that her conduct was unacceptable because new staff members are required to view a two-hour video on adult abuse. Wiebenga noted that a memo to nursing staff dated November 13, 2003, stated that "[t]easing of a resident can be considered resident abuse" if the resident responds by becoming agitated, upset, or withdrawn.[3]

The jury returned a verdict of guilty on one count of sexual exploitation by a counselor or therapist, and one count of wanton neglect of a dependent adult. Meyer's subsequent motion for new trial and motion in arrest of judgment were denied by the district court. The district court sentenced Meyer to a five-year

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[2] The record suggests CNAs do not document behavioral or physical changes on medical charts, are not involved in determining causes for behavioral changes or providing medical treatment or therapy. Instead, a CNA's duties involve feeding, clothing, washing, and shaving residents. CNAs are also involved in reporting resident's dietary needs, vital signs, and bowel activity. With regard to residents suffering from Alzheimer's, CNAs calm upset residents and help to reorient them when they become confused. In order to become certified, a CNA is required to complete a seventy-two hour training course.

[3] Wiebenga admitted that she had never personally informed Meyer that her alleged conduct amounted to resident abuse. Meyer maintained that she was never directly informed that she was committing resident abuse against L.L.. It is unclear from the record whether the alleged touching incidents occurred after the memo concerning resident abuse was issued.

term of imprisonment on the sexual exploitation by a counselor or therapist charge, and imposed a two-year term of imprisonment on the wanton neglect charge. The concurrent prison terms were suspended, however, and Meyer was placed on probation for a period of two years.

Meyer appeals her conviction on the wanton neglect charge alleging there is insufficient evidence from which the jury could find that she knowingly acted in a manner likely to cause injury to L.L.'s emotional or physical welfare. Meyer also challenges her conviction on the sexual exploitation charge, claiming there is insufficient evidence from which the jury could have concluded she (1) was a counselor or therapist providing mental health services, (2) possessed the specific intent to arouse or satisfy either her sexual desires or L.L.'s sexual desires, and (3) engaged in the touching as part of a pattern, practice, or scheme. Meyer further claims her trial counsel provided ineffective assistance in failing to challenge the sufficiency of the evidence to prove L.L. was emotionally dependent upon Meyer, an element of the sexual exploitation charge the State was required to prove. Finally, Meyer contends the district court erred in denying her motion to dismiss both charges based on the prosecutor's vindictiveness in increasing the charges in retaliation for Meyer's refusal to plead guilty to the simple misdemeanors.

II. Scope and Standards of Review.

We review Meyer's challenges to the sufficiency of the evidence supporting her convictions for errors at law, and we will uphold the jury's verdict if supported by substantial evidence. *State v. Hopkins,* 576 N.W.2d 374, 377 (Iowa 1998). Evidence is substantial if a rational jury could be convinced of the

defendant's guilt beyond a reasonable doubt as to each essential element of the crime charged. *State v. Speicher*, 625 N.W.2d 738, 741 (Iowa 2001). Evidence is not substantial, however, where it raises only suspicion, speculation, or conjecture. *Id*. And while we review the entire record, not just evidence supporting guilt, we must view the evidence presented in the light most favorable to the jury's verdict. *Hopkins*, 576 N.W.2d at 377. We review Meyer's constitutional claim de novo. *State v. Countryman*, 572 N.W.2d 553, 557 (Iowa 1997).

III. Discussion.

A. Sexual Exploitation by a Counselor or Therapist.

Iowa Code section 709.15(1)(f) (2003) makes it illegal for a "counselor or therapist" who provides "mental health services" to an "emotionally dependent patient" to engage in "sexual conduct" with the patient for the purpose of satisfying the sexual desires of either the counselor/therapist or patient. The classification of "counselor or therapist" includes a physician, nurse, psychologist, social worker "or any other person, whether or not licensed by the state, who provides or purports to provide mental health services." Iowa Code § 709.15(1)(a). "Mental health services" is defined as "the treatment, assessment, or counseling of another person for a cognitive, behavioral, emotional, mental, or social dysfunction, including an intrapersonal or interpersonal dysfunction." Iowa Code § 709.15(1)(d).

Meyer alleges there is insufficient evidence from which the jury could have found she (1) was a counselor or therapist providing mental health services, (2) possessed the specific intent to arouse or satisfy either her sexual desires or

L.L.'s sexual desires, and (3) engaged in the touching of L.L. as part of a pattern, practice, or scheme.

We begin our analysis by addressing whether the evidence was sufficient to support a finding that Meyer, as a CNA, provided mental health services as contemplated by the plain language of section 709.15. Despite the fact that "nurses" are included in the statutory enumeration of professionals who provide mental health services, we are convinced that the legislature did not intend to cast the net so broadly as to include "certified nursing assistants" within the coverage of the statute. Our conclusion is strongly influenced by a comparison of the training, duties, and responsibilities of the professionals enumerated in section 709.15(1)(a) with those of Meyer, a CNA. As a CNA, Meyer was required to complete a seventy-two hour course that covered topics such as bathing, dressing, grooming, taking and reporting vital signs, skin care, and infection control. *See* Iowa Admin. Code r. 441-81.16(3)(b) (2005). The only mental health topics covered by CNA training are "modifying aide's behavior in response to resident's behavior," understanding the aging process, "understanding the behavior of cognitively impaired residents," and learning methods to reduce the effects of cognitive impairment. *See id*. None of these training topics are calculated to equip CNAs with the skills and expertise necessary to treat, assess, or counsel a patient with a behavioral or cognitive dysfunction.

In sharp contrast, the professionals enumerated in section 709.15(1)(a) – physicians, nurses, counselors, therapists and social workers – routinely provide mental health services to patients and are trained to diagnose and ameliorate such dysfunctions. *See id.* at r. 653-9.3 (physicians), r. 655-6.1 (registered and

practical nurses), r. 645-31.1 (therapists and counselors), r. 645-280.5 (social workers).

We believe the definition of "mental health services" found within section 709.15(1)(d) is also instructive. It includes the words "treatment, assessment, or counseling," each suggesting the responsibility for, or the ability to exert some level of control over, the therapeutic decisions concerning persons with mental dysfunction. Although such responsibility is routinely undertaken by the professionals enumerated in section 709.15(1)(a), the record in this case conclusively confirms that Meyer did not, and was not expected to by her employer. The testimony of the various witnesses and the CNA job description placed in evidence suggest that Meyer's general duties involved caring for the routine physical needs of the facility's residents. At most, Meyer was tasked with observing changes in residents' behavior and reporting them to the nursing staff. However, it was the nursing staff or the patients' physician who processed that information and made decisions based upon it. Meyer did not diagnose disorders, nor did she engage in psychoanalysis or mental health assessments. She did not dispense or prescribe medication. It was not her responsibility to provide therapy calculated to treat or ameliorate mental health dysfunction. In sum, Meyer's job description and training establish as a matter of law that she did not provide mental health services as contemplated in the sexual exploitation statute upon which Meyer's conviction was based. Accordingly, we conclude the State failed to adduce sufficient evidence to sustain Meyer's conviction on this charge.

B. Wanton Neglect of a Dependent Adult.

Meyer contends her conviction on this charge was not supported by sufficient evidence that she knowingly acted in a manner likely to cause physical or mental injury to L.L. We disagree.

Iowa Code section 726.7(1) requires the State to prove beyond a reasonable doubt that Meyer knowingly acted in a manner likely to cause injury to the physical or mental welfare of L.L., who was a resident of a health care facility. Our supreme court has defined "injury" under the statute as "any wrong or damage done to another." *State v. McKee*, 392 N.W.2d 493, 495 (Iowa 1986). "Welfare" is defined as "well-doing or well-being in any respect." *Id*.

Only conduct the defendant knew would *likely* cause a physical or mental injury is criminalized by section 726.7(1). By including a scienter requirement in section 726.7(1), the legislature clearly intended a conviction under the statute should occur only upon proof beyond a reasonable doubt that the defendant knew her conduct was likely to cause the type of injury contemplated under the statute. *McKee,* 392 N.W.2d at 495. The plain language of the statute suggests it is the State's burden to prove such knowledge was possessed by the defendant at the time of the charged conduct, and thus actual knowledge must be shown instead of "theoretical knowledge of a reasonable person." *See State v. Miller*, 308 N.W.2d 4, 7 (Iowa 1981) (concluding that driver prosecuted for leaving scene of an injury accident must be shown to possess actual knowledge of the accident and stating "it is not the reasonable person who is on trial but the defendant and it is the defendant's knowledge which must be proved and not that of a hypothetical reasonable person") (citations omitted).

"Knowledge or intent is seldom capable of direct proof, but usually is established from the surrounding circumstances." *Id*. We believe the best measure of whether Meyer knew her conduct would likely cause an injury to L.L. is the conduct itself, coupled with Meyer's training as a CNA. We note Meyer was required to complete seventy-two hours of course work in order to achieve her CNA certification. Kathie Wiebenga testified that Davenport Lutheran Home requires all CNAs to view a two-hour video on resident abuse. Although the record does not indicate whether the probable effects of teasing on residents' mental or physical health were discussed in either the course work or the video, the record discloses that the facility posted a memo cautioning employees against teasing residents.[4]

We conclude a reasonable fact finder could find on this record that Meyer knew her conduct was likely to cause L.L. mental injury. Wiebenga, a registered nurse, testified that teasing L.L. as Meyer did "could further depress [L.L.]," or "could . . . upset him in a way where he would not want to receive care, proper care from another caregiver." Although the record is devoid of evidence tending to show L.L. did suffer emotional distress or physical injury as a consequence of Meyer's conduct, multiple witnesses established that Meyer did touch or attempt to touch L.L.'s breasts on multiple occasions; and that L.L. attempted on one or more of those occasions to block or shield himself from Meyer's acts. Although section 726.7 does not define the nature and extent of physical or mental injury sufficient to support a conviction for wanton neglect of a resident of a health care

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[4] The record is unclear whether the memo was available to the facility's employees prior to the incidents upon which Meyer's conviction was based.

facility, we conclude the legislature intended to broadly define "injury" in this context.

Our conclusion is influenced by our belief that the legislature intended the statute to provide very broad protection to a vulnerable population of nursing home residents. We believe a reasonable fact-finder could find beyond a reasonable doubt that Meyer knew repeated instances of unwanted physical contact would cause emotional injury to L.L. Although we concede the State did not offer direct evidence that L.L. suffered emotional distress as a consequence of Meyer's conduct, such proof is not an element of the charge. That Meyer's conduct was offensive and likely to cause emotional injury to L.L. is sufficiently established by his efforts to use his arm to prevent the touching.

C. Prosecutorial Vindictiveness.

Meyer next contends her due process rights were violated when she was vindictively prosecuted on the charges for which she was convicted following her refusal to plead guilty to two simple misdemeanor charges. We need not decide this claim as it relates to the sexual exploitation conviction which we have decided must be reversed and dismissed for insufficiency of the evidence. However, because we have concluded that the evidence is sufficient to sustain Meyer's conviction for wanton neglect of a resident of a health care facility, we must address her due process claim in connection with that charge.

In *Bordenkircher v. Hayes*, 434 U.S. 357, 358, 98 S. Ct 663, 665, 54 L. Ed. 2d 604, 606 (1978), Hayes was indicted by a grand jury on a charge of uttering a forged instrument in the amount of $88.30, an offense then punishable by a term of two to ten years in prison. During plea negotiations, the prosecutor

offered to recommend a sentence of five years in prison if Hayes would plead guilty to the charge, but if Hayes did not plead guilty and "save the court the inconvenience and necessity of a trial," the prosecutor promised that he would return to the grand jury to seek an indictment under the Kentucky Habitual Criminal Act and subject Hayes to a mandatory sentence of life in prison by reason of his two prior felony convictions. *Id*. at 359, 98 S. Ct at 666, 54 L. Ed. 2d at 606. Upon Hayes's insistence to go to trial on the forgery charge, the prosecutor obtained an indictment under the Habitual Criminal Act, and Hayes was subsequently convicted and sentenced as a habitual offender. *Id*. at 359, 98 S. Ct at 666, 54 L. Ed. 2d at 607. Hayes appealed contending his due process rights were violated by the prosecutor's vindictive prosecution of the enhanced charge. *Id*. at 359, 98 S. Ct at 666, 54 L. Ed. 2d at 606. In rejecting Hayes's due process claim, the Supreme Court observed:

> We hold only that the course of conduct engaged in by the prosecutor in this case, which no more than openly presented the defendant with the unpleasant alternatives of forgoing trial or facing charges on which he was plainly subject to prosecution, did not violate the Due Process Clause of the Fourteenth Amendment.

Id. at 365, 98 S.Ct at 669, 54 L.Ed.2d at 610.

As in *Bordenkercher*, the prosecutor here clearly expressed during plea negotiations her intention to file other charges if Meyer did not plead guilty to the two simple misdemeanors. Meyer was thus informed of the true terms of the plea offer when she made her decision not to plead guilty. This is not a case in which a defendant faces the State's unilateral imposition of a penalty for the exercise of a choice to appeal from a conviction. *See Blackledge v. Perry*, 417 U.S. 21, 29, 94 S. Ct. 2098, 2103, 40 L. Ed. 2d 628, 634 (1974). It is instead a

case which illustrates the "give and take negotiation common in plea bargaining between the prosecution and defense." *Parker v. North Carolina*, 397 U.S. 790, 809, 90 S. Ct. 1458, 1474, 25 L. Ed. 2d 785, 798 (1970). In the "give and take" of plea negotiations, there is no element of punishment or retaliation so long as the accused is free, as Meyer was here, to accept or reject the prosecution's offer. *Bordenkircher*, 434 U.S. at 363, 98 S. Ct at 668, 54 L. Ed. 2d at 609. Accordingly, we conclude Meyer's due process challenge must fail.

IV. Conclusion.

Having found sufficient evidence to support Meyer's conviction on the wanton neglect charge, and having rejected her due process challenge, we affirm that conviction. However, we conclude there is not sufficient evidence in this record to find beyond a reasonable doubt that Meyer was a counselor or therapist providing mental health services. Accordingly, we reverse the conviction on that charge and remand for entry of a dismissal. Our dispostion of the issues addressed in this opinion makes it unnecessary for us to address her other claims on appeal.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.