IN THE COURT OF APPEALS OF IOWA

No. 6-617 / 05-1558
Filed November 30, 2006

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DANIEL LAWRENCE MASON,
Defendant-Appellant.

Appeal from the Iowa District Court for Cerro Gordo County, Bryan H. McKinley, Judge.

Daniel Lawrence Mason appeals his conviction and sentence for assault with intent to commit sexual abuse. **CONDITIONALLY AFFIRMED AND REMANDED WITH DIRECTIONS.**

Michael G. Byrne of Winston & Byrne, P.C., Mason City, for appellant.

Thomas J. Miller, Attorney General, Robert P. Ewald, Assistant Attorney General, Patricia Houlihan, County Attorney, and Paul L. Martin, Assistant County Attorney, for appellee.

Heard by Mahan, P.J., and Miller and Vaitheswaran, JJ.

MAHAN, P.J.

Daniel L. Mason appeals his conviction and sentence for assault with intent to commit sexual abuse in violation of Iowa Code section 709.11 (2003). He argues the district court (1) erred in refusing to consider juror affidavits in ruling on his motion for new trial and motion in arrest of judgment; (2) failed to make factual findings showing the jury's verdict was substantially supported by the evidence; (3) improperly considered sentencing factors; and (4) incorrectly excluded evidence under Iowa Rule of Evidence 5.412. We conditionally affirm and remand with directions.

I. Background Facts and Proceedings

In September 2004 Mason and April Brummer met at a bar in Mason City. Mason was a Mason City police officer with fourteen years' experience. After talking at the bar, Mason and Brummer went to his apartment. They drank beer and played strip poker with friends. Later, they had consensual sexual intercourse.

Mason and Brummer engaged in a romantic relationship that lasted until early November 2004. After the relationship ended, they continued to contact each other via telephone and text messaging.

On the evening of December 9, 2004, Mason and his roommate, Bill Halloran, arrived uninvited at Brummer's apartment. Brummer and her roommate, Jenny Kloberdanz, watched a movie with the two men. Kloberdanz then went upstairs to bed. Around 12:41 a.m. Kloberdanz called Brummer on her cell phone to ask her to turn down the television. Brummer took the call in the kitchen and, out of ear-shot of the men, asked Kloberdanz to come downstairs to

help her ask the men to leave. Kloberdanz refused. When Brummer returned to the living room, Mason took her phone away from her and called Kloberdanz back. Mason teasingly and falsely told Holloran that Kloberdanz wanted him to come up to her bedroom. When Holloran went upstairs to meet Kloberdanz, Mason tried to kiss Brummer. Brummer resisted, but eventually Mason led her upstairs to her bedroom. Once in the bedroom, Mason removed Brummer's pants and put her on the bed. Brummer tried to resist, but Mason got on top of her, fully clothed, and tried to kiss her. Brummer moved her head away. Mason got up, removed his clothes, and got back into bed. Mason then had intercourse with Brummer. After he finished, he went downstairs, met Holloran and left the apartment.

After the men left, Kloberdanz found Brummer crying on the floor in the bathroom. Brummer told her that Mason had raped her. The next day, Brummer had a black eye. She and Kloberdanz discussed going to police, but did not think they would be believed. A few days later, Kloberdanz told her cousin, Matt Kloberdanz, about the incident. He in turn reported it to a friend, who told his uncle who worked at the police department. The uncle reported the incident to police Captain Dennis Bengston, who called Iowa Department of Criminal Investigation Special Agent Larry Hedlund.

Hedlund interviewed Brummer and Kloberdanz. He also had Kloberdanz and Brummer call Mason on a monitored and recorded telephone line to see how he would react to the accusations. Mason stated that he and Brummer had had consensual intercourse once. He claimed he stopped when Brummer refused to have intercourse a second time.

Mason was charged with third-degree sexual abuse on December 22, 2004. At trial, he testified to the same set of facts he told Kloberdanz and Brummer on the monitored line. The telephone call was also played for the jury. Mason tried to introduce evidence indicating Brummer had had a sexual relationship with Matt Kloberdanz. The court, however, excluded the evidence under Iowa Rule of Evidence 5.412. The jury convicted Mason for the lesser-included offense of assault with intent to commit sexual abuse without injury.

After the verdict, Mason's attorney contacted jurors. Five jurors provided affidavits concerning their interpretation of the jury instruction on assault with intent to commit sexual abuse. Mason filed a motion for new trial and motion in arrest of judgment, arguing that the jury incorrectly interpreted the law. He also argued the verdict was not substantially supported by evidence. The court refused to consider the juror affidavits, and denied his motion.

Mason was sentenced to a maximum sentence of two years. He appeals both the jury verdict and his sentence.

II. Standard of Review

We review a motion for new trial according to the grounds on which it is based. *Clinton Physical Therapy Servs., P.C. v. John Deere Health Care, Inc.,* 714 N.W.2d 603, 609 (Iowa 2006); *State v. Lopez*, 633 N.W.2d 744, 781-82 (Iowa 2001); *Taylor v. State*, 632 N.W.2d 891, 894 (Iowa 2001). Because the appropriateness of an inquiry into jury deliberations is a legal question, we review the district court's ruling regarding the jury members' affidavits for errors at law. *See Weatherwax v. Koontz*, 545 N.W.2d 522, 524 (Iowa 1996). Sufficiency of the evidence to convict is also a legal question which we review for errors at law.

State v. Nitcher, 720 N.W.2d 547, 556 (Iowa 2006); *State v. Reeves*, 670 N.W.2d 199, 202 (Iowa 2003). However, we review a ruling on a motion for new trial such as this for abuse of discretion. *Reeves*, 670 N.W.2d at 202. We also review the district court's ruling on the admissibility of evidence under rule 5.412 for abuse of discretion. *State v. Alberts*, 722 N.W.2d 402, 407 (Iowa 2006); *State v. Mitchell*, 568 N.W.2d 493, 497 (Iowa 1997).

III. Merits

A. Juror Affidavits

Mason argues the district court erred in failing to grant a new trial based on juror misconduct. In support of his argument, he presented five affidavits from jurors. Mason claims the affidavits show the jury misunderstood the instruction on assault with intent to commit sexual abuse. He argues the affidavits are objective evidence showing the jury misunderstood or misapplied the law. In doing so, he urges us to apply a subjective/objective test to determine whether the juror's affidavits should be considered.

Under the subjective/objective test Mason argues, "objective reports of statements made in the jury room [are] competent evidence, however, subjective reports concerning the influence of those statements [are] not competent." *Ryan v. Arneson*, 422 N.W.2d 491, 494 (Iowa 1988). Our supreme court, however, replaced the subjective/objective test with the internal/external test in *Ryan v. Arneson*. *Id.* at 495. Under that test,

> [t]he internal workings include what parts of the record or instructions were or were not considered, the jurors' discussion, their motivations, mental or emotional reactions, their votes, or other evidence which seeks to show that the actual decision of the

> jury was, or should have been, something other than what the verdict indicates.

State v. Rouse, 290 N.W.2d 911, 916 (Iowa 1980). Such evidence is inadmissible to show the jury's thinking processes were incorrect. *Weatherwax*, 545 N.W.2d at 524. External matters improperly influencing a verdict may be considered by the court. *Id.* ("[I]t [is] clear that a juror's testimony can be received to show that (1) a verdict was not correctly recorded or (2) external matters were improperly brought into deliberations."); *Rouse*, 290 N.W.2d at 916-17 (listing a juror's experiment or a bailiff's prejudicial comment as examples of external matters). External matters, unlike the internal workings of the jury, do not "inhere" in the verdict.

The internal/external test is codified in Iowa Rule of Evidence 5.606(*b*). Under that rule,

> **a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions** as influencing him to assent or to dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or brought to bear upon any juror.

Iowa R. Evid. 5.606(*b*) (emphasis added).

In this case, Mason urges us to examine juror statements concerning the jurors' understanding of the law. He claims that the jurors' understandings of the instruction constituted "parameters [that] were objectively discussed and applied by the jury." According to the internal/external test described in *Rouse* and adopted in *Ryan*, this is precisely the type of evidence we cannot consider. *See Rouse*, 290 N.W.2d 916 ("internal workings include what parts of the record *or*

instructions were or were not considered, [and] the *jurors' discussion*") (emphasis added). Furthermore, in *Prendergast v. Smith Laboratories, Inc.*, 440 N.W.2d 880, 883 (Iowa 1989), our supreme court wrote:

> If the issue were whether a verdict may be overturned because it was induced by the jury's misunderstanding of the court's instructions, rule 606(b) would render juror testimony inadmissible for purposes of achieving that result. The situation to which that rule of testimonial exclusion applies, however, presupposes that the jury has in fact responded to the fact-finding process entrusted to it and returned a finding on the issue which was submitted. Once that finding has been solemnized in a formal verdict accepted by the court it may not be impeached on the ground that it was induced by juror misapprehension as to the controlling principles of law.

Allowing such impeachment after the jury's verdict would cause "[j]urors [to] be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict." *Ryan*, 422 N.W.2d at 493-94. "[A]ll frankness and freedom of discussion and conference" within the jury room would be destroyed. *Id.* at 494. Mason's claim must therefore fail.

B. Motion for New Trial and Motion in Arrest of Judgment

Mason argues the district court did not adequately address his motion for new trial and motion in arrest of judgment. He also argues the evidence was insufficient to support the jury's verdict and the verdict was internally inconsistent.

Our supreme court has previously stated the standards district courts must employ when ruling on a motion in arrest of judgment and a motion for new trial:

> On a motion [in arrest of judgment], the court is required to approach the evidence from a standpoint most favorable to the government, and to assume the truth of the evidence offered by the prosecution. If on this basis there is *substantial evidence* justifying

> an inference of guilt, the motion [in arrest of judgment] must be denied
>
> On a motion for new trial, however, the power of the court is much broader. It may weigh the evidence and consider the credibility of witnesses. If the court reaches the conclusion that the verdict is contrary to the *weight of the evidence* and that a miscarriage of justice may have resulted, the verdict may be set aside and a new trial granted.

Reeves, 670 N.W.2d at 202 (quoting *State v. Ellis*, 578 N.W.2d 655, 658-59 (Iowa 1998)).

In addressing Mason's motions, the court wrote at length about the issue of juror affidavits. The court then stated, "[T]he remainder of defendant's arguments is found to be without merit." We have reviewed the record in this case and conclude there is substantial evidence to support the verdict. Therefore, the court was correct in overruling the motion in arrest of judgment. However, we are unable to tell what standard the district court used to arrive at its conclusion for the motion for new trial. For that reason, we must remand to the district court for a determination under the proper standard.

C. Improper Sentencing Factors

Third, Mason alleges the district court improperly considered sentencing factors when it imposed the maximum sentence. However, he never states what improper factors the court considered. Instead, he argues that the court should have considered both the jurors' affidavits and the weight of the evidence for the purposes of imposing a sentence.

We find no evidence in the record indicating the court considered anything improper in determining Mason's sentence. Further, we have already concluded the court properly excluded the juror affidavits. Finally, though the sentence is

the maximum Mason could receive under his offense, it is nonetheless a sentence that could legally be imposed under the jury's verdict.

D. Rape Shield

Finally, Mason claims the district court erred when it refused to allow evidence concerning a prior sexual relationship Mason alleged Brummer had with Matt Kloberdanz, a prosecution witness. Mason argues the evidence was necessary to show Brummer's motive to fabricate the rape and prevent Kloberdanz from discovering she had intercourse with Mason.

Evidence of the alleged victim's past sexual history is not admissible in a criminal sex abuse case. Iowa R. Evid. 5.412. The evidence Mason urged the court to consider does not fall within any of the recognized exceptions to rule 5.412. *See id.* Furthermore, evidence of Brummer's alleged relationship with Kloberdanz would have been more prejudicial than probative. The jury already knew Kloberdanz and Brummer were "emotionally close," although not "boyfriend/girlfriend." Mason's theory is based on the premise that Brummer herself believed sex with more than one individual was "bad." Therefore, its sole purpose is to portray Brummer as sexually promiscuous. *See State v. Knox*, 536 N.W.2d 735, 740 (Iowa 1995); *State v. Smith*, 522 N.W.2d 591, 593 (Iowa 1994). This is precisely the type of evidence rule 5.412 excludes.

IV. Conclusion

Because the district court's ruling on Mason's motion for new trial did not specifically address how it reviewed his motion, we conditionally affirm his conviction and remand this matter for the district court to enter a ruling on this issue. *See State v. Rubino*, 602 N.W.2d 558, 565-66 (Iowa 1999) (conditionally

affirming convictions and remanding for hearing on Sixth Amendment issue); *State v. Bailey*, 452 N.W.2d 181, 183-84 (Iowa 1990) (conditionally affirming conviction and remanding for reopening of suppression hearing). The district court shall rule on the basis of the existing record. If, having conducted a weight-of-the-evidence test, it again denies the motion, our affirmation of Mason's conviction shall stand. If the district court grants the motion, Mason's conviction will be set aside and a new trial will be conducted. We do not retain jurisdiction.

CONDITIONALLY AFFIRMED AND REMANDED WITH DIRECTIONS.