IN THE COURT OF APPEALS OF IOWA

No. 7-813 / 05-1344
Filed December 28, 2007

STATE OF IOWA,
Plaintiff-Appellee,

vs.

KYLE MICHAEL CROMER,
Defendant-Appellant.

Appeal from the Iowa District Court for Muscatine County, Patrick J. Madden, Judge.

Kyle Cromer appeals from his conviction and sentence for sexual abuse in the third degree. **AFFIRMED.**

Kent A. Simmons, Davenport, for appellant.

Thomas J. Miller, Attorney General, Sheryl Soich, Assistant Attorney General, Gary Allison, County Attorney, and Dana Christiansen, Assistant County Attorney, for appellee.

Heard by Huitink, P.J., and Miller and Eisenhauer, JJ.

HUITINK, P.J.

Kyle Cromer appeals from his conviction and sentence for sexual abuse in the third degree in violation of Iowa Code sections 709.4(1) and (4) (2003). We affirm.

I. Background Facts and Proceedings

The record includes evidence of the following: On March 29, 2003, Nicole Schubick, while celebrating her cousin's wedding, consumed copious amounts of alcohol. Towards the end of the evening, Schubick found herself heavily intoxicated and at a tavern where she talked to and danced with Cromer and Donnie Schulthies. Both men had also consumed a large quantity of alcohol. Later that evening, Schubick accepted a ride home with Cromer and Schulthies. The testimony of the witnesses varied as to how intoxicated Schubick may have been when she left with the two men.

Schubick's next memory is waking up naked on a motel bed between Cromer and Schulthies. At trial, both Schubick and her mother testified to the number of small bruises she had on her body, the lump on her forehead, and her bruised jaw. The State's theory of prosecution was Schubick was so intoxicated that the two men dragged her into the hotel room, disrobed her, and then preformed various sexual acts on her, as she remained "passed out." This theory was corroborated by Cromer's cellmate, who testified Cromer had described a similar course of events to him. Cromer also testified to the events of the evening and based his defense on his assertion that all sexual contact was consensual. He claimed Schubick, while admittedly very drunk, was, nonetheless, a willing participant.

After the jury found Cromer guilty of sexual abuse in the third degree,[1] he filed a motion for a new trial, arguing, among other things, (1) the trial court failed to instruct the jury that he must know Schubick was mentally incapacitated and (2) the verdict was contrary to the weight of the evidence. More specifically, Cromer argued sections 709.4(2)(a), which provides a sex act committed between persons not cohabiting as husband and wife is sexual abuse in the third degree when the other person is suffering from a mental defect or incapacity which precludes giving consent, and 709.1A(1), which defines mentally incapacitated, violate his due process rights because they are vague and overbroad on their face and as applied. The trial court agreed the instructions violated Cromer's due process rights because they were vague as applied and granted the motion.

The State appealed. With regard to the weight of the evidence issue, we stated in a footnote:

> [W]hile it is true that Cromer raised in his brief in support of his motion for a new trial a claim regarding the "sufficiency of the evidence" the district court never made a decision regarding the "sufficiency of the evidence," the "weight of the evidence," or a "miscarriage of justice." Therefore, we cannot consider this argument. *See State v. Manna,* 534 N.W.2d 642, 644 (Iowa 1995) (holding that error was not preserved on one of the two issue[s] presented by a defendant in a motion when the trial court addressed only the other issue).

State v. Cromer, No. 04-0814 (Iowa Ct. App. Mar. 31, 2005). With regard to the constitutional issue, we held:

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[1] Of note, the jury found Cromer not guilty of the other charges—sexual abuse in the second degree in violation of section 709.3(3) and assault with the intent to commit sexual abuse in violation of section 709.11.

> The standard imposed by Iowa Code section 709.4(4) is clear: to avoid the proscribed conduct Cromer should have refrained from performing a sex act with a person who is mentally incapacitated as that term is defined in Iowa Code section 709.1A(1). If he did engage in such conduct, his lack of knowledge of Schubick's mental incapacitation caused by his intoxication is no defense. *See State v. Tague,* 310 N.W.2d 209, 211 (Iowa 1981) (indicating that "statutes regarding sex offenses are common examples of employment of strict liability intended to protect the public welfare"). Moreover, even if Cromer's subjective knowledge of Schubick's mental incapacity was required by due process, the weight of the evidence supports a jury conclusion that Cromer knew of Schubick's mental incapacitation, as evidence indicated she was dragged into the hotel room and was unconscious throughout the entire incident. Consequently we conclude the district court erred in determining the jury instructions violated Cromer's due process rights. *We reverse the ruling on the motion for new trial and remand for entry of a judgment of conviction.*

Id. (emphasis added).

On remand, Cromer filed a second motion for a new trial, arguing the verdict was contrary to the weight of the evidence. He also filed a motion in arrest of judgment, claiming trial counsel failed to request a ruling on the first motion for a new trial based on the weight of the evidence. The trial court heard the motions, expressed its belief that the verdict was against the weight of the evidence, but, nonetheless, stated:

> I don't think, based on what the Court of Appeals has instructed me to do, that I have any right to do anything with those arguments at this level at this point in time. So again, I'm going to overrule your motions but urge you to take them up on appeal.

The trial court accordingly entered a judgment of conviction and sentenced Cromer to a term of imprisonment not to exceed ten years.

On appeal, Cromer claims: (1) the trial court erred in determining it did not have authority to grant his second motion for a new trial based on the weight of the evidence; (2) trial counsel was ineffective in failing to object to the admission

of a recorded telephone conversation between himself and the victim; and (3) trial and appellate counsel were ineffective in failing to obtain a ruling on his first motion for a new trial based on the weight of the evidence.

II. Trial Court's Authority to Grant the Second Motion for a New Trial

The trial court has broad but not unlimited discretion in ruling on a new trial motion. Iowa R. App. P. 6.14(6)(*c*). We, therefore, review the denial of a new trial motion for abuse of discretion. *State v. Reeves*, 670 N.W.2d 199, 202 (Iowa 2003). Abuse of discretion means the trial court exercised its discretion "'on grounds or for reasons clearly untenable or to an extent clearly unreasonable.'" *State v. Axiotis*, 569 N.W.2d 813, 815 (Iowa 1997) (quoting *State v. Blackwell*, 238 N.W.2d 131, 138 (Iowa 1976) (citations omitted)). We are "slower to interfere with the grant of a new trial than with its denial." Iowa R. App. P. 6.14(6)(*d*).

Cromer argues the trial court did not consider the operation of Iowa Rule of Criminal Procedure 2.24(4)(*b*), which provides "[i]f the defendant moves for a new trial, or in arrest of judgment, the court shall defer the judgment and proceed to hear and decide the motions." We disagree. The trial court considered and acted in accordance with this rule when it heard and overruled the second motion for a new trial and then entered a judgment of conviction.

Instead, the complaint is the trial court's authority to grant Cromer's second motion for a new trial when we had reversed and remanded for entry of a judgment of conviction. "When an appellate court remands a case to a trial court for some stated further proceeding, the nature and extent of that proceeding are circumscribed." *Winnebago Indus. v. Smith*, 548 N.W.2d 582, 584 (Iowa 1996).

The authority of the trial court on remand is limited to the matters specified by the appellate court. *Kuhlmann v. Persinger*, 261 Iowa 461, 468, 154 N.W.2d 860, 864 (1967). Stated another way, the trial court does not have authority to act on matters outside the appellate court's mandate. *Id.* "Any action contrary to or beyond the scope of the mandate is null and void." *State v. O'Shea*, 634 N.W.2d 150, 158 (Iowa Ct. App. 2001). If the remand limits the issues to be determined, the trial court on remand is prohibited from considering other issues or new matters. *In re Marriage of Davis*, 608 N.W.2d 766, 769 (Iowa 2000).

According to our supreme court,

> [t]he court on remand should interpret the mandate in "accordance with the context of the proceedings" and should "tak[e] into account the appellate court's opinion and the circumstances it embraces." *Id.* § 782, at 451-52.
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> Additionally,
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> > [t]he mandate serves the purpose of communicating the judgment of the appellate court to the lower court [on remand], and the opinion, which is part of the mandate, serves an interpretative function. Thus, [a court on remand] need not read the mandate in a vacuum, but rather has the opinion of the appellate court to aid it in interpreting the mandate. In this way, the court may examine the rationale of the appellate opinion in order to discern the meaning of language in the court's mandate.
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> *Id.* at 452.
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> Finally, "[w]hat is contemplated in the appellate opinion by necessary implication may be considered equivalent to that clearly and expressly stated in the appellate opinion." *Id.*

Id.

In this case, the remand to the trial court was for the sole and limited purpose of entry of a judgment of conviction and did not extend to granting a second motion for a new trial, considering we had stated the weight of the

evidence issue had not been properly preserved on appeal.[2] The trial court was correct in determining it was without authority to grant Cromer's second motion for a new trial and in overruling the motion. Therefore, the trial court did not abuse its discretion.

III. Ineffective Assistance of Counsel

We review ineffective assistance of counsel claims de novo. *State v. Bergmann*, 600 N.W.2d 311, 313 (Iowa 1999).

Ordinarily, we preserve ineffective assistance of counsel claims for postconviction proceedings to enable full development of the record and to afford trial counsel an opportunity to respond. *Berryhill v. State*, 603 N.W.2d 243, 245 (Iowa 1999). "Even a lawyer is entitled to his day in court, especially when his professional reputation is impugned." *State v. Coil*, 264 N.W.2d 293, 296 (Iowa 1978). Because we find the record is insufficient to address Cromer's ineffective assistance of counsel claims on direct appeal, we preserve his claims for possible postconviction relief proceedings.

We accordingly affirm Cromer's conviction and sentence and preserve his ineffective assistance of counsel claims.

AFFIRMED.

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[2] The State argues our statement constitutes the law of the case. Under the law of the case doctrine, "an appellate decision becomes the law of the case and is controlling on both the trial court and on any further appeals in the same case." *United Fire & Cas. Co. v. Iowa Dist. Ct.*, 612 N.W.2d 101, 103 (Iowa 2000). The doctrine, however, applies "only to those questions that were properly before us for consideration and passed on." *In re Lone Tree Cmty. Sch. Dist.*, 159 N.W.2d 522, 526 (Iowa 1968). Stated another way, this doctrine does not apply to dictum. *State ex rel. Goettsch v. Diacide Distribs., Inc.*, 596 N.W.2d 532, 537 (Iowa 1999). Because the issue of whether the verdict was contrary to the evidence was not properly before us and was not passed on, this statement is dictum and is not the law of the case.