IN THE COURT OF APPEALS OF IOWA

No. 7-822 / 06-1197
Filed December 28, 2007

IN RE DETENTION OF
DAVID A. ELET,

DAVID A. ELET,
Respondent-Appellant.

Appeal from the Iowa District Court for Calhoun County, Gary L. McMinimee, Judge.

David A. Elet appeals from the judgment entered on a jury verdict finding, following an annual review final hearing, that he was not suitable for discharge from civil commitment as a sexually violent predator under Iowa Code chapter 229A (2005). **AFFIRMED.**

Greta Truman, State Public Defender's Office, Civil Commitment Unit, Des Moines, for appellant.

Thomas J. Miller, Attorney General, and Linda J. Hines and Andrew B. Prosser, Assistant Attorneys General, for appellee.

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

MILLER, J.

David A. Elet appeals from the judgment entered on a jury verdict finding, following an annual review final hearing, that he was not suitable for discharge from civil commitment as a sexually violent predator under Iowa Code chapter 229A (2005). We affirm.

I. BACKGROUND FACTS AND PROCEEDINGS.

The respondent, David Elet, was committed as a sexually violent predator in 2002. The mental abnormalities with which Elet was diagnosed were pedophilia; sexual attraction to females, non-exclusive type; and a personality disorder, not otherwise specified. The State filed its third annual review report on Elet, pursuant to Iowa Code section 229A.8, on December 14, 2005. On February 21, 2006, Elet submitted the report of a psychologist, Dr. Richard Wollert, and requested an annual review hearing pursuant to sections 229A.8(2) and (5)(d). Dr. Wollert relied, in large part, on evidence about the effect of aging and its role in reducing the recidivism rates of sex offenders.

In an order filed March 10, 2006, the district court concluded Elet had met his burden under Iowa Code section 229A.8(5)(e) to establish that a final hearing should be held to determine whether his mental abnormality had so changed that he was not likely to engage in predatory acts constituting a sexually violent offense if discharged. On March 14, 2006, the State filed a demand for a jury trial on all issues that were to be decided in the final hearing pursuant to section 229A.8(6)(c).[1] It also demanded that both the issue of discharge and the issue

[1] This section provides in relevant part, "The attorney general shall represent the state and shall have a right to demand a jury trial." Iowa Code § 229A.8(6)(c).

of placement in a transitional release program be tried at the final hearing pursuant to Iowa Code § 229A.8(5)(i).[2]

Elet, who was not requesting transitional release and was in fact willing to stipulate he was not suitable for transitional release, objected to the State's demand to put both the discharge and transitional release issues before the jury. The State argued the intent of section 229A.8(5)(i) was to ensure that the option of transitional release was not skipped over and that good policy reasons supported having a jury consider the option of transitional release. The district court held that under section 229A.8(5)(i) the State has the right to demand that both issues be presented to the jury.

During the final hearing the State elicited extensive testimony from its expert Dr. Jason Smith. Smith is the administrator of the State's civil commitment unit for sexual predators. Smith testified that Elet did not meet many of the criteria for transitional release set forth in section 229A.8A(2). Elet's expert, Dr. Wollert, testified that although Elet still suffered from pedophilia and personality disorder, due to his age and his score on actuarial risk assessments used to predict recidivism he no longer met the criteria for continued commitment because he "is not more likely than not to reoffend" if discharged.

Over Elet's objections the jury was instructed on both the issue of whether Elet should be discharged because his mental abnormality had so changed that

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[2] This section provides, "If at the time of the annual review the committed person is in a secure facility and not in the transitional release program, the state shall have the right to demand that both determinations in paragraph "e" be submitted to the court or jury." Iowa Code § 229A.8(5)(i). The determinations to be made pursuant to paragraph "e" are the issues of (1) discharge from commitment and (2) suitability for placement in a transitional release program. Iowa Code § 229A.8(5)(e).

he was not more likely than not to commit sexually violent offenses if not confined, and whether he was suitable for transitional release. In so doing, the court instructed the jury that the State had to prove, beyond a reasonable doubt, that at least one of the nine statutory criteria for placement in the transitional release program had not been met. The jury found Elet's mental abnormality remained such that he is likely to engage in predatory acts that constitute sexually violent offenses if discharged and that he was not suitable for placement in the transitional release program.

Elet appeals from the resulting judgment, contending substantial evidence did not support the submission of the instruction to the jury on his suitability for placement in a transitional release program. Elet also argues the election of remedies doctrine barred the State from requesting that the jury continue his commitment. More specifically, he contends the State's demand to submit the transitional release issue to the jury constituted an election to have the jury consider *only* the options of discharge or transitional release and not the option of his continued commitment. Elet argues that once the State made this election it could not offer evidence about or argue for a disposition that was anything less than that of transitional release. The State disputes that Elet has preserved error on the election of remedies issue.

II. MERITS.

A. Jury Instruction.

Trial court determinations regarding jury instructions are reviewed on appeal for errors of law. *In re Detention of Seewalker*, 689 N.W.2d 705, 706

(Iowa Ct. App. 2004). "Parties are entitled to have their legal theories submitted to a jury if they are supported by the pleadings and substantial evidence in the record." *Beyer v. Todd*, 601 N.W.2d 35, 38 (Iowa 1999). "Substantial evidence means evidence that a reasonable mind would accept as adequate to reach a conclusion." *Bellville v. Farm Bureau Mut. Ins. Co.*, 702 N.W.2d 468, 473 (Iowa 2005) (citation omitted). "The submission of instructions upon issues that have no support in the evidence is error." *Bride v. Heckart*, 556 N.W.2d 449, 452 (Iowa 1996) (citing *Vachon v. Broadlawns Med. Found.*, 490 N.W.2d 820, 822 (Iowa 1992)). However, error in giving or refusing a jury instruction does not merit reversal unless it results in prejudice to the defendant. *Seewalker*, 689 N.W.2d at 707. "Prejudice results when the trial court's instruction materially misstates the law, confuses or misleads the jury, or is unduly emphasized." *Anderson v. Webster City Cmty. Sch. Dist.,* 620 N.W.2d 263, 268 (Iowa 2000) (citation omitted).

Elet first contends the trial court erred in instructing the jury to determine whether he was suitable for transitional release because substantial evidence did not support such an instruction.

The State concedes, and we agree, that neither party presented evidence that Elet was suitable for transitional release. However, once the trial court determined the State had the right to have the issue of transitional release also tried to the jury at the final hearing, it was the State's burden to show beyond a reasonable doubt that Elet was not suitable for placement in a transitional release program. Iowa Code § 229A.8(6)(d)(2); *see also In re Detention of*

Bradford, 712 N.W.2d 144, 150 (Iowa 2006) (stating it is State's burden to show that respondent's mental abnormality remains such that he is likely to commit sexually predatory acts if discharged or placed in a transitional program).

At trial Dr. Smith testified for the State that Elet had not completed the statutory requirements to be placed in the transitional release program. He expressly opined that Elet had not achieved and demonstrated significant insights into his sex offending cycle, Elet had not accepted responsibility for his past behavior or shown understanding of the impact his crimes had upon his victims, Elet was still at risk to escape or attempt to escape from custody, transitional release was not in Elet's best interest, and Elet's mental abnormality had not so changed that he was no longer more likely than not to reoffend. *See* Iowa Code §§ 229A.8A(2)(b), (c), (f), (h), & (a) respectively. Accordingly, we conclude the State presented substantial evidence to warrant submission of the instruction requiring the jury to determine whether it had proved beyond a reasonable doubt that Elet was not suitable for transitional release.

However, assuming without deciding the trial court erred in submitting the instruction regarding transitional release, Elet does not argue, nor can we find, how the instruction resulted in prejudice to him. The State had the right under section 229A.8(5)(i) to have both the issue of discharge *and* the issue of Elet's suitability for the transitional release program tried to the jury. The jury ultimately concluded that Elet's mental abnormality remained such that he is likely to reoffend if discharged and accordingly Elet was going to remain confined. Thus, even if the court had granted Elet's request and not submitted the instruction

regarding transitional release, he would not have been discharged. Therefore, Elet can have suffered no prejudice from the court's submission of the transitional release instruction to the jury and no reversible error appears.

B. Election of Remedies.

Elet next contends the election of remedies doctrine barred the State from requesting that the jury continue his commitment. He argues that the State's demand to submit the transitional release issue to the jury constituted an election to have the jury consider only the options of discharge or transitional release, and not the option of continued confinement. Elet contends the trial court erred in allowing the State to elect the remedy of transitional release and then present evidence against this remedy. The State contends Elet failed to preserve error on this issue. "The question of applicability of the [election of remedies] doctrine is one of law for the court to decide." *Bolinger v. Kiburz*, 270 N.W.2d 603, 605 (Iowa 1978).

Issues must ordinarily be presented to and passed upon by the trial court before they may be raised and adjudicated on appeal. *State v. Eames*, 565 N.W.2d 323, 326 (Iowa 1997); *Benavides v. J.C. Penney Life Ins. Co.*, 539 N.W.2d 352, 356 (Iowa 1995). "Nothing is more basic in the law of appeal and error than the axiom that a party cannot sing a song to us [on appeal] that was not first sung in trial court." *State v. Rutledge*, 600 N.W.2d 324, 325 (Iowa 1999). We do not review issues, even of constitutional magnitude, not presented to the trial court and first raised on appeal. *State v. Farni*, 325 N.W.2d 107, 109 (Iowa 1982).

Elet did not raise an issue of election of remedies in the trial court. Thus, the merit, or lack thereof, of the applicability of this doctrine to the case at hand was neither presented to nor passed upon by the trial court. Where error is not preserved on an issue there is nothing for an appellate court to review. *State v. Manna*, 534 N.W.2d 642, 644 (Iowa 1995). We conclude Elet has not properly preserved this issue for our review and decline to address it.

III. CONCLUSION.

We conclude the trial court did not err in submitting the issue of transitional release to the jury. There was substantial evidence in the record to support instruction on the issue, and Elet was not prejudiced by submission of the issue. We further conclude Elet has not preserved error on the election of remedies issue.

AFFIRMED.