IN THE COURT OF APPEALS OF IOWA

No. 9-136 / 07-0188
Filed April 22, 2009

IN RE THE DETENTION OF
PAUL MICHAEL BLAISE

PAUL MICHAEL BLAISE,
Respondent-Appellant/Cross-Appellee.

STATE OF IOWA,
Petitioner-Appellee/Cross-Appellant.

Appeal from the Iowa District Court for Lee (North) County, Michael J. Schilling, Judge.

Paul Michael Blaise appeals from his civil commitment as a sexually violent predator, and the State cross-appeals from the district court's order granting Blaise a new trial. **GRANT OF NEW TRIAL AFFIRMED.**

Mark C. Smith, State Appellate Defender, Steven L. Addington, Assistant Public Defender, and Greta Truman, Assistant Public Defender, for appellant/cross appellee.

Thomas J. Miller, Attorney General, Elisabeth S. Reynoldson, Assistant Attorney General, and Becky Goettsch, Assistant Attorney General, for appellee/cross-appellant State.

Heard by Vaitheswaran, P.J., and Doyle and Mansfield, JJ.

DOYLE, J.

Paul Michael Blaise appeals from his civil commitment as a sexually violent predator, and the State cross-appeals from the district court's order granting Blaise a new trial. Upon our review, we affirm on both appeals.

I. Background Facts and Proceedings.

Paul Blaise has a long history of sexually aberrant behavior, going back as early as 1989. He was convicted of sexual abuse in the third degree in 1991 after abusing a nine-year-old girl and was sentenced to a ten-year term of imprisonment. After his release, he was in and out of jail and prison for a variety of offenses, including sexually related offenses. Even while incarcerated, Blaise was unable to contain his sexual deviance and sexual assault threats, and as a result, he received numerous disciplinary reports for sexual misconduct.

On October 17, 2005, less than six months after his latest release from jail, Blaise was picking up cans in a Fort Madison park when he approached a stranger and began talking to her. He asked the woman several inappropriate questions about sex. Additionally, he asked the woman if she would perform various sexual acts if someone threatened her with a gun. The woman became frightened and contacted the police, and Blaise was arrested shortly thereafter in the park while in possession of a gun. He pleaded guilty to first-degree harassment and was sentenced to a two-year term of imprisonment.

On October 16, 2006, while Blaise was serving his sentence for the harassment offense, the State filed a petition alleging Blaise was a sexually violent predator under Iowa Code chapter 229A (2005). Among other things, the petition alleged that Blaise's 2005 harassment offense was a sexually motivated

offense. Thereafter, the district court found probable cause, and trial to a jury commenced on January 8, 2007.

The morning of trial, Blaise's counsel made the following record:

> Your Honor, [at] the pretrial conference that we held last week, I asked the court to bifurcate this matter and I again am requesting the court bifurcate the trial. I believe that the first issue that the . . . jury has to decide is a factual issue of whether [Blaise's 2005 harassment offense] was a sexually violent offense. [Blaise] was charged with harassment and it's the State's burden to prove that that was a sexually violent offense in accordance with 229A of the Iowa Code. Because that does not require his entire background, it does not require we go into detail about all past criminal acts or other matters, it would be superfluous to it in fact prejudice that one fact, we would ask that the jury decide that issue first and then we'd continue with the same jury and then go on to the other issues. That would be the fairest way to proceed in this matter.

The State resisted, arguing essentially that the same evidence would be used to show that the 2005 harassment offense was a sexually motivated offense and that Blaise was a sexually violent predator, and thus bifurcating the trial would not hold any purpose or have any effect but to drag out the trial. The district court overruled Blaise's motion, finding the request to be untimely and that there was no authority for the court to bifurcate the trial. The trial then proceeded.

At trial, the State called its expert witness psychologist Joseph Belanger, Ph.D., to testify. At the time of trial, Dr. Belanger was employed by the North Dakota Department of Human Services as a forensic psychologist. His work consisted predominantly of performing evaluations for "sexually dangerous individuals," North Dakota's equivalent to "sexually violent predators." He was also self-employed doing business as Psychological Services. He had focused his work on sexually dangerous individuals since 1997, after North Dakota

passed a law similar to Iowa's sexually violent predator law, and had testified as an expert witness in North Dakota over fifty times regarding the assessment of sex offenders.

Dr. Belanger testified at trial that after reviewing Blaise's history and interviewing Blaise, he formed an opinion that Blaise had a mental abnormality broken down into two diagnoses: paraphilia not otherwise specified with the descriptor nonconsent, and antisocial personality disorder. He explained that persons with paraphilia not otherwise specified nonconsent are attracted to sex with people that are unable or unwilling to consent to the sexual actions with them. Additionally, he stated that for someone who has paraphilia nonconsent, such as Blaise, knowing that their victim or their target is scared is arousing to them. He opined that Blaise's actions underlying his 2005 harassment offense were for Blaise's sexual gratification. He further opined that Blaise was more likely than not to reoffend sexually.

Clinical and forensic psychologist Craig Rypma, Ph.D. and M.B.A., testified on Blaise's behalf as an expert witness. Dr. Rypma diagnosed Blaise with attention deficit hyperactivity disorder and antisocial personality disorder. He disagreed with Dr. Belanger's conclusions and opined that Blaise did not suffer from a mental abnormality that predisposes him to commit sexually violent offenses. He also opined that Blaise was not more likely than not to commit a sexually violent offense if not confined in a secure facility. He further opined that Blaise's actions underlying his 2005 harassment offense were not for Blaise's sexual gratification.

The jury found Blaise's 2005 harassment offense was a sexually motivated crime, and then found Blaise to be a sexually violent predator. The district court then entered an order of commitment. On January 25, 2007, Blaise filed his notice of appeal, raising several grounds for appeal.

Sometime after Blaise was committed, Dr. Belanger quit his job with the state of North Dakota. This occurred after the Department of Homeland Security seized Dr. Belanger's home computer, upon which he had downloaded child pornography. On November 27, 2007, Dr. Belanger wrote a letter to the North Dakota Board of Psychologist Examiners. In the letter he disclosed that he had survived some "horrific" abuse in his childhood. He said his melancholic depressions and anxiety attacks became worse as he started to do evaluations of sexually dangerous individuals. He admitted that in retrospect that because of his own issues he should have told his supervisor immediately and let somebody else do the work. He also stated: "I found [my work] appalling and frightening." He admitted that he was ill but he did not know how ill. The letter was disclosed to the North Dakota Attorney General, and then apparently to the Iowa Attorney General in early December 2007. It is believed that the office of the Iowa Attorney General then disclosed the letter to counsel for Blaise.

On December 18, 2007, Blaise filed a motion for new trial based on newly discovered evidence.[1] He alleged that the State's expert was "an admitted mentally ill pedophile with serious difficulty controlling his behavior." The State resisted. After a hearing was held on April 2, 2008, the district court granted a

[1] Blaise later filed an amended motion for a new trial and then an amended motion and petition for a new trial.

new trial and ordered it be scheduled within ninety days. The State then filed its notice of appeal.

Upon the State's combined motion to stay the district court proceedings and to consolidate the two pending appeals, the Iowa Supreme Court stayed the district court proceedings, consolidated the appeals, and allowed the parties additional time for briefing and the filing of a supplemental appendix.

In his appeal, Blaise contends the State failed to prove he was incarcerated on a sexually violent offense and the district court erred in denying his motion to bifurcate. In its cross-appeal, the State claims the district court erred in granting a new trial.

II. Sexually Violent Offense.

Blaise first argues the State failed to prove he was incarcerated on a sexually violent offense. He contends there was insufficient evidence to support the jury's finding that Blaise harassed his victim for the purpose of his sexual gratification, and therefore the State's petition should be dismissed.[2] We review a challenge to the sufficiency of the evidence for errors at law. *In re Detention of Betsworth*, 711 N.W.2d 280, 286 (Iowa 2006).

Under the statutory scheme of chapter 229A:

[2] One might argue that we need not reach the sufficiency of the evidence to support the jury's finding since this is a civil proceeding and there will be a new trial in any event. However, we believe the prudent course here is to decide that issue. This avoids any possible due process issue, *see Gomes v. Gaughan*, 471 N.W.2d 794, 797 (1st Cir. 1973) (noting that multiple civil commitment trials would likely violate due process), or other potential concerns, *see In re Detention of Anderson*, 139 P.3d 396, 405-06 (Wash. App. 2006) (Armstrong, J., dissenting) (expressing the view that where there was insufficient evidence to prove a recent overt act, retrial should not occur). Thus we will decide whether there was sufficient evidence to support the jury's finding that Blaise's harassment conviction was a sexually violent offense, without holding that we are required to do so.

> If the court or jury determines [beyond a reasonable doubt] that the respondent is a sexually violent predator, the respondent shall be committed to the custody of the director of the department of human services for control, care, and treatment until such time as the person's mental abnormality has so changed that the person is safe to be placed in a transitional release program or discharged.

Iowa Code § 229A.7(5). A "sexually violent predator" is defined as:

> [A] person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality which makes the person likely to engage in predatory acts constituting sexually violent offenses, if not confined in a secure facility.

Id. § 229A.2(11). Thus, the State was required to prove three elements beyond a reasonable doubt: (1) Blaise had been convicted of or charged with a sexually violent offense;[3] (2) Blaise suffered from a mental abnormality; and (3) Blaise's mental abnormality made him likely to engage in predatory acts constituting sexually violent offenses. *See In re Detention of Swanson*, 668 N.W.2d 570, 575 (Iowa 2003). At issue here is the third element.

"Likely to engage in predatory acts" is defined in section 229A.2(4):

> "Likely to engage in predatory acts of sexual violence" means that the person more likely than not will engage in acts of a sexually violent nature. If a person is not confined at the time that a petition is filed, a person is "likely to engage in predatory acts of sexual violence" only if the person commits a recent overt act.

Id. § 229A.2(4). If the respondent is confined at the time the sexually violent predator petition is filed, the State must prove that the confinement is for a sexually violent offense. *See In re Detention of Gonzales*, 658 N.W.2d 102, 104 (Iowa 2003). Among other things, a sexually violent offense includes "[a]ny act which, either at the time of sentencing for the offense or subsequently during civil

[3] Blaise stipulated at trial that he had been convicted of or charged with a sexually violent offense in 1990, meeting the first element.

commitment proceedings pursuant to this chapter, has been determined beyond a reasonable doubt to have been *sexually motivated*." Iowa Code § 229A.2(10)(g) (emphasis added). "'Sexually motivated' means that one of the purposes for commission of a crime is the purpose of sexual gratification of the perpetrator of the crime." *Id*. § 229.2(9).

Although Blaise was confined at the time the State's petition was filed, his confinement was for his 2005 harassment in the first degree conviction, a crime that is not a per se sexual offense. Thus, the State was required to prove that Blaise committed his 2005 harassment offense for his sexual gratification, to show that the harassment charge was sexually motivated and therefore a sexually violent offense.

At trial, the jury heard evidence concerning Blaise's past sexual offenses and deviances, as well as testimony from Blaise's 2005 harassment offense victim. The victim testified that she was very, very scared by Blaise's sexual questions and hypothetical questions about what she would do at gunpoint. Additionally, Dr. Belanger testified that it was his opinion that Blaise committed the harassment offense for Blaise's sexual gratification, based upon Blaise's mental abnormality. Upon our review, we find the State presented sufficient evidence for the jury to conclude that Blaise's conviction for harassment in the first degree was for Blaise's sexual gratification and thus sexually motivated. However, given the district court's grant of a new trial concerning Dr. Belanger's credibility, we next turn to that issue.

***III. New Trial*.**

Generally, "[t]rial courts have broad but not unlimited discretion in ruling on motions for new trials." *Benson v. Richardson*, 537 N.W.2d 748, 762 (Iowa 1995). A court is given "unusually broad discretion" in ruling on a motion for new trial that is on the basis of newly discovered evidence. *State v. Miles*, 490 N.W.2d 798, 799 (Iowa 1992) (citation omitted).

> This broad discretion is particularly appropriate. It is important to distinguish between the unavoidable, legitimate claims and those proposed in desperation by a disappointed litigant. From its closer vantage point the presiding trial court has a clearer view of this crucial question, and we generally yield to its determination.

Id. Nevertheless, motions for new trial based on newly discovered evidence are not favored. *Benson*, 537 N.W.2d at 762. A trial court's ruling will not be disturbed unless the evidence clearly shows the court has abused its discretion. *Id*. We will find an abuse of discretion if the trial court clearly exercised its discretion on untenable grounds or acted unreasonably. *Id*. This court is slower to interfere with a grant of a new trial than with its denial. Iowa R. App. P. 6.14(6)(*d*).

In order for Blaise to prevail on his petition for new trial based on a claim of newly-discovered evidence, he must show: (1) that the evidence is newly discovered and could not, in the exercise of due diligence, have been discovered prior to the conclusion of the trial; (2) that the evidence is material to the issues in the case and not merely cumulative or impeaching; and (3) that the evidence will probably change the result if a new trial is granted. *Benson*, 537 N.W.2d at 762. Under Iowa law, "newly discovered evidence" sufficient to merit a new trial is

evidence which existed at the time of trial, but which, for excusable reasons, the party was unable to produce at the time. *Id*. at 762-63.

***A. Newly Discovered Evidence*.**

At the hearing for new trial, Dr. Rypma expressed concern about Dr. Belanger's ability to properly evaluate individuals, including Blaise, for possible civil commitment as sexually violent predators. Dr. Rypma opined that a professional psychologist doing an evaluation must always maintain a professional distance.[4] In Dr. Rypma's opinion, persons like Dr. Belanger with a history of sexual issues would have a tendency to find pathology or mental abnormality in individuals more readily than would otherwise be expected. He further opined that persons with unresolved issues of sexual abuse are more likely to possess the tendency to diagnose a mental abnormality when one is not actually present. Dr. Rypma further stated that such a person would be more likely to find a risk of reoffense than would a professional without a background of unresolved issues of sexual abuse.

In resisting Blaise's motion for a new trial, the State offered a report from Dr. Amy Phenix, a clinical psychologist specializing in forensic psychology and violent and sexual offender evaluations. She reviewed the psychological evaluations completed by Dr. Belanger, and concluded that she agreed with Dr. Belanger's opinion that Blaise was more likely than not to engage in predatory sexually violent offenses if not confined in a secured facility.

[4] Dr. Belanger apparently agrees. During his testimony at trial, he stated that "you have to be able to step back and take a more neutral, forensic stance to assess the risk and that is substantiated in the record."

The trial court found the parties agreed that the "evidence" was discovered following trial and that it could not with reasonable diligence have been discovered and produced at trial. The letter would not, in and of itself, qualify as "newly discovered evidence" since it did not exist at the time of the trial. The parties did not agree as to whether Dr. Belanger's problems, as revealed in the letter, existed at the time of trial. The State argued in its resistance to the motion for new trial, at the hearing thereon, and on appeal that there was no evidence that Dr. Belanger's "issues" existed at the time of trial. Although Dr. Belanger does not set forth at what period of time he should have started letting others do his work because of his "own issues" stemming from "horrific" childhood abuse, a review of the record leads to a conclusion that Dr. Belanger was suffering from his condition at or before the time he evaluated Blaise. He stated in his letter that his melancholic depressions and anxiety attacks became worse as he started evaluations of sexually dangerous individuals. He testified he started doing those evaluations in 1997. Additionally, he testified that he had testified on these issues as an expert more than fifty times prior to Blaise's trial. The district court found:

> [T]he critical evidence with respect to the Petition—Belanger's horrific abuse, his self-disclosure that he should have asked others to do the evaluations, and his statement that he found these evaluations to be appalling and frightening—is evidence that existed at the time of trial, notwithstanding Blaise's failure to establish the precise time frame for all of the newly discovered evidence.

We agree. Additionally, we find the evidence of Dr. Belanger's illness and deviant behavior could not, with reasonable diligence, have been discovered and produced at trial.

***B. Materiality*.**

The district court also concluded the evidence of Dr. Belanger's deviant behavior was material. "Evidence is material when there is a 'reasonable probability' that disclosure would have changed the result of the proceeding." *State v. Piper*, 663 N.W.2d 894, 905 (Iowa 2003) (quoting *State v. Veal*, 564 N.W.2d 797, 810 (Iowa 1997)). Cumulative evidence is not material. *See Larson v. Meyer & Meyer*, 227 Iowa 512, 518-19, 288 N.W. 663, 666-67 (1939). Likewise, evidence which is merely impeaching is generally not considered material, but evidence may be both material and also "incidentally impeach" a witness and may properly serve as the basis for a new trial. *Dobberstein v. Emmet County*, 176 Iowa 96, 104-05, 155 N.W. 815, 818-19 (1916).

The court recognized that some of the evidence is indeed impeaching and a portion would be inadmissible at trial, but concluded that:

> Dr. Belanger's admission that he should not have performed evaluations of sexually dangerous individuals, coupled with his description of that work as both "frightening and appalling," goes to the very heart of his qualification and bias as an expert witness, and thus to the accuracy of his opinions on the crucial subject of mental abnormality and likelihood of reoffending. This new evidence is clearly material. Its materiality is even greater considering Belanger's role as the State's only expert, and the vital role his testimony served in sustaining the State's burden of proof, resulting in Blaise's adjudication and commitment as a sexually violent predator.

We agree.

***C. Change in Result*.**

Lastly, the trial court concluded that "the new evidence about Belanger is such that if the jury heard it at trial the jury verdict would probably change." For Blaise to be entitled to a new trial, it must be shown that the new evidence will

probably change the result if a new trial is granted. *Benson*, 537 N.W.2d at 762. Put another way, "[i]f it can be said that in all probability the newly discovered evidence will not affect the result in case of a second trial, then the motion should be denied." *Henderson v. Edwards*, 191 Iowa 871, 873, 183 N.W. 583, 584 (1921). To be sure, this rule is speculative, but nevertheless is a reasonably safe guide. *Id*. We agree with the trial court that if this case were tried again with the new evidence about Dr. Belanger, the results would probably change.

Our conclusions might be different had Dr. Belanger's expertise been in a different area, such as accident reconstruction and his testimony limited to that field. Under those circumstances his illness and deviant behavior, being unrelated to the subject matter of his testimony, would probably have no impact on his credibility or bias concerning the subject matter of his testimony. But in this case, Dr. Belanger's illness and deviant behavior directly parallels that of the very subjects he was entrusted to evaluate and strikes at the very heart of the subject matter of his testimony. Under these circumstances, we have serious concerns as to whether Dr. Belanger could maintain a professional distance when evaluating a candidate, such as Blaise, for commitment.

In enacting chapter 229A, the legislature recognized the necessity to establish a civil commitment procedure for the long-term care and treatment of sexually violent predators; procedures that reflect legitimate public safety concerns, while at the same time, providing treatment services designed to benefit sexually violent predators. Iowa Code § 229A.1 (2005). As important as the State's interest is in protecting the public and victims from sexually violent predators, that interest cannot outweigh the fundamental right to a fair trial.

Involuntary commitment "for any purpose constitutes a significant deprivation of liberty that requires due process protection." *Addington v. Texas*, 441 U.S. 418, 425, 99 S. Ct. 1804, 1809, 60 L. Ed. 2d 323, 330-31 (1979) (citations omitted). Where the significant deprivation of a person's liberty is at stake, as here, we think it is more prudent to err on the side of caution. The disturbing nature of Dr. Belanger's own illness and deviant behavior, that mirrors the mental illness of the very subjects he evaluated, including Blaise, is sufficient to undermine the court's confidence in a jury verdict based largely on his testimony. A new trial is therefore warranted, but our analysis does not end here.

The State argues the "newly discovered evidence" proffered by Blaise would not affect the result in case of a second trial since, as a practical matter, it would call another expert, clinical and consulting psychologist Amy Phenix, Ph.D.[5] Dr. Phenix reviewed Dr. Belanger's psychological evaluation of Blaise and offered a preliminary opinion that agreed with the findings of Dr. Belanger's assessment that Blaise meets the criteria as a sexually violent predator. At first blush the State's argument appears attractive—just substitute Dr. Belanger with an expert who holds the same opinion, assume the results would be the same, and thereby avoid a second trial. "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Goldberg v. Kelly*, 397 U.S. 254, 269, 90 S. Ct. 1011, 1021, 25 L. Ed. 2d 287, 300 (1970) (citations omitted). This right to cross-examination has ancient roots and has been zealously protected from erosion in all types of cases, not just criminal cases. *See id*.

[5] No doubt Dr. Belanger would not be called by the State to testify at a second trial.

(citing *Greene v. McElroy*, 360 U.S. 474, 496-97, 79 S. Ct. 1400, 1413, 3 L. Ed. 2d 1377 (1959)). If the State wishes to rely on the opinions of Dr. Phenix, Blaise, who faces a significant deprivation of liberty, has the right to confront and cross-examine Dr. Phenix. That can only be done at a second trial. We therefore affirm the trial court's grant of a new trial.

IV. Bifurcation.

Blaise's final argument asserts that the district court erred in denying his motion to bifurcate the trial. He contends the issue of whether his 2005 harassment offense was a sexually violent offense should have been tried to the jury separately because the evidence of his prior bad acts was not relevant to that issue. A motion to bifurcate "is a matter of the trial court's discretion and will be disturbed only if the court abused that discretion." *Briner v. Hyslop*, 337 N.W.2d 858, 870 (Iowa 1983); *see also Beeman v. Manville Corp. Asbestos Disease Comp. Fund*, 496 N.W.2d 247, 251 (Iowa 1993). Because we find that a new trial is warranted, we need not decide this issue and we do not address the propriety of this procedure. *See Swanson*, 668 N.W.2d at 574 n.3.

V. Conclusion.

For all the above reasons, we find the newly discovered evidence warrants a new trial, and we affirm the district court's grant of a new trial. Because we conclude a new trial is warranted, we conclude the State must again prove to a jury, beyond a reasonable doubt, all elements necessary to establish that Blaise meets the statutory definition of a sexually violent predator, excluding the element previously stipulated by Blaise to have been met. Additionally, because we find a new trial is warranted, we do not address the propriety of

bifurcating the trial, nor do we decide other issues claimed by Blaise to be the subject of his appeal.

GRANT OF NEW TRIAL AFFIRMED.