IN THE SUPREME COURT OF IOWA

STATE OF IOWA,	)	
	)	
Plaintiff–Appellee,	)	
	)	
v.	)	S.CT. NO. 19–1697
	)	
PATRICK BARRETT, JR.,	)	
	)	
Defendant–Appellant.	)	

APPEAL FROM THE IOWA DISTRICT COURT
FOR CASS COUNTY
THE HONORABLE JEFFREY L. LARSON, JUDGE

APPELLANT'S REPLY BRIEF AND ARGUMENT

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FINAL

CERTIFICATE OF SERVICE

On the 12th day of June, 2020, the undersigned certifies that a true copy of the foregoing instrument was served upon Defendant–Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to Patrick Barrett, Jr., #6407176, Clarinda Correctional Facility, 2000 North 16th Street, Clarinda, IA 51632.

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STATEMENT OF THE CASE

COMES NOW the Defendant–Appellant Patrick Barrett, Jr., pursuant to Iowa Rule of Appellate Procedure 6.903(4), and hereby submits the following argument in reply to the State's brief filed on or about May 8, 2020. While the Defendant–Appellant's brief and argument adequately addresses the issues presented for review, a short reply is necessary to address certain contentions raised by the State.

ARGUMENT

THE DISTRICT COURT ERRED IN DENYING THE DEFENDANT'S MOTION FOR A NEW TRIAL AFTER THE CONFIDENTIAL RECORDS WERE DISCLOSED TO THE DEFENSE ON REMAND.

The State argues that Barrett should only be granted a new trial if the evidence in the previously undisclosed records "probably would have changed the result, or if it would have created a reasonable probability of a different result." (State's Br. pp. 2, 31–41). For the reasons stated in the original brief, Barrett contends that even if this is the appropriate standard, the district court erred in concluding that Barrett was not

entitled to a new trial. (Def.'s Br. pp. 74–78). However, this Court should find that the district court should have only examined whether "the nondisclosure was harmless beyond a reasonable doubt"; because it was not, the Court should find Barrett is entitled to a new trial. See State v. Neiderbach, 837 N.W.2d 180, 198 n.3 (Iowa 2013) (citing Pennsylvania v. Ritchie, 480 U.S. 39, 58 (1987)).

First, the record establishes defense counsel did not invite error by asking the district court to apply the standard for a motion for a new trial based upon newly discovered evidence. See (State's Br. p. 29). Rather, counsel argued that the standard was more easily met than that:

> I thought that those comments by *the Court of Appeals . . . have established a very low threshold for the defense today* on our request for a new trial because this material is clearly exculpatory and [tends] to establish the defendant's innocence. . . . [I]t says here that it is the District Court's duty to review the records and to consider whether a new trial is necessary. And I'm confident, Your Honor, that if you look at the opinion in its whole and reflect upon their definition of innocence and exculpatory and the evidence being -- new evidence, including even impeachment, that Mr. Barrett is entitled to a new

trial.

(Mot. Hr'g p.9 L.12–p.10 L.2) (emphasis added). While Barrett's counsel did discuss the standard for a new trial based on newly discovered evidence, he did so in response to the State's argument that the evidence was merely cumulative; he stated: "Traditionally the standard for newly-discovered evidence for new trial is material to the issues in the case and not merely cumulative. *I don't think this is the formula that we should use in this case*." (Mot. Hr'g p.19 L.2–p.20 L.2). Moreover, counsel explicitly told the district court: "*I'm not sure this is the [newly-discovered evidence] standard or the word cumulative should be used in this context*." (Mot. Hr'g p.19 L.23–p.20 L.2) (emphasis). Thus, rather than inviting the district court to apply the standard for newly-discovered evidence, the record shows defense counsel was merely responding to the State's arguments when discussing the standard for newly discovered evidence and that counsel informed the district court that he did not believe that

standard was appropriate in this case. Therefore, "[c]ounsel did not cite an incorrect standard; he simply left it to the court to apply the correct standard." State v. Condit, No. 05–1547, 2007 WL 1342511, at *4 (Iowa Ct. App. May 9, 2007) (unpublished table decision).

Moreover, the concept of "invited error" is inapplicable to the situation at hand. Iowa Courts have found that a defendant "cannot deliberately act as to invite error and then object because the court has accepted the invitation." Jasper v. State, 477 N.W.2d 852, 856 (Iowa 1991) (citation omitted). This was not a trial strategy or tactical decision made by the defense, where the application of invited error could potentially apply. See, e.g., State v. Burkett, 357 N.W.2d 632, 635 (Iowa 1984) ("It seems clear that the failure to instruct on assault was in fact part of defense counsel's strategy for the case, a strategy which defendant knew and acquiesced in."); Jasper, 477 N.W.2d at 856 (discussing "invited error" where trial counsel submitted a written waiver and transfer to

district court because he believed the juvenile would have a better outcome if he was waived up given his adjudicative history); Countryman v. State, No. 00–1228, 2003 WL 22015521, at *5 (Iowa Ct. App. Aug. 27, 2003) (unpublished table decision) (citation omitted) (noting the defendant invited error by his "tell-all" defense and seeking admission of all relevant testimony, even if such testimony was inadmissible hearsay). This is not a case of trial strategy or a tactical decision, where defense counsel knowingly encourages the district court to commit an error.

Furthermore, the district court has a duty to apply the appropriate legal standard, without the defense explicitly informing the court of the standard. See Condit, 2007 WL 1342511, at *4; see also State v. Ellis, 578 N.W.2d 655, 656 (Iowa 1998) (reversing for application of the correct standard where the defendant questioned the appropriateness of the court's application of a sufficiency standard). Defense counsel does not have to inform the district court of the

correct legal standard for it to determine an issue in order for error to be preserved. While it would have certainly been helpful, it was not necessary to do so to preserve error. See Summy v. City of Des Moines, 708 N.W.2d 333, 338 (Iowa 2006), overruled on other grounds by Alcala v. Marriott Intern., Inc., 880 N.W.2d 699, 707–08 (Iowa 2016) ("Error preservation does not turn . . . on the thoroughness of [trial] counsel's research and briefing . . . ."). Counsel filed a motion for a new trial and discussed the previously nondisclosed evidence and how it affected the defendant's trial, thereby alerting the court to the corrective action that needed to be taken. See id. Here, the district court was clearly presented with the issue on appeal—whether the defendant was entitled to a new trial based on the exculpatory evidence contained in the nondisclosed evidence. The district court overruled the motion, thus preserving the claims made on appeal. See id.; Feld v. Borkowski, 790 N.W.2d 72, 84 (Iowa 2010) (Appel, J., concurring in part and dissenting in part) ("[T]he Supreme

Court has made it clear that once a claim is properly presented, a party is not limited to arguments presented below.") (emphasis added).

Additionally, although the district court's ruling mentions several different legal standards for the motion, it does state that "if the records 'contain no such information or *if the information was harmless beyond a reasonable doubt*, the lower court will be free to reinstate the prior conviction'", citing State v. Neiderbach, 837 N.W.2d 180, 198 (Iowa 2013). (Ruling Mot. New Trial) (App. p.60) (emphasis added). Later, the district court also finds that the nondisclosure of the records "was indeed harmless". (Ruling Mot. New Trial) (App. p. 4). Thus, although there is limited discussion regarding the district court's application of a harmless-error standard to Barrett's case, the district court's statements indicate it considered Barrett's proposed standard and found the nondisclosure was harmless error; therefore, error on this standard was preserved. See Lamasters v. State, 821 N.W.2d

856, 864 (Iowa 2012) (citations omitted) ("If the court's ruling indicates the court *considered* the issue and necessarily ruled on it, even if the court's reasoning is 'incomplete or sparse,' the issue has been preserved."); State v. Ambrose, 861 N.W.2d 550, 555 (Iowa 2015) (noting the principles of error preservation are based upon fairness and giving an opportunity to the district court to correctly rule on an issue).

However, even if the State is correct that Barrett did not adequately preserve error, this Court should still consider Barrett's argument on appeal. The Iowa Supreme Court has "been willing to relax ordinary rules of issue preservation based on notions of judicial economy and efficiency." Feld, 790 N.W.2d at 84; see also DeVoss v. State, 648 N.W.2d 56, 60–63 (Iowa 2002) (noting that the appellate court may affirm an evidentiary ruling where the record reveals an alternate ground for admission of evidence). In addition, the Court has addressed "issues that are 'incident' to a determination of other issues properly presented." Feld, 790 N.W.2d at 84

(citing Presbytery of Se. Iowa v. Harris, 226 N.W.2d 232, 234 (Iowa 1975)). Here, the question of what standard the district court should have applied when determining whether Barrett was entitled to a new trial is necessarily intertwined with the issue of whether the district court improperly denied the defendant's motion for a new trial. Necessarily also intertwined in the question of the proper standard are the constitutional implications of a standard the court must apply to determine whether the defendant is entitled to a new trial after the district court erroneously forced him to prepare and try his case without access to the exculpatory information contained in the records. As such, the Court should consider and address Barrett's arguments on appeal.

Furthermore, it makes little sense to require Barrett to go through yet another proceeding—a post-conviction relief proceeding on whether counsel below was ineffective for failing to raise the question of what standard applies and the constitutional implications of a standard less than harmless

error presents—when this Court can resolve the argument in this case and on this record. There is no allegation that the State would have presented different evidence if counsel made this particular argument on the standard in trial court. See State v. Gaskins, 866 N.W.2d 1, 43 n.20 (Iowa 2015) (Waterman, J., dissenting) (noting the State argued that if the defendant had raised the abandonment of the automobile exception in district court, the State could have developed a record at the suppression hearing on that issue); Feld, 790 N.W.2d at 85 ("Nor is this a case where the factual record developed below is inadequate, thereby preventing meaningful appellate review."). Nor is this a case where the State has not been given the opportunity to advocate for its position. Rather, the opposite: in its brief, the State had the opportunity to and did respond to the argument that the district court should have applied a harmless-error standard when determining whether Barrett should have received a new trial. Accordingly, the general principles behind the error

preservation doctrine do not support the notion that this argument cannot be addressed. Moreover, the interests of judicial economy and efficiency are served if the Court addresses and applies the correct standard to Barrett's case at hand.

In its brief, the State also that the nondisclosed records had no exculpatory value and contained information that was already available for Barrett's trial. However, the decision of the Court of Appeals in Barrett's prior appeal already determined both of these issues. Accordingly, this Court should find that the State is now precluded from making these arguments in the pending appeal.

Issue preclusion, or direct or collateral estoppel, means simply that when an issue . . . has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." City of Johnston v. Christenson, 718 N.W.2d 290, 297 (Iowa 2006) (internal quotation marks omitted) (citations omitted). There

are four requirements necessary for the prior determination to have a preclusive effect. Id. The elements are:

> (1) the issue concluded must be identical; (2) the issue must have been raised and litigated in the prior action; (3) the issue must have been material and relevant to the disposition of the prior action; and (4) the determination made of the issue in the prior action must have been necessary and essential to the resulting judgment.

Id. at 297–98 (citations omitted).

Applying these factors, the Court should find the State is precluded from litigating whether the undisclosed records contained exculpatory and noncumulative, material evidence. First, the Court of Appeals previously concluded that the records contained exculpatory and noncumulative, material evidence. It stated: "We find the district court abused its discretion in finding the privileged records contained no exculpatory information", and it specifically limited portions of the records where exculpatory information was located. State v. Barrett, No. 17–1814, 2018 WL 6132275, at *3 (Iowa Ct. App. 2018). The Court of Appeals also found that "the district

court abused its discretion in concluding no exculpatory information needed to be disclosed under the statutory balancing test." Id. In doing so, the Court of Appeals concluded the district court erred when balancing the need to disclose the information against the privacy interest of A.F. See id.; see also Iowa Code § 622.10(4)(a)(2)(c) (2017). In conducting section 622.4(a)(2)(c)'s balancing test and finding the district court erred in failing to order disclosure of the records, the Court of Appeals necessarily found that the information was not cumulative and that it was material to the fairness of the trial. See Barrett, 2018 WL 6132275, at *3–4 (citation omitted) (noting that under the statute the district court is "obligated to release information material to the fairness of the trial"); see also Neiderbach, 837 N.W.2d at 224 (Appel, J., concurring specially) ("The test for disclosure is applied only after the records have been examined and found to contain material and relevant evidence). As such, the issues of whether the nondisclosed records were exculpatory

and cumulative were already determined by the prior decision by the Court of Appeals.

Second, these issues were litigated directly in the prior appeal. Barrett argued the records contained exculpatory and noncumulative, material evidence that should have been disclosed to the defense after an in camera review by the district court, and the State argued the records did not contain exculpatory evidence nor was there a need for the evidence when balanced against A.F.'s privacy interests.[1] The third and fourth elements are also met since the issue was material and relevant to the disposition of the prior action; the Court of Appeal's conclusions regarding the materiality and exculpatory nature of the evidence contained in the undisclosed records were the basis of its opinion and these

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1 If it deems it necessary, the Court may take judicial notice of parties' filings on EDMS in Barrett's previous appeal, S.Ct. No. 17–1814. See Iowa R. Evid. 5.201 (2019) (allowing the court to judicially notice if the facts "[c]an be accurately and readily determined from sources whose accuracy cannot reasonably be questioned").

conclusions were necessary in its determination that the case had to be remanded. See Barrett, 2018 WL 6132275, at *3.

The State argues it is unfair to deem its arguments regarding the evidence "dead on arrival" prior to it being able to make them; however, the State did make these arguments in the prior appeal, although necessarily they were non-specific because neither party had viewed the evidence. See id. at *2 ("In assessing the defendant's argument, we must acknowledge the defendant is at a disadvantage in challenging the district court's ruling and the State is at a disadvantage in defending the district court's ruling. Because the records were reviewed only by the district court, the parties are unaware of what information is contained therein. The defendant's argument on appeal is thus necessarily non-specific, and the State's rebuttal is also necessarily non-specific."). The statute itself is the source of the unfairness claim that the State makes. The statutory scheme, as currently written by the legislature, requires this process,

however improvidently; thus, the State's complaint must be addressed and remedied by the legislature, not the Court. See id. at *3–4 (discussing the problematic and untenable features of Iowa Code section 622.10(4)(a) and urging the legislature to restore the Cashen protocol and having defense counsel conduct an in camera review of the records).

Moreover, even if the opinion of the Court of Appeals in the prior appeal does not preclude the State from making the argument that the records do not contain exculpatory information, the State waived that issue in this appeal. The rules concerning error preservation apply equally to the State on appeal as they do to the defendant. DeVoss, 648 N.W.2d at 63. The State accepted and agreed the records contained exculpatory information in both its filed resistance and at the hearing below on the motion for new trial. (Mot. Hr'g p.15 L.20–p.22 L.2) (The State's position is that while the records may have some minimally-exculpatory information in them . . . ."); (Resist. Mot. New Trial) (App. p. 53) ("The mental health

records in question contain only minimally exculpatory information . . . ."). The State did not argue the records did not contain exculpatory information below; it cannot now make this argument. See State v. Baldon, 829 N.W.2d 785, 789 (Iowa 2013) (citing State v. Ochoa, 792 N.W.2d 260, 291 (Iowa 2010)) ("We find the State waived the . . . argument by not presenting it to the district court . . . ."); State v. Webber, 885 N.W.2d 829, 2016 WL 4035239, at *8 (Iowa Ct. App. 2016) (unpublished table decision) (finding the State did not preserve an argument that was not made in district court).

This Court should find that when the district court conducts an in camera review and improperly denies a defendant the ability to use that evidence at trial, it should simply examine whether that "nondisclosure was harmless beyond a reasonable doubt." See Neiderbach, 837 N.W.2d at 198 n.3 (citing Ritchie, 480 U.S. at 58). Certainly one could imagine a case where there was overwhelming evidence of the defendant's guilt and the nondisclosure was harmless beyond

a reasonable doubt, making a new trial unnecessary. However, in a he-said-he-said case, in which the jury clearly discredited a portion of A.F.'s testimony (by acquitting Barrett of one count) even when Barrett did not have the benefit of the exculpatory, it cannot be said that the nondisclosure was harmless beyond a reasonable doubt. Accordingly, the district court erred in failing to grant Barrett a new trial based on the previously undisclosed evidence.

CONCLUSION

For the reasons above and in his original brief and argument, Defendant–Appellant Patrick Barrett, Jr. respectfully requests this Court reverse his conviction and remand for a new trial. Alternatively, he requests a remand for the application of the proper standard to the motion for a new trial.

ATTORNEY'S COST CERTIFICATE

The undersigned hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was $1.08, and that amount has been paid in full by the Office of the Appellate Defender.

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) because:

> [X] this brief has been prepared in a proportionally spaced typeface Bookman Old Style, font 14 point and contains ,3074 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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