IN THE COURT OF APPEALS OF IOWA

No. 22-1188
Filed March 27, 2024

STATE OF IOWA,
Plaintiff-Appellee,

vs.

LUKOUXS ALAN BROWN,
Defendant-Appellant.

Appeal from the Iowa District Court for Wright County, Gregg R. Rosenbladt, Judge.

On interlocutory appeal, a defendant appeals the reinstatement of proceedings after the district court found that he was restored to competency. **REVERSED AND REMANDED WITH DIRECTIONS.**

Martha J. Lucey, State Appellate Defender, and Melinda J. Nye, Assistant Appellate Defender, for appellant.

Brenna Bird, Attorney General, and Kyle Hanson (until withdrawal), Louis S. Sloven, and Katherine Wenman, Assistant Attorneys General, for appellee.

Heard by Tabor, P.J., and Badding and Buller, JJ.

BADDING, Judge.

Soon after he was charged with first-degree murder, Lukouxs Brown was found incompetent to stand trial and transferred to the Iowa Medical and Classification Center (IMCC) for restoration treatment. After eight months of "very aggressive" treatment, his treating psychiatrists, in consultation with a neuropsychologist, concluded that his competency could not be restored. The district court allowed the State to seek a second opinion from an outside psychologist, who concluded Brown was competent to stand trial.

Finding that psychologist's conclusions to be "clear, concise, well-founded, and on point," the court determined Brown's competency had been restored and reinstated the criminal proceedings against him. On interlocutory appeal, Brown challenges this determination and the court's decision to allow the State to obtain a second opinion. He also claims the court erred in not holding a substantive hearing within fourteen days after receiving notification that he was unrestorable. On our de novo review of the record,[1] we find that Brown's competency has not been restored. We accordingly reverse and remand for further proceedings.

[1] In *State v. Lyman*, 776 N.W.2d 865, 873 (Iowa 2010), the supreme court held that "we review a trial court's decision as to a defendant's competency to stand trial de novo and overrule any of our prior cases holding otherwise." Urging that *Lyman* should be overruled as an "outlier," and that we should return to a substantial-evidence review, the State asked the supreme court to retain this case. Brown also asked for retention, but the supreme court transferred the case to us. Because "[w]e are not at liberty to overrule controlling supreme court precedent," *State v. Beck*, 854 N.W.2d 56, 64 (Iowa Ct. App. 2014), we apply the de novo standard of review set out in *Lyman*.

I. Background Facts and Proceedings

In February 2021, Brown was charged with first-degree murder for allegedly killing his co-worker, Wayne Smith, in a locker room at the pork processing facility where they both worked. Defense counsel immediately moved for a competency hearing. *See* Iowa Code § 812.3(1) (2021). Counsel explained that Brown "exhibited an abnormal thought process, stated he had been 'hearing voices,' appeared to respond to outside stimuli that were not present in reality, and stated he had previously had an inpatient hospitalization for a schizophrenia diagnosis." The State agreed that probable cause existed to sustain the allegations. After a hearing in early March, the court suspended the proceedings and ordered Brown to undergo a psychiatric evaluation at IMCC. *See id.* § 812.3(2).

In a report filed with the court on March 22, staff psychiatrist Dr. Arnold Andersen found that, due to Brown's likely schizophrenia disorder, he "is not competent to stand trial but is a candidate for restoration treatment." After an uncontested hearing in mid-April, the court entered an order finding Brown to be incompetent, continuing suspension of the proceedings, and ordering treatment at IMCC or other appropriate treatment facility designed to restore Brown to competency. *See id.* §§ 812.5(2), .6(2).

Brown was admitted to the IMCC forensic psychiatric hospital on May 17, where he was treated by a team that included Dr. Andersen, psychiatrist Dr. Gary Keller, and a forensic social worker. The social worker helped Brown learn restoration material about the court proceedings, while Dr. Keller handled his medications, and Dr. Andersen periodically evaluated his competency.

A thirty-day report filed in mid-June by Dr. Keller confirmed Brown's schizophrenia diagnosis and disclosed the following: "So far he has struggled with the start of treatment and restorations. He has been aggressive and attempted to assault our staff on two occasions. He remains paranoid, restless, and non-verbal." In the evaluations that followed, Dr. Andersen found Brown was not yet competent to stand trial but remained a candidate for continued restoration. From August through November, he cautiously described Brown's chances of restoration as a "modest possibility," "small possibility," and "moderately good possibility." The social worker noted that Brown's progress with "learning necessary information concerning the court and the proceedings of a trial is fairly slow" but continued to regularly improve. And while Dr. Keller's reports noted some "limited progress" and "improvements in his presentation and symptoms," by December, he wrote: "we have now seemingly stalled due to the patient's impaired mental status and inability to process." Because of Brown's "considerable difficulty in incorporating new information," the treatment team at IMCC requested a neuropsychological evaluation to give them "a level at which he was functioning and highlight areas that might be focused on" to help with his learning.

Dr. John Bayless, a consulting neuropsychologist for IMCC, conducted that evaluation in early December. Brown scored as significantly impaired—"well below the 1st percentile"—across a battery of neuropsychological tests, which "indicates marked cognitive decline given his estimated premorbid abilities." Dr. Bayless diagnosed Brown with major neurocognitive disorder and concluded that his "cognitive deficits render him mentally incapable of following the progress of a trial and unable to meaningfully assist his attorney in his defense."

After reviewing this information from Dr. Bayless, and evaluating Brown again in December, Dr. Andersen found:

> Because he has shown substantial improvement since his admission through extensive pharmacological treatment and education as well as psychotherapeutic support, it is possible but far from certain that he may within a reasonable amount of time become competent to stand trial. I am in accord with Dr. Bayless'[s] report and with his concern about Mr. Brown's neuropsychological deficits.

But by January 2022, Dr. Andersen "and the other members of the treatment and evaluation team at the Forensic Psychiatric Hospital" had concluded that Brown "lacks the capability of ever being restored to competency in any reasonable amount of time, with any currently available or known treatment options." They recommended placing Brown at "a restricted 24/7 setting with attention to his receiving all of his prescribed medications of supervision of his behaviors." *See id.* § 812.9(3) (allowing the State to commence civil commitment proceedings).

This report was filed with the court on February 1. The next day, Brown was discharged from the IMCC forensic psychiatric hospital and transported to county jail. Defense counsel then requested that a hearing be held within fourteen days of the court's receipt of the report, as required by Iowa Code section 812.8(4). The State responded with a "motion for additional time to obtain an expert" to provide a second opinion on competency, which Brown resisted. A hearing was held on February 11, at which the parties largely repeated their written arguments. Ruling from the bench, the court chose "to continue the finding or decision on the competence and restorability issue for . . . a brief period of time while this second opinion . . . is completed." On March 15, after more than one month passed with no report from the State's expert, Brown moved to dismiss the case against him

"because a hearing had not been held within 14 days." The State resisted, pointing out that a hearing had been held, and its expert's report was provided to the defense the day the dismissal motion was filed. The court denied the motion and scheduled a competency hearing for May 6.

Dr. Rosanna Jones-Thurman, a clinical psychologist, testified at that hearing. She met with Brown for a psychological evaluation on February 19 that took about ninety minutes to complete. She also reviewed the reports by Drs. Andersen, Keller, and Bayless, as well as some investigative reports and evidence in the case and criminal records from Oregon where Brown used to live. After doing so, Dr. Jones-Thurman authored a report concluding that Brown was competent to stand trial. The court also heard from Drs. Andersen and Bayless, who stood by their conclusions that Brown was not competent to stand trial. Finally, the court heard from Brown's sister, who testified that since his return to county jail, "his cognitive function seemed to decline a little bit." An audio recording from one of their conversations in April was admitted into evidence. During that call, Brown returned to some of the delusions that had resolved during his treatment at IMCC, telling his sister that you "get CIA" in jail, which is "something to do with your head."

The district court filed its competency ruling in June. The court "was impressed with the methodology used by Dr. Jones-Thurman in conducting her evaluation of the defendant" and found her conclusions credible. In rejecting the contrary opinions of Drs. Andersen and Bayless, the court noted that in the IMCC reports, Brown consistently made progress until "an abrupt change with the most recent report." Because of that "abrupt change," the court concluded that IMCC

personnel simply "concluded that the clock had run out" and thus found Brown incompetent. As a result, the court found Brown to be competent to stand trial, reinstated the proceedings, and set the matter for arraignment. Brown applied for interlocutory appeal and requested a stay, which the supreme court granted.

II. Analysis

Brown raises three claims of error about (1) the ultimate conclusion that he was restored to competency, (2) the State being allowed to obtain a second opinion at this stage of the proceedings, and (3) there not being a substantive restoration hearing within fourteen days of the filing of the report concluding he could not be restored to competency. We address his last claim first, before a combined discussion on the first two.

A. Hearing

Brown claims that his statutory and constitutional due process rights were violated when the court did not hold a substantive hearing within fourteen days of the filing of Dr. Andersen's final report. Like with the constitutional competency question, we review alleged violations of due process de novo. *State v. Peterson*, 998 N.W.2d 876, 879 (Iowa Ct. App. 2023).

Section 812.8(3) provides that "upon a finding by a treating psychiatrist"[2] that there is "no substantial probability that the defendant will be restored to competency in a reasonable amount of time," the psychiatrist "or the director of the inpatient facility shall immediately notify the court. Upon receiving notification, the court shall proceed as provided in subsection 4." Iowa Code § 812.8(3). That

[2] The statute was amended effective July 1, 2023, to replace "a treating psychiatrist" with "an evaluating psychiatrist." *See* 2023 Iowa Acts ch. 140, § 13(3).

subsection in turn states: "Upon receiving a notification under this section, the court shall schedule a hearing to be held within fourteen days." *Id.* § 812.8(4).

The statute clearly imposes a duty to hold a hearing within fourteen days. But, as the State points out, one *was* held within that timeframe. Even though that hearing did not address the merits of the restoration question, we agree with the State that "nothing in section 812.8(4)'s instruction to hold a hearing within 14 days also requires the hearing to be completed and a ruling issued within that timeframe."[3] We accordingly reject Brown's assignment of error on this point.

B. Restoration of Competency

Brown next claims that "the district court erred by allowing the State to obtain a second opinion of [his] competency or potential for restoration at this stage of the proceedings." He argues the State was only entitled to a second opinion for the initial competency determination under section 812.3(2), and "this authorization does not apply to later stages of the incompetency proceedings." As a result, Brown contends we should disregard the opinion of the State's expert—Dr. Jones-Thurman. The State counters that the restoration hearing is adversarial, and the court had either express or implied authority to allow either party to obtain an independent evaluation on the restoration issue. We assume without deciding that the court could authorize the State to obtain a second opinion in the restoration phase of competency proceedings. Even with that opinion, we find upon our de

[3] Our conclusion should not be interpreted to approve of a delay in holding a substantive hearing on the restoration of a defendant's competency given the fundamental rights at stake. *See Cooper v. Oklahoma*, 517 U.S. 348, 364 (1996).

novo review of the record that the preponderance of the evidence shows Brown remained incompetent to stand trial.

Our analysis starts with the basic but fundamental principle that "the criminal trial of an incompetent defendant violates due process." *Medina v. California*, 505 U.S. 437, 453 (1992); *accord Lyman*, 776 N.W.2d at 871. In Iowa, the statutory test for competency is whether "the defendant is suffering from a mental disorder which prevents the defendant from appreciating the charge, understanding the proceedings, or assisting effectively in the defense." Iowa Code § 812.3(1). A defendant is restored to competency "upon a finding by a psychiatrist or licensed doctorate-level psychologist that there is a substantial probability that the defendant has acquired the ability" to meet each of those three prongs. *Id.* § 812.8(1). "The critical question is 'whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding—and whether he has a rational as well as factual understanding of the proceedings against him.'" *State v. Lucas*, 323 N.W.2d 228, 232–33 (Iowa 1982) (quoting *Dusky v. United States*, 362 U.S. 402, 402 (1960)).

"We presume a defendant is competent to stand trial." *In re J.K.*, 873 N.W.2d 289, 294 (Iowa Ct. App. 2015). The initial burden to overcome that presumption is on the defendant to prove by a preponderance of the evidence. *Id.* The parties agree Brown met that burden early on in these proceedings. From there, the law is not clear on which party has the burden to prove that competency has been restored or not. *See State v. Chatman*, No. 19-0856, 2020 WL 7021709, at *3 (Iowa Ct. App. Nov. 30, 2020) (indicating *State v. Snethen*, 245 N.W.2d 308, 311 (Iowa 1976) burdens the defendant with proving he is not competent at the

time of the restoration hearing, while noting the supreme court in *State v. Veal*, 930 N.W.2d 319, 338 (Iowa 2019) suggested "that it was the State's burden to prove by a preponderance of the evidence that a defendant's 'competency had been restored'"). But in the district court proceedings,[4] and at oral arguments, the State conceded it bore that burden. Regardless, what matters is that the district court's decision is supported by a preponderance of the evidence. *See* Iowa Code § 812.8(5), (6), (8) (stating the court must exercise whichever of these options it finds supported by a preponderance of the evidence).[5] Here, it was not.

Both parties try to poke holes in the opinions of each other's experts in advancing their positions. Brown contends "Dr. Jones-Thurman's evaluation of [him] does not establish his competency as neither her expertise and experience match that of Drs. Bayless and Andersen, nor was her brief interview with Brown sufficient to outweigh Dr. Andersen's eight-month inpatient relationship with Brown." The State, on the other hand, argues that "Brown is too eager to criticize Dr. Jones-Thurman's conclusions while overlooking significant shortcomings in the analysis by Drs. Andersen and Bayless. Comparisons of the doctors' credentials was not determinative, the timing of IMCC's incompetency finding was suspect, and the final incompetency finding was flawed." We disagree with each of the State's contentions and find the opinions of the treating psychiatrists at the IMCC

[4] At the beginning of the restoration hearing, the State told the district court: "I think we have to show by a preponderance of the evidence that the defendant is competent to stand trial. At this point in time he has been ruled incompetent, so it would make sense to me that we would go first and put on our evidence."

[5] A fourth option allows the court discretion to change the defendant's placement for continuing treatment if it is supported by clear and convincing evidence. Iowa Code § 812.8(7).

and the consulting neuropsychologist more convincing. *See Nicolou v. Clements*, 516 N.W.2d 905, 909 (Iowa Ct. App. 1994) (stating that while weight must be given to expert testimony, "their final conclusions are not binding on the trier of fact nor on the appellate courts"); *see also In re Long*, 313 N.W.2d 473, 482 (Iowa 1981) ("We then, as the trier de novo, are free to accept or reject [expert] opinions.").

1. Experts' credentials

Competency decisions, as here, "often hinge on a 'battle of the experts.'" *State v. Wadsworth*, No. 16-1775, 2018 WL 2230666, at *8 (Iowa Ct. App. May 16, 2018). If the experts "conduct substantially equivalent reviews of the case, it is 'within a district court's province to choose one expert's opinion over a competing qualified expert's opinion.'" *Id.* (quoting *United States v. Ghane*, 593 F.3d 775, 781 (8th Cir. 2010)). But the experts in this case did not "conduct substantially equivalent reviews of the case." *Id.*

Dr. Andersen evaluated Brown six times from March 2021 through January 2022. He consulted the multi-disciplinary team at the IMCC forensic psychiatric hospital, which included nurses, correctional officers, a social worker, and Brown's treating psychiatrist, Dr. Keller, who saw Brown several times a week. In contrast, Dr. Jones-Thurman met with Brown one time for ninety minutes. During that meeting, she administered only one psychological test—the verbal portion of the Wechsler IQ test. Conversely, Dr. Bayless administered eleven tests over the course of the three-and-a-half to four hours that he spent with Brown. Because the evaluations conducted by Drs. Andersen, Keller, and Bayless were "far more thorough and comprehensive" than Dr. Jones-Thurman's evaluation, we give them greater weight. *See Wadsworth*, 2018 WL 2230666, at *7; *accord United States*

v. Casteel, 717 F.3d 635, 642–43 (8th Cir. 2013) (finding trial court appropriately gave more credit to the expert who spent more time evaluating the defendant).

Further adding to that weight is the greater experience and credentials of Drs. Andersen, Keller, and Bayless in competency determinations as compared to Dr. Jones-Thurman. *See J.K.*, 873 N.W.2d at 297 (examining expert's credentials in determining that her competency recommendation should be rejected). Dr. Andersen is board certified in psychiatry and neurology, while Dr. Bayless is board certified in neuropsychology. Dr. Jones-Thurman is not board certified. Both Drs. Andersen and Keller are employed by the Department of Corrections at the IMCC forensic psychiatric hospital—Dr. Andersen as a forensic psychiatrist and Dr. Keller as a treating psychiatrist. Though he is not employed at IMCC, Dr. Bayless is one of their "consulting contract neuropsychologist[s]," on top of his private practice and professorship at the University of Iowa Department of Psychiatry.[6] Drs. Andersen and Keller have treated thousands of patients at an institution "entirely devoted to [the] diagnosis and treatment of mental disorders that are alleged to have some relationship to a criminal charge." Dr. Jones-Thurman, on the other hand, is a clinical psychologist, with a private practice focused on "evaluations for children, adults, forensic, Social Security disability, things like that." In the small part of her practice devoted to treatment, she did not have any current patients with schizophrenia. This difference in education and experience is more than just a superficial comparison of "the thickness of their curricula vitae," as the State argues on appeal.

[6] Dr. Andersen is also a professor at the University of Iowa Department of Psychiatry.

2. Timing of IMCC's incompetency finding

Unlike Drs. Andersen, Keller, and Bayless, who were not retained by either party and had no "skin in the game," the State paid Dr. Jones-Thurman for her evaluation and testimony. *See State v. Walter*, No. 14-1339, 2015 WL 8388296, at *9 (Iowa Ct. App. Dec. 9, 2015) ("[T]he fact that an expert is paid is proper grounds for impeachment."); *see also In re Marriage of Rosenfeld*, 524 N.W.2d 212, 215 (Iowa Ct. App. 1994) (considering expert opinions the same as other testimony, giving it the "weight we consider it deserves after considering, among other things, the expert's education, experience, familiarity with case, reasons given for the opinion, and interest, if any, in the case"). Yet the district court questioned Dr. Andersen's reasons for making "an abrupt change" in his final competency opinion, suggesting he was motivated by a desire to free up bed space at the facility. The State seizes on this part of the court's ruling, arguing "the progression of IMCC's reports weighs against accepting the abrupt change of opinion in Dr. Andersen's final determination." We reject this argument for three reasons.

First, we don't find that Dr. Andersen's opinion abruptly changed. Brown's first few months at IMCC were dominated by the positive symptoms of his schizophrenia diagnosis—delusions, paranoia, and aggressive behavior. By September 2021, those symptoms were "moderately diminished," but Brown's negative symptoms were "prominent." Those negative symptoms included Brown's flat affect, which Dr. Andersen noted was the "most striking aspect" of his mental status examination, and "periods of blankness in his mind." After a setback in October, which included stalled progress and an assault on a peer, changes

were made to Brown's care plan and treatment. With those changes, Dr. Andersen reported in November that Brown "has made considerable improvement in not only the positive symptoms of schizophrenia but also for the first time in negative symptoms," though he still had "a mild vacancy of thought." That vacancy of thought persisted in December, with Dr. Andersen reporting: "He does have a somewhat enigmatic experience of blankness in his mind that occurs several times an hour, for a limited period." Consistent with the prior reports, which contained guarded prognoses for Brown's restoration, Dr. Andersen finally concluded in January 2022 that Brown's "inattention, his periods of mental blankness, and his other 'negative' symptoms of schizophrenia would preclude his ability to follow the proceedings of a trial in a meaningful manner." *See State v. Einfeldt*, 914 N.W.2d 773, 781 (Iowa 2018) ("Competency evaluations include a 'careful assessment of the accused's ability to interact with counsel.'" (citation omitted)).

Second, while Brown's competency did improve in November and December 2021, Dr. Jones-Thurman agreed at the competency hearing "that sometimes patients can decompensate," meaning they "[e]ither go back and develop symptoms or symptoms get worse." Dr. Bayless likewise testified that schizophrenia, "and to some extent cognitive disorders—can fluctuate." *See Ghane*, 593 F.3d at 779 ("A defendant's competency is not static and may change over even a short period of time."). But Dr. Bayless said that despite testing Brown "at a time when we believed he had been aggressively treated with the best treatment that we have to optimize his psychiatric treatment," including "long-term hospitalization for months" and "reliable use of medications," "his performances

were still greatly impaired." Brown's fluctuations, and inability to retain information he had been taught, are apparent in the periodic reports from IMCC.

For instance, in August and September, Brown knew that he was charged with first-degree murder and "might face up to 'life.'" But in November, although he knew that his charge was serious, he estimated the maximum punishment "might be up to 'two years in the penitentiary.'" In some reports, Brown could identify one of his two attorneys and reported that he had talked to him by phone or video. Yet in January 2022, Brown told Andersen "that he has never spoken" to his attorney. And although he knew in December 2021 that his attorney's role was to "prove that I'm not guilty," by the next month, Brown described his attorney's role as: "To keep on good spools." Dr. Andersen reported that he questioned him:

> Q. What does the word "spool" mean, Mr. Brown? A. It's just a word I thought of. (This is an example of a neologism, a made-up word without any standard meaning.)
> Q. Could you give me some other information on the role you expect your attorney to carry out? A: Keep me in good heights.

Dr. Andersen testified Brown's use of the word "spools" and the phrase "[k]eep me in good heights" was characteristic of the "negative symptoms of schizophrenia that medications, unfortunately, are not particularly good at." He explained that based on multiple interactions with Brown, the staff at IMCC observed "that simply when he can't do something, he makes stuff up." Dr. Bayless noted the same, testifying about one of the memory tests he gave to Brown where he "not only . . . fail[ed] to remember a significant amount, he also introduced details that had not

been present in those stories. . . . So his memory was not only poor, it was inaccurate."[7]

Third, at the competency hearing, Dr. Andersen adamantly denied that bed space affected their decision, testifying, "I don't care who likes it or doesn't like it, we'll keep anybody when we have some reasonable clinical background to suggest that they would improve." He testified that "about 75 to 80 percent of the patients we receive do become competent with an average time of about 50 to 60 days with a range of 7 days to 7 to 9 months." Brown was not among those patients, according to Dr. Andersen, because despite some initial improvements, he had "stalled and stalled and stays stalled." At the competency hearing, Dr. Andersen explained: "He appeared stuck at a plateau long enough that based on thousands of patients Dr. Keller and I have treated, we could not go up on the medicine, he was having as much as he could tolerate." If freeing up a bed at the hospital had been a motivating factor in the IMCC doctors' competency decision, they could have just as easily found he was competent to stand trial.

[7] Dr. Andersen gave Brown a similar practical test in his final evaluation by having him watch a half-hour television show and then asking him what he could remember. The answer was nothing: "He was not able to attend to the content of this episode. He could not remember any of the names of the four main characters. . . . He could not remember any of the events or themes of the episode." The district court questioned Dr. Andersen's use of this test, noting it "seems to be somewhat of an informal test versus the many month[s] of interviews, testing, medication regimens, and formal interviews with the defendant." True, but it was one small piece of the overall puzzle of Brown's competency. *See, e.g.*, *Ghane*, 593 F.3d at 779 ("In assessing a defendant's competency, the district court may consider various factors, including expert medical opinions and its own observations of the defendant during the proceedings.").

3. Flaws in the final incompetency finding by IMCC

Still, the State argues that the district court was right in adopting Dr. Jones-Thurman's opinion because of "deficiencies in IMCC's process and conclusions." One of those deficiencies, according to the State, was Dr. Andersen's inference in his December 2021 evaluation that "Brown did not understand the difference between a felony and misdemeanor because he thought 'getting a DUI' was a felony." Dr. Jones-Thurman criticized this inference in her report, noting, "there is actually a felony DUI if one receives too many DUI's, and he had already [had] two DUI's in Oregon." Yet her report also noted Brown first told her that he was charged with either "manslaughter or murder first degree," before later stating that "he knows he is charged with first degree murder of a co-worker." While Brown stated that he knew "this is a serious crime," he thought "they may lower his case to a misdemeanor, and he knows that he has higher than a misdemeanor and may be a felony." Dr. Jones-Thurman nevertheless found that Brown "has a general understanding" of the "potential outcomes and consequences" of his charged crime.

We find that, and other deficiencies in Dr. Jones-Thurman's report, are more concerning than the ones from Dr. Andersen's reports that the State highlights on appeal. One example is the mental status portion of Dr. Jones-Thurman's report, where she noted Brown "was oriented to time, place and person, and in contact with reality," but then stated, "He was not able to state the day, month and year, location of the facility and identity of the examiner." At the hearing, Dr. Jones-Thurman testified that was a typo because Brown "wasn't sure of the day, month, and year," although he knew "where he was and knew who I was." Being "oriented

to time and place" seems to be one of the base requirements of competency. *See Einfeldt*, 914 N.W.2d at 781 ("[T]he 'rational understanding' required under *Dusky* means *more than being* "oriented to time and place" but includes accurate perception of reality and proper response to the world around the defendant. . . ." (emphasis added)); *see also Dusky*, 362 U.S. at 402 ("[I]t is not enough for the district judge to find that 'the defendant (is) oriented to time and place and (has) some recollection of events. . . .").

Next, Dr. Jones-Thurman testified that Brown understood "the role of a judge and a jury." But in her report, Dr. Jones-Thurman noted that Brown

> knows that the judge is supposed to remain neutral, and *blends the story and puts it back together*, and comes up with the best solution and motion of the court. He reports that he can't remember what the jury does and doesn't know exactly, but they might be like *court jesters*.

(Emphasis added.) At the hearing, she reluctantly conceded that knowing what a jury was "could be" an important part of the trial. *Cf. Cooper*, 517 U.S. at 364 (noting an incompetent defendant who lacks the ability to communicate effectively with counsel may be unable to exercise other "rights deemed essential to a fair trial," like "whether to waive his right to trial by jury" (citations omitted)).

While Dr. Andersen went through a comprehensive review of the court proceedings with Brown in each evaluation—including his understanding of his criminal charges, possible punishment, and the roles of defense counsel, prosecutor, judge, and jury—Dr. Jones-Thurman's questions were more limited:

> Q. Did you ask him about a bench trial, doctor? A. I probably did not specifically ask him about a bench trial.
>
> Q. Did you ask him to compare and contrast these two proceedings? A. No, I did not.
>
> . . . .

> Q. Okay. Did you go over the question of defenses or choice of defenses, what defenses a person might choose from as far as if they were charged with that crime? A. I don't know if I specifically went over if he had talked to his attorney about that, no.

See United States v. Brown, 669 F.3d 10, 17 (1st Cir. 2012) (holding the "understanding" required by *Dusky* is "of the essentials—for example, the charges, basic procedure, possible defenses—but not of legal sophistication").

These deficiencies, coupled with the greater weight we believe should be assigned to the combined opinions of the experts at the IMCC and their consulting neuropsychologist, convince us on our de novo review of the record that the district court erred in determining that Brown was competent to stand trial. But where does that leave us?

4. Restoration options

Once a defendant has been found incompetent to stand trial after restoration treatment, the court may choose to either continue or terminate the defendant's treatment. Iowa Code sections 812.8(6) and (8) lay out those options:

> 6. If the court finds by a preponderance of the evidence that the defendant remains incompetent to stand trial but is making progress in regaining competency, the court shall continue the placement ordered pursuant to section 812.6.
>
> . . . .
>
> 8. If the court finds by a preponderance of the evidence that there is no substantial probability the defendant's competency will be restored in a reasonable amount of time, the court shall terminate the commitment under section 812.6 in accordance with the provisions of section 812.9.

Brown argues that we should choose the latter option, which is what Dr. Andersen recommended in his final report:

> This evaluator and the other members of the treatment and evaluation team at the Forensic Psychiatric Hospital agree that Mr. Brown lacks the capability of ever being restored to competency in

> any reasonable amount of time, with any currently available or known treatment options. His strongest area of knowledge appears to be his partial appreciation of the charge he faces, but even in that area he shows weakness, and was not able to incorporate new information about the areas he lacked, such as the meaning of "first degree" regarding the murder charge. He is not able to effectively assist his defense attorney in building a defense in even a modest or minimal manner. He does not have a rational or factual understanding of the key personnel in court during trial.

But Dr. Andersen's prognosis for Brown was not so pessimistic at the competency hearing, where he did not meaningfully dispute that Brown appreciated the charge and could assist defense counsel "to a limited extent but not to an extensive degree." His opinion seemed to be a matter of degree: "In terms of being able to participate in joint decision making, that depends, and his mind does change somewhat from time to time. I think the more demanding and precise definition of effectively assisting, the less he would meet that criteria."[8]

With this equivocation, we find the preponderance of the evidence shows that Brown remains incompetent to stand trial but is making progress in regaining competency. *See* Iowa Code § 812.8(6). The parties agreed at oral argument that under section 812.9(1), Brown would have ten months left for restoration treatment. We accordingly reverse the district court's decision and remand for the entry of an order suspending the criminal proceedings indefinitely and placing Brown back in the custody of IMCC for continued restoration treatment under section 812.6.

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[8] The State argues that Dr. Andersen's "waffling explanations" show that he "applied too high of a standard." But we think his testimony reflected the difficulty of the decision. *See, e.g.*, *Drope v. Missouri*, 420 U.S. 162, 176 (1975) (recognizing "the uncertainty of diagnosis in this field and the tentativeness of professional judgment" (citation omitted)).

REVERSED AND REMANDED WITH DIRECTIONS.

Tabor, P.J., concurs; Buller, J., concurring specially.

BULLER, Judge (concurring specially).

As the majority indicates in its first footnote, the State asked the supreme court to retain this interlocutory appeal to "correct the standard of review in competency cases." Other appellate courts have noted Iowa's status as an outlier—standing alone—in reviewing competency findings de novo, re-weighing the facts rather than engaging in a deferential review. *See State v. O'Neill*, 945 N.W.2d 71, 82 (Minn. Ct. App. 2020) ("Except for Iowa, . . . we have found no jurisdiction applying a de novo, fact-reweighing approach on appellate review." (citing *State v. Lyman*, 776 N.W.2d 865, 871 (Iowa 2010))). Yet as an intermediate appellate court, this court cannot overrule supreme court precedent. *See State v. Beck*, 854 N.W.2d 56, 64 (Iowa Ct. App. 2014). Under existing case law, the majority correctly employs de novo review, and I concur in the judgment on that basis. *See Lyman*, 776 N.W.2d at 873; *see also State v. Einfeldt*, 914 N.W.2d 773, 778 (Iowa 2018). But if the standard of review required deference—rather than compelling me to independently re-weigh the evidence with a cold record—I would have affirmed.

This case turns on a classic battle of the experts: some experts believed Brown was incompetent and couldn't be restored, while another expert testified he had been restored to competency despite some fairly significant deficits. The district court presided over live testimony and, in its ruling, wrote that it was "impressed with the methodology used by Dr. Jones-Thurman" (the State's expert) and "gives credibility to her findings and conclusions." If my review were for substantial evidence and correction of errors at law, I would be bound by this credibility finding and be forbidden from second-guessing the district court's

decision about which evidence to credit. *See, e.g.*, *State v. Jacobs*, 607 N.W.2d 679, 685 (Iowa 2000).

In its review, the majority makes some judgments about the evidence I do not join fully—including criticism of Dr. Jones-Thurman's credentials, discounting the odd timing of changing opinions at IMCC, and assigning less weight to Dr. Jones-Thurman's opinion because she was a paid expert. But the majority also points out—fairly—that there are significant conflicts between Dr. Jones-Thurman's trial testimony, her report, and other evidence. Those conflicts all go unanswered on this record. Perhaps the district court knew of these discrepancies and still found Dr. Jones-Thurman's testimony more credible than the contrary experts; perhaps not. The ruling does not explicitly say. And under de novo review, I am required to "make an independent evaluation [based on] the totality of the circumstances as shown by the entire record," without deference. *See State v. Krogmann*, 804 N.W.2d 518, 522 (Iowa 2011) (alterations in original).

While I cannot entertain the State's request to revisit the standard of review, I share its concerns about *Lyman*, including that its standard of review is apparently an aberration among all other jurisdictions. The State correctly observes competency cases frequently boil down to a battle of the experts. And, "[w]hen a case evolves into a battle of experts, we, as the reviewing court [for sufficiency of the evidence], readily defer to the district court's judgment as it is in a better position to weigh the credibility of the witnesses." *Jacobs*, 607 N.W.2d at 685 (citation omitted). But such deference is forbidden when it comes to competency.

While mindful of the "customary reluctance to overturn precedent," stare decisis is not an inexorable command. *Youngblut v. Youngblut*, 945 N.W.2d 25, 39

(Iowa 2020). Precedent should be revisited when it is "erroneous and leads to undesirable results." *Id.* The supreme court may wish to revisit *Lyman*—otherwise we will remain compelled to re-weigh the evidence when reviewing competency challenges de novo.