

IN THE SUPREME COURT OF IOWA

STATE OF IOWA,)
)
 Plaintiff-Appellee,)
)
 v.) S.CT. NO. 17-1697
)
 DALE ROBERT TOURNIER,)
)
 Defendant-Appellant.)

APPEAL FROM THE IOWA DISTRICT COURT
FOR BREMER COUNTY
HONORABLE CHRIS FOY, JUDGE

APPELLANT'S REPLY BRIEF AND ARGUMENT

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CERTIFICATE OF SERVICE

On April 26, 2018, 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 Dale Tournier, No. 0037513, Clarinda Correctional Facility, 2000 North 16th Street, Clarinda, IA 51632.

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TABLE OF AUTHORITIES

No authorities were cited in this reply brief.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. DID THE COURT ABUSE ITS DISCRETION WHEN IT FAILED TO GRANT TOURNIER A NEW TRIAL BECAUSE THE WEIGHT OF THE EVIDENCE WAS CONTRARY TO THE VERDICT?

No authorities were cited in this reply brief.

II. DID THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT SUMMARILY DENIED THE DEFENSE REQUEST TO SET ASIDE THE JUDGMENT AND TAKE ADDITIONAL TESTIMONY PURSUANT TO IOWA RULE OF CRIMINAL PROCEDURE 2.24(2)(c)?

This issue is not addressed in this reply brief.

III. DID THE DISTRICT COURT ERR IN ASSESSING FINANCIAL OBLIGATIONS TO TOURNIER FOR UNKNOWN AMOUNTS OF RESTITUTION, INCLUDING JAIL FEES PURSUANT TO IOWA CODE SECTION 356.7, WITHOUT FIRST OBTAINING A REQUEST FOR REIMBURSEMENT FROM THE JAIL?

This issue is not addressed in this reply brief.

STATEMENT OF THE CASE

COMES NOW the Defendant-Appellant, pursuant to Iowa R. App. P. 6.903(4), and hereby submits the following argument in reply to the State's proof brief filed on or about April 11, 2018. While the defendant's brief adequately addresses the issues presented for review, a short reply is necessary to address certain factual inaccuracies raised by the State.

Facts: The Defendant disagrees with the following facts asserted by the State.

In discussing the timeline for the evening, and when Tournier was present at his house, the State claims that Tournier returned *after* Jason Tournier and Ryan Cosby spoke with the police at the Kampman house. See State's brief p. 12-13. The Defendant acknowledges that on direct examination, Mr. Cosby testified that it was *after* they talked to the police that Tournier returned to his house (Trial Tr. p. 174 L7-11). Mr. Cosby described this later interaction with Tournier as having occurred because Tournier forgot his cell

phone charger. (Trial Tr. p. 177 L6-19). However, on cross-examination, defense counsel clarified the timeline of events:

Q: You mentioned earlier that the last - - you saw Dale packing up; is that correct?

A: He was getting ready to leave.

Q: What was he packing up?

A: That he was just getting ready to leave. That's what he said.

Q: Do you know what Dale does for a living?

A: No, not now. No. At the time, yeah.

Q: Okay. At that time did you know what Dale did for a living?

A: Yeah. He was a semi driver.

Q: Worked for Gray's

A: Just a semi driver. I don't know the specifics.

Q: And how long was Dale gone that you recall?

A: Which time?

Q: Well, when he was packing up and he leaves and then he comes back to the garage.

A: There was probably hour I suppose, hour and a half window.

Q: Okay. So what time is it getting now?

A: Oh, it was probably - That - He left. So six. Or 7:30. So it was probably about 7:30, eight o'clock.

Q: Okay. Are their [sic] police cars still there?

A: No. There was no car - no cops while he was there.

Q: Okay. Did the cops already come to the Kampmans' house before seven o'clock at night?

A: No. It wasn't before seven.

Q: What time would you estimate it to be?

A: Nine o'clock.

Q: All right. And when you see Dale for the last time in the garage, he tells you he's picking up his phone charger; is that correct?

A: Yeah. That he forgot it.

(Trial Tr. p. 181 L14-p. 182 L24).

In discussing Tournier's interactions with Captain Leonard, the State asserts that Tournier "described a *separate* episode in the swimming pool." See State's brief p.16 (emphasis in original). The State cites to State Exhibit D, pbx #2, at 5:24-6:45. While it is accurate that a discussion occurred related to the swimming pool, during the conversation Tournier indicated that he did not know anything about anything occurring in the pool, not admitted that a different incident occurred:

TOURNIER: I don't know where the hell you're- they're coming up with the trampoline and, uh, swimming pool because, um, I've been in that swimming pool twice since he put it up. And, the first time I was in it, I was in it with Gary and his wife, and his daughters-two daughters, and Zoey, and my daughter, and Jason.

LEONARD: Ok. Well...I'm sorry. I mean, I just... I don't, I don't, understand. I mean that's not what we talked about the other day when we talked about the swimming pool.

TOURNIER: What's that?

LEONARD: Umm...The swimming pool and stuff. You and I never talked about that the other day

when you were talking to me on the phone. I mean
--

TOURNIER: No. No, my mother-in-law—

LEONARD: yeah?

TOURNIER: was um said that you asked where the swimming pool and the trampoline were.

LEONARD: Yeah. No, I asked that yesterday. I asked where the swimming pool was because that was what they-- didn't-- they swam yesterday...they swam that day before while they were playing, right?

TOURNIER: Right, yeah.

LEONARD: Yeah, no. That was the only reason why I was asking. I didn't know if it was in your backyard or their backyard.

See State's Exhibit D, pbx #2, at 5:46-6:45.

ARGUMENT

I. DID THE COURT ABUSE ITS DISCRETION WHEN IT FAILED TO GRANT TOURNIER A NEW TRIAL BECAUSE THE WEIGHT OF THE EVIDENCE WAS CONTRARY TO THE VERDICT?

In the State's argument about the events that allegedly occurred on the day in question, specifically whether anyone saw Tournier on the trampoline with Z.K., the State asserts

that “just because those other witnesses did not see Tournier on the trampoline, that could not invalidate Gary’s testimony that he *did* observe that.” See State’s brief p.25 (emphasis in original). The transcript references cited by the State indicate that neither Theresa nor Gary witnessed Tournier on the trampoline on July 4, 2016, with Z.K. And, conveniently, Gary’s testimony about seeing Tournier on the trampoline with Z.K. the night in question changed when he was asked the direct question of whether or not he saw physical contact.

Q: And do you recall any times when you saw Dale Tournier on the trampoline with your granddaughter [Z.K.]?

A (Theresa): When he was jumping with [K.T.] and [Z.K.], yes, once.

Q: **Okay. Was that on the fourth of July?**

A: **I do not know.**

(Trial Tr. p. 83 L25-p. 84 L4)(emphasis added).

Q: And on this evening did you ever have occasion to see [Z.K.] on the trampoline with – with Dale?

A (Gary): Yes

Q: Okay. Who else did you see on the trampoline?

A: He had his kids on there with him.

Q: And that would be [K.T.] and [K.T.]?

A: Yes.

Q: Can you see what’s occurring on the trampoline?

A: Yes.

Q: Okay. And did you see any physical contact?

A: **We were not watching that night.**

Q: Okay. But you were there. Were you sitting in a lawn chair out in your front yard?

A: We were not – We were in the house.

(Trial Tr. p. 105 L4-24)(emphasis added). There is absolutely no testimony that Tournier was on the trampoline on July 4, 2016, with Z.K. and K.T.

CONCLUSION

For the reasons argued in this reply brief and in Defendant-Appellant's opening brief, Tournier respectfully requests this Court find that the verdict was not supported by the evidence, vacate his conviction, and remand for a new trial. Alternatively, Tournier requests that this Court find that the district court abused its discretion when it failed to vacate the judgment and take additional testimony under Rule 2.24(2)(c), and vacate the judgment and remand the case with the instruction that the district court take additional testimony pursuant to Rule 2.24(2)(c). At the very least,

Tournier requests this Court remand the case for a new sentencing hearing.

ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was \$1.30, and that amount has been paid in full by the Office of the Appellate Defender.

MARK C. SMITH

State Appellate Defender

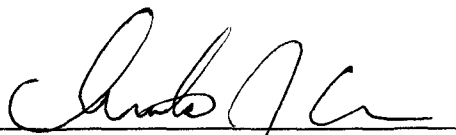
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**CERTIFICATE OF COMPLIANCE WITH TYPEFACE
REQUIREMENTS AND TYPE-VOLUME LIMITATION FOR
BRIEFS**

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 1,155 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).



Dated: 26 April 2018

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