IN THE SUPREME COURT OF IOWA

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

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

APPELLANT'S APPLICATION FOR FURTHER REVIEW OF THE DECISION OF THE IOWA COURT OF APPEALS FILED DECEMBER 19, 2018

MARK C. SMITH
State Appellate Defender

BRENDA J. GOHR
Assistant Appellate Defender
bgohr@spd.state.ia.us
appellatedefender@spd.state.ia.us

STATE APPELLATE DEFENDER
Fourth Floor Lucas Building
Des Moines, Iowa 50319
(515) 281-8841 / (515) 281-7281 FAX
ATTORNEYS FOR DEFENDANT-APPELLANT

CERTIFICATE OF SERVICE

On January 7, 2019 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.

STATE APPELLATE DEFENDER

/s/ Mark C. Smith
MARK C. SMITH
State Appellate Defender
Appellate Defender Office
Lucas Bldg., 4th Floor
321 E. 12th Street
Des Moines, IA 50319
(515) 281-8841
msmith@spd.state.ia.us
appellatedefender@spd.state.ia.us

BJG/3/18
BJG/sm/4/18

QUESTION PRESENTED FOR REVIEW

DID THE IOWA COURT OF APPEALS ERR WHEN IT DECLINED TO CONSIDER TOURNIER'S ARGUMENT THAT A DIFFERENT STANDARD OF REVIEW SHOULD BE APPLIED WHEN COUNSEL REQUEST THAT THE COURT PERMIT ADDITIONAL TESTIMONY AND SET ASIDE ITS FINDINGS OF FACT AND CONCLUSIONS OF LAW PURSUANT TO IOWA RULE OF CRIMINAL PROCEDURE 2.24(2)(c)?

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STATEMENT IN SUPPORT OF FURTHER REVIEW

Further review should be granted by the Iowa Supreme Court because the issues raised involve a substantial issue of first impression in Iowa. Iowa R. App. P. 6.903(2)(d) and 6.1101(2)(c). On appeal, Tournier requested the Court determine that the appropriate application for the scope of Iowa Rule of Criminal Procedure 2.24(2)(c) requires more than just applying the standard for a motion for a new trial filed under Rule 2.24(2)(b) by looking at "exceptional circumstances" and whether vacating the judgment and taking additional testimony is in the "interests of justice."

Rather than addressing the issue, the Iowa Court of Appeals merely applied the "newly discovered evidence" standard for a regular motion for a new trial and found it "unnecessary to address Tournier's argument concerning the standard to be applied under rule 2.24(2)(c)." (Court of Appeals decision, page 4 of 7, 12/19/18).

STATEMENT OF THE CASE

Nature of the Case:

Dale Tournier seeks further review of an Iowa Court of Appeals decision affirming his conviction and sentence for Sexual Abuse in the Second Degree, a Class B felony, in violation of Iowa Code sections 709.1 and 709.3(b).

Course of Proceedings in the Trial Court:

On August 22, 2016, Tournier was charged with two counts of Sexual Abuse in the Second Degree, a Class B felony, in violation of Iowa Code sections 709.1 and 709.3(b). (Trial Information) (App. pp. 6-7).

Following a bench trial, the court found him guilty on one count; not guilty on the other. (Hearing Tr. p. 4 L12-21; Verdict and Order) (App. pp. 13-16).

The trial court denied the defense motion for a new trial and/or to vacate the judgment and take additional testimony pursuant to Iowa Rule for Criminal Procedure 2.24(2)(c). (Sent. Tr. p. 13 L20-23).

Tournier was sentenced to an indeterminate term of 25-years' confinement with a 70% mandatory minimum.

A timely notice of Appeal was filed. (Notice of Appeal) (App. p. 23).

Course of Proceedings in Appellate Court:

On appeal Tournier raised three issues: (1) The trial court abused its discretion in not granting him a new trial; (2) The trial court erred in failing to set aside the verdict and reopen the record for additional testimony; and (3) The trial court erred in assessing an uncertain amount of jail fees.

On December 19, 2018, the Iowa Court of Appeals set aside the assessment of jail fees and affirmed the denial of the motion for new trial and the request to present additional evidence. (Court of Appeals decision, 12/19/18).

Facts:

Following the bench trial, the court found that Tournier, an adult, knowingly and intentionally made contact between his finger or hand and the genitalia of Z.K, a twelve-year old, and that the contact was skin to skin, not inadvertent or

accidental, and was sexual in nature. (Hearing Tr. p. 3 L20-p. 4 L11; Verdict and Order) (App. pp. 13-16).

Other relevant facts will as necessary for the argument.

ARGUMENT

DID THE IOWA COURT OF APPEALS ERR WHEN IT DECLINED TO CONSIDER TOURNIER'S ARGUMENT THAT A DIFFERENT STANDARD OF REVIEW SHOULD BE APPLIED WHEN COUNSEL REQUEST THAT THE COURT PERMIT ADDITIONAL TESTIMONY AND SET ASIDE ITS FINDINGS OF FACT AND CONCLUSIONS OF LAW PURSUANT TO IOWA RULE OF CRIMINAL PROCEDURE 2.24(2)(c)?

The appellate courts review the district court's interpretation of the criminal rules of procedure for errors at law. State v. Folkerts, 703 N.W.2d 761, 763 (Iowa 2005); Iowa R. App. P. 6.907.

The standard of review for a motion for a new trial is an abuse of discretion. State v. Carter, 158 N.W.2d 651 (Iowa 1968). To find the district court abused its discretion, the defendant must show that the district court's decision was exercised on grounds or for reasons clearly untenable or to an

extent clearly unreasonable. State v. Blum, 560 N.W.2d 7, 9 (Iowa 1997).

Iowa Rule of Criminal Procedure 2.24(2)(c) allows the court the discretion to determine when it is appropriate to vacate a judgment and take additional testimony. The rule provides:

> On a motion for a new trial in an action tried without a jury, the court may where appropriate, in lieu of granting a new trial, vacate the judgment if entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and enter judgment accordingly.

Iowa R. Crim. P. 2.24(2)(c) (2017).

In arguing for the trial court to permit additional testimony and set aside the verdict, trial counsel indicated that he would call an additional nine witnesses to provide testimony to the Court "who were present during all of this." (Sent. Tr. p. 7 L10).

Counsel stated that he would call K.T., the eyewitness who was with Z.K. during all the time frames related to the

allegations, along with two more minors (W.T and K.T.), Shawn Tournier, Amanda Jenison, and others. (Sent. Tr. p. 7 L6-10).

The state argued that the evidence defense counsel wanted to present to the court was all discoverable at the time of trial. The State went on to argue that "[t]here's really no newly discovered evidence here and that's really what we're talking about when we talk about opening up the cases is – is for, um, the purposes of allowing the Court to receive a newly discovered evidence. There's nothing new here to discover." (Sent. Tr. p. 9 L17-21).

While the state is correct in that all the proposed witnesses by the defense were available to testify at trial, the newly discovered evidence standard is inappropriate to apply under Rule 2.24(2)(c) when the grounds for the motion for a new trial was not newly discovered evidence under Rule 2.24

Trial counsel was not asking for a "do-over" with newly discovered evidence, but sought a finding of *exceptional circumstances* that would require the court to vacate the judgment and take the additional testimony.

This case is replete with exceptional circumstances.

At the time defense counsel tried the case, counsel could not anticipate that the court could or would divide the allegations since the allegations were so intertwined. Depending on which version of her story is believed, Z.K. alleged that the touching and licking occurred either on the trampoline or in K.T.'s bedroom or both.

The findings of fact make it clear that the court was not focused on when or where the alleged touching occurred, given the general nature of the findings: "The sexual contact between Defendant and Z.K. described above took place in or near the residence of Defendant." (Verdict and Order) (App. pp. 13-16). While the findings of fact do specify that the Court found the allegations to have occurred on July 4, 2016, the evidence presented at trial does not support such a finding related to the allegation on the trampoline. (Verdict and Order) (App. pp. 13-16).

The court was unwilling or unable to determine exactly where and when the alleged touching occurred.

In planning his defense of Tournier, trial counsel could not have contemplated that the court would "split the baby" when it came to a verdict, because the evidence does not support a finding of guilt for one charge but not the other.

The findings of fact presented by the court do not explain why the court found Z.K. credible regarding the touching allegation and not credible regarding the licking allegation.

The circumstances are more exceptional because the court apparently considered evidence outside the record when it reached its conclusions.

When considering potential testimony from K.T., the eyewitness to the allegations, the Court stated: "The Court's not satisfied that the people that were present, and I guess specifically [K.T.], um, that [K.T.] would have necessarily been old enough to really understand or, um, alert others, um, to what she was observing." (Sent. Tr. p. 12 L19-22).

The Court was not presented with any evidence that K.T. would be unable to comprehend what was going on, if she saw anything happen between Tournier and Z.K. Furthermore,

evidence was presented by police testimony that children as young as two years old have provided actionable information during interviews. (Trial Tr. p. 241 L24-p. 242 L7).

The court's statement that K.T. would be too young to understand indicates that the court does not believe that young children can make credible sex abuse allegations or be competent witnesses. This is in direct contradiction with Iowa Code and case law. See Iowa R. Crim. P. 5.601 (2017) ("Every person is competent to be a witness unless a statute or rule provides otherwise."); State v. Dodson, 452 N.W.2d 610 (Iowa Ct. App. 1989) (Five-year-old sexual abuse victim was found to be competent when she told the court that to tell the truth meant not to lie and she would tell the truth.); State v. Brotherton, 384 N.W.2d 375 (Iowa 1986) (Four-year-old was competent to testify about sexual abuse where she promised to tell the truth, had remarkable independent recollection of tangible details of the sexual abuse incident, and remembered details about the night in question.)

Allowing the testimony of K.T. to, at the very least, determine if she did witness anything and could recall it, before making a competency and credibility determination about her proposed testimony, would be a very justifiable reason to reopen the record.

Furthermore, the explanation given by the court during the motion hearing did not clarify this point.

If anything, it further muddied the waters when it stated "In the Court's opinion, its experience, that, um, a – a child, [Z.K.], that age does not, um – does not initiate that kind of conversation unless, um, it's something they've actually experienced." (Sent. Tr. p. 10 L21-24).

The court claimed that children do not make up these types of allegations; however, that statement is completely at odds with the court's verdict, acquitting Tournier of Count II- the allegation of oral sexual abuse.

Trial counsel was not asking for a "do-over" but asking for a finding of *exceptional circumstances* that would require

the court to vacate the judgment and take the additional testimony.

Neither the trial court, nor the court of appeals addressed whether "exceptional circumstances" were present in the case or whether that standard was appropriate to resolve the issue.

Without addressing what standard it applied, the trial court denied the defense counsel's request for reopening the case under Rule 2.24(2)(c) stating "I don't believe that there's any purpose that would be served by, um, reopening the record or allowing additional testimony." (Sent. Tr. p. 13 L21-23).

The Court of Appeals found it "unnecessary to address Tournier's argument concerning the standard to be applied under rule 2.24(2)(c)."

The Iowa Supreme Court should determine that the standard is a showing of "*exceptional circumstances.*"

The scope of the application of Rule 2.24(2)(c) is an issue of first impression in Iowa and as such it is beneficial to look

at other jurisdictions to see if and how they have handled similar matters.

The Federal Rules of Criminal Procedure, Rule 33, is similar to the Iowa rule, stating: "Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires. If the case was tried without a jury, the court may take additional testimony and enter a new judgment." See Fed. R. Crim. P. 33(a) (emphasis added).

Other states have adopted the federal rule or similar versions of the federal rule. See, District of Columbia Super. Ct. Crim. R. 33(a) (verbatim to federal rule); Rhode Island Super. R. Crim. P. 33 ("If trial was by the court without a jury, the court on motion of a defendant for a new trial may vacate the judgment, take additional testimony, and direct the entry of a new judgment."); N.J. Ct. R. 3:20-1 ("If trial was by the judge without a jury, the judge may, on defendant's motion for a new trial, vacate the judgment if entered, take additional testimony and direct the entry of a new judgment."); Wyo. R.

Crim. P. 33 ("If trial was by the court without a jury, the court, on motion of a defendant for a new trial, may vacate the judgment if entered, take additional testimony, and direct the entry of a new judgment."). The Michigan rule is modeled after the Uniform Rules of Criminal Procedure of 1987, which are modeled after the federal rule, and add a requirement that the defendant consent to the vacation of the judgment and taking additional testimony. See, MI R. RCRP MCR 6.431(C) ("If the court tried the case without a jury, it may, on granting a new trial and with the defendant's consent, vacate any judgment it has entered, take additional testimony, amend its findings of fact and conclusions of law, and order the entry of a new judgment.") (emphasis added); see also Unif. Rules. Crim. Procedure 1987, Rule 552.

The majority of these jurisdictions treat a motion for a new trial based on newly discovered evidence differently than other grounds for a new trial. See District of Columbia Super. Ct. Crim. R. 33(b); Rhode Island Super. R. Crim. P. 33; Wyo. R. Crim. P. 33; Fed. R. Crim. P. 33(b).

In a recent case, Green v. United States, 164 A.3d 86 (D.C. 2017), the D.C. Court of Appeals discussed when it is appropriate for a judgment to be vacated based on the "interest of justice" standard. In reaching its decision that the defendant was not entitled to relief, the Court reviewed the historical cases that addressed what was considered in the "interests of justice." Green v. United States, 164 A.3d 86, 93-94 (D.C. 2017).

In Benton v. United States, 188 F.2d 625, 627 (D.C. Cir. 1951), the court found "exceptional circumstances" where the mother of the child victim provided an affidavit after the trial that called into question the child's testimony, and the testimony was the crux of the case.

In Brodie v. United States, the situation involved a case of misidentification. The motion was filed as newly discovered evidence, but the standard that should have been applied was the interests of justice standard. The Court found that while the standard for newly discovered evidence is stricter than the interest of justice, a factor to be considered under the interest

of justice standard is the due diligence of the defense. Brodie v. United States, 295 F.2d 157, 159-160 (D.C. Cir. 1961)

In Lyons v. United States, the Court found that a hearing should be conducted to determine if the defendant was denied a fair trial because he had been threatened prior to trial. Lyons v. United States, 833 A.2d 481, 488-89 (D.C. 2003).

Finally, Green analyzed Huggins v. United States, finding that where the defendant had access to evidence to impeach a critical witness at the time of trial, and opted not to, it did not qualify as an exceptional circumstance because counsel did not exercise due diligence. Huggins v. United States, 333 A.2d 385, 387 (D.C. 1975).

The Green Court held that Rule 33(a) is not a "do-over" rule, giving the defense an opportunity to present a better defense after having a negative judgment issued against it. The Court further concluded that a new trial under the "interests of justice" will only be justified only if "'exceptional circumstances' prevented the defendant from receiving a fair trial." Green v. United States, 164 A.3d 86, 93-94 (D.C. 2017).

The Court concluded:

> Appellant has completely failed to meet that standard. This record is not comparable to the unique situation presented in Benton. There was no question of misidentification. No codefendant intimidated appellant or prevented him from presenting a full defense. The evidence he submitted after trial was equally available prior to trial. In short, nothing interfered with appellant's ability to present his defense. Indeed, he won acquittals or partial acquittals on many of the charges against him.

Green v. United States, 164 A.3d 86, 93-94 (D.C. 2017).

Rhode Island utilizes a different standard than D.C. The standard of review on appeal to be applied in a bench trial motion for a new trial is:

> [T]he same as would be applied to the trial justice's factual findings on the merits. Such determinations are entitled to great weight and will not be disturbed unless the trial justice has overlooked or misconceived relevant and material evidence or was otherwise clearly wrong.

State v. Duffy, 705 A.2d 992, 993 (R.I. 1997) (citations omitted).

The Rhode Island Supreme Court has further explained the standard to be applied by the trial court:

> weigh and evaluate the evidence, pass upon the credibility of the trial witnesses, and engage in the inferential process, impartially, not being required to view the inferences in favor of the nonmoving party, and against the moving party. After so doing, if the trial justice *** concludes that the trial evidence is sufficient to establish guilt beyond a reasonable doubt, he or she denies the defendant's motion to dismiss and, if both sides have rested, enters decision and judgment of conviction thereon. If the evidence is not so sufficient, he or she grants the motion and dismissed the case.

State v. Forand, 958 A.2d 134, 141 (R.I. 2008) (citations omitted).

The Rhode Island Supreme Court has indicated that in order to be granted a new trial under Rule 33, unless the defendant also asserts an offer of newly discovered evidence, "he must overcome a high hurdle in demonstrating that the trial justice abused her discretion when she denied his motion." State v. Medeiros, 996 A.2d 115, 123 (R.I. 2010); see also State v. Erminelli, 991 A.2d 1064, 1070 (R.I. 2010). It is unclear whether the Rhode Island Supreme Court means newly discovered evidence within the meaning of Rule 33, or if there is a separate standard for evidence not provided at trial

but not technically within the "newly discovered evidence" standard, such as the exceptional circumstances standard applied in D.C.

Iowa Rule of Criminal Procedure 2.24(2)(c) is different than the federal rule and the identical District of Columbia rule analyzed in Green.

The Iowa Rules of Criminal Procedure establish more specific grounds for a motion for a new trial. Compare, Iowa R. Crim. P. 2.24(2)(b) (2017); Fed. R. Crim. P. 33; and District of Columbia Super. Ct. Crim. R. 33. Under the Federal Rule the "interest of justice" standard is the standard applied to determine if a new trial should be granted in all cases other than newly discovered evidence.

The standard applied in Rhode Island is more akin to Iowa's in that Rhode Island applies a standard that is a blend of the sufficiency of the evidence and verdict against the weight of the evidence in Iowa. The Rhode Island standard is couched in a sufficiency of the evidence label but does not require the trial judge to view the evidence in the light most

favorable to the State, like is required in Iowa. Cf. State v. Forand, 958 A.2d at 141; State v. Robinson, 288 N.W.2d 782,787 (Iowa 1992).

In Iowa, the grounds on which a defendant may move for a new trial in a bench trial is limited to those found in Rule 2.24(2)(b), subsections (1), (6), (8), and (9). The remaining subsections specifically reference matters related to a jury. See Iowa R. Crim. P. 2.24(2)(b) (2017). Of those four subsections, subsection (6) and subsection (8) have their own standards to be applied by the trial court upon a motion for a new trial. Subsection (6) addresses when the verdict is contrary to law or evidence, and subsection (8) is for newly discovered evidence.

Subsection (9) is most akin to the Federal "interests of justice" rule, allowing for any other claim that the trial was not fair and impartial.

When analyzing Rule 2.24(2)(c), a separate standard other than that under 2.24(2)(b) should apply when the court

is considering taking additional testimony because of the nature of a bench trial.

The difference between a motion for a new trial in a jury trial and a motion for a new trial in a bench trial is the position of the judge. On a motion for a new trial for a jury trial, the judge sits as the thirteenth juror "determin[ing] whether a fair trial requires that the [claim presented in the motion for a new trial] be made available to the jury." Green v. United States, 164 A.3d 86, 92 (D.C. 2017).

A motion for a new trial for a bench trial requires the judge to reevaluate his or her own evaluation of the evidence and conclusions. Human nature dictates that it is difficult for a person to question his/her own judgment and decision making process.

If this Court determines that the standard under Rule 2.24(2)(c) should be the same as under Rule 2.24(2)(b), the district court will rarely, if ever, find it necessary to vacate the judgment and take additional testimony, without an additional motion for a new trial due to newly discovered evidence,

because it is unlikely that the Court will ever find that any additional evidence (not newly discovered evidence) will change the outcome of the case. See State v. Mujkanovic, No. 10-0768, 2011 WL 441358, at *5 (Iowa Ct. App. Feb. 9, 2011) ("Senahid also challenges the district court's denial of his motion for a new trial because the verdict was contrary to the weight of the evidence. Based on the evidence in the record already discussed, we find the district court did not abuse its discretion in denying the motion for a new trial."). The cases in Rhode Island are a good example of this.

However, if it were the intent of the rule were to apply the same standard to both, why create a rule separate from that of Rule 2.24(2)(b)? See State v. Adams, 810 N.W.2d 365, 370 (Iowa 2012) ("In construing statutes, we assume the legislature is familiar with the existing state of the law when it enacts new legislation."). Rule 2.24(2)(c) does not state on its face that the evidence to be considered by the Court be "new evidence" or "newly discovered evidence." Iowa R. Crim. P. 2.24(2)(c) (2017). The rule states that the Court can take "additional

testimony." The standard applied to "newly discovered evidence" is strict and requires the evidence to not be discoverable prior to trial with due diligence.

However, as the D.C. Courts have found, there are other *exceptional circumstances* that can result in the necessity of taking "additional testimony" that is not "newly discovered evidence", Green v. United States, 164 A.3d 86, 93 (D.C. 2017).

This Court should adopt a standard similar to the "exceptional circumstances" standard utilized in D.C. when analyzing a motion raised pursuant to Rule 2.24(2)(c).

Pursuant to a showing of exceptional circumstances, the district court should vacate the judgment, take additional testimony, and issue amended findings and conclusions or new findings and conclusions.

In this case, counsel filed an appropriate motion for a new trial when the verdict is contrary to the evidence; forming the grounds for the application of Rule 2.24(2)(c). (Motion for a New Trial) (App. pp. 17-18). The heart of the argument by

counsel was the inconsistencies in the testimony of Z.K., the lack of physical evidence, the lack of due diligence by the investigators to interview potential eyewitnesses, and the fact that the two charges stem from the same set of facts but the Court only found Tournier guilty of one of the two counts. (Sent. Tr. p. 2 L25-p. 6 L19) Due to the fact that it was a bench trial, trial counsel also requested the court set aside the verdict and take additional testimony. (Sent. Tr. p. 6 L20-p. 7 L13).

Similar to the trial court's findings in Green, here the district court relied upon two combined pieces of evidence: Z.K.'s testimony and the statements made by Tournier. (Sent. Tr. p. 11 L16-p. 12 L3; Sent. Tr. p. 13 L13-19). Without even being presented with an offer of proof as to the testimony of the nine witnesses trial counsel requested calling, the District Court summarily determined that nothing would change the outcome of the case-including the potential exculpatory testimony of K.T. Given that it was a bench trial, it would

have been relatively easy for the Court to reopen the record and admit testimony.

Tournier acknowledges that the district court should not allow any bench trial to be reopened after the fact because the defendant can now produce evidence in his favor; however, where exceptional circumstances exist Rule 2.24(2)(c) should allow for the taking of "additional testimony" when it's in the interests of justice. The District Court abused its discretion when it summarily denied Tournier's request pursuant to Rule 2.24(2)(c) because it failed to take into consideration any additional testimony under the exceptional circumstances of the confusing nature of the verdict, which under the circumstances was unreasonable. See State v. Buck, 275 N.W.2d 194, 195 (Iowa 1979).

CONCLUSION

Tournier respectfully requests this Court grant further review; vacate the decision of the Iowa Court of Appeals; find that exceptional circumstances exist; and remand the case to the district court to take the additional testimony and enter appropriate findings of fact, conclusions of law, and judgment.

ATTORNEY'S COST CERTIFICATE

The undersigned hereby certifies that the true cost of producing the necessary copies of the foregoing Application for Further Review was $3.95, and that amount has been paid in full by the Office of the Appellate Defender.

MARK C. SMITH
State Appellate Defender

BRENDA J. GOHR
Assistant Appellate Defender

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION FOR FURTHER REVIEWS

This application complies with the typeface and type-volume requirements of Iowa R. App. P. 6.1103(4) because:

> [X] this application has been prepared in a proportionally spaced typeface using Bookman Old Style, font 14 point and contains 4,073 words, excluding the parts of the application exempted by Iowa R. App. P. 6.1103(4)(a).

/s/ Mark C. Smith Dated: 1/7/19

MARK C. SMITH
State Appellate Defender
Appellate Defender Office
Lucas Bldg., 4th Floor
321 E. 12th Street
Des Moines, IA 50319
(515) 281-8841
msmith@spd.state.ia.us
appellatedefender@spd.state.ia.us

IN THE COURT OF APPEALS OF IOWA

No. 17-1697
Filed December 19, 2018

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DALE ROBERT TOURNIER,
Defendant-Appellant.

Appeal from the Iowa District Court for Bremer County, Christopher C. Foy, Judge.

Dale Robert Tournier appeals his convictions for second degree sexual abuse of a child under the age of twelve. **CONVICTION AFFIRMED; SENTENCE AFFIRMED IN PART AND VACATED IN PART AND REMANDED.**

Mark C. Smith, State Appellate Defender, and Brenda J. Gohr, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, and Louis S. Sloven, Assistant Attorney General, for appellee.

Considered by Vaitheswaran, P.J., and Doyle and Mullins, JJ.

VAITHESWARAN, Presiding Judge.

Dale Robert Tournier's daughter had an older neighborhood friend who often played at her home. One evening, the friend told her grandmother that Tournier touched her in her genital and anal area.

The State charged Tournier with two counts of second-degree sexual abuse of a child under the age of twelve. *See* Iowa Code §§ 709.1; 709.3(b) (2016). At a bench trial, the child, who was in first grade, testified to Tournier's sex acts. Following trial, the district court found Tournier guilty of one count involving digital penetration of the child's vagina and not guilty of the other count charging a different type of sex act.

Tournier moved for a new trial on the ground the finding of guilt was "contrary to the evidence." Alternatively, he asked the court to "vacate the judgment, . . . take additional testimony, and amend its findings of fact." The district court denied Tournier's new trial motion and his request to vacate the judgment. The court imposed judgment and sentence, including a fee for room and board at the county jail.

On appeal, Tournier argues (1) the district court abused its discretion in declining to grant him a new trial and in refusing to set aside the finding of guilt and receive further testimony and (2) the district court erred in imposing the jail fee without first determining the amount of the fee.

I. New Trial Motion/Vacating of Judgment

In support of his new trial motion, Tournier argued the child's testimony was "clearly inconsistent with statements made prior to trial." In ruling on the motion, the district court acknowledged that "certain aspects of [the child's] trial testimony"

did not "match precisely with . . . statements she had made to other people involved." But, in the court's view, "[a]ny distinctions between her trial testimony and what she had told other people" were "pretty much details" that could "certainly be . . . expected when . . . a child that age is being asked to recount events that took place . . . at least . . . ten months . . . after the fact." The court noted that the child's "initial report was made . . . immediately upon her return to her grandparents' home that evening." The court found the child was "consistent about . . . the digital or the finger and hand contact . . . Mr. Tournier had with her vagina."

Conversely, the court found "the statements and the conduct of . . . Mr. Tournier . . . were also . . . [a] strong indicator of guilt." The court explained, "some of . . . the comments that Mr. Tournier had made to others about this . . . indicated a knowledge of what had actually taken place that . . . he would not have had if the events hadn't happened."

The court also assessed the credibility of other witnesses, expressing a lack of conviction that Tournier's young daughter "would have necessarily been old enough to really understand or . . . alert others . . . to what she was observing." And the court explained "there was a period of time when there was no . . . other adult in that room."

The court thoroughly weighed witness credibility. *See Powers v. State*, 911 N.W.2d 774, 782 (Iowa 2018) ("In assessing a motion for new trial, the judge examines the weight of the evidence offered in the criminal trial, which includes a weighing of the credibility of the complaining witness."). Notably, the court served as fact finder and, in that capacity, had the opportunity to weigh witness credibility during the criminal trial. *See State v. Wickes*, 910 N.W.2d 554, 571 ("Wickes opted

for a bench trial in this case, so the district court in reaching its verdict assessed the credibility of the witnesses."). In light of the court's detailed credibility findings, we conclude this was not the exceptional case warranting the grant of a new trial motion based on the weight of the evidence. *See State v. Ary*, 877 N.W.2d 686, 705 (Iowa 2016) ("A district court should grant a motion for a new trial only in exceptional circumstances."). We discern no abuse of discretion in the district court's ruling. *See Wickes*, 910 N.W.2d at 563–64 ("We generally review rulings on motions for new trial asserting a verdict is contrary to the weight of the evidence for an abuse of discretion.").

For the same reasons, the court did not abuse its discretion in declining to vacate the judgment and take additional testimony. *See* Iowa R. Crim. P. 2.24(2)(c) ("On a motion for a new trial in an action tried without a jury, the court may where appropriate, in lieu of granting a new trial, vacate the judgment if entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and enter judgment accordingly."); *State v. Watkins*, 659 N.W.2d 526, 535 (Iowa 2003) (affirming district court's disposition of case under rule 2.24(2)(c)). We find it unnecessary to address Tournier's argument concerning the standard to be applied under rule 2.24(2)(c).

II. Restitution for Jail Fees

In its written judgment and sentence the district court imposed a "jail fee" obligation:

> **JAIL FEE:** Defendant is ordered to pay a fee established by the Sheriff for room and board at the county jail, pursuant to Iowa Code section 356.7. The jail fee shall apply to all days actually served, including those days where credit is given for time previously served. If Defendant serves the sentence in another facility with the

> consent of the agency in charge, then he shall pay the customary fee charged at that facility. In the event Defendant fails to pay such fee, judgment is imposed against him in favor of this county in the amount to be certified by the Sheriff to the Clerk of Court.

The court found Tournier had "the reasonable ability to pay" the obligation.

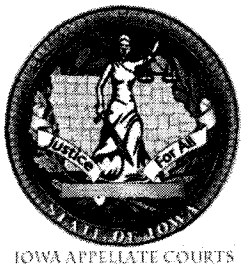
On appeal, Tournier contends "the district court erred in assessing financial obligations to [him] for unknown amounts of restitution, including jail fees pursuant to Iowa Code section 356.7, without first obtaining a request for reimbursement from the jail." The State concedes "the trial court would need to assess Tournier's reasonable ability to pay before assessing restitution for jail fees" but argues the court did not assess "those costs—so Tournier's challenge is not ripe."

To the contrary, the district court assessed the jail fee in the sentencing order and included a payment plan. Although the court did not specify the amount of the jail fee, we are persuaded by this court's opinion permitting a direct appeal of a sentencing order that deferred imposition of the amount. *See State v. Pace*, No. 16-1785, 2018 WL 1442713, at *3 (Iowa Ct. App. Mar. 21, 2018) (citing *State v. Kurtz*, 878 N.W.2d 469, 472 (Iowa Ct. App. 2016). We conclude the issue is ripe for review.

We further conclude the court's failure to specify the amount of the jail fee was an abuse of discretion. *Id.* ("[T]he court determined [the defendant] was able to pay the jail fees without knowing what the amount of those costs were. The court abused its discretion in so doing."). We vacate the portion of the sentence imposing an obligation to pay the jail fees and remand for a determination of

Tournier's ability to pay a specified amount. *Id.* We affirm the balance of the sentence.

CONVICTION AFFIRMED; SENTENCE AFFIRMED IN PART AND VACATED IN PART AND REMANDED.



IOWA APPELLATE COURTS

State of Iowa Courts

Case Number	**Case Title**
17-1697	State v. Tournier

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