IN THE COURT OF APPEALS OF IOWA

No. 0-084 / 09-0533
Filed March 24, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

YOOSUF KAMAAL MOMENT,
Defendant-Appellant.

Appeal from the Iowa District Court for Dubuque County, Michael J. Shubatt, Judge.

Defendant appeals from his convictions and sentences for domestic abuse assault causing injury and kidnapping in the third degree. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, David Arthur Adams, Assistant State Appellate Defender, and Matthew Sease, Student Intern, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney General, Ralph Potter, County Attorney, and Robert Richter, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., Doyle and Danilson, JJ.

SACKETT, C.J.

Yoosuf Moment appeals from his convictions and sentence for domestic abuse assault causing injury, in violation of Iowa Code sections 708.2A(2)(b) and 708.2A(4) (2007), and kidnapping in the third degree, in violation of section 710.4. The victim of the assault was Toni Wemmer, Moment's girlfriend and the mother of his children. He contends the court misapplied *State v. Heemstra*, 721 N.W.2d 549, 563 (Iowa 2006), in initially denying the discovery of Wemmer's medical records, and in later admitting redacted portions of the medical records. He contends the court erred in refusing to give a requested jury instruction. We affirm.

I. BACKGROUND. On April 28, 2008, Moment was charged by trial information with domestic abuse assault causing injury while being a third offender, and kidnapping in the third degree. Prior to trial, on January 6, 2009, Moment filed a motion for deposition and discovery, seeking to depose Wemmer and obtain her mental health records. The motion asserted that Wemmer had previously been admitted into psychiatric wards and these records were relevant to her credibility. It also claimed that Wemmer's psychiatric records were relevant to whether Moment intended to cause pain or injury to Wemmer or intended to make offensive or insulting contact with her. Moment asserted Wemmer was trying to hurt herself and threatening suicide when the incident occurred. He claimed during the altercation he was trying to restrain her and protect her from herself, not hurt her; therefore, the records would help prove his defenses of necessity and mistake of fact.

The district court denied the motion and the case proceeded to trial. Wemmer testified that the argument began when Moment accused her of cheating on him. According to her, Moment confined her in a bedroom, made her take off her clothes, and began punching her. She eventually escaped out of the house with a shirt on but Moment caught up to her and dragged her back to the house and threw her over a fence. On cross-examination she stated that she had never been committed for suicidal thoughts, threats, or suicide attempts. She stated she had only been committed briefly in 1999 when she was pregnant with their first child because she felt confused and her hormones were unbalanced. At the close of the State's evidence, Moment moved for a mistrial. He argued there was a miscarriage of justice in denying the discovery of Wemmer's medical records because the records would have allowed him to impeach her testimony about previous psychiatric treatment.

The district court determined that in light of the testimony presented thus far, the medical records could be relevant to Moment's defense. The court ordered the records be subpoenaed, and that Wemmer be given notice and opportunity to be heard regarding the court's inspection and potential disclosure of the records. The court conducted an *in camera* inspection of the records and determined that one set, those that dealt with psychological treatment, were relevant to the defense. It provided a copy of this set of records to the State and the defendant. After the parties briefly reviewed the records, they argued to the court about their relevancy. The court ruled that, in balancing the privilege and privacy interests of Wemmer against Moment's right to a fair trial, the records

were relevant to Moment's defense. It informed the parties that the defendant could move to admit those records that were relevant. It added that the State would be allowed to call Wemmer as a witness again to address any issues raised in the records. The court ruled that the defendant was not entitled to a mistrial.

In presenting its evidence, the defense then moved to admit certain portions of the mental health records. The State objected, arguing that the documents should be excluded in their entirety, and alternatively, that some statements be redacted. It noted some statements were hearsay that did not qualify as an exception for admission, and some statements should not be admitted because they were not relevant to Moment's defense. The court agreed to redact certain statements to keep the disclosure extremely limited to those portions relevant to the defense. This redacted version was admitted into evidence.

Prior to submitting the case to the jury, the defense requested the court include jury instructions explaining the defenses of mistake of fact and necessity. The court rejected both instructions, finding Moment's defense that he was preventing Wemmer from committing suicide negated the element of intent, but was not a basis for either mistake of fact or necessity defenses. The jury found Moment guilty of both charges. He appeals contending the court erred in not allowing Moment to review more of Wemmer's medical records for relevant information to support his defense, and by instead making its own determination

of which records were relevant. He also claims the court erred in not giving the jury his requested instruction on necessity.

II. MEDICAL RECORDS. The parties disagree as to our standard of review on the issue of whether, and to what extent, Wemmer's medical records are discoverable. Moment contends our review is for an abuse of discretion because it is a discovery matter governed by rules of criminal procedure. The State argues our review is for correction of errors at law because it is an evidentiary matter determined under Iowa Code section 622.10. We agree with Moment. His claimed error most directly concerns whether the court properly regulated discovery of the mental health records as provided in Iowa Rule of Criminal Procedure 2.14(6). A ruling on a defendant's demand for discovery is reviewed for an abuse of discretion. *State v. Grocost*, 355 N.W.2d 32, 34 (Iowa 1984). We will find an abuse when the defendant demonstrates "'such discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable.'" *State v. Schuler*, 774 N.W.2d 294, 297 (Iowa 2009) (quoting *State v. Morrison*, 323 N.W.2d 254, 256 (Iowa 1982)).

Iowa Rule of Criminal procedure 2.14(6)(*a*) provides in relevant part,

> Upon a sufficient showing the court may at any time order that the discovery or inspection be denied, restricted or deferred, or make such other order as is appropriate. In addition to any other grounds for issuing an order pursuant to this paragraph, the court may limit or deny discovery or inspection, . . . if the court determines that any of the following exist:
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> (1) That granting the motion will unfairly prejudice the nonmoving party and will deny that party a fair trial.
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> (2) That the motion is intended only as a fishing expedition and that granting the motion will unduly delay the trial and will result in unjustified expense.

> (3) That the granting of the motion will result in the disclosure of privileged information.

The principles governing the discovery and disclosure of medical records were most recently set forth in *State v. Heemstra*, 721 N.W.2d 549, 559-563 (Iowa 2006). The court made clear that the physician-patient privilege extended to "'medical records that contain information which would be inadmissible at trial as oral testimony from the physician.'" *Heemstra*, 721 N.W.2d at 560 (quoting *State v. Eldrenkamp*, 541 N.W.2d 877, 881 (Iowa 1995)). Mental health records in particular should be sheltered by the physician-patient privilege because uninhibited communication without the threat of public disclosure is crucial to treatment. *Id.*, at 561. Therefore, "[s]ound public policy supports a more protective treatment for mental health records than those in other doctor-patient situations." *Id.* While acknowledging this policy, the court explained that the right to a fair trial must also be considered when determining whether a defendant should have access to privileged information. *See id.* at 562-63. "[I]t has long been recognized that the criminal defendant's Sixth Amendment right to confront the witnesses against him means that the government cannot simultaneously prosecute an individual and assert privileges that would inhibit his defense." *Id.* at 563 (quoting 23 Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice & Procedure* § 5436, at 887 (1980)). The court suggested that in evaluating these competing policies, "[t]he privacy interest must always be weighed against such public interests as the societal need for information, and a compelling need for information may override the privacy interest." *Id.* (quoting *McMaster v. Iowa Bd. of Psychology Exam'rs*, 509 N.W.2d 754, 759 (Iowa

1993)). In weighing the interests involved in *Heemstra*, it concluded the defendant was entitled to a limited disclosure of the victim's medical records. *Id.* The factors favoring disclosure included that the defendant was facing criminal charges with a severe penalty as opposed to defending a civil action, the victim was deceased, and some of the information had already been disclosed in a related case. *Id.* The court found the most important reason supporting limited disclosure was that "the information sought might reasonably bear on the defendant's possibility of success in supporting his claim of self-defense," and would allow him to effectively cross-examine an important witness in the case. *Id.* To determine the scope of the disclosure, the court instructed the trial judge to conduct an *in camera* examination of the records. *Id.* However, the defense and prosecution should receive the records under a protective order, and be given an opportunity to "aid in the weighing process." *Id.*

In the case before us, the court initially denied Moment's pretrial request for discovery of Wemmer's medical records. After the State finished presenting its evidence, Moment moved for a mistrial contending the court's failure to permit discovery of Wemmer's medical records denied Moment a fair trial. The court agreed that in light of the testimony presented, particularly with regard to Wemmer's testimony, the records may have relevance and provide support to the defense. It conducted an *in camera* inspection of all of Wemmer's medical records, selected which medical records pertained to Wemmer's mental health, and provided this portion to the defense and prosecution. The attorneys then argued to the court which parts of the mental health records were relevant to the

defendant's claim of necessity or mistake of fact, and which parts should be redacted to protect the victim's physician-patient privilege. The court then made a ruling on which parts should be redacted before the defense submitted the records as an exhibit during its presentation of evidence.

The defendant argues that this procedure violated the process outlined in *Heemstra* for the limited disclosure of privileged information. He complains of the trial court's actions in two respects. First, he claims the court's failure to allow discovery of the medical records prior to trial denied his ability to "establish a proper defense and effectively direct and cross-examine witnesses." Second, he claims the court violated *Heemstra* by making an initial relevancy determination on the medical records without allowing input from the attorneys. He claims both attorneys should have been given access to all of Wemmer's medical records, not just the mental health records, before the court heard arguments by the attorneys on relevance and admissibility. He claims other records besides the mental health reports may have been relevant.

In denying the pretrial motion for discovery, the court distinguished the present case from *Heemstra*, noting that Moment was not subject to a life sentence as was Heemstra, and none of the records had already been disclosed as was the case in *Heemstra*. It also concluded that the record, at that stage prior to trial, did not demonstrate that Wemmer's medical records might reasonably bear on Moment's claimed defenses. It also expressed concern that the physician-patient privilege is intended to protect one's privacy and the record did not show that Wemmer had been given notice of the request for her records.

When Moment moved for a mistrial later for the court's failure to allow pretrial discovery of the records, the court reiterated that prior to trial

> there was a very limited record available at that point to show what the relevance of the medical records necessarily were. We didn't know what the testimony of Miss Wemmer was going to be at that point.

We find no error in the court's failure to allow discovery of Wemmer's medical records prior to trial. The pretrial ruling shows the court applied the analysis of *Heemstra*, and obviously at that point did not find Moment had a compelling need for the information to override Wemmer's privacy interest. Only after Wemmer's testimony alluded to her previous mental health treatment and she denied any treatment for suicidal tendencies did the mental health records become relevant to the defense. After the records were submitted, the court permitted the parties to question Wemmer again to address the records. We find no abuse of discretion in the court's ruling on the pretrial motion for discovery.

We also find no abuse of discretion in the court's *in camera* inspection of Wemmer's complete medical file and its independent decision to make only the mental health records available to the parties. We acknowledge that in *Heemstra*, the *in camera* inspection was to be accomplished with "defense and prosecution counsel, to aid in the weighing process." *Heemstra*, 721 N.W.2d at 563. However, the trial court's determination of counsel's participation in *in camera* inspections is reviewed for abuse of discretion. *Stanford v. Iowa State Reformatory*, 279 N.W.2d 28, 31-32 (Iowa 1979). In these proceedings no objection was levied at the trial court level and an issue cannot ordinarily be asserted for the first time on appeal. *Meier v. Senecaut*, 641 N.W.2d 532, 537

(Iowa 2002); *State v. Greene*, 226 N.W.2d 829, 832-33 (Iowa 1975). Thus the issue of counsel's participation in the *in camera* inspection was waived.

Furthermore, Moment does not specify what other medical records would likely have additional information to support his defense of necessity which would outweigh Weemer's interest in the privacy of her medical records. In addition to permitting a court to deny discovery of privileged information, rule 2.14(6)(*a*) allows a court to deny discovery if the request is a mere fishing expedition. Iowa R. Crim. P. 2.14(6)(*a*)(2)(3). *Heemstra* also does not endorse complete disclosure of a victim's medical records. It permitted only a "limited disclosure" when a compelling need for the privileged information is shown. *Heemstra*, 721 N.W.2d at 563. Moreover, it appears Moment never requested medical records besides those concerning Wemmer's mental health. The pretrial motion for discovery notes that Wemmer was previously admitted to a psychiatric ward and "therefore [Moment] requests permission to obtain the *medical records regarding Ms. Wemmer's mental health history* so as to allow him to present relevant information to the jury." When it moved for a mistrial, it again stated this was because the defendant had a right to "medical records specifically dealing with suicidal ideations, commitments up at Mercy Two-West Hospital and mental health history, specifically related to suicide." Moment does not argue that these relevant documents were not provided to him in the limited disclosure allowed by the court. We affirm on this issue.

III. JURY INSTRUCTIONS. Moment also contends the district court erred in refusing to give an instruction he requested. Our scope of review on this issue

is for correction of errors at law. *See State v. Carey*, 709 N.W.2d 547, 551 (Iowa 2006); *State v. Hartsfield*, 681 N.W.2d 626, 630-31 (Iowa 2004). "'Under Iowa law, a court is required to give a requested instruction when it states a correct rule of law having application to the facts of the case and when the concept is not otherwise embodied in other instructions.'" *State v. Lyman*, 776 N.W.2d 865,876 (Iowa 2010) (quoting *Herbst v. State*, 616 N.W.2d 582, 585 (Iowa 2000)).

Moment first argues the court erred in not providing an instruction on justification. Moment never requested an instruction specifically on justification. Error was therefore not preserved on this issue. *See* Iowa R. Civ. P. 1.924 (providing that all objections regarding jury instructions, and the specific grounds for objecting must be made before final arguments at trial, and "[n]o other grounds or objections shall be asserted thereafter, or considered on appeal."); Iowa R. Crim. P. 2.19(2)(*f*) (making rules on instructions in civil jury trials applicable to criminal jury trials); *State v. Taggart*, 430 N.W.2d 423, 425 (Iowa 1988) (stating that timely objection to jury instructions is required to preserve error for appellate review).

Moment did request an instruction outlining the elements of the affirmative defense of necessity. The court denied the request and Moment argues this was error. Moment requested the following instruction:

> Mr. Moment claims the physical contact between he and Ms. Toni Wemmer was necessary. The elements of the necessity defense include:
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> a) The threatening conduct by Ms. Wemmer was sufficient to create in the mind of a reasonable person the fear of death or serious bodily harm;
> b) The conduct in fact caused such fear of death or serious bodily harm in the mind of the defendant;

> c) The fear or duress was operating upon the mind of the defendant at the time of the alleged act; and,
> d) The defendant committed the act to avoid the threatened harm.
>
> The State has the burden of proving the defendant was not acting under necessity as it applies to the question of his specific intent.

"If substantial evidence exists showing that an affirmative defense applies, the trial court must instruct on the defense." *State v. Ceaser*, 585 N.W.2d 192, 193-94 (Iowa 1998) overruled on other grounds by *State v. Bruegger*, 773 N.W.2d 862, 871 (Iowa 2009). The defendant has the burden to prove the record has sufficient evidence to support instructing the jury on the affirmative defense. *State v. Lawler*, 571 N.W.2d 486, 489 (Iowa 1997). After this showing, the State must disprove the defense beyond a reasonable doubt. *Id.* On appeal, we must only determine whether the trial court correctly determined the requested instruction did not have evidentiary support. *See Hartsfield*, 681 N.W.2d at 631. "If all the requirements of the defense are not addressed in the defendant's evidence, [a] trial court is not obligated to submit the issue to the jury." *State v. Walton*, 311 N.W.2d 113, 115 (Iowa 1981).

The defense of necessity contemplates the predicament of one having to make a choice between two evils, and in opting for the lesser of the two evils, the person avoids causing a greater harm. *Id.*; *State v. Harrison*, 473 N.W.2d 242, 243 (Iowa Ct. App. 1991). A crucial element to a necessity defense is that the danger must be impending.

> The necessity defense does not apply except in emergency situations where the threatened harm is immediate and the threatened disaster imminent. The defendant must be stripped of options by which he or she might avoid both evils.

Walton, 311 N.W.2d at 114. The necessity defense does not negate the element of any crime, but instead is an independent question for the jury after the elements of the crime have already been established. *State v. Reese*, 272 N.W.2d 863, 866 (Iowa 1978). Our courts have limited the application of the necessity defense in several instances. *See, e.g., State v. Bonjour*, 694 N.W.2d 511, 514-15 (Iowa 2005) (holding that a medical necessity defense is not available as a defense to manufacturing marijuana); *Planned Parenthood of Mid-Iowa v. Maki*, 478 N.W.2d 637, 640 (Iowa 1991) (stating "[t]he necessity defense is generally not available to excuse criminal activity by those who disagree with the policies of the government."); *Reese*, 272 N.W.2d at 866-67 (making the defense available to a prisoner facing escape charges, but specifying that one requirement of the defense is that the prisoner report to authorities after escaping as soon as it is safe to do so). It is unclear if the defense of necessity is even available to one who allegedly seeks to avoid harm to others. *See Planned Parenthood of Mid-Iowa*, 478 N.W.2d at 640 (rejecting the defense when a defendant trespassed upon Planned Parenthood's property in an effort to prevent women from obtaining abortions); *Harrison*, 473 N.W.2d at 244 (stating that "[e]ven assuming the defense of necessity is available to a defendant who seeks to avoid harm to others," the threat of future injury to the other person is not enough).

We agree that Moment did not generate a fact question on the defense to require the giving of the requested instruction. Moment testified that he believed Wemmer was going to kill herself. According to his version of the incident,

Wemmer had a knife initially but after he comforted her, she threw it in the sink. Then she hid in a closet with a bottle of pills. Moment grabbed the pill bottle from her, discovered it was empty, and carried her to the bathroom where she spit out a few pills. Then Wemmer retrieved the knife again and headed out the back door. Moment stated he grabbed her to stop her from leaving, and they both fell through the back door and became scraped up from the pavement. He took the knife from her and threw it in a boat that was in the yard. He testified they then sat outside and talked for a while before returning indoors. They both cleaned themselves up and Wemmer then decided to leave and took the children with her to her mother's house. Moment testified that several times throughout the encounter, he threatened to call 911. He testified that once in the past he called the police when Wemmer took some pills and was hurting herself. When asked why he did not actually call the police or other family members this time, he stated that he did not want Wemmer to be admitted into a psychiatric facility and that is what happened when he previously called the authorities. Even accepting all of Moment's testimony as true, there is no showing that disaster was imminent or that he had no other options available. According to his own testimony, he could have called 911 or family members or friends for assistance. A court need not give an instruction on the necessity defense if the defendant fails to show that harm was imminent. *See Walton*, 311 N.W.2d at 115-16; *Harrison*, 473 N.W.2d at 243-44. Accordingly, we affirm on this issue.

IV. CONCLUSION. We affirm Moment's convictions. The district court did not err in denying the motion for discovery of Wemmer's mental health

records before trial or in conducting an *in camera* inspection of Wemmer's medical records before granting a limited disclosure of her mental health records during trial. There was no error in the court's refusal to submit an instruction on the necessity defense.

AFFIRMED.