IN THE COURT OF APPEALS OF IOWA

No. 1-049 / 10-0611
Filed March 21, 2011

IN RE THE DETENTION OF
GALEN KENDRICK SHAFFER,

GALEN KENDRICK SHAFFER,
Respondent-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Bradley J. Harris, Judge.

Galen Shaffer appeals his civil commitment, pursuant to Iowa Code chapter 229A (2009). **AFFIRMED.**

Crystal W. Rink of Dunakey & Klatt, P.C., Waterloo, for appellant.

Thomas J. Miller, Attorney General, Linda J. Hines, Assistant Attorney General, and John McCormally and Susan Krisko, Assistant Attorneys General, for appellee State.

Considered by Vogel, P.J., and Doyle and Danilson, JJ. Mansfield, J., takes no part.

VOGEL, P.J.

Galen Shaffer appeals his civil commitment, pursuant to Iowa Code chapter 229A (2009), contending there was insufficient evidence he suffered from a mental abnormality that made him likely to engage in predatory acts constituting sexually violent offenses if not confined to a secure facility. Shaffer also contends his counsel was ineffective for failing to (1) raise constitutional issues, (2) make evidentiary objections, and (3) object to the State's evidence so as to preserve error on appeal. Finding that his claims of ineffective assistance of counsel fail and sufficient evidence in the record to support the district court's decision, we affirm.

I. Background Facts and Proceedings.

In September 1991, Shaffer was adjudicated to have committed a delinquent sexual act as a minor. In April 1995, as an adult, Shaffer pled guilty to three counts of sexual abuse in the second degree. He was sentenced to three concurrent indeterminate terms of incarceration, not to exceed twenty-five years. On October 9, 2007, while Shaffer remained incarcerated, the State filed a petition under Iowa Code sections 229A seeking the commitment of Shaffer as a sexually violent predator. The district court granted Shaffer's motion for summary judgment in August 2008 and dismissed the petition for civil commitment. The State appealed, and the Iowa Supreme Court reversed the dismissal, remanding the case for further proceedings required by the sexually violent predator act. *In re Det. of Shaffer*, 769 N.W.2d 169 (Iowa 2009). Following a hearing, in March 2010, the district court found Shaffer to be a sexually violent predator and ordered his commitment. Shaffer appeals.

II. Standard of Review.

Our review of this claim is for correction of errors at law. *In re Det. of Altman*, 723 N.W.2d 181, 183 (Iowa 2006). We evaluate whether substantial evidence exists to support the district court's decision. *In re Det. of Pierce*, 748 N.W.2d 509, 511 (Iowa 2008). "Evidence is substantial when a reasonable mind would accept it as adequate to reach a conclusion." *Det. of Altman*, 723 N.W.2d at 183. In making this determination, we view the evidence in the light most favorable to the nonmoving party. *Id.*

III. Sufficiency of the Evidence.

***Expert Testimony*.** Shaffer contends the State failed to produce sufficient evidence to prove he was a sexually violent predator. In particular, he asserts the evidence did not support that he "suffers from a mental abnormality," that "makes him likely to engage in predatory acts if not confined."

A "sexually violent predator" is defined as

> a person who has been convicted of or charged with a sexually violent offense and who suffers from a mental abnormality which makes the person likely to engage in predatory acts constituting sexually violent offenses, if not confined in a secure facility.

Iowa Code § 229A.2(11). A person is "likely to engage in predatory acts of sexual violence" if "the person more likely than not will engage in acts of a sexually violent nature." *Id.* § 229A.2(4).

Shaffer argues the district court misconstrued the expert testimony in finding he suffered from a mental abnormality. Three experts testified at trial: Craig B. Rypma, Ph.D. and Luis Rosell, Ph.D. for Shaffer, and Anna Salter, Ph.D. for the State. Each expert gave varying testimony regarding Shaffer's

mental condition. Dr. Rypma testified that he "did diagnose [Shaffer] with a diagnosis that would qualify him under Iowa statute" as a person who suffers from a mental abnormality that predisposes him to commit sexually violent offenses, in addition to pedophilia and antisocial personality disorder. He continued that although he technically gave Shaffer this diagnosis, there were some "serious caveats" as to whether he truly qualified as having a mental abnormality. He surmised Shaffer's crimes could have been the result of suffering from a developmental disorder when he was a child, and in Shaffer's "current presentation" he did not believe he was a pedophile. Dr. Rosell agreed, testifying that while Shaffer may have suffered from pedophilia at the time of his convictions, he believed the diagnosis was no longer appropriate. He did, however, diagnosis Shaffer with antisocial personality disorder. Dr. Salter, on the other hand, concluded that Shaffer suffered from pedophilia, and "is high risk to reoffend." When questioned as to Dr. Rypma's diagnosis of antisocial personality disorder, Dr. Salter testified that it was a fair diagnosis, but it did not change her diagnosis of pedophilia; antisocial personality disorder merely decreased Shaffer's ability to control his behavior. She did not believe that the time he spent imprisoned and away from children changed the status of his pedophilia, particularly because he did not complete any treatment program.

The court found it was "more persuaded by the testimony of Dr. Salter and Dr. Rypma concerning the diagnosis that respondent suffers from a condition that impairs the ability to control emotions or act voluntarily." Shaffer argues the court incorrectly relied on both Dr. Rypma and Dr. Salter in its conclusion, as well as in failing to make a distinction between their diagnoses of pedophilia versus anti-

social personality disorder. He also argues the court gave Dr. Salter's testimony too much weight. The court addressed these concerns and acknowledged that each expert had a different interpretation, stating,

> Dr. Salter and Dr. Rypma disagree as to whether respondent's mental condition predisposes him to commit sexually violent offenses. The court determines the respondent's mental condition, whether it be pedophilia or antisocial personality disorder does predispose respondent to commit sexually violent offenses.

While we have reviewed the contradictory testimony, we defer to the court's assessment of the experts. *See In re Det. of Barnes*, 689 N.W.2d 455, 461 (Iowa 2004) ("Because the issue essentially turned on a judgment of credibility of two experts with different opinions, we give weight to the district court's judgment."); *State v. Fetters*, 562 N.W.2d 770, 775 (Iowa Ct. App. 1997) ("When the psychiatric testimony is conflicting, the reviewing court will not determine anew the weight to be given trial testimony."). The district court found,

> [R]espondent is more likely to engage in predatory acts constituting sexual violent offenses if not confined to a secure facility. Respondent began offending at the age of 7 and continued to offend until he was incarcerated at the age of 18. Respondent has failed to take advantage of treatment opportunities that have been presented to him and has continued to manipulate his treatment throughout his incarceration. Respondent's only plan to avoid reoffending is to state that he "doesn't want to be around kids." This plan is not acceptable given that respondent agrees that people who are easily manipulated are at risk, including children and adults with difficulties. The court does not find it likely that respondent will be able to avoid those types of persons who are at risk to be sexually abused by respondent. The court does determine that respondent is likely to engage in predatory acts constituting sexually violent offenses if he is not confined in a secure facility. The State has proven elements beyond a reasonable doubt.

Substantial evidence supports the district court's finding that Shaffer suffers from a mental abnormality that makes him likely to engage in predatory acts constituting sexually violent offenses, if not confined to a secure facility.

Actuarial Tests. The experts also debated the merits of various testing methods used on Shaffer to determine the likelihood a person will sexually reoffend, such as the MnSOST-R, RRASOR, and Static-99 tests. Shaffer argues these tests were unreliable in calculating the rate of recidivism, specifically that the Static-99 test did not meet the "more likely than not [to reoffend] standard." *See* Iowa Code 229A.2(4).

All three experts evaluated the results of the Static-99 assessment test on Shaffer; each in agreement that this was the best available actuarial test. The disagreement occurred in the interpretation of the given results. Each expert interpreted the scoring and its translation into a rate of recidivism, based on factors such as age, nonviolent behavioral, and the gender of the victim. While all three experts arrived at a different conclusion, each placed Shaffer in the high risk category for re-offending. Dr. Rypma qualified his result, testifying that the number he reached was based upon the standard recommendation, but his clinical judgment placed Shaffer as less likely to reoffend. Dr. Rosell also qualified his result, testifying that he had significant problems with the accuracy of this test. Dr. Salter testified that this test had the most "up-to-date norms" and taking all factors into consideration, Shaffer was at a "high risk to reoffend."

The district court took the reliability and accuracy of the tests into its consideration, stating, "All experts agree that the statistical tools were only a guide being developed and that some reason must also be applied in making a

determination as to whether an individual will reoffend." We find that in reaching its conclusion, the district court weighed the actuarial tests, and considered them in conjunction with full clinical evaluations and the competing testimony of the three experts. *In re Det. of Holtz*, 653 N.W.2d 613, 619 (Iowa Ct. App. 2002) (stating that actuarial risk assessment instruments are not to be solely relied upon, but used in conjunction with a full clinical evaluation). As stated above, we agree substantial evidence supports the district court's determination that Shaffer is more likely than not to commit a sexually violent offense if not confined to a secured facility. While the evidence was in conflict, the court chose to assign less weight to Shaffer's evidence. We defer to the district court's judgment, as it was in a better position to weigh the testimony and evidence presented. *See State v. Jacobs*, 607 N.W.2d 679, 685 (Iowa 2000).

IV. Ineffective Assistance of Counsel.

Shaffer also contends his counsel was ineffective for failing to (1) raise constitutional issues, (2) make evidentiary objections, and (3) object to the parts of the State's evidence so as to preserve error on appeal. We review ineffective-assistance-of-counsel claims de novo. *State v. Fountain*, 786 N.W.2d 260, 262 (Iowa 2010). To establish a claim of ineffective assistance of counsel, the defendant must prove by a preponderance of the evidence: (1) that trial counsel failed to perform an essential duty, and (2) that prejudice resulted from this failure. *Id.* We will resolve ineffective-assistance-of-counsel claims on direct appeal when the record is adequate to decide the issue. *State v. Query*, 594 N.W.2d 438, 444 (Iowa Ct. App. 1999).

Constitutional Issues. Shaffer contends counsel should have argued that the sexually violent predator statute is unconstitutional under the Equal Protection Clause of both the Iowa and the United States Constitutions, because chapter 229A treats criminals with mental abnormalities different from those convicted of other crimes, while having a mental abnormality. However, if people are not similarly situated, their dissimilar treatment does not violate equal protection. *See Bruns v. State*, 503 N.W.2d 607, 610 (Iowa 1993). Our supreme court has already addressed this very issue and found that because sexually violent predators and other violent offenders are not similarly situated, they may be treated differently without violating the Equal Protection Clause. *In re Morrow*, 616 N.W.2d 544, 548 (Iowa 2000). As such, we find counsel was not ineffective for failing to argue the statute violated Shaffer's right to equal protection.

Shaffer also raises a due process argument, claiming the statute is not implemented in a fair manner, as it punishes those who do not participate in treatment or express empathy for their victims. This appears to be a facial attack on "the due process clause" without citation to either the United States or the Iowa Constitution. His argument only makes the bald assertion that the statute is being used to punish rather than to treat based on "what the trial courts consider in making its determinations." We find this argument was made without citation to applicable legal authority and is without merit. *See Hollingsworth v. Schminkey*, 553 N.W.2d 591, 596 (Iowa 1996) ("When a party, in an appellate brief, fails to state, argue, or cite authority in support of an issue, the issue may be deemed waived.").

***Evidentiary Issues*.** Shaffer next argues counsel was ineffective for failing to (1) object to questioning regarding Shaffer's failure to complete treatment and express empathy for the victims, specifically Dr. Salter's testimony, and (2) make a hearsay objection when Dr. Salter read statements from Shaffer's treatment record into evidence. Shaffer himself testified that he was removed from treatment because the staff felt he was not expressing empathy for his victims. Therefore, Dr. Salter's testimony reporting Shaffer's lack of empathy or remorse was duplicative of what Shaffer had already stated. *See State v. Hildreth*, 582 N.W.2d 167, 170 (Iowa 1998) (stating that prejudice will not be found where substantially the same evidence is in the record without objection and thus the challenged testimony is merely cumulative).

Moreover, counsel had no duty to make a hearsay objection to Dr. Salter's testimony regarding remarks Shaffer had made, because this information was considered in making her diagnosis. Iowa R. Evid. 5.703 ("The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the trial or hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence."). Because counsel did not breach an essential duty by not objecting to admissible evidence, we conclude counsel was not ineffective.

AFFIRMED.