IN THE COURT OF APPEALS OF IOWA

No. 1-452 / 09-1230
Filed September 8, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

TIMOTHY STEVEN BENJEGERDES,
Defendant-Appellant.

Appeal from the Iowa District Court for Worth County, Stephen P. Carroll (Motion to Suppress) and James M. Drew (Trial), Judges.

The defendant appeals from his conviction for third-degree sexual abuse. **AFFIRMED.**

Kent A. Simmons, Davenport, for appellant.

Thomas J. Miller, Attorney General, Kyle P. Hanson, Assistant Attorney General, Jeffrey H. Greve, County Attorney, and Denise Timmins and Laura Roan, Assistant County Attorneys, for appellee.

Heard by Sackett, C.J., and Vogel and Danilson, JJ. Tabor, J., takes no part.

VOGEL, J.

Timothy Benjegerdes appeals from his conviction for third-degree sexual abuse. He asserts the district court should have granted his motion to suppress and granted his motion for a new trial. Because we find the seizure of his planner by school officials was permissible under the Fourth Amendment, the denial of the motion to suppress was proper. We further find the district court did not abuse its discretion in evaluating the evidence and making credibility assessments when ruling on the motion for a new trial. We affirm.

I. Procedural History.

On June 3, 2008, the State filed a trial information charging Benjegerdes with two counts of third-degree sexual abuse in violation of Iowa Code sections 709.1(3) and 709.4(2)(b) (2007), alleging he performed sex acts on two thirteen-year-old girls, B.K. and N.Y.[1] On November 3, 2008, Benjegerdes filed a motion to suppress, asserting that any evidence taken from the seizure of his school planner should be suppressed.[2] A hearing was held on December 1, 2008. On March 11, 2009, the district court issued its ruling. It found that school officials were permitted to seize the planner and there was no Fourth Amendment violation.

Following trial, a jury found Benjegerdes not guilty of the charge concerning N.Y., but guilty of the charge concerning B.K. Benjegerdes filed a motion for a new trial. In the following hearing, Benjegerdes argued that the

[1] The trial information also charged Benjegerdes with two counts of lascivious acts with a child, which the State subsequently dismissed on May 4, 2009.

[2] The motion also asserted that any evidence resulting from the seizure of his cell phone should be suppressed. Any error in that ruling, however, is not raised on appeal.

guilty verdict was against the weight of the evidence because the evidence from his planner should not have been admitted and B.K. was not a credible witness. The district court affirmed the earlier ruling on the motion to suppress. It further found that B.K. was "extremely credible" and the verdict was not against the weight of the evidence. Therefore, the district court denied the motion for a new trial. Benjegerdes appeals. He asserts the district court should have granted his motion to suppress and motion for a new trial.

II. Motion to Suppress.

We review a ruling on a motion to suppress based upon an alleged violation of a constitutional right de novo. *State v. Jones*, 666 N.W.2d 142, 145 (Iowa 2003). "In undertaking this review, we assess 'the totality of the circumstances as shown by the entire record,' including 'the evidence presented at the suppression hearing.'" *Id.* (quoting *State v. Naujoks*, 637 N.W.2d 101, 106 (Iowa 2001)).

In the 2007–2008 school year, Benjegerdes was a high school senior. At the school he attended, each student was issued a planner that set forth the school rules and policies, included a calendar, and functioned as a hall pass. In April 2008, one of Benjegerdes's classes was being held in the library. Benjegerdes went into the library and put his books on a table, and left the library to use the restroom. While he was gone, a teacher sitting at the table noticed Benjegerdes's planner on top of his books. She saw a drawing of a penis and testicles made in black marker on the front of the planner, which she considered obscene and offensive and visible to anyone walking in the library. The teacher confiscated the planner, and found what she believed to be "inappropriate things

inside." When Benjegerdes returned, he asked the teacher whether she had seen his planner. She responded that she had not, and later explained she did so because she felt the matter was "over [her] head and that it should be addressed by the principal."

The teacher gave the planner to the principal's administrative assistant, telling her the reason why she confiscated the planner and that there were objectionable items inside the planner. The principal was not in the office at that time, but the planner was given to him shortly thereafter. The principal testified that he "thumbed through it and there was a . . . lot of inappropriate things that were on and in the planner." In addition, there were two lists of girls' names in the planner, which the teacher and administrative assistant believed were troublesome. The principal kept the planner in his office, but decided not to take any disciplinary action, other than keeping the planner so that it was "out of circulation." He testified that Benjegerdes was eighteen-years-old and was going to graduate in a few weeks, and if Benjegerdes wanted his planner back, he could come in and they would discuss it. He was unaware that Benjegerdes did not know the planner had been confiscated. On May 19, 2008, two officers went to the school to interview Benjegerdes about the charges in the present case and the principal's administrative assistant gave the officers the planner.

The evidence also demonstrated that the school rules printed inside the planner provided that "suggestive or obscene pictures . . . should not be found within any instructional materials used at school." Further, the school policies on searches and seizures provided that a student's personal effects "may be searched when a school official has reasonable suspicion to believe the student

is in possession of illegal or contraband items or has violated school district policies, rules, regulations or the law affecting school order." Additionally, the school policies stated that any contraband "shall be confiscated by school officials and may be turned over to law enforcement."

On appeal, Benjegerdes argues that the seizure of his planner was a violation of his constitutional rights.[3] The Fourth Amendment exists to protect the right of the people to be free from unreasonable searches and seizures conducted by government officials, including school officials. *See, e.g.*, *New Jersey v. T.L.O.*, 469 U.S. 325, 337, 105 S. Ct. 733, 740, 83 L. Ed. 2d 720, 731

[3] At district court, Benjegerdes cited to the Iowa Constitution in his motion to suppress, but did not make a specific argument based upon the Iowa Constitution. The district court's ruling on the motion to suppress was based entirely on the United States Constitution. Benjegerdes did not seek to amend or enlarge that ruling as permitted by Iowa Rule of Civil Procedure 1.904(2). *See State v. Iowa Dist. Court*, ___ N.W.2d ___, ___n.2 (Iowa 2011) (citing *State v. Mitchell*, 757 N.W.2d 431, 435 (Iowa 2008) (holding that when a defendant argues a constitutional violation, but the district court fails to address it, it is incumbent upon the defendant to "file a motion to enlarge the trial court's findings or in any other manner have the district court address th[e] issue")). Because the state constitutional ground was not ruled on by the district court, we find this argument was not preserved. *See Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) ("It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal.").

Additionally, on appeal Benjegerdes once again cites to the Iowa Constitution in stating it has the same language as the federal constitution, but makes no specific argument based upon the Iowa Constitution and in the argument section of his brief cites only to United States Supreme Court cases. Because Benjegerdes does not argue the Iowa Constitution should be interpreted any differently than the United States Constitution, we "decline to consider an independent state constitutional standard based upon a mere citation to the applicable state constitutional provision." *State v. Effler*, 769 N.W.2d 880, 895 (Iowa 2009) (Appel, J., concurring specially).

Furthermore, in its brief, the State asserts "Benjegerdes has only preserved error on his challenge under the federal constitution." Benjegerdes does not dispute this point in his reply brief. *See Iowa Dist. Court*, ___ N.W.2d at ___(Appel, J. dissenting) ("When faced with an explicit challenge regarding whether he adequately raised a state constitutional claim with his vague district court pleadings, Harkins has an obligation at that point to fish or cut bait."). Consequently, we find any argument under the Iowa Constitution was not preserved, not made, and waived.

(1985); *Jones*, 666 N.W.2d at 145.[4] Essentially, the Fourth Amendment imposes a standard of "reasonableness." *T.L.O.*, 469 U.S. at 337, 105 S. Ct. at 740, 83 L. Ed. 2d at 731; *Jones*, 666 N.W.2d at 145. In the context of searches and seizures done in public schools, the Fourth Amendment analysis differs from that applied in other situations. *See Morse v. Frederick*, 551 U.S. 393, 406, 127 S. Ct. 2618, 2627, 168 L. Ed. 2d 290, 302 (2007) ("[T]he school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject." (quoting *T.L.O.*, 469 U.S. at 340, 105 S. Ct. at 742, 83 L. Ed. 2d at 733)); *Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls*, 536 U.S. 822, 829–830, 122 S. Ct. 2559, 2565, 153 L. Ed. 2d 735, 744 (2002) ("Fourth Amendment rights . . . are different in public schools than elsewhere[.]" (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 656, 115 S. Ct. 2386, 2392, 132 L. Ed. 2d 564, 576 (1995)); *see also, Jones*, 666 N.W.2d at 145 (explaining that usually a search and seizure analysis is a two-part test focused on the expectation of privacy and the reasonableness of an invasion of that privacy, but the analysis in the context of a school search is more focused than the general approach).

In *T.L.O.*, the Supreme Court examined a case where a search and seizure focused on one particular student, rather than the student body as a

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[4] The supreme court described the relationship between the State and Federal search and seizure clauses:

> The Iowa Constitution also contains a search and seizure clause that is virtually identical to the Fourth Amendment. Accordingly, we usually interpret the scope and purpose of article I, section 8, of the Iowa Constitution to track with federal interpretations of the Fourth Amendment.

Jones, 666 N.W.2d at 145. As noted above, Benjegerdes did not make an independent state constitutional argument and we will examine the State provision in accordance with the Federal one. Therefore, our analysis is confined to the Federal constitution. *Iowa Dist. Court*, ___ N.W.2d at ___ (explaining that no claim under the Iowa Constitution was raised and confining the analysis to the United States Constitution).

whole. 469 U.S. at 345–47, 105 S. Ct. at 744–46, 83 L. Ed. 2d at 737–38; *cf. Earls*, 536 U.S. at 826–27, 122 S. Ct. at 2562–63, 153 L. Ed. 2d at 741–42 (search conducted based upon generalized concerns); *Acton*, 515 U.S. at 650, 115 S. Ct. at 2390, 132 L. Ed. 2d at 572 (same). The Court stated,

> [T]he legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search. Determining the reasonableness of any search involves a twofold inquiry: first, one must consider "whether the . . . action was justified at its inception"; second, one must determine whether the search as actually conducted "was reasonably related in scope to the circumstances which justified the interference in the first place." Under ordinary circumstances, a search of a student by a teacher or other school official will be "justified at its inception" when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school. Such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.

T.L.O., 469 U.S. at 341–42, 105 S. Ct. at 742–43, 83 L. Ed. 2d at 734–35.

In the present case, Benjegerdes asserts that the seizure of his planner was unreasonable at its inception, challenging the circumstances under which the planner was taken and arguing that the "possible infraction did not require seizure of the entire planner."[5] Benjegerdes left the planner on a table, at which

[5] In making this argument Benjegerdes states, "Additionally, the judge did not even mention that student searches are governed by [Iowa Code chapter 808A]." He also cites to Iowa Code section 808(1). As Benjegerdes acknowledges, the district court did not rule on any argument made under Iowa Code chapters 808 or 808A. We agree with the State that this issue is not preserved for appeal.

In addition, Benjegerdes makes a second argument that the scope of the search was an additional violation of his constitutional rights, namely that that teacher and administrative assistant did not have "the right to go through" the planner. This argument is also plagued by error preservation problems. In order to preserve an issue for appellate review, it must be raised and ruled upon by the district court. *See State v. Mitchell*, 757 N.W.2d 431, 435 (Iowa 2008) (finding that error was not preserved where it was raised in a motion, but the district court did not discuss or rule on the claim); *State v. Hernandez-Lopez*, 639 N.W.2d 226, 233 (Iowa 2002) ("Generally, we will only review an

a teacher was sitting, in the open where others could see the drawing on the cover. *See State v. Legg*, 633 N.W.2d 763, 767 (Iowa 2001) ("What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." (quoting *Katz v. United States*, 389 U.S. 347, 351, 88 S. Ct. 507, 511, 19 L. Ed. 2d 576, 582 (1967))). The drawing on the front cover was of a penis and testicles in black marker. Although Benjegerdes attempts to describe it as a "possible infraction," the teacher could clearly conclude the drawing was a "suggestive or obscene picture," in violation of school rules. Accordingly, the seizure of the planner was reasonable. *Cf. T.L.O.*, 469 U.S. at 341–42, 105 S. Ct. at 742–43, 83 L. Ed. 2d at 734–35 (explaining that in order for a search to be justified at its inception, there must be reasonable grounds to suspect the search will turn up evidence the student was violating school rules). The teacher's denial to Benjegerdes that she took the planner, does not invalidate the grounds for the seizure.

Benjegerdes argues that the seizure could have been avoided had the teacher simply ripped off the cover of the planner and permitted him to keep the rest of the planner. Again, the teacher witnessed what she understood to be a violation of school rules. The teacher explained that this was a situation where

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issue raised on appeal if it was first presented to and ruled on by the district court. This general rule includes constitutional issues.").

Before the district court, Benjegerdes argued that "the initial seizure by [the teacher]" was unconstitutional, challenging whether the drawing was obscene and the fact he was not notified of the seizure. Benjegerdes did not make an argument based upon the teacher and administrative assistant reading the planner. The district court only ruled upon whether the initial seizure was in violation of the United States Constitution. On appeal, Benjegerdes acknowledges that the district court did not rule on "any actions of school officials beyond the initial taking." Consequently, we find this issue is not preserved for our review. Nevertheless, we address this issue somewhat in the discussion below and find that the scope of the search was also reasonable.

she felt any discipline should be handled by the principal. It was reasonable for her to simply confiscate the whole planner without defacing it and turn it in to the principal for him to pursue any disciplinary action. Moreover, once the teacher observed an apparent rule violation with respect to the cover of the planner, it was reasonable for her to believe that there could be objectionable material inside the planner as well. After looking at the pages of the planner, and finding more "inappropriate things," the planner would not be returned to Benjegerdes with or without the cover. *See T.L.O.*, 469 U.S. at 341–42, 105 S. Ct. at 742–43, 83 L. Ed. 2d at 734–35 (explaining the search is permissible when it is reasonably related to the objective and not overly intrusive). Therefore, we find no violation of Benjegerdes's Fourth Amendment rights as both the search and seizure were reasonable under the circumstances and affirm on this issue.[6]

III. Motion for a New Trial.

> The district court has broad discretion in ruling on a motion for a new trial. We reverse where the district court has abused that discretion. To establish such abuse, [complaining party] must show that the district court exercised its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable. We are slower to interfere with the grant of a new trial than with its denial.

[6] Even if the planner was not properly admitted, we would find the error was harmless beyond a reasonable doubt. *See State v. Hensley*, 534 N.W.2d 379, 382 (Iowa 1995) (explaining not all constitutional violations amount to reversible error, but rather the error may be harmless). The planner contained two lists of names, with initials alleged to be referencing B.K. and N.Y. As the State argues, the initials of B.K. and N.Y. were both written in the planner and the jury found Benjegerdes not guilty of the charge regarding N.Y., demonstrating that the jury did not rely on the list in determining whether the abuse occurred or not. *See id.* ("The inquiry . . . is . . . whether the guilty verdict *actually* rendered in *this* trial was surely unattributable to the error." (quoting *Sullivan v. Louisiana*, 508 U.S. 275, 279, 113 S. Ct. 2078, 2081, 124 L. Ed. 2d 182, 189 (1993)).

> On a weight-of-the-evidence claim,[7] appellate review is limited to a review of the exercise of discretion by the trial court, not of the underlying question of whether the verdict is against the weight of the evidence.

State v. Reeves, 670 N.W.2d 199, 202–03 (Iowa 2003).

Benjegerdes asserts that the district court abused its discretion in ruling on the motion for a new trial, essentially arguing the court put too much emphasis on statements he made regarding certain text messages and the court should have found B.K. was not credible. The district court discussed that during the initial interview with police officers, Benjegerdes made statements in an attempt to "protect himself," including ones regarding text messages. Benjegerdes stated that he and B.K. sent text messages to one another once every two weeks or "[m]aybe even less than that." Contrary to this, phone records demonstrated that in an eleven-month period Benjegerdes sent 700 text messages to B.K. Benjegerdes later attempted to explain this discrepancy in his testimony that sometimes B.K.'s older brother would use B.K.'s phone and that "young people . . . commonly engage in thousands of text contacts every month." He now argues that because he explained the discrepancy, "it is impossible to describe

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[7] In ruling on a motion for a new trial in a criminal case, the district court is to apply a weight-of-the-evidence standard. *State v. Wells*, 738 N.W.2d 214, 219 (Iowa 2007) ("A court may grant a new trial pursuant to Iowa Rule of Criminal Procedure 2.24(2)(b)(6) when 'the verdict is contrary to law or evidence.' The Iowa Supreme Court has held a verdict is contrary to the evidence under this rule if it is 'contrary to the weight of the evidence.'"). Under the "weight of the evidence standard," the trial court weighs the evidence and considers credibility as it determines whether "a greater amount of credible evidence supports one side of an issue . . . than the other." *State v. Reeves*, 670 N.W.2d 199, 202 (Iowa 2003). While trial courts have wide discretion in deciding motions for a new trial, such discretion must be exercised "carefully and sparingly" to insure the court does not "lessen the role of the jury as the principal trier of the facts." *State v. Ellis*, 578 N.W.2d 655, 659 (Iowa 1998). The trial court grants a new trial only in the "exceptional case" where "a miscarriage of justice may have resulted." *Reeves*, 670 N.W.2d at 202. In the present case, there is no dispute that the district court applied the correct standard.

[his] statements as 'minimizing' his contact with B.K." We disagree. Simply offering an explanation does not mean that it was credible or a reasonable explanation of the factual discrepancy. Further, there were other discrepancies between the police interview and his later testimony. For instance, in the initial interview Benjegerdes was questioned about the sex act, which he denied perpetrating. Instead he stated that he asked B.K. to "show me her boobs" and she lifted up her shirt. Yet, at trial he testified that he misspoke during the interview and once B.K. had lifted up her shirt without him asking and he responded by telling her not to do that.

Faced with determining the truth in the conflicting stories, the district court found B.K. "to be not just credible but, frankly, extremely credible." However, Benjegerdes points to the fact that the jury did not find him guilty of the count regarding N.Y., asserting that the jury found it did *not* occur. He surmises that B.K.'s testimony as to the abuse she claims to have witnessed Benjegerdes perpetrate on N.Y. must be false, rendering her testimony as to her own abuse suspect. We first note the jury did not find that Benjegerdes did not sexually abuse N.Y., but rather found that there was not sufficient evidence of that act to prove him guilty beyond a reasonable doubt. The two charges of sexual abuse, one against N.Y. and one against B.K., stemmed from separate acts on different days, and the jury could have found there was more evidence regarding the charge involving B.K. than the charge involving N.Y. The district court was not required to find that an acquittal on one charge results in insufficient evidence to support the verdict on the other. In ruling on the motion for a new trial, the district court stated it had reviewed the exhibits and the transcript of the trial, specifically

discussing some points of the evidence and made credibility assessments supported by the record. We find no abuse of discretion in the court's denial of the motion for a new trial and affirm.

AFFIRMED.