IN THE COURT OF APPEALS OF IOWA

No. 2-053 / 11-0202
Filed March 14, 2012

IN RE THE DETENTION OF
BEN SANDERS

BEN SANDERS,
Respondent-Appellant.

Appeal from the Iowa District Court for Scott County, Gary D. McKenrick, Judge.

Ben Sanders appeals from a judgment finding him a sexually violent predator. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Amy Kepes of the Special Defense Unit, for appellant.

Thomas J. Miller, Attorney General, Elisabeth S. Reynoldson and John McCormally, Assistant Attorneys General, and Michael J. Walton, County Attorney, for appellee State.

Considered by Eisenhauer, C.J., and Danilson and Bower, JJ.

DANILSON, J.

The respondent, Ben Sanders, appeals from a judgment finding him to be a sexually violent predator under Iowa Code chapter 229A (2011). He claims the trial court erred in failing to grant his motion for directed verdict[1] based on the State's alleged failure to present substantial evidence that Sanders' antisocial personality disorder made it likely he would engage in predatory acts constituting sexually violent offenses if not confined in a secure facility. *See* Iowa Code § 229A.2(11). Because substantial evidence supports the State's case, we affirm.

I. Background Facts and Proceedings.

The State filed this action to have respondent Ben Sanders declared a sexually violent predator. The case proceeded to a jury trial. The record made reveals Sanders was convicted in 1965 for rape. Sanders, then age eighteen, broke into a home of strangers, bound and gagged the husband, and sexually assaulted the wife. He was released from prison in 1973. He was imprisoned again in 1973 on a burglary conviction after he went to a house, kicked in a window, and was shot by the female occupant of that house three times. In 1980, while on a weekend furlough, Sanders went to the home of his next door neighbor "[e]xpecting sex." When the woman of the house did not answer his knock on the door, he forced his way into the house. His subsequent burglary conviction was overturned on postconviction relief, and he was released from

[1] Although Sanders' attorney stated at the close of the State's evidence, "I would move for summary judgment," we construe the motion to be a motion for directed verdict. *Kagin's Numismatic Auctions, Inc. v. Criswell*, 284 N.W.2d 224, 226 (Iowa 1979) (stating Iowa courts "look to the substance of a motion and not to its name").

prison in 1986. Shortly after his release from prison in 1986, Sanders had a flat tire and "ended up raping" the woman of the house where he went for help. He was convicted of second-degree sexual abuse and was sentenced to an indeterminate term not to exceed twenty-five years.

Sanders completed a sex offender treatment program in 1995. In 2001, Sanders was transferred from a medium security facility to a maximum security facility after a female guard accused him of stalking her. Sanders stated he took a "refresher" sex offender course in 2007. At trial, Sanders testified, "I don't know why I rape" though he stated his "danger zones" were drinking and his temper.

Dr. Barry Leavitt, a forensic psychologist, testified Sanders' diagnosed antisocial personality disorder qualified as a mental abnormality that "predispos[es] [him] to commit sexually violent offenses to a degree which would constitute a menace to the health and safety of others." *Id.* § 229A.2(5). He testified Sanders' antisocial personality disorder affected Sanders' ability to control his emotions and behavior. He further concluded, based upon his review of Sanders' criminal offense history, analysis of psychological testing, and personal interview, that Sanders was more likely than not to commit sexually violent offenses if not confined. Dr. Richard Wollert testified to a contrary conclusion. Sanders' motions for summary judgment and directed verdict, claiming insufficient evidence, were overruled.

The jury found Sanders to be a sexually violent predator, and Sanders now appeals.

II. Scope and Standard of Review.

Our supreme court has recited our standard of review in *In re Detention of Hennings*, 744 N.W.2d 333, 340 (Iowa 2008):

> Our review of rulings on motions for directed verdict is for correction of errors at law. Iowa R. App. P. [6.907]. We view the evidence in the light most favorable to the party opposing the motion. Iowa R. App. P. [6.904(3)(*b*); *Reuter v. State Farm Mut. Auto. Ins. Co.*, 469 N.W.2d 250, 251 (Iowa 1991). We review the district court's ruling to determine whether the State presented substantial evidence on each element of the claim. *Gibson v. ITT Hartford Ins. Co.*, 621 N.W.2d 388, 391 (Iowa 2001). Evidence is substantial if a jury could reasonably infer a fact from the evidence. *Balmer v. Hawkeye Steel*, 604 N.W.2d 639, 640 (Iowa 2000).

Our supreme court has further elaborated upon motions for directed verdicts and our review in *Royal Indemnity Co. v. Factory Mutual Insurance Co*., 786 N.W.2d 839, 844-845 (Iowa 2010):

> On appeal, an appellate court's review is limited to those grounds raised in the defendant's motion for a directed verdict. *Konicek v. Loomis Bros., Inc.*, 457 N.W.2d 614, 617 (Iowa 1990). Error must be raised with some specificity in a directed verdict motion. *See Ragee v. Archbold Ladder Co.*, 471 N.W.2d 794, 798 (Iowa 1991). On appeal from such judgment, review by an appellate court is limited to those grounds raised in the directed verdict motion. *Meeker v. City of Clinton,* 259 N.W.2d 822, 828 (Iowa 1977).
>
> Neither these commonly recited rules, our rules of civil procedure, nor previous cases provide any definitive guidance on when a motion for directed verdict must be made. Nothing in the rules requires a motion for directed verdict occur at the close of plaintiff's case. Iowa Rule of Civil Procedure 1.945 provides that "[a]fter a party has rested, the adverse party may move for dismissal because no right to relief has been shown, under the law or facts, without waiving the right to offer evidence thereafter." This rule is permissive rather than mandatory. *Christensen v. Sheldon,* 245 Iowa 674, 687-89, 63 N.W.2d 892, 900-01 (1954). Iowa Rule of Civil Procedure 1.1003(2), on the other hand, provides:
>
> > If the movant was entitled to a directed verdict *at the close of all the evidence,* and moved therefor, and the jury did not return such verdict, the court may then

> either grant a new trial or enter judgment as though it had directed a verdict for the movant.

(Emphasis added.) This rule contemplates that the motion for a directed verdict is to be made at the close of all evidence.

> In *Christensen*, we approved the procedure of not granting motions for directed verdict until the completion of all evidence except in the most obvious cases. *Christensen,* 245 Iowa at 688-89, 63 N.W.2d at 901. We continue to believe this to be the best course of action. Even the weakest cases may gain strength during the defendant's presentation of the case. *Id.* at 688, 63 N.W.2d at 900 ("'There is . . . a failure of justice, where the evidence for the defense discloses a case against a defendant already prematurely acquitted, that such acquittal ought never to take place until there is the strongest reason to believe that such a consequence cannot follow.'") (quoting *Castle v. Bullard,* 23 How. 172, 64 U.S. 172, 185, 16 L. Ed. 424, 428 (1859)).

III. Analysis.

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).

On behalf of the State, Dr. Leavitt testified generally that Sanders was more likely than not to reoffend if not confined and he meets the statutory definition of a sexually violent predator. In our review of the evidence, this is not one of the "obvious cases" where the district court should have disposed of this case via Sanders' motion at the close of the State's evidence. The State presented evidence that Sanders had been convicted of two sexually violent offenses, suffered from a mental abnormality, and the abnormality makes

Sanders likely to engage in predatory acts constituting sexually violent offenses if not confined. *Id*. § 229A.2(11), § 229A.2(4).

On the other hand, Sanders' expert, psychologist Richard Wollert, opined Sanders did not have a mental abnormality and was not more likely than not to sexually reoffend.

Clearly, the two experts held two different opinions. It is not the court's function here to determine the correctness of either the theory or testimony between experts. *Martin v. Bankers' Life Co. of Des Moines*, 216 Iowa 1022, 1029, 250 N.W. 220, 223 (Iowa 1933). In ruling upon a motion for directed verdict, "[t]he function of the court is to decide whether the evidence is sufficient to a make a case for the jury." *Id*. Moreover we must view the evidence in the light most favorable to the party opposing the motion. Iowa R. App. P. 6.904(3)(*b*).

We view Dr. Leavitt's opinion that Sanders had a mental abnormality and would likely reoffend sexually in the future, along with all the other circumstances presented including his two convictions, as constituting substantial evidence of each element of the claim that Sanders was a sexually violent predator. We therefore affirm.

AFFIRMED.