IN THE COURT OF APPEALS OF IOWA

No. 2-086 / 11-0297
Filed February 29, 2012

IN RE THE DETENTION OF TIMOTHY McCURRY,

TIMOTHY McCURRY,
Respondent-Appellant.

Appeal from the Iowa District Court for Pottawattamie County, Kathleen A. Kilnoski, Judge.

Timothy McCurry appeals from his civil commitment as a sexually violent predator. **AFFIRMED.**

Michael H. Adams, Local Public Defender, and Thomas J. Gaul, Assistant Public Defender, Special Defense Unit, for appellant.

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

Considered by Vogel, P.J., and Potterfield and Doyle, JJ.

DOYLE, J.

Timothy McCurry was convicted of first-degree sexual assault in Nebraska in 1987 and first-degree burglary and third-degree sexual abuse in Iowa in 1994. He was sentenced to a combined term of incarceration of thirty-five years on the burglary and sexual abuse convictions.

In August 2010, in anticipation of McCurry's release from prison, the State filed a petition under Iowa Code chapter 229A (2009) seeking commitment of McCurry as a sexually violent predator. The district court held a hearing and found probable cause to believe McCurry was a sexually violent predator as defined in section 229A.2(11). A jury trial was held in January 2011.

At trial, McCurry testified as follows:

> Q. How many women have you sexually assaulted? A. Six.
> . . . .
> Q. Do you recall giving a deposition with me in December? A. Yes, I do.
> . . . .
> Q. And do you recall how many victims you told me you had at that time? A. Six.
> Q. Mr. McCurry, you don't remember telling me that you had four victims? A. Four victims, six, four. I can't remember. It's been so long.
> . . . .
> Q. Do you recall writing in your autobiography, as part of treatment, and I'm quoting now, that between 14 and 17 years old I did nine home invasions and raped six women during them? A. Yes.
> Q. So these six would be prior to your two convictions; is that correct? A. Yes.
> Q. So by my count we're actually up to eight victims; is that correct? . . .
> . . . .
> Q. So that's six between 14 and 17, one, the 1986 conviction, that's a total of seven, two between your two convictions, plus your 1993 offense. A. Yes.
> Q. That's ten total offenses; is that correct? A. Yes.
> . . . .

> Q. Are there any [sexual assaults] that I haven't asked about? A. No. That's it.
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> . . . .
>
> Q. I just have one more question, Mr. McCurry. Tell me again how many women you've sexually assaulted. A. Twelve.

Following McCurry's testimony, the State called its expert witness, Dr. Barry Leavitt. He testified McCurry suffered from the mental abnormality of "paraphilia, not otherwise specified, non-consent." Based on that diagnosis, as well as his overall evaluation of McCurry, Leavitt concluded McCurry would more likely than not commit sexually violent offenses if not confined in a secure facility. The prosecutor then asked Leavitt:

> Q. So is it significant to you that Mr. McCurry gave us several different numbers in terms of his victims today? A. It's highly concerning to me, because it speaks to the fact that you don't know what the truth is. . . .

McCurry's attorney objected, arguing Leavitt was improperly commenting on the veracity of a witness. The objection was overruled, and Leavitt continued,

> It concerns me a great deal because it goes to looking at the meaningfulness of what he got out of treatment and how far along is this gentleman, if, after all this time, he still is inconsistent in what he's telling people with respect to his victims and the extent of his sexual violence.
>
> . . . .
>
> Q. Dr. Leavitt, presumably Mr. McCurry knows the truth. Why does it matter if he told different stories to different people? A. Well, it matters because, one, it speaks to his—a lack of willingness to be open and honest about it, and it also speaks to the fact that he continues to be reluctant to look at it and examine that issue for himself in the kind of in-depth way that would need to be done.

The prosecutor later asked Leavitt:

> Q. Did anything [McCurry] say today change your opinion of his risk of re-offending? A. What he said today reinforced my concerns that . . . he still has not progressed as far in treatment as he would like to believe. . . .

> Q. And he has not progressed as far because he is still inconsistent about what he's done? A. I think he sat here today and lied.

Defense counsel interposed another objection, which was again overruled.

The jury found McCurry was a sexually violent predator. The district court consequently committed him to the custody of the Iowa Department of Human Services for treatment.

McCurry appeals, claiming the district court erred under *State v. Graves*, 668 N.W.2d 860 (Iowa 2003), in allowing the State's expert witness to comment on his veracity.[1] To the extent McCurry alleges a violation of his due process rights, our review is de novo. *See Graves*, 668 N.W.2d at 869 (noting prosecutorial misconduct that denies a defendant the right to a fair trial violates due process); *In re Detention of Williams*, 628 N.W.2d 447, 451 (Iowa 2001) (reviewing a constitutional challenge de novo).

It is the prejudice resulting from the misconduct, not the misconduct itself, that entitles a defendant to a new trial. *See Graves*, 668 N.W.2d at 869. In other words, misconduct, if any, does not necessarily entitle McCurry to relief. The bright-line rule of *Graves* is not a bright-line rule for prejudice. To prevail, McCurry must show he was prejudiced to the extent he was denied a fair trial.

[1] "It is well-settled law in Iowa that a bright-line rule prohibits the questioning of a witness on whether another witness is telling the truth." *Bowman v. State*, 710 N.W.2d 200, 204 (Iowa 2006) (citing *Graves*, 668 N.W.2d at 873). Our courts have also repeatedly held it is improper for an expert witness to opine as to the truthfulness of a witness. *See State v. Myers*, 382 N.W.2d 91, 97 (Iowa 1986); *Johnson v. State*, 495 N.W.2d 528, 530 (Iowa Ct. App. 1992). But because McCurry's claim on appeal is based solely on *Graves* (prosecutorial misconduct), we need not address the *Myers* line of cases. *See Hyler v. Garner*, 548 N.W.2d 864, 870 (Iowa 1996) ("[O]ur review is confined to those propositions relied upon by the appellant for reversal on appeal.").

Id. McCurry has failed to show any such prejudice resulted from the claimed misconduct.

Dr. Leavitt referred to McCurry as a liar once, and the prosecutor did not exploit the reference. *See id.* (examining the severity and pervasiveness of the misconduct in determining prejudice). "It is not so much the fact that the prosecutor suggests the defendant is untruthful that creates the misconduct." *State v. Carey*, 709 N.W.2d 547, 558 (Iowa 2006). Instead, it is the use of the word "liar" itself that is improper. *Id.* Moreover, McCurry's recollection of the number of offenses was not a critical issue in the civil commitment trial, as it was undisputed he had committed at least two sexually violent offenses. *Compare Graves*, 668 N.W.2d at 877 (finding defendant was prejudiced by the misconduct where the misconduct related to a central issue in the case) *with Nguyen v. State*, 707 N.W.2d 317, 326 (Iowa 2005) (finding no prejudice resulted from claimed misconduct where "the issue of lying did not become a central theme, or any theme, in the case"). McCurry's recollection of the exact number of victims he sexually assaulted was collateral to the ultimate question for the jury—whether the timing and sequence of his offenses were consistent with the definition of a sexually violent predator.

Because the claimed instances of misconduct were not pervasive and did not relate to the elements of the State's case, we conclude McCurry failed to show prejudice sufficient to require a new trial. *See Carey*, 709 N.W.2d at 560. We accordingly affirm the judgment of the district court.

AFFIRMED.