IN THE COURT OF APPEALS OF IOWA

No. 2-562 / 11-0686
Filed August 22, 2012

IN RE THE DETENTION OF MARK SCHMUECKER,

MARK SCHMUECKER,
Respondent-Appellant.

Appeal from the Iowa District Court for Linn County, Patrick R. Grady, Judge.

Mark Schmuecker appeals the district court's order of commitment following a jury verdict finding him to be a sexually violent predator. **AFFIRMED.**

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

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

Considered by Vaitheswaran, P.J., and Doyle and Danilson, JJ.

DOYLE, J.

Mark Schmuecker appeals the order of commitment entered by the district court following a jury verdict finding him to be a sexually violent predator, as defined by Iowa Code section 229A.2(11) (2009). Asserting there was insufficient evidence to prove he met the definition of a sexually violent predator, Schmuecker argues the district court erred in denying his motion for a directed verdict. We affirm.

***I. Background Facts and Proceedings*.**

In 1988, Schmuecker pled guilty to the offense of lascivious acts with a child. His victim was a twelve-year-old boy. Schmuecker admitted that he performed oral sex multiple times on the boy over a six-month period. After his probation was revoked, he served his prison sentence and was released in 1993. In 2004, Schmuecker pled guilty to the offense of sexual abuse in the third degree. His victim was another young adolescent boy upon whom Schmuecker performed oral sex three times between 1999 and 2000. He was sentenced to serve a prison term not to exceed ten years. Before he was due to be released from prison in January 2010, the State filed a petition seeking to have Schmuecker committed as a sexually violent predator under Iowa Code chapter 229A.

The case proceeded to a jury trial in April 2011. Schmuecker testified at trial and admitted to his prior offenses. He also testified that he is attracted to teenage boys and probably has been most of his life. The State offered the opinions of Dr. Richard Elwood in support of its case, while Schmuecker

countered with the opinions of Dr. Craig Rypma and Dr. Luis Rosell in his defense.

After the State rested, and again at the end of the trial, Schmuecker made motions for a directed verdict.[1] He asserted the State had failed to prove he fit the definition of a sexually violent predator. The district court denied the motions and submitted the case to the jury, which found Schmuecker to be a sexually violent predator. The district court committed Schmuecker "to the custody of the Director of the Department of Human Services for control, care, and treatment until such time as his mental abnormality has so changed that he is safe to be placed in a transitional release program or discharged."

Schmuecker appeals, again asserting there was insufficient evidence that he suffers from a mental abnormality or that he is likely to reoffend. He asserts the evidence showed he had been free from 1999 to 2003 and had not committed a sexually violent offense, he had no diagnosis that fit the definition of a mental abnormality, and he is not likely to reoffend.

II. Scope and Standards of Review.

We review a district court's decision on a motion for a directed verdict for correction of errors at law. *In re Det. of Hennings*, 744 N.W.2d 333, 340 (Iowa 2008). We view the evidence in the light most favorable to the opposing party

[1] Although Schmuecker's attorney stated at the close of the State's evidence, "I would specifically request the court make a ruling—you can call it judgment of acquittal," and at the end of trial, "I would renew my motion for a judgment for [Schmuecker] as a matter of law," 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").

and will find the evidence substantial if a jury could reasonably infer a fact from the evidence. *Id.*

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, 844-45 (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).
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> 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*, [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.
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> 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*, [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 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*, [64 U.S. 172, 185] (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).

This case essentially boils down to a battle of the experts. The State's expert, Dr. Elwood, testified Schmuecker had four mental abnormalities, including paraphilia not otherwise specified with some interest in children and young adolescents, and antisocial personality disorder. Dr. Elwood found that these mental abnormalities predisposed Schmuecker to commit further acts of sexual violence and that he was more likely than not to commit another sexual violent act. 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 Schmuecker's motion at the close of the State's evidence. The State presented evidence that Schmuecker had been convicted of two sexually violent offenses, suffered from a mental abnormality, and the abnormality made Schmuecker likely to engage in predatory acts constituting sexually violent offenses if not confined. *Id*. § 229A.2(4), (11).

On the other hand, Schmuecker offered the opinions of Dr. Craig Rypma and Dr. Luis Rosell. Dr. Rypma opined Schmuecker did not have a mental abnormality as defined under chapter 229A. Dr. Rosell similarly opined

Schmuecker did not fit within the statutory definition of a sexually violent predator. Both doctors believed Schmuecker was less likely than not to sexually reoffend if released.

Clearly, the opposing camps of 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.*, 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.* Furthermore, the credibility of witnesses is for the jury: "The jury is free to believe or disbelieve any testimony as it chooses and to give weight to the evidence as in its judgment such evidence should receive." *State v. Thornton*, 498 N.W.2d 670, 673 (Iowa 1993); *see also State v. Jacobs*, 607 N.W.2d 679, 685 (Iowa 2000) ("When conflicting psychiatric testimony is presented to the fact finder, the issue . . . is clearly for the fact finder to decide. [T]he trier of fact is not obligated to accept opinion evidence, even from experts, as conclusive. When a case evolves into a battle of the experts . . . the reviewing court . . . readily defer[s] to the [fact finder's] judgment as [they are] in a better position to weigh the credibility of the witnesses." (Internal citations omitted.)). 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).

Based upon the evidence at trial, including Dr. Elwood's testimony that Schmuecker's mental abnormalities predisposed Schmuecker to commit further acts of sexual violence and that he was more likely than not to commit another sexually violent act and Schmuecker's two convictions for sexually violent

offenses, we find there was sufficient evidence presented from which a reasonable jury could conclude Schmuecker is a sexually violent predator. We therefore find no error in the district court's denial of Schmuecker's motions for directed verdict and accordingly affirm the court's order of commitment.

AFFIRMED.