

**IN THE COURT OF APPEALS OF IOWA**

No. 2-571 / 11-1587  
Filed August 22, 2012

**IN RE THE DETENTION OF  
DAVID WHETSTONE,**

**DAVID WHETSTONE,**  
Respondent-Appellant.

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Appeal from the Iowa District Court for Cass County, Richard H. Davidson,  
Judge.

David Whetstone appeals the jury's verdict finding him to be a sexually  
violent predator. **AFFIRMED.**

Thomas J. Gaul, Assistant Public Defender, for appellant.

Thomas J. Miller, Attorney General, John B. McCormally, Assistant  
Attorney General, and Daniel Feistner, County Attorney, for appellee State.

Considered by Eisenhauer, C.J., and Potterfield and Mullins, JJ.

**EISENHAUER, C.J.**

David Whetstone contends insufficient evidence supports the jury's conclusion he is a sexually violent predator.

***I. Background Facts & Proceedings.***

The State alleged Whetstone was a sexually violent predator within the meaning of Iowa Code chapter 229A (2011). Trial was held in September 2011. The jury returned a verdict finding Whetstone to be a sexually violent predator.<sup>1</sup>

Whetstone was convicted in 2008 of assault with intent to commit sexual abuse. While living in a group home he exposed himself to a nurse, fondled her, and rubbed his penis against her. He was placed on probation, but the probation was later revoked, and he was sent to prison where he remained at the time of trial.

After Whetstone refused to be interviewed, Dr. Amy Phenix, a forensic psychologist, examined his medical and mental health records and reported he has both an antisocial personality disorder and bi-polar disorder. Dr. Phenix also testified Whetstone was more likely than not to commit sexually violent offenses if not confined in a secure facility.

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<sup>1</sup> The jury was instructed:

To prove the Respondent, David Whetstone is a sexually violent predator, the State must prove each of the following elements beyond a reasonable doubt;

1) The Respondent has been convicted of . . . a sexually violent offense.

2) The Respondent suffers from a mental abnormality.

3) The mental abnormality makes the Respondent likely to engage in the predatory acts constituting sexually violent offenses if Respondent is not confined to a secure facility.

See Iowa Code section 229A.2(11) (defining "sexually violent predator").

## ***II. Sufficiency of the Evidence.***

Whetstone claims the State did not present sufficient evidence to prove he is a sexually violent predator. He cites *In re Detention of Gonzales*, 658 N.W.2d 102, 104-05 (2003), and argues a “recent overt act evidencing present dangerousness” is required and also claims the evidence showed he “does not pose a present danger to commit sexually violent offenses if not confined in a secure facility.”

Our review of challenges to the sufficiency of the evidence is for correction of errors at law. *In re Detention of Altman*, 723 N.W.2d 181, 184 (Iowa 2006). The jury’s verdict is binding upon a reviewing court unless there is an absence of substantial evidence in the record to sustain it. *Fenske v. State*, 592 N.W.2d 333, 343 (Iowa 1999). “Evidence is substantial when a reasonable mind would accept it to support a conclusion.” *Altman*, 723 N.W.2d at 814. “[W]e view the evidence in the light most favorable to the State.” *State v. Leckington*, 713 N.W.2d 208, 213 (Iowa 2006).

Iowa Code section 229A.2(4) provides:

*“Likely to engage in predatory acts of sexual violence”* means that the person more likely than not will engage in acts of a sexually violent nature. If a person is not confined at the time that a petition is filed, a person is *“likely to engage in the predatory acts of sexual violence”* only if the person commits a recent overt act.

The *Gonzales* case Whetstone relies on is distinguishable. *Gonzales* served his sentence on a sex offense, was released from custody, and was later incarcerated for operating a motor vehicle without the owner’s consent. *Gonzales*, 658 N.W.2d at 102-03. The State petitioned for civil commitment while *Gonzales* was in prison for the driving-without-consent charge. *Id.* at 103.

The Iowa Supreme Court noted the “significant difference” in the State petitioning “against confined and nonconfined persons is that, [for nonconfined persons], the State must show the person has committed a recent overt act, while this is not expressly required as to a person who is confined.” *Id.* at 104. The court interpreted the term “confined” to require the confinement be for a sexually violent offense, stating:

If the “confinement” referred to in these statutes is interpreted, as we believe it should be, to mean confinement for a sexually violent offense, the “recent overt act” requirement of chapter 229A is satisfied. The recent act would simply be deemed to be the act for which the person is presently confined. If we interpret the statute as the State suggests, a person could be committed without any showing of a recent overt act because they are being processed as a “confined” person. This would raise serious constitutional issues.

*Id.* at 105. The *Gonzales* court remanded the case for dismissal of the State’s petition “because Gonzales was not confined for a sexually violent offense at the time the petition was filed and the State failed to prove, or even allege, a recent overt act.” *Id.* at 106.

Here, it is undisputed Whetstone was confined for a sexual offense at the time the State filed the civil commitment petition. Accordingly, the concerns leading to dismissal in *Gonzales* are not implicated, and Whetstone’s confinement offense is sufficient. *See id.; In re Detention of Shaffer*, 769 N.W.2d 169, 173-75 (2009) (noting State does not allege a recent overt act, but respondent was confined for sexual abuse at time of State’s petition).

Further, Dr. Phenix’s testimony, as discussed above, specifically supports the jury’s verdict. We note the credibility of witnesses is for the factfinder to decide except for those rare circumstances where the testimony is absurd,

impossible, or self-contradictory. *State v. Kostman*, 585 N.W.2d 209, 211 (Iowa 1998). None of those factors apply to Dr. Phenix's testimony. When viewing the evidence in the light most favorable to the State, we conclude substantial evidence supports the jury's determination and affirm the verdict.

**AFFIRMED.**