IN THE COURT OF APPEALS OF IOWA

No. 2-799 / 11-1878
Filed November 29, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JEFFREY ALAN ASHMORE,
Defendant-Appellant.

Appeal from the Iowa District Court for Davis County, Crystal S. Cronk, District Associate Judge.

Defendant appeals from his conviction and sentence for two counts of invasion of privacy. **JUDGMENT AFFIRMED; SENTENCE VACATED AND CASE REMANDED FOR RESENTENCING.**

Mark E. Weinhardt, Holly M. Logan, and William B. Ortman of Weinhard & Logan, P.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney General, and Rick Lynch, County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Potterfield and Bower, JJ.

BOWER, J.

Jeffrey Ashmore appeals from the judgment and sentence entered upon a jury verdict finding him guilty of two counts of invasion of privacy, in violation of Iowa Code section 709.21 (2011). Ashmore argues the district court: (1) erred in denying his motion for judgment of acquittal, (2) abused its discretion in denying his motion for new trial, (3) failed to adequately explain the reasons for the sentence it imposed, and (4) erred in sentencing him under section 692A.106(4).

Upon our review we find substantial evidence supports the jury's determination in regard to the challenged elements of the crime, and the district court properly denied Ashmore's motion for judgment of acquittal. We further find the greater weight of the evidence supports the jury's determination of guilt in this case, and the district court did not abuse its discretion in overruling Ashmore's motion for new trial. However, we find the court did not give sufficient reasons for Ashmore's sentence, and therefore, his sentence must be vacated and the case remanded for resentencing. On remand, we also direct the court to remove the reference in regard to section 692A.106(4) from Ashmore's sentence. Accordingly, we affirm Ashmore's judgment, vacate his sentence, and remand this case for resentencing.

I. Background Facts and Proceedings.

Thirty-three year old Shannon Woods lives with her husband, Ryan, and their two young children in Bloomfield, Iowa. Shannon is an attorney, and Ryan is a middle school principal. Shannon and Ryan both work "full-time-plus jobs" and "always have a pretty strict routine." In addition, Shannon is a long-distance

runner with a "set pattern" for her training. The children have an 8:00 bedtime, and then usually between 8:00 and 8:30, Shannon takes a shower.

On the evening of March 4, 2011,[1] Shannon was home alone with the children. Ryan was at a school function and did not return home until 11:00 p.m. Shannon put the children to bed, took a shower "at 8:00 or 8:30," and then went to bed. As Shannon got into bed, she heard "what [she] thought was a ladder on the outside of [the] bedroom wall." When Ryan came home, Shannon told him she "had heard something outside, and that it sounded like a ladder scraping along the side of the house." Ryan told Shannon, "Well, that's just crazy." Trying to "defend [herself] a little bit," Shannon reminded Ryan that when she was a child, her house was burglarized by a person who climbed a ladder and entered through the chimney.

Four days later, on March 8, Shannon's "exact same routine" was altered because she was presenting a speech at an out-of-town seminar. By the time Shannon arrived home "between 8:00 and 8:30," the children were already in bed. Shannon decided to make a cup of hot chocolate and sit down "on the living room couch for a minute in the dark." As Shannon was relaxing and looking out the back window, she saw a man "carrying a ladder [walk] right through the backyard." The man was "tall and skinny" and was "dressed fully in black, had black pants, a black coat, a black stocking hat." The man came "from the east," the direction of their next door neighbor, the defendant Jeffrey

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[1] All dates refer to 2011 unless otherwise specified.

Ashmore.[2] Because the man "was walking a straight shot from the front of [Ashmore's] house," Shannon wondered if the person was "stealing a ladder from Mr. Ashmore." Shannon lost sight of the man after he walked past their three-season porch.

Ryan entered the living room, and Shannon told him what she had just seen. Ryan agreed that was "kind of odd." As Ryan opened up a sliding glass door and stepped out onto the porch, Shannon heard the man fall off the ladder and run into the woods behind the house. Ryan did not see the man fall off the ladder, but saw him "about 10 feet" from their home, heading with the ladder toward the woods. Ryan was "90-plus percent sure" the man was Ashmore. Ryan then heard "what sounded like somebody falling, because all of the sudden there was a quite a noise back in the timber."

Shannon and Ryan called the police, and officers searched the area with spotlights for approximately fifteen minutes without success before concluding they had "scared 'em off." After the police left, Shannon told Ryan, "I've been hearing stuff at night. Do you think it's somebody coming and looking in the house?" Ryan went outside with a flashlight to take a closer look around the house. Ryan returned and said, "There are multiple ladder prints beside your bathroom window and beside our bedroom window." Shannon and Ryan called the police again.

The police returned and examined the ladder prints. Police Chief Shawn Armstrong asked Shannon if she had any idea who might be looking through her

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[2] Ashmore has since moved away from the Woodses' neighborhood.

windows. Shannon responded, "The only person that comes to mind would be my next-door neighbor [Ashmore]." Shannon further explained that from her few interactions with Ashmore, he "creeps [her] out a little bit" and "made the hair on the back on [her] neck stand up." Shannon also thought it was "odd" that several times Ashmore stopped as he drove by the Woodses' driveway and commented about "how many days it had been since [Shannon] had run or since he had seen [Shannon] run."

Chief Armstrong and Officer Jason Cole decided to install a motion sensor camera behind the Woodses' home. The camera had a night vision setting and after movement was detected, it would automatically take five photographs at a series of four-second intervals. After that, the camera would enter a designated "sleep" mode for ten minutes before waking again to capture any movement.

A few weeks after the camera was installed, Shannon called the police department and asked the officers to check the contents of the camera. The footage revealed five still photographs, taken at approximately 7:45 p.m. on March 21, depicting a man carrying a large ladder and walking from the direction of Ashmore's home to the Woodses' home and arriving near Shannon and Ryan's bedroom window in the last picture. The man also appeared to be carrying a camera.

Ashmore agreed to come to the police station for questioning. Chief Armstrong conducted the video-taped interview, in which Ashmore admitted to carrying a ladder and a camera onto the Woodses' property, and stated he had done so "probably about four or five" times. Ashmore later stated, "I mean, I

didn't even hardly get to see anything" and stated that he "didn't take any pictures." Ashmore denied masturbating and lamented his marital problems, but agreed he had "screwed up." Ashmore stated he thought Shannon was "a beautiful lady" and said he had stopped walking in the evenings because "it was just too tempting." Ashmore told Chief Armstrong, "To be honest, Shawn, I was surprised that it took you guys so long."

Ashmore accompanied Chief Armstrong and Officer Cole to his home where he cooperated in a search. The officers seized a ladder and a camera from Ashmore's home. The camera had black tape covering the flash, but the officers determined it contained no inappropriate pictures.

The State filed a trial information charging Ashmore with two counts of invasion of privacy—nudity, in violation of Iowa Code section 709.21, for the incidents that took place on March 4 and March 21. Following a two-day trial, the jury found Ashmore guilty as charged. The district court sentenced Ashmore to one year in jail on each count, with all but thirty days suspended, and ordered the two sentences to be served consecutively. Ashmore now appeals.

II. Motion for Judgment of Acquittal.

Ashmore asserts the district court erred in denying his motion for judgment of acquittal because the evidence was insufficient to prove he committed the crime of invasion of privacy. Our review of claims of insufficient evidence to support a conviction is for correction of errors at law. Iowa R. App. P. 6.907; *State v*. *Brubaker*, 805 N.W.2d 164, 171 (Iowa 2011). A jury's findings of guilt are binding on appeal if supported by substantial evidence. *State v*. *Enderle*, 745

N.W.2d 438, 443 (Iowa 2007). Substantial evidence exists to support a verdict when the record reveals evidence that could convince a rational trier of fact a defendant is guilty beyond a reasonable doubt. *Brubaker*, 805 N.W.2d at 171. In making this determination, we consider all of the evidence in the record in the light most favorable to the verdict and make all reasonable inferences that may fairly be drawn from the evidence. *Id*. "However, it is the State's 'burden to prove every fact necessary to constitute the crime with which the defendant is charged, and the evidence presented must raise a fair inference of guilt and do more than create speculation, suspicion, or conjecture.'" *Id*. (quoting *State v*. *Kemp*, 688 N.W.2d 785, 789 (Iowa 2004)).

To convict Ashmore of two counts of invasion of privacy in this case, the State was required to prove:

> 1. On or about March [4 and 21], 2011, Jeffrey Ashmore knowingly and intentionally viewed another person for the purpose of arousing or gratifying his sexual desire [and committed invasion of privacy if all of the following apply]:
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> a. The other person did not have knowledge about and did not consent or is unable to consent to being viewed, photographed, or filmed.
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> b. The other person was in a state of full or partial nudity.
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> c. The other person has a reasonable expectation of privacy while in a state of full or partial nudity.

Jury Instructions no. 13, 14; *see* Iowa Code § 709.21.

"Evidence is sufficient to withstand a motion for judgment of acquittal when, viewing the evidence in the light most favorable to the State and drawing all reasonable inferences in the State's favor, there is substantial evidence in the record to support a finding of the challenged element." *State v*. *Williams*, 695 N.W.2d 23, 28 (Iowa 2005) (quotation marks omitted).

> [T]he function of the court, on a motion to direct a verdict of acquittal, is limited to determining whether there is sufficient evidence from which reasonable persons could have found the defendant guilty as charged. It is not the province of the court, in determining the motion, to resolve conflicts in the evidence, to pass upon the credibility of witnesses, to determine the plausibility of explanations, or to weigh the evidence; such matters are for the jury.

Id.

First, Ashmore contends the State "did not prove beyond a reasonable doubt" he was on the Woodses' property "on or about March 4." Shannon Woods testified that on March 4, she heard what "sounded like a ladder scraping along the side of the house" outside of her bedroom wall, after she had taken a shower and as she was getting into bed. Four days later, Ryan Woods discovered "multiple ladder prints" outside the bedroom and bathroom windows. Several weeks later, Ashmore admitted he had trespassed on the Woodses' property with his ladder "four or five times." Concerning the date of an alleged offense, our supreme court has held:

> [t]he date or dates fixed in the indictment for the commission of a crime are not material, and a conviction can be returned upon any date within the limitations statute, if there is no fatal variance between the indictment allegations and the proof offered.

State v. Washington, 356 N.W.2d 192, 196 (Iowa 1984) (holding information charging defendant with theft on or about January 5, 1983, did not preclude defendant's conviction for thefts in February 1982, when evidence admitted tended to show commission of a theft in 1982); *see also State v. Young*, 172 N.W.2d 128, 129 (Iowa 1969) (holding information charging defendant with statutory rape on June 15, 1968, did not prevent defendant from being convicted

for rape on June 22, 1968, when evidence admitted showed statutory rape occurred on June 22, 1968); *State v. Hardesty*, 153 N.W.2d 464, 471–72 (1967) (holding indictment charging defendant with larceny between August 10 and August 14 did not immunize defendant from conviction when jury instruction stated the larceny occurred between August 1 and August 15, because evidence admitted showed the time period of the larceny to have occurred between August 1 and August 15).

Here, considering the evidence in the light most favorable to the verdict and making all reasonable inferences that may fairly be drawn from the evidence, we find the jury was presented with substantial evidence establishing Ashmore's presence at the Woodses' home "on or about" March 4. Therefore, "there is no fatal variance between the indictment allegations and the proof offered." *See*, *e.g.*, *Washington*, 356 N.W.2d at 196.

Ashmore next argues the State failed to prove that he "actually saw [Shannon Woods] in a state of full or partial nudity" on either March 4 or March 21. "Full or partial nudity" was defined to the jury as "the showing of any part of the human genitals or pubic area or buttocks, or any part of the nipple of the breast of a female, with less than fully opaque covering." Jury Instruction no. 15; *see* Iowa Code 709.21(2)(a).

In this case, multiple ladder prints were discovered outside Shannon's bathroom and bedroom windows. The record contains pictures depicting the exterior of the Woodses' home as well as the Woodses' master bedroom and bathroom. Shannon testified the bathroom contains a "huge" mirror that "covers

pretty much the whole wall." Shannon explained that both her bathroom and bedroom windows provide a "full view" of the bathroom, the bathroom mirror, and "anything that was in the mirror." Shannon explained the windows have "wood blinds that are always down," but that the blinds do not "lay totally flat against the window" so there is always "an inch or two along the edge of the window where you can see in at an angle." Shannon further testified she conducted all her pre-shower and post-shower grooming rituals in front of the bathroom mirror in the nude. As Shannon explained, "I would put—you know, comb my hair, brush my teeth, take my contacts out, put lotion on [while] I was naked."

On March 4, Shannon heard a ladder scraping outside the house immediately after her shower, as she was getting into bed. Ladder prints were discovered outside Shannon's bathroom and bedroom windows on March 8. On March 21, surveillance footage depicted Ashmore with a ladder outside the bedroom window at 7:45 p.m. Ashmore repeatedly states that he could not have seen Shannon on March 21 because she did not shower until approximately 8:45 p.m. that evening. Ashmore persists that only "by speculating" could the jury find he maintained a post at Shannon's window "for a full hour," and that he did so "without triggering the motion sensor camera a second time."

The State argues the jury "was reasonable to infer that a person who knew his neighbor's nightly schedule and went to the effort of repeatedly dragging a large extension ladder through her yard to see her shower might also wait patiently to see the fruits of his labor." We agree. We also reiterate that "[t]he date or dates fixed in the indictment for the commission of a crime are not

material, and a conviction can be returned upon any date within the limitations statute, if there is no fatal variance between the indictment allegations and the proof offered." *Washington*, 356 N.W.2d at 196. Here, Ashmore told police "I didn't even hardly get to see anything," and stated he had stopped walking in the evenings because "it was just too tempting." A reasonable fact-finder could infer from these statements that Ashmore did see something during the "four or five times" he had trespassed on the Woodses' property with his ladder. In addition, we observe the detailed testimony in regard to the timing of Shannon's showering schedule and routine.

Considering the evidence in the light most favorable to the verdict and making all reasonable inferences that may fairly be drawn from the evidence, we find the jury was presented with substantial evidence establishing Ashmore's viewing of Shannon Woods in a state of full or partial nudity. The district court properly denied Ashmore's motion for judgment of acquittal.

III. Motion for New Trial.

Ashmore argues the district court erred in denying his motion for new trial when the weight of the evidence failed to establish he actually viewed Shannon Woods in a state of full or partial nudity on March 4 or March 21, or that he was on the Woodses' property on March 4. The district court has broad discretion in ruling on a motion for new trial, and our review in such cases is for abuse of discretion. *State v. Nitcher*, 720 N.W.2d 547, 559 (Iowa 2006). The court may grant a new trial where a verdict rendered by a jury is contrary to law or evidence. *Id*. "Contrary to the evidence" means "contrary to the *weight* of the

evidence." *State v*. *Reeves*, 670 N.W.2d 199, 201 (Iowa 2003) (emphasis added). "Unlike the sufficiency-of-the-evidence analysis, the weight-of-the-evidence analysis is much broader in that it involves questions of credibility and refers to a determination that more credible evidence supports one side than the other." *Nitcher*, 720 N.W.2d at 559. Our review of a weight-of-the-evidence claim "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." *Reeves*, 670 N.W.2d at 203. The court should only exercise its discretion to grant a new trial "carefully and sparingly." *State v*. *Taylor*, 689 N.W.2d 116, 134 (Iowa 2004).

Upon our review, we find the greater weight of the evidence supports the jury's determination of guilt in this case. "Only in the extraordinary case, where the evidence preponderates heavily against the verdict, should a district court lessen the jury's role as the primary trier of fact and invoke its power to grant a new trial." *Id*.*; State v*. *Shanahan*, 712 N.W.2d 121, 135 (Iowa 2006). We conclude the district court did not abuse its discretion in overruling Ashmore's motion for new trial.

IV. Sentencing.

Ashmore contends the district court failed to adequately explain the reasons for the sentence it imposed. We review a sentence in a criminal case for the correction of errors at law. *State v*. *Formaro*, 638 N.W.2d 720, 724 (Iowa 2002). "We will not reverse the decision of the district court absent an abuse of discretion or some defect in the sentencing procedure." *Id*.

In this case, the district court sentenced Ashmore to one year in jail on each count, with all but thirty days suspended, and ordered the two sentences to be served consecutively. In reaching its sentencing determination, the court gave the following statement on the record:

> Mr. Ashmore, I have selected this particular sentence for you after considering your age, prior criminal record, employment, family circumstances, the nature of the offense committed, and harm to the victim, whether a weapon or force was used in the commission of the offense, your need for rehabilitation and the potential for rehabilitation, and the necessity of protecting the community from further offenses by you and others.

The sentencing court must state on the record its reasons for imposing consecutive sentences. Iowa R. Crim. P. 2.23(3)(d); *State v*. *Lumadue*, 622 N.W.2d 302, 304 (Iowa 2001). It is insufficient if the court cites "only generalized, vague considerations which we may assume advise every court in making every sentencing decision." *State v*. *Cooper*, 403 N.W.2d 800, 802 (Iowa Ct. App. 1987). Rather, the court should give a "rationale relating to *this* offense, and *this* defendant's background." *Lumadue*, 622 N.W.2d at 305.

The State concedes "the court's statement of reasons does not appear to be particularized to this defendant or these offenses." Upon our review, we find the district court's statement of reasons for the sentence imposed does not provide a sufficient basis to review that sentence for an abuse of discretion. When the court fails to state on the record adequate reasons for the sentence imposed, the sentence must be vacated and the case remanded for resentencing. *See Cooper*, 403 N.W.2d at 801–02. As the court did not give sufficient reasons for Ashmore's sentence as required by Iowa Rule of Criminal

Procedure 2.23(3)(d), the sentence must be vacated and the case remanded for resentencing.

Ashmore further argues the district court erred in requiring him to register as a sex offender for "an additional ten years" under Iowa Code section 692A.106(4).[3] The State concedes that "nothing in this record indicates that Ashmore had been previously convicted of violating any sex offender registry requirement." *See* Iowa Code § 692A.106(4) (requiring that a sex offender "who is convicted of violating any of the requirements of this chapter shall register for an additional ten years."). We agree. We direct the court on remand to remove the reference in regard to Iowa Code section 692A.106(4) from Ashmore's sentence.

V. Conclusion.

Upon our review, we find substantial evidence supports the jury's determination in regard to the challenged elements of the crime and the district court properly denied Ashmore's motion for judgment of acquittal. We further find the greater weight of the evidence supports the jury's determination of guilt in this case, and the district court did not abuse its discretion in overruling Ashmore's motion for new trial. However, we find the court did not give sufficient reasons for Ashmore's sentence, and therefore, Ashmore's sentence must be vacated and the case remanded for resentencing. On remand, we also direct the

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[3] In imposing Ashmore's sentence, the court noted:

> Pursuant to Iowa Code section 692A.106(4), defendant shall be required to register as a sex offender for an additional 10 years commencing from the date the defendant's registration would have expired under Iowa Code section 692A.106(1).

court to remove the reference in regard to section 692A.106(4) from Ashmore's sentence. Accordingly, we affirm Ashmore's judgment, vacate his sentence, and remand this case for resentencing.

JUDGMENT AFFIRMED; SENTENCE VACATED AND CASE REMANDED FOR RESENTENCING.