IN THE COURT OF APPEALS OF IOWA

No. 6-1017 / 06-0033
Filed January 31, 2007

IN RE THE DETENTION OF

MARTIN DEAN HARLESS,
Respondent-Appellant.

Appeal from the Iowa District Court for Woodbury County, Duane E. Hoffmeyer, Judge.

Martin Dean Harless appeals his civil commitment as a sexually violent predator pursuant to Iowa Code chapter 229A (2005). **AFFIRMED.**

Mark Smith, First Assistant State Public Defender, and Steven L. Addington, Assistant Public Defender, for appellant.

Thomas J. Miller, Attorney General, Mary E. Tabor and Andrew B. Prosser, Assistant Attorney General, and Patrick Jennings, County Attorney, for appellee.

Heard by Zimmer, P.J., and Miller and Baker, JJ.

MILLER, J.

Martin Dean Harless appeals, following jury trial, his civil commitment as a sexually violent predator pursuant to Iowa Code chapter 229A (2005). He contends the district court erred in denying his motion for a directed verdict because the State failed to prove he was presently more likely than not to commit a sexually violent offense if not confined in a secure facility. We affirm.

I. BACKGROUND FACTS AND PROCEEDINGS.

The record reveals the following facts. At age eighteen Harless enlisted in the United States Army during the Vietnam War and then served in Vietnam. He admitted that while there he observed and participated in the torture and rape of several Vietnamese women, some as young as twelve years old. After he was discharged from the Army, Harless was charged with and/or convicted of a series of sexual offenses each involving allegations that he confined the victims against their will and then either attempted to or actually had sexual intercourse with them.

A brief summary of Harless's activities following his discharge from the military to the present is as follows: July 1983 charged with assault and attempted rape in Nebraska, pled guilty to assault and battery; September 23, 1974, pled guilty to and was convicted of kidnapping for the purpose of rape in the United States District Court for the Northern District of Iowa and sentenced to six years;[1] July 22, 1976 escaped from federal prison in Colorado, met a teenage girl in South Dakota who allegedly wanted to run away from home, took her to

[1] Harless was also charged with statutory rape in July 1974 but the plea agreement in federal court provided for the dismissal of the state rape charge.

Omaha, had sex with her, telephoned her parents demanding $1,000 for her release, and was convicted in federal court for wire fraud; paroled in the fall of 1980 and by July 6, 1981, was back in federal district court in Iowa where he pled guilty to kidnapping for the purpose of rape, initially receiving a life sentence that was later reduced to ten years; paroled in October 1986 and on July 30, 1987, was convicted in a Nebraska District Court for kidnapping and first degree sexual assault for which he received a sentence of twenty-five to thirty years. In 2003 Harless was returned to federal prison because of his parole violations.

In 1994, while serving time in the Nebraska prison system Harless was diagnosed with systemic scleroderma. Neither party called a physician to testify at the commitment hearing, but each party had a psychologist testify. Each psychologist discussed scleroderma and its effects. It was described as a progressive, degenerative and fatal disease which manifests itself in "fits and starts." The estimated life expectancy from the time of diagnosis is ten to twenty years. At the time of trial Harless's symptoms from the disease included difficulty breathing due to a fibrous lung; curled hands due to the tightening of the skin; some difficulty speaking and swallowing; a reduced ability to walk, causing him to use a walker for assistance; and Reynaud's Syndrome, which causes a constriction of the arteries.

On September 26, 2005, the State filed a petition seeking to have Harless civilly committed as a sexually violent predator under chapter 229A. The district court held a probable cause hearing and found there was probable cause to believe Harless was a sexually violent predator. A jury trial on the issue of

whether Harless should be committed as a sexually violent predator was held in December 2005.

Psychologist Caton Roberts evaluated Harless for the State and testified at the commitment trial. He diagnosed Harless as suffering from a mental abnormality of "paraphilia not otherwise specified" which was "reflected in specific sexual arousal towards individuals who are nonconsenting to sexual actions." The most compelling attributes leading to Roberts's diagnosis was Harless's "repeated set of behaviors" in which he "abducted, forcibly detained, forcibly and violently sexually assaulted a series of women over a number of years with very little time outside of being in a correctional facility. . . ." Roberts opined that this mental abnormality "predisposed [Harless] towards such future sexually violent acts and that the nature of that predisposition" made it "more likely than not" that Harless would "commit future acts if not detained."

To determine Harless's level of risk to reoffend Dr. Roberts, in part, used two actuarial instruments, the Rapid Risk Assessment of Sexual Offender Recidivism (RRASOR) and the Static-99. He clarified that these instruments actually measure recidivism by *reconviction* rates, not the broader category of whether a person is at risk to *reoffend*. Roberts found Harless to represent a moderate risk to reoffend on the RRASOR assessment and at a high risk on the Static-99 test. More specifically, on the RRASOR Harless scored a "3" which equates to a reconviction rate of 24.8% within five years and 36.9% within ten years. On the Static-99 test Harless scored a "7" which equates to a reconviction rate of 39% within five years, 45% within ten years, and 52% within fifteen years.

Harless's expert, Dr. Stephen Hart, was a psychology professor from Canada. He testified he found no evidence that Harless suffered from a mental abnormality. Without using any actuarial instruments, Hart opined that Harless had a low to moderate risk of reoffending based primarily on his physical health.

Harless made motions for directed verdict both at the close of the State's case-in-chief and after presentation of all of the evidence. He argued the language of the statute requires proof of a more immediate risk to reoffend than the actuarial numbers presented by the State and thus the State failed to show he is *presently* more likely than not to reoffend if not confined.[2] The court denied Harless's motions, finding the State had presented sufficient evidence for the case to be submitted to the jury. The jury found Harless was a sexually violent predator and the court entered an order of commitment.

Harless appeals, contending the district court erred in overruling his motions for directed verdict based on the insufficiency of the evidence because the State failed to prove he is presently more likely than not to engage in a sexually violent offense if not confined in a secure facility as required by section 229A.2.

II. SCOPE AND STANDARDS OF REVIEW.

We review the denial of a motion for directed verdict for the correction of errors at law. *Top of Iowa Co-op. v. Sime Farms, Inc*., 608 N.W.2d 454, 466 (Iowa 2000). We must determine whether there was "sufficient evidence to generate a jury question." *Id*. We view the evidence in the light most favorable

[2] Harless also made a Constitutional Due Process argument before the district court on the issue of a requirement of "present dangerousness." However, the district court did not rule on the issue and Harless does not pursue it on appeal.

to the nonmoving party, regardless of whether the evidence was contradicted. *Id*. We afford the nonmoving party every legitimate inference that can reasonably be drawn from the evidence. *Id*. If reasonable minds could differ on resolution of the issue, then it should be submitted to the jury. *Id.* The question in this case is whether the jury could conceivably find, from the evidence presented, that the respondent Harless is a sexually violent predator beyond a reasonable doubt. *See In re Detention of Swanson*, 668 N.W.2d 570, 574 (Iowa 2003).

III. MERITS.

As set forth above, both parties presented expert testimony to the jury on Harless's likelihood to reoffend and thus whether he met the statutory definition of a sexually violent predator. The credibility of witnesses, in particular, 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) (stating that when conflicting psychiatric testimony is presented to the fact finder the issue (of sanity) is clearly for the fact finder to decide; the trier of fact is not obligated to accept opinion evidence, even from experts, as conclusive; and when a case evolves into a battle of experts the reviewing court readily defers to the fact finder's judgment as it is in a better position to weigh the credibility of the witnesses).

Some of the evidence presented by Dr. Roberts showed that Harless's lifetime risk to reoffend is 52%. Our courts have rejected the argument that

Chapter 229A is unconstitutional because it permits commitment based on an estimation of lifetime risk, rather than a temporal risk, of reoffending. *In re Detention of Selby,* 710 N.W.2d 249, 253 (Iowa Ct. App. 2005). Thus, it was reasonable for the jury to consider Harless's likelihood to reoffend over the remainder of his life.

Some factors presented to the jury might suggest the 52% likelihood of lifetime reoffending was high. These include Harless's age at the time of trial (fifty-four), and the symptoms and prognosis of his systemic scleroderma. However, there were also several factors which would suggest the 52% was low. These include the fact that since his first conviction for a sexual offense there has not been a period of time of more than a few months where he has been free and he did not reoffend, as well as his failure to complete a structured sexual offender program.

Perhaps the most compelling evidence presented that the 52% likelihood to reoffend was low was that the actuarial instruments used by Dr. Roberts actually measure recidivism by using rates of *reconviction* for sexual offenses rather than using rates of *reoffending*. As Dr. Roberts pointed out, the percent of sex offenders who reoffend is no doubt higher than the percent who are reconvicted, and thus the figures generated by use of the actuarial instruments no doubt underestimate the likelihood of reoffense. It would seem intuitive, although unfortunate, that there are sex offenses committed which do not result in a conviction, a charge, or even a report, including sex offenses committed by prior offenders. Thus, based on the evidence presented it was reasonable for

the jury to determine a 52% likelihood of Harless to reoffend over his lifetime was a reasonable, or perhaps even low estimate.

Furthermore, despite Harless's assertion to the contrary, Dr. Roberts did consider many factors in forming his opinion of Harless's risk to reoffend. While it is true Roberts did take into account the results of the actuarial instruments, he testified he also considered Harless's criminal history and the fact Harless had never completed a structured treatment program for sex offenders. He further stated he considered other situational or circumstantial factors, including Harless's scleroderma, but opined that condition would not prevent him from reoffending, particularly because Harless had used weapons in some of his past offenses and would still be able to do so, although with more difficulty.

IV. CONCLUSION.

Viewing the evidence in the light most favorable to the State and affording it every legitimate inference that can reasonably be drawn from the evidence, we conclude the jury could conceivably find beyond a reasonable doubt that Harless was presently more likely than not to reoffend if not confined to a secure facility. There was sufficient evidence to generate a jury question. Thus the district court did not err in denying Harless's motion for directed verdict.

AFFIRMED.