IN THE COURT OF APPEALS OF IOWA

No. 7-460 / 06-0556
Filed October 24, 2007

IN RE THE DETENTION OF
DANIEL JOSEPH SCOTT

DANIEL JOSEPH SCOTT,
Respondent-Appellant.

Appeal from the Iowa District Court for Johnson County, Amanda P. Potterfield (trial) and Douglas S. Russell (retrial), Judges.

The respondent appeals following a jury verdict that found him to be a sexually violent predator. **AFFIRMED.**

Mark Smith, State Appellate Defender, and Michael Adams and Matthew Sheeley, Assistant Public Defenders, for appellant.

Thomas J. Miller, Attorney General, Darrel Mullins and Andrew Prosser, Assistant Attorneys General, Janet Lyness, County Attorney, and J. Patrick White, Assistant County Attorney, for appellee State.

Heard by Zimmer, P.J., Eisenhauer, J., and Schechtman, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2007).

ZIMMER, P.J.

Daniel Joseph Scott appeals from his commitment as a sexually violent predator under Iowa Code chapter 229A (2005). He contends the jury's findings that he is predisposed to commit sexually violent offenses and that he is likely to engage in predatory acts constituting sexually violent offenses if not confined are not supported by substantial evidence and are contrary to the weight of the evidence. Scott also claims it would be a denial of due process to retry him following a hung jury because the State demanded a jury trial and the mistrial was attributed solely to its failure to convince the jury to commit him as a sexually violent predator. Finding no merit in these claims, we affirm the district court.

I. Background Facts and Proceedings.

On June 14, 2005, the State filed a petition to commit Scott as a sexually violent predator. On June 20, 2005, the district court found probable cause that Scott was a sexually violent predator. The State demanded a jury trial in these proceedings pursuant to Iowa Code section 229A.7(4),[1] and trial commenced on December 12, 2005.

The record made at trial reveals that in 1984 twenty-seven-year-old Scott took a customer back to his tow-service business and forced her to perform oral sex upon him. He pled guilty to third-degree kidnapping and sexual abuse in exchange for receiving immunity from other sexual assaults that were committed around this same time. Scott was released from prison in the fall of 1989.

[1] Iowa Code section 229A.7(4) provides that a respondent, the attorney general or the court may demand a jury trial.

The following March, thirty-three-year-old Scott assaulted a female acquaintance by grabbing her breast and forcing her to place her hand on his exposed penis while he gave her a ride home. He was convicted of assault with intent to commit sexual abuse and sentenced to prison.

After his release from prison, Scott lost his left leg in a motorcycle accident and began working as a taxicab driver. On September 2, 1997, forty-year-old Scott sexually assaulted a female passenger by grabbing her breasts in his cab. The next day, he assaulted another female passenger in a similar manner. Scott was convicted of assault with intent to commit sexual abuse and third-degree sexual abuse as an habitual offender.

The trial record also reveals Scott has an extensive history of non-sexual criminal acts commencing with theft of Christmas lights at age eleven. By 1982, he had committed seven felony-grade thefts. By the time of his first sexual assault conviction, Scott estimated he had written fifty to seventy fraudulent checks. Over the course of his life, Scott has committed nearly 100 incidents of theft, forgery, fraudulent practice, harassment and disorderly conduct.

At trial, the State's expert, Dr. Dennis Doren, testified that Scott suffered from an antisocial personality disorder and further concluded that this disorder predisposed him to commit sexually violent offenses. Dr. Doren testified that Scott had normal sexual desires but his disorder leads him to "take what he wants, when he wants." Further, Dr. Doren explained, Scott takes a "damn the torpedoes" approach concerning sexual affairs, meaning if he decides he wants to have sex that night then he will have a sexual encounter whether or not a woman consents. Dr. Doren opined that Scott had serious difficulty controlling

his sexually dangerous behavior and concluded it was more likely than not that Scott will commit another sex offense within five years.

The respondent called Dr. Craig Rypma and Dr. Steven Hart as expert witnesses. Dr. Rypma agreed that Scott suffered from an antisocial personality disorder. However, he disagreed that this disorder predisposed Scott to commit sexual offenses in particular. Rather, Dr. Rypma and Dr. Hart described Scott as a "typical criminal," "con man," and a "run-of-the-mill criminal."

After considering the evidence presented, the jury failed to reach a unanimous verdict that Scott was a sexually violent predator. As a result, a mistrial was declared on December 16, 2005, and a new trial was scheduled pursuant to Iowa Code section 229A.7(7). Scott moved to dismiss the petition because the State had demanded a jury but failed to convince the jury members that he was a sexually violent predator. Scott's motion to dismiss and request for an immediate discharge were denied on February 6, 2006.

On February 20, 2006, a second jury trial commenced.[2] Scott moved for a directed verdict at the conclusion of the State's case and at the conclusion of his own case, arguing that the State failed to present substantial evidence that his antisocial personality disorder "predisposed him to commit sexually violent offenses to a degree which would constitute a menace to the health and safety and welfare of others" and that he was "more likely than not to reoffend if not confined to a secure facility." The trial court denied his motions and submitted the case to the jury. The jury found that Scott was a sexually violent predator.

[2] Following the hung jury, the State moved to withdraw its jury demand. Scott resisted the motion, and it was denied.

Scott's motions for judgment notwithstanding the verdict and for a new trial were denied on March 23, 2006.

Scott appeals, asserting: (1) the jury's finding that he is predisposed to commit sexually violent offenses is not supported by substantial evidence, (2) the jury's finding that he is likely to engage in predatory acts constituting sexually violent offenses if not confined is not supported by substantial evidence, (3) the district court erred in denying his motion to dismiss because retrying him following a hung jury was fundamentally unfair and violated his right to due process, and (4) his motion for new trial should have been sustained because the jury's verdict is contrary to the weight of the evidence.

II. Motion for Judgment Notwithstanding the Verdict.

A. Scope of review. We review the district court's denial of Scott's motion for judgment notwithstanding the verdict for correction of errors at law. *In re Det. of Betsworth*, 711 N.W.2d 280, 286 (Iowa 2006). We evaluate whether substantial evidence exists to support the State's case. "Evidence is substantial when a reasonable mind would accept it as adequate to reach a conclusion." *In re Det. of Holtz*, 653 N.W.2d 613, 620 (Iowa Ct. App. 2002). We view the evidence in the light most favorable to the nonmoving party. *Id.*

B. Discussion. Scott first contends the jury's finding that he is predisposed to commit sexually violent offenses is not supported by substantial evidence. Pursuant to Iowa Code section 229A.2(11), a sexually violent predator is

> 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.

In order to prove that Scott had a "mental abnormality," the State had to prove that his condition "predispos[es] [him] to commit sexually violent offenses to a degree which would constitute a menace to the health and safety of others." Iowa Code § 229A.2(5). Antisocial personality disorder can be a mental disorder that predisposes an individual to commit sexually violent offenses to a degree that would constitute a menace to the health and safety of others, and thus may serve as the basis for civil commitment under chapter 229A. *In re Det. of Barnes*, 689 N.W.2d 455, 458 (Iowa 2004).

Scott asserts that because his disorder causes him to commit crimes "predominantly non-sexual in nature," he is not predisposed to commit sexual offenses in particular and his sexual offending was the exception rather than the rule. While it is true that Scott has committed many more non-sexual than sexual crimes during his lifetime, the Iowa Supreme Court in *State v. Altman*, 723 N.W.2d 181, 185 (Iowa 2006), concluded that the mental abnormality required under section 229A.2(5) does not require a person's "risk to be *primarily* sexual in nature." Rather, the definition of "mental abnormality" is focused on the likelihood that the respondent will commit a sexual offense. *Altman*, 723 N.W.2d at 185. Based primarily on the results of three tests[3] Dr. Doren administered on Scott, he concluded that Scott was likely to commit another sex offense within

[3] The RRASOR (Rapid Risk Assessment for Sex Offense Recidivism), the MnSOST-R (Minnesota Sex Offender Screening Tool-Revised), and the Static-99.

five years.[4] We conclude that the jury's finding that Scott is predisposed to commit another sexually violent offense is supported by substantial evidence.

Scott also contends sufficient evidence did not support the jury's finding that he was likely to engage in predatory acts if not confined, especially due to his poor physical condition. Scott suffers from a number of health ailments. He has type II diabetes, is morbidly obese, and has hypertension and an enlarged heart. Additionally, he lost his left leg in a motorcycle accident in 1992.[5] Despite these conditions, however, Dr. Doren testified that Scott's likelihood of committing another sexual offense was not sufficiently diminished. Although Dr. Rypma reached a contrary conclusion, "it was for the jury to decide which of the experts was more credible . . . and whose opinion . . . the jury would accept." *Altman*, 723 N.W.2d at 185 (quoting *Mercy Hosp. v. Hansen, Lind & Meyer, P.C.,* 456 N.W.2d 666, 672 (Iowa 1990)). We conclude Dr. Doren's opinion that Scott would likely reoffend sexually in the future was sufficient to distinguish the respondent from the typical criminal recidivist. Therefore, the district court did not err in denying Scott's request for judgment notwithstanding the verdict.

III. Due Process Claim.

Scott claims the district court erred in denying his motion to dismiss because retrying him following a hung jury was fundamentally unfair and violated

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[4] The Static-99 test showed a 39% percent chance that Scott would be convicted of a sex crime within the next five years. Dr. Doren testified that risk of arrest, compared to the risk of reconviction, was 1.25% to 1.5% higher than the risk of reconviction. He then testified that the risk of rearrest underestimates the risk of committing an offense. Based on these statistics, he concluded that even a conservative viewpoint makes it more likely than not Scott will commit another sex offense within five years.

[5] Regarding Scott's argument that the loss of his leg has diminished the likelihood that he would reoffend, we note that Scott committed his last two sexual offenses while he was an amputee.

his right to due process. We review Scott's constitutional challenge de novo.[6] *In re Det. of Garren*, 620 N.W.2d 275, 278 (Iowa 2000).

Scott contends that Iowa Code sections 229A.7(4) and 229A.7(7) are fundamentally unfair because they allow the State to demand a jury and require the court to order a retrial in the event of a hung jury. Scott asserts his retrial violated due process because the State had demanded a jury trial and the mistrial was attributable solely to the State's failure to meet its statutory burden of proof to convince the jury to commit him as a sexually violent predator.

Our supreme court has previously held less-than-unanimous verdicts are not allowed in sexually violent predator proceedings, and if a jury cannot return a unanimous verdict, the court must discharge the jury and order a new trial. *In re Det. of* Williams, 628 N.W.2d 447, 455 (Iowa 2001); *see also* Iowa Code § 229A.7(8) (procedures following mistrial). Scott cites no case which holds that a retrial following one hung jury in a civil commitment proceeding or a sexually violent predator commitment case violates due process. We recognize that multiple commitment proceedings would likely be a violation of due process. *See Gomes v. Gaughan*, 471 F.2d 794, 797 (1st Cir. 1973) (stating "oppressive misuse of multiple [sexually dangerous] commitment proceedings would doubtless be a violation of due process"). However, in this case, there has only been one mistrial. Neither trial was especially long or complicated. The second

[6] While Scott alludes to the federal due process clause in his issue statement, the body of his argument discusses only the Iowa Constitution. Scott does not argue the Iowa Constitution should be interpreted differently than the United States Constitution. Thus, we address only the state constitutional challenge, but in doing so may apply both state and federal precedent. *See State v. Lewis*, 675 N.W.2d 516, 522 (Iowa 2004) (holding its discussion of the federal constitution is equally applicable to appellant's Iowa constitutional claim where appellant did not argue otherwise).

trial occurred only five weeks after the first. Thus, we conclude Scott's right to due process has not been violated. One hung jury followed by a prompt retrial does not offend due process.

IV. Weight of the Evidence Claim.

In his brief on appeal, Scott contends the district court abused its discretion in failing to grant his motion for a new trial. He argues the jury's verdict is contrary to the weight of the evidence standard set forth in *State v. Ellis*, 578 N.W.2d 655, 659 (Iowa 1998). The State responds that this issue is not properly before this court. Upon review of the record, we conclude that this issue has not been preserved for our review. Scott did not mention *Ellis* or the weight of the evidence standard in his post-trial motion or in his oral motion for directed verdict.[7] An issue not presented to and passed on by the trial court may not be raised on appeal for the first time. *Peters v. Burlington N. R.R.*, 492 N.W.2d 399, 401-02 (Iowa 1992). Therefore, we do not review this claim.

V. Conclusion.

We conclude substantial evidence exists to support the jury's finding that Scott is predisposed to commit sexually violent offenses and that he is likely to engage in predatory acts constituting sexually violent offenses if not confined. Further, we conclude Scott's constitutional challenge to the statutes allowing for the State to demand a jury trial in sexually violent predator commitment

[7] It appears the district court injected *Ellis* into this case when it denied Scott's motion for a new trial stating that the court reviewed the issue on the "weight of the credible evidence presented standard of *State v. Ellis*" and found the verdict was sustained by "sufficient evidence." The "weight of the credible evidence" standard and "sufficient evidence" standard are different standards. *Ellis*, 578 N.W.2d at 659. Scott, however, did not argue that the court applied an incorrect standard nor did he move for reconsideration or enlargement of the issue.

proceedings and for the court to order a retrial in the event of a hung jury is without merit. We find Scott did not preserve error in his contention that the district court abused its discretion in failing to grant his motion for a new trial under *Ellis*. Accordingly, we affirm the district court.

AFFIRMED.