IN THE IOWA SUPREME COURT

No. 18-0733

STATE OF IOWA,

Appellee/Plaintiff,

v.

FONTAE C. BUELOW,

Appellant/Defendant.

APPEAL FROM THE DISTRICT COURT
FOR DUBUQUE COUNTY
HON. MONICA ZRINYI WITTIG

RESISTANCE TO APPLICATION FOR FURTHER REVIEW

(Iowa Court of Appeals Decision: December 18, 2019)

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals err when it applied a per se rule that, under Iowa law, evidence of a victim's mental health should not be considered character evidence?

2. Did the Court of Appeals err when it determined that the temporal proximity of a victim's previous suicide attempt plays no role in determining the admissibility of this evidence?

3. Did the Court of Appeals err when it determined that any error in excluding the victim's records was not harmless?

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STATEMENT RESISTING FURTHER REVIEW

The Iowa Supreme Court should deny the State's Application for Further Review because the State lacks a factual basis to advance its peculiar legal position. The Iowa Court of Appeals' decision is narrow and relies on the State's failure to develop a factual record for its legal position.

Judge May, writing for an unanimous panel with Chief Judge Bower and Judge Greer, repeatedly criticized the State for failing to marshal record evidence. Op. at 5 ("…the State has pointed to no evidence…."); *id.* at 7 ("…we find no record support for the State's assumption…."); *id.* at 11 ("…record evidence does not support the State's threory…."); *id.* at 13 ("On this record, the State has not affirmatively established…."). Just as the Court of Appeals declined to take the State at its word for a variety of factual issues, this Court should not take the State at its word for either the content of the Court of Appeals' decision or the substance of Iowa law described in the Application for the Further Review.[1]

The Court of Appeals applied existing Iowa law on character evidence (Section I), and there is no "temporal proximity" requirement for admissible

[1] In both its merits brief and its Application for Further Review, the State omitted several key facts about the circumstances of Ms. Link's death and the evidentiary value of her medical records. Those omissions are briefly addressed in Section III. Instead of re-litigating facts, this brief will focus on the State's flawed legal reasoning.

evidence (Section II). The State gets the law wrong in its assertions to the contrary. It is the State that is urging a *sui generis* rule. The State also requested review of the Court of Appeals' decision on harmless error, but the State has not identified a legal basis in the Iowa Rules of Appellate Procedure for that review (Section III).

ARGUMENT

I. The Court of Appeals properly applied existing Iowa law with the aid of on-point authority from another jurisdiction to hold that the character evidence rule does not apply to medical mental health records.

The Court of Appeals held that "evidence of suicidal tendencies of a deceased should not be considered character evidence." Op. at 11 (internal citation omitted). The State, for its part, essentially conceded this point by agreeing that "mental health disorders and their symptoms are not character evidence," *id.* at 9, because mental health problems and their associated behaviors are not evidence of a "blameworthy character trait." Appellee's Br. at 33. This concession means that mental health records are definitionally not character evidence. *See* Black's Law Dictionary 674 (10th ed. 2014) (defining character evidence as evidence of an individual's "praiseworthy or blameworthy nature; evidence of a person's moral standing in the community."). The Court of Appeals also took guidance from the New Mexico Supreme Court, which decided this very question in the context of

an alleged murder that may have been a suicide. Op. at 5 (citing *State v. Stanley*, 37 P.3d 85 (N.M. 2001)). The State has not pointed to any federal or state court that has held that medical mental health records are character evidence.

When this appeal started, Mr. Buelow believed that this case presented a question of first impression, but the case no longer presents such a question because the State abandoned the district court's legal analysis. The district court barred the decedent's medical records by applying the rule in *State v. Jacoby*, 260 N.W.2d 828 (Iowa 1977), that an alleged victim's character is only at issue in cases of self-defense. Here is the written Order[2] from the district court: "[T]he Court intended to follow the holding of *State v. Jacoby* and its progeny, which barred the admission of evidence of the victim's mental health and propensities without the defense of self-defense is raised." App. v. IV, p. 21–23.

Mr. Buelow argued that this was an unprecedented extension of *Jacoby*, and that *Jacoby* could not apply because medical records are not

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[2] The State omitted this written Order in its Application for Further Review. This Order was the last word from the district court on this issue. The State is trying to have this Court review an earlier colloquy instead of the written Order because the reasoning in the district court's written Order, in the State's view, is indefensible. The State did not even cite *Jacoby* in its merits brief. The written Order also inexplicably said that the medical records are hearsay without an exception.

character evidence in the first place. The question of whether *Jacoby* barred admission of the records was mooted by the State declining to take that position and, instead, proposing a *sui genesis* framework for assessing character evidence. Here is the character evidence test that the State is proposing:

> If evidence of a mental health issue—here, risk of suicide—is highly relevant, it is less likely to be character evidence. But if the evidence is less relevant the more likely it is to be prejudicial or used only to show action in conformity therewith or both.

Appellee's Br. at 34.

The State has not pointed to any judicial decision, treatise, or law review article that urges this test. It is a test concocted for this case. The State has not pointed to any case in which the Iowa Attorney General's Office has proposed a similar test for character evidence. There is a long discussion in the Application for Further Review about the supposedly novel legal issues raised by admission of an alleged victim's medical records but none of these issues were mentioned in the State's merits brief. The State's reasoning for further review is a striking about-face from its earlier representation to this Court that this case is "not novel and existing case law is sufficient to resolve his appeal." Appellee's Br. at 7. The State has given no explanation for its conflicting statements to this Court. As such, the State

has not presented a substantial question for this Court's review or any reason to believe that the Court of Appeals erred.

II. The State mischaracterizes both the Court of Appeals' decision and Iowa law related to the "temporal proximity" of admissible evidence.

It is unclear what the State means when it says that there is some sort of "temporal proximity" test for "admissibility." It appears that the State has mischaracterized the Court of Appeals decision and muddled its analysis of Iowa law by conflating the character evidence and relevance rules.

The Court of Appeals held that temporal proximity of the decedent's prior suicide attempts and diagnoses did not affect its analysis of whether such evidence is *character evidence*. That is to say, the Court of Appeals rejected the State's proposed test of so-called "highly relevant" versus "less relevant" information playing a role in the determination of what is or is not character evidence. The State has not cited any case where "temporal proximity"—or even relevance standards more broadly—are somehow grafted onto the character evidence analysis.

The key case cited by the State for a "temporal proximity" test, *State v. Engeman*, 217 N.W.2d 638 (Iowa 1974), is a case that deals with whether evidence is *relevant*. On this point, the Court of Appeals explained that "the State has pointed to no evidence, such a psychiatrist's opinion, to show 'the

elapsed time [was] so great as to negative all rational or logical connection' between Link's prior sufferings—including her multiple prior suicide attempts in 2014—and her alleged suicide in 2017." Op. at 5 (citing *Engeman*, 217 N.W.2d at 639). This is not a rejection of "temporal proximity" as a legal consideration for relevance but a rejection of the factual basis for the State's relevance theory and a refusal by the Court of Appeals to practice arm-chair psychiatry. Op. at 8. ("[W]e respectfully decline to treat [the State's] brief as competent evidence on the boundaries of psychiatric inquiry.").

With this distinction made clear, the State is essentially asking this Court to redo a run-of-the-mill balancing test that does not present a question of broader legal significance or an error in the application of existing law.

III. The Court of Appeals correctly concluded that the district court's error was not harmless, and the State has not identified a basis for further review.

The Court of Appeals held that the decedent's medical records would have "clearly aided the defense" and the State failed to build a record sufficient to meet its burden for harmless error. Op. at 13. There is no suggestion by the State that the Court of Appeals applied the wrong law or that there is anything novel about the Court of Appeals' analysis.

Mr. Buelow must point out, however, that the State omitted or mischaracterized key facts in its Application for Further Review. There are no eye witnesses to the alleged crime. Mr. Buelow's fingerprints were not found on the knife. App. v. I, p. 154. Ms. Link was covered in blood but Mr. Buelow was not. *Compare* App. v. II, p. 17, 18 (showing Ms. Link) with App. V. II, p. 25 (showing Mr. Buelow). Mr. Buelow has consistently explained—during interrogation on the night of the incident and when testifying at trial—that Ms. Link stabbed herself. During closing arguments, the prosecutor mocked this explanation; calling his version of event "bizarre," 01/18/2018 Tr. 163:19, and asserting that "[Mr. Buelow]'s got no explanation that makes any sense, nor actually, I don't think he even offered one." 01/18/2018 Tr. 169:5–6.

Ms. Link's medical records, however, provided a compelling explanation that supports Mr. Buelow's testimony. When she died at the age of 21, Ms. Link had attempted suicide at least three times. App. v. III, p. 57–58. She once grabbed a knife during an argument with a former boyfriend, which led the former boyfriend to wrestle the knife from her hand before she could hurt herself. App. v. I, p. 73. Ms. Link suffered from bipolar disorder and borderline personality disorder—psychiatric conditions associated with rapid, unpredictable mood swings that dramatically increase the risk of

committing suicide. App. v. III, p. 53–54. She once said that she intended to commit suicide in a way consistent with how Mr. Buelow said she stabbed herself. App. v. III, p. 57.

All of this information should have been coupled with the State's concessions at trial that are omitted from its telling of the facts in its Application for Further Review. The State's medical examiner said it was possible for suicide victims to have multiple such stab wounds as observed for Ms. Link. 01/16/2018 Tr. 120:8–23. Likewise, the State conceded at trial that the blood splatter evidence allowed for the fact that Mr. Buelow may have been as much as 10 feet away from Ms. Link at the time that she was stabbed. 01/12/2018 Tr. 211:25–212:4. Finally, the wounds to Ms. Link's hand, according to Mr. Buelow's expert, were more consistent with the knife slipping in her hand while she stabbed herself than with a defensive stab wound. 01/17/2018 Tr. 32:22–33:16.

CONCLUSION

The Des Moines Register and KCRG called this a case that is "dividing Dubuque."[3] The emotional force of this case does not stem from the application of the character evidence rule, of course.

[3] The Des Moines Register, *Dubuque Man Granted New Trial*, December 22, 2019, at 4A; KCRG-TV9, *Family on both sides of a Dubuque*

Recall that this is a case where Mr. Buelow, who is black, was convicted by an all-white jury *after* a holdout juror was removed *during* deliberations. This is a case where the district court judge asked Mr. Buelow to affirm that he is "100% African-American" before hearing his challenge to the racial composition of jury venire, and then demanded that Mr. Buelow could maintain either his objection to the jury venire or right to a speedy trial but not both. 01/05/2018 Tr. 23–29. This is also a case where, after the trial, it came to light that the juror that was removed during deliberations wrote a letter to the district court judge before he was dismissed explaining that he had not failed to deliberate but that he simply believed that the State had not met its burden. Appellee's Br. 21–30. The district court shredded the letter only to have the holdout juror surface with a copy of the letter just prior to the new trial hearing. *Id.*

This case is dividing Dubuque—as it would any community—because it strikes at the heart of the public's perception of the court system as fair and reliable. On sound evidentiary priciples, the Court of Appeals reached a narrow, fact-based conclusion. Its decision should not be disturbed. Mr.

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murder case speak about possibility for a new trial, available at http://www.kcrg.com/content/news/Family-on-both-sides-of-a-Dubuque-murder-case-speak-about-possibility-for-a-new-trial-478097793.html, March 27, 2018 (last retrieved January 16, 2020).

Buelow respectfully requests that this Court deny the State's Application for Further Review.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on January 16, 2020, I electronically filed the foregoing with the Clerk of the Supreme Court by using the Iowa Electronic Document Management System which will send notice of electronic filing to the following. Per Rule 16.317(1)(a), this constitutes service of the document for purposes of the Iowa Court Rules.

IOWA ATTORNEY GENERAL CRIMINAL APPEALS DIVISION
for the STATE OF IOWA

By /s/ David N. Fautsch
David N. Fautsch

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that:

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because this brief contains 2,223 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Times New Roman 14 pt.

Dated: January 16, 2020

By /s/ David N. Fautsch
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