IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff-Appellee, v. COREY ROBERT FENTON, Defendant-Appellant.	SUPREME COURT NO. 22-1681

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY
THE HONORABLE SAMANTHA GRONEWALD, JUDGE (TRIAL, POSTTRIAL, AND SENTENCING)

APPELLANT'S BRIEF AND ARGUMENT AND REQUEST FOR ORAL ARGUMENT

MARTHA J. LUCEY
State Appellate Defender

JOSH IRWIN
Assistant Appellate Defender
jirwin@spd.state.ia.us
appellatedefender@spd.state.ia.us

STATE APPELLATE DEFENDER'S OFFICE
Fourth Floor Lucas Building
Des Moines, Iowa 50319
(515) 281-8841 / (515) 281-7281 FAX

ATTORNEYS FOR DEFENDANT-APPELLANT

FINAL

CERTIFICATE OF SERVICE

On the 25th day of September, 2023, the undersigned certifies that a true copy of the foregoing instrument was served upon Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to Corey Fenton, No. 6273399, Iowa Medical and Classification Center, 2700 Coral Ridge Avenue, Coralville, IA 52241

APPELLATE DEFENDER'S OFFICE

Josh Irwin
Assistant Appellate Defender
Appellate Defender Office
Lucas Bldg., 4th Floor
321 E. 12th Street
Des Moines, IA 50319
(515) 281-8841
jirwin@spd.state.ia.us
appellatedefender@spd.state.ia.us

JI/sm/9/23

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes and Court Rules:

Other Authorities:

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. The district court erred in overruling Fenton's objection to a photographic exhibit, because its probative value was substantially outweighed by the danger of needlessly presenting cumulative evidence and of unfair prejudice.

Authorities

State v. Dessinger, 958 N.W.2d 590, 598 (Iowa 2021)

State v. Helmers, 753 N.W.2d 565, 567 (Iowa 2008)

Iowa R. Evid. 5.403

State v. Sassman, No. 21-0434, 2022 WL 4361785, at *4 (Iowa Ct. App. Sept. 21, 2022)

State v. Buelow, 951 N.W.2d 879, 889 (Iowa 2020)

State v. Henderson, 696 N.W.2d 5, 10–11 (Iowa 2005)

State v. Parker, 747 N.W.2d 196, 209 (Iowa 2008)

II. The evidence was insufficient to establish anything of value was given to, promised to, or received by anyone in exchange for a sex act or sexually explicit performance.

Authorities

State v. Crawford, 972 N.W.2d 189, 202 (Iowa 2022)

State v. Folkers, 941 N.W.2d 337, 338 (Iowa 2020)

Iowa R. App. P. 6.904(3)(a)

State v. Dalton, 674 N.W.2d 111, 116 (Iowa 2004)

State v. Hamilton, 309 N.W.2d 471, 479 (Iowa 1981)

Iowa Code § 710A.2A

Iowa Code § 710A.1

Iowa Code § 710A.1(1)

State v. Hughes, No. 07-0988, 2008 WL 3364043, at *2 (Iowa Ct. App. Aug. 13, 2008) (unpublished table decision)

State v. Osmundson, 546 N.W.2d 907, 909 (Iowa 1996)

Coerce Definition, Merriam-Webster, https://www.merriam-webster.com/dictionary/coerce (last visited June 1, 2023)

Recruit Definition, Merriam-Webster, https://www.merriam-webster.com/dictionary/recruit (last visited June 1, 2023)

III. The district court applied the wrong standard when evaluating Fenton's motion for new trial.

Authorities

State v. Scalise, 660 N.W.2d 58, 65 (Iowa 2003)

State v. Ary, 877 N.W.2d 686, 705 (Iowa 2016)

State v. Reeves, 670 N.W.2d 199, 202 (Iowa 2003)

State v. Ellis, 578 N.W.2d 655, 658-59 (Iowa 1998)

State v. Maxwell, 743 N.W.2d 185, 193 (Iowa 2008)

State v. Nitcher, 720 N.W.2d 547, 559 (Iowa 2006)

Commonwealth v. Widmer, 560 Pa. 308, 744 A.2d 745, 751 (2000)

IV. The district court imposed an illegal sentence by ordering Fenton to complete the sex offender treatment program while incarcerated.

Authorities

State v. Bruegger, 773 N.W.2d 862, 872 (Iowa 2009)

State v. Damme, 944 N.W.2d 98, 103 (Iowa 2020)

State v. Formaro, 638 N.W.2d 720, 724 (Iowa 2002)

State v. Woody, 613 N.W.2d 215, 217 (Iowa 2000)

State v. Hess, 533 N.W.2d 525, 527 (Iowa 1995)

Iowa Code § 901.5

Dykstra v. Iowa Dist. Court for Jones County, 783 N.W.2d 473, 478–79 (Iowa 2010)

State v. Gardner, No. 22-0422, 2023 WL 153509, at *2 (Iowa Ct. App. Jan. 11, 2023) (unpublished table decision)

ROUTING STATEMENT

This case should be transferred to the Court of Appeals because the issues raised involve the application of existing legal principles. Iowa R. App. P. 6.903(2)(d) and 6.1101(3)(a).

STATEMENT OF THE CASE

Nature of the Case

The defendant-appellant, Corey Fenton, appeals from his conviction, judgment, and sentence for solicitation of commercial sexual activity, a class D felony, in violation of Iowa Code section 710A.2A.

Course of Proceedings

The State charged Fenton with solicitation of commercial sexual activity in violation of Iowa Code section 710A.2A by trial information filed February 18, 2022. (Trial Information) (App. pp. 4-5). Fenton entered a plea of not guilty the same day. (Order of Arraignment) (App. pp. 6-8).

On March 21, Fenton filed a motion for bill of particulars, asking that the State identify "what item of value Defendant is

alleged to have 'given, promised to, or received' for 'any sex act or sexually explicit performance'." (Motion for Bill of Particulars p. 1) (App. p. 9). The matter was heard on April 5. The State alleged Fenton offered clothes, food, marijuana, payment for an Uber ride, and payment for a shower, and that any one of those offers would be sufficient. (4/5/2022 Hearing Tr. p. 5 L. 11–p. 7 L. 8). The district court denied the motion, stating the original minutes of evidence, as well as the amended minutes filed after the hearing, were sufficient. (4/5/2022 Hearing Tr. p. 8 L. 22–p. 9 L. 1; Order Denying Motion for Bill of Particulars p. 1) (App. p. 11).

Trial began on May 9. Fenton objected to the State submitting a photo of a penis, allegedly sent by him during a conversation with a police officer posing as a juvenile female, arguing its probative value was outweighed by the danger of unfair prejudice and that it was "duplicative" to an interview video where the picture was discussed. (5/9/2022 Trial Tr. p. 158 L. 15–p. 159 L. 3). After hearing from the State, the

district court overruled the objection. (5/9/2022 Trial Tr. p. 161 L. 25–p. 162 L. 1).

At the close of the State's evidence, Fenton moved for judgment of acquittal, arguing the State failed to prove the "commercial sexual activity" element because no evidence indicated anything of value was offered in exchange for sex. (4/10/2022 Trial Tr. p. 36 L. 7–p. 40 L. 22). After hearing from the State, the district court denied the motion. (4/10/2022 Trial Tr. p. 44 L. 14–p. 45 L. 18). Fenton raised the same motion after indicating the defense would rest, and was again denied. (4/10/2022 Trial Tr. p. 55 L. 19–p. 56 L. 4). The jury returned a verdict of guilty. (4/10/2022 Trial Tr. p. 86 L. 16–21; Verdict) (App. p. 16).

Fenton filed a motion for new trial on June 16, arguing "[t]he verdict is contrary to law or evidence in violation of Iowa Rule of Criminal Procedure 2.24(2)(b)(6)." (Motion for New Trial p. 1) (App. p. 17).

The district court denied Fenton's motion on August 19. It characterized his motion for new trial as a "challenge[] to the sufficiency of the evidence," and said that the evidence, viewed in the light most favorable to the State, was sufficient for conviction. (Order Denying Defense Motions p. 1) (App. p. 20).

A combined sentencing hearing took place September 23, addressing this case and several others. In this case, the district court imposed a term of incarceration not to exceed five years, ordered him to complete sex offender treatment while in custody, ordered him to register as a sex offender and pay a $260 civil penalty and $25 annual fee associated with the registry, and suspended a fine of $1875. (Sentencing Tr. p. 17 L. 12–p. 18 L. 4, p. 18 L. 21–25). The court ordered the sentence in this case to run consecutively to the sentences imposed in the other cases addressed. (Sentencing Tr. p. 18 L. 5–12). The court filed an order of disposition the same day. (Order of Disposition) (App. pp. 23-29).

Fenton filed a notice of appeal through counsel on October 5. (Notice of Appeal) (App. pp. 30-31).

Facts

Altoona Detective David Lowe created a fake Facebook profile posing as a 15-year-old female called Neveah Roberts. (5/9/2022 Trial Tr. p. 166 L. 21–p. 167 L. 20). He testified Fenton initiated a conversation with that account using Facebook Messenger, beginning on November 20, 2021. (5/9/2022 Trial Tr. p. 170 L. 18–p. 171 L. 3, p. 174 L. 23–p. 175 L. 1).

The conversation, which spanned from November 20, 2021 to January 7, 2022, was initially mildly flirtatious but gradually turned sexual. Beginning on November 30, Lowe (posing as Roberts) and Fenton began discussing meeting to have sex, and potential meeting places. See (Exhibit 7 Facebook Conversation[1] pp. 116–119) (Ex. App. pp. 121-124).

[1] The State submitted two exhibits containing this conversation: one with photos included (exhibit 7) and one with photos removed (exhibit 8). (5/9/2022 Trial Tr. p. 10 L. 9–p. 12 L. 11, p. 163 L. 13–18). Both show the conversation

On December 27, Lowe asked "Where u wanna go do this", Fenton suggested "my place", Lowe said that would not work, and Fenton suggested renting a shower room at a truck stop. (Exhibit 7 Facebook Conversation pp. 75–76) (Ex. App. pp. 80-81).

On January 2, Lowe asked "U still down for the showers at flyin j?" (Exhibit 7 Facebook Conversation p. 69) (Ex. App. p. 74). Later that day, Lowe asked "What would u do 4 a threesome", Fenton asked "what do i need to do lol", Lowe said "Idk. Girls like food and clothes lol", and Fenton said "ok i have no prob spoiling a likl". (Exhibit 7 Facebook Conversation p. 63) (Ex. App. p. 68).

On January 3, Lowe asked "U bringing me some food?" (Exhibit 7 Facebook Conversation p. 47) (Ex. App. p. 52).

---

in reverse chronological order—the first message on the first page is the last message sent. Quotations of the text exchange are reproduced verbatim throughout this brief. No alterations to spelling or capitalization were made, and punctuation which did not appear in the message is intentionally placed outside of quotation marks.

Fenton responded “sure lol” then followed up with “this cock”. (Exhibit 7 Facebook Conversation p. 47) (Ex. App. p. 52).

On January 4, Lowe said “i don’t have any money 2 rent the showers” and Fenton responded “ill get it no worries”. (Exhibit 7 Facebook Conversation p. 43) (Ex. App. p. 48).

On January 6, Lowe asked “What u wanna do after our time in the shower” then asked Fenton “What do u like to do” and he responded “smoke lol”. (Exhibit 7 Facebook Conversation p. 27) (Ex. App. p. 32). Lowe asked if he meant “Weed”, Fenton said he did, and Lowe said “Lol ok I’m down”. (Exhibit 7 Facebook Conversation p. 27) (Ex. App. p. 32). Lowe asked if Fenton had any marijuana, and Fenton said “I have to gdet more”. (Exhibit 7 Facebook Conversation p. 26) (Ex. App. p. 31).

On January 7, the day the meeting was to take place, Fenton said he was having car trouble and asked Lowe “Can I Uber you here?” (Exhibit 7 Facebook Conversation pp. 13–15) (Ex. App. pp. 18-20). Lowe asked if Fenton could Uber to

the truck stop, and Fenton said he would be stuck if he did because he did not have money to get home; Lowe responded by saying "I got $20". (Exhibit 7 Facebook Conversation pp. 12–13) (Ex. App. pp. 17-18). Later, Fenton said "If I Uber and get the shower I can't Uber back", and Lowe repeated "ya i got $20 so no worries." (Exhibit 7 Facebook Conversation p. 9) (Ex. App. p. 14). Fenton said "Go to flying js buy a shower from the clerk then go upstairs and wait in a chair ok". (Exhibit 7 Facebook Conversation p. 4) (Ex. App. p. 9). Fenton instructed Lowe to "Walk up to lady and tell her you want a shower and you pay for it". (Exhibit 7 Facebook Conversation p. 3) (Ex. App. p. 8).

Fenton was arrested when he arrived at the truck stop. (5/9/2022 Trial Tr. p. 185 L. 4–20).

ARGUMENT

I. The district court erred in overruling Fenton's objection to a photographic exhibit, because its probative value was substantially outweighed by the danger of needlessly presenting cumulative evidence and of unfair prejudice.

Preservation of Error

Fenton objected to exhibit 6, a photograph of a penis allegedly sent by Fenton to Lowe, on the ground that it was needlessly cumulative and more prejudicial than probative. (5/9/2022 Trial Tr. p. 158 L. 15–p. 159 L. 3). The State argued the photo was important because the charge included as an element that Fenton intended to engage in a sex act, and the photo was not "any more graphic than what the defendant chose to disseminate or at least what Detective Lowe received." (5/9/2022 Trial Tr. p. 160 L. 4–p. 161 L. 21). The district court overruled the objection. (5/9/2022 Trial Tr. p. 161 L. 25–p. 162 L. 5). Error was preserved. See State v. Dessinger, 958 N.W.2d 590, 598 (Iowa 2021) (ruling on

contemporaneous objection to evidence preserves issue for appeal).

Standard of Review

Evidentiary rulings are generally reviewed for abuse of discretion. State v. Helmers, 753 N.W.2d 565, 567 (Iowa 2008).

Discussion

The district court permitted the State to submit as an exhibit a photo of an erect penis, allegedly sent by Fenton to Lowe in the course of their conversations. (5/9/2022 Trial Tr. p. 161 L. 25–p. 162 L. 5, p. 179 L. 24–p. 180 L. 8; Exhibit 6 Penis Photo) (Conf. App. p. 4). The court erred in permitting the exhibit, because its probative value was substantially outweighed by the danger of needless presentation of cumulative evidence and of unfair prejudice.

"The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues,

misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Iowa R. Evid. 5.403. "To apply this rule, courts ask two questions: (1) what is the probative value of the evidence? And (2) does the danger of its wrongful effect on the jury weigh heavily against that probative value?" State v. Sassman, No. 21-0434, 2022 WL 4361785, at *4 (Iowa Ct. App. Sept. 21, 2022) (citing State v. Buelow, 951 N.W.2d 879, 889 (Iowa 2020)).

First, the relevance of the photo was minimal. While the charged offense required proof of intent to engage in commercial sexual activity, which in turn potentially includes a sex act, it is unclear what value the photo could add to that determination. The text conversation submitted to the jury was clearly sexual in nature at various points and included discussions of various sex acts. See (Exhibit 7 Facebook Conversation pp. 33–35, p. 37, pp. 63–70, pp. 77–83, pp 116–117) (Ex. App. pp. 38-40, 42, 68-75, 82-88, 121-122). Insofar as the photo could be probative regarding intent to engage in

commercial sexual activity, it was cumulative and thus carried only a small amount of probative weight. Similarly, the photo was discussed during Fenton's interview, alerting the jury to its existence. See Exhibit 10 Interview at 19:14–20:01). This further demonstrates the cumulative nature of this exhibit, and that the only probative value was that provided by actually viewing the photo. That probative value was minimal at best.

Whatever small probative value the photo could have carried was substantially outweighed by the danger of needlessly presenting cumulative evidence and of unfair prejudice to Fenton. "Evidence that . . . provokes [the jury's] instinct to punish, or triggers other mainsprings of human action [that] may cause a jury to base its decision on something other than the established propositions in the case is unfairly prejudicial." State v. Henderson, 696 N.W.2d 5, 10–11 (Iowa 2005) (citations and internal quotation omitted, second alteration in original). The photo carried significant

danger of triggering the jury's instinct to punish, or of otherwise improperly influencing the jury's view of the case. It is one thing for the jury to know of the photo's existence; it is quite another to make them view it. In light of the minute probative value and video-recorded discussion of the photo's existence, the photo's probative value was substantially outweighed by both the danger of needlessly presenting cumulative evidence and the danger of unfair prejudice.

Finally, the State cannot establish the erroneous admission of the photo was harmless. See State v. Parker, 747 N.W.2d 196, 209 (Iowa 2008) (prejudice is presumed from evidentiary error "unless the contrary is affirmatively established"). As argued below, the evidence of guilt, and particularly of the commercial sexual activity element, was lacking. This is not a case where harm can be dismissed due to overwhelming evidence of guilt. Exhibit 6 called upon the jury to judge Fenton by his character, rather than presume his

innocence unless the State proved all elements of solicitation of commercial sexual activity beyond a reasonable doubt.

The district court erred in admitting exhibit 6, and the State cannot establish that error was harmless to Fenton.

Conclusion

The district court erred in overruling Fenton's objection to exhibit 6, because its probative value was substantially outweighed by the danger of needlessly presenting cumulative evidence and the danger of unfair prejudice. Fenton's conviction should be vacated and the case remanded for new trial.

II. The evidence was insufficient to establish anything of value was given to, promised to, or received by anyone in exchange for a sex act or sexually explicit performance, or that Fenton enticed, coerced, recruited, or attempted to entice, coerce, or recruit an individual to engage in commercial sexual activity.

Preservation of Error

Fenton moved for judgment of acquittal at the close of the State's case, and renewed the motion at the close of the defense case, arguing the evidence was insufficient to

establish anything was given, promised to, or received by anyone in exchange for a sex act or sexually explicit performance. (5/10/2022 Trial Tr. p. 36 L. 2–p. 40 L. 20, p. 55 L. 19–23). The court denied Fenton's motions. (5/10/2022 Trial Tr. p. 44 L. 14–p. 45 L. 18, p. 56 L. 3–4). Additionally, a defendant preserves error with regard to the sufficiency of evidence by taking his case to trial; nothing more is needed. State v. Crawford, 972 N.W.2d 189, 202 (Iowa 2022).

Standard of Review

Challenges to the sufficiency of evidence are reviewed for errors at law. State v. Folkers, 941 N.W.2d 337, 338 (Iowa 2020). The jury's verdict is binding if supported by substantial evidence. Id.; Iowa R. App. P. 6.904(3)(a). "Substantial evidence means such evidence as could convince a rational trier of fact the defendant is guilty beyond a reasonable doubt." State v. Dalton, 674 N.W.2d 111, 116 (Iowa 2004). The evidence is viewed in the light most

favorable to the State, but the appellate court "must consider all the record evidence, not just the evidence supporting guilt." Id. The evidence "must raise a fair inference of guilt and do more than create speculation, suspicion, or conjecture." State v. Hamilton, 309 N.W.2d 471, 479 (Iowa 1981).

Discussion

The conversation between Fenton and Lowe contained discussions of sexual activity and an arrangement to meet and engage in sex acts; it did not contain any evidence which would allow a reasonable juror to conclude anything of value was given, promised, or received in exchange for a sex act or sexually explicit performance. Additionally, because Lowe initiated and instigated the discussions the State relied on at trial, those discussions do not constitute enticement, coercion, or recruitment by Fenton.

Iowa Code section 710A.2A is titled "Solicitation of commercial sexual activity" and reads:

> A person shall not entice, coerce, or recruit, or attempt to entice, coerce, or recruit, either a person

> who is under the age of eighteen or a law enforcement officer or agent who is representing that the officer or agent is under the age of eighteen, to engage in a commercial sexual activity. A person who violates this section commits a class "D" felony.

Iowa Code § 710A.2A. Commercial sexual activity is defined as follows:

> "Commercial sexual activity" means any sex act or sexually explicit performance for which anything of value is given, promised to, or received by any person and includes, but is not limited to, prostitution, participation in the production of pornography, and performance in strip clubs.

Iowa Code § 710A.1. The jury was instructed in accord with these sections. (Jury Inst. No. 14 Solicitation of Commercial Sexual Activity Marshalling; Jury Inst. No. 15 Commercial Sexual Activity Definition) (App. pp. 13-14).

In its resistance to Fenton's motion for judgment of acquittal, the State argued the discussion of renting a shower room and discussion of paying for an Uber fulfilled the commercial sexual activity argument. (5/10/2023 Trial Tr. p. 42 L. 13–24). During closing argument, the State asserted the element was also met by discussions of providing food or

clothing, and of smoking marijuana. (5/10/2023 Trial Tr. p. 68 L. 6–25). None of portions of the conversation suggested by the State involved the sort of quid pro quo exchange contemplated by the statute or instructions.[2]

Discussions about renting a shower room did not constitute an offer to provide something of value in exchange for sex. Fenton initially suggested renting a shower when Lowe said meeting at Fenton's house would not work. (Exhibit 7 Facebook Conversation pp. 75–76) (Ex. App. 80-81). Lowe had already agreed, or at least entertained the idea, to engage in a sex act before a location (or anything else the State claimed meets the commercial sexual activity element) was ever discussed. See (Exhibit 7 Facebook Conversation pp. 116–117) (Ex. App. pp. 121-122). Fenton did not say he

---

[2] The State claimed this offense does not require proof of "quid pro quo, tit for tat, 'I'm giving you this in exchange for that.'" (5/10/2022 Trial Tr. p. 42 L. 5–7). That is incorrect; the statutory language requiring "any sex act or sexually explicit performance *for which* anything of value is given, promised to, or received" plainly requires exactly what the State claimed it does not. See Iowa Code § 710A.1(1) (emphasis added).

would pay for the shower; he said "rent a shower room maybe." (Exhibit 7 Facebook Conversation p. 75) (Ex. App. p. 80). This statement was ambiguous about who would pay, and most importantly was not an offer to get a shower *in exchange for* sex; it was merely an attempt to arrange a location. Once the idea had come up, Lowe encouraged it, asking on January 2 if Fenton was "still down for the showers at flyin j?" (Exhibit 7 Facebook Conversation p. 69) (Ex. App. p. 74). When Lowe said on January 4 that he did not have money to rent a shower, Fenton offered to pay; once again, this was not an offer to pay for the shower in exchange for sex, and Lowe expressing the understanding he was going to pay demonstrates no quid pro quo was involved. See (Exhibit 7 Facebook Conversation p. 43) (Ex. App. p. 48). On January 7, Fenton was concerned about his funds, and told Lowe to pay for the shower upon arrival at the Flying J, even further establishing the shower was not a thing of value being offered by Fenton in exchange for a sex act. (Exhibit 7 Facebook

Conversation p. 4) (Ex. App. p. 9). The evidence would not lead a reasonable juror to conclude beyond a reasonable doubt that Fenton offered to rent a shower room in exchange for sex.

For similar reasons, the discussion of Uber payment was insufficient to establish an offer to provide something of value in exchange for sex. On January 7, Fenton was having car trouble and asked Lowe "Can I Uber you here ?" (Exhibit 7 Facebook Conversation p. 13) (Ex. App. p. p. 18). Lowe said that would not work, and asked if Fenton could take an Uber to the truck stop; Fenton responded that if he did that he would not be able to afford to get back home, and Lowe offered to pay. (Exhibit 7 Facebook Conversation pp. 12–13) (Ex. App. pp. 17-18). A similar exchange occurred shortly thereafter, with Lowe suggesting Fenton take an Uber to the truck stop, Fenton saying he could not afford to get home if he did, and Lowe offering to pay. (Exhibit 7 Facebook Conversation pp. 9–10) (Ex. App. pp. 14-15). Eventually, Fenton got an Uber to take him to the truck stop. (Exhibit 7

Facebook Conversation pp. 1–4) (Ex. App. pp. 6-9). None of these exchanges involved a quid pro quo offer of an Uber ride in exchange for sex; like the topic of renting a shower, they were discussions about facilitation, not payment. Most of the conversation centered around Lowe paying for Fenton's Uber ride, not the other way around, and the one time Fenton offered to buy an Uber for Lowe, it was not as a quid pro quo exchange for sex. The evidence was insufficient to establish Fenton offered to pay for an Uber ride in exchange for sex.

Fenton also did not offer Lowe marijuana in exchange for sex. On January 6, Lowe asked what Fenton wanted to do "after our time in the shower", then asked what Fenton liked to do, and Fenton replied he liked to smoke marijuana. (Exhibit 7 Facebook Conversation p. 27) (Ex. App. p. 32). Lowe said "[l]ol ok I'm down". (Exhibit 7 Facebook Conversation p. 27) (Ex. App. p. 32). Lowe asked if Fenton had any marijuana, and he said he needed to get more. (Exhibit 7 Facebook Conversation p. 26) (Ex. App. p. 31).

Lowe said he was "down 4 whatever" and "Sounds like a good way to spend the afternoon lol". (Exhibit 7 Facebook Conversation p. 26) (Ex. App. p. 31). That was the extent of the conversation about marijuana. It was initiated by Lowe asking what Fenton might want to do after they had sex, and never included a quid pro quo dimension. The evidence was insufficient to convince a rational juror beyond a reasonable doubt that Fenton offered marijuana in exchange for sex.

Finally, Fenton never offered food or clothing in exchange for sex. The State suggested this element was met by an exchange where Lowe asked if Fenton was bringing him food and he responded that he was. (5/10/2023 Trial Tr. p. 68 L. 13–15; Exhibit 7 Facebook Conversation p. 47) (Ex. App. p. 52). That argument ignores that the next line—Fenton saying "this cock"—obviously establishes he did not intend to provide food, and that his response was in jest. (Exhibit 7 Facebook Conversation p. 47) (Ex. App. p. 52). And even if that line did not exist, as with all of the exchanges the State pointed to,

nothing established there was any quid pro quo involved. Lowe asked out of the blue if Fenton was bringing food, and did not premise any sexual activity on him doing so.

The State also claimed Fenton offered food and clothing in exchange for three-way sex with Lowe and a hypothetical friend. (5/10/2023 Trial Tr. p. 68 L. 6–12). During a sexually-charged portion of the conversation on December 27, Fenton suggested he would like a "friend" to join them if Lowe knew of one. (Exhibit 7 Facebook Conversation p. 77) (Ex. App. p. 82). He asked again if a friend would be interested on January 2; Lowe said "like a 3some", Fenton responded "yeah", and Lowe said "Hmmm ya maybe lol". (Exhibit 7 Facebook Conversation pp 64–65) (Ex. App. pp. 69-70). Lowe asked what Fenton would "do 4 a threesome" and Fenton asked "what do i need to do lol". (Exhibit 7 Facebook Conversation p. 63) (Ex. App. p. 68). Lowe suggested "Idk. Girls like food and clothes lol" and Fenton said "ok i have no prob spoiling a likl". (Exhibit 7 Facebook Conversation p. 63)

(Ex. App. p. 68). Fenton said "lmk what she says", Lowe said "Ok i will" and then followed up with "U promise?" (Exhibit 7 Facebook Conversation p. 62) (Ex. App. p. 67). Fenton said "yeah for sure" and Lowe said "Ok cool. I'll let u know a good day and if she's down". (Exhibit 7 Facebook Conversation p. 62) (Ex. App. p. 67). This exchange does not constitute a quid pro quo offer of the nature required by section 710A.1(1). It was a flirtatious discussion, initiated and entirely driven by Lowe, with no particular indication a sex act would be entirely contingent on Fenton providing food and clothes.

None of the circumstances relied upon by the State—paying for a shower room, paying for an Uber, smoking marijuana, or providing food or clothing, constitute a quid pro quo offer of something of value in exchange for sex. The evidence would not convince a rational jury of Fenton's guilt beyond a reasonable doubt, and therefore is insufficient to support his conviction.

Additionally, Fenton did not entice, coerce, or recruit Lowe, or attempt to do so, because Lowe, not Fenton, initiated and drove many of the discussions relied upon by the State. "The term 'entice' has been defined as 'to draw on by arousing hope or desire' or 'to draw into evil ways.'" State v. Hughes, No. 07-0988, 2008 WL 3364043, at *2 (Iowa Ct. App. Aug. 13, 2008) (unpublished table decision) (quoting State v. Osmundson, 546 N.W.2d 907, 909 (Iowa 1996)). Coerce means "to compel to an act or choice," "to achieve by force or threat," or "to restrain or dominate by force." *Coerce Definition*, Merriam-Webster, https://www.merriam-webster.com/dictionary/coerce (last visited June 1, 2023). Recruit means, as relevant here, "to secure the services of." *Recruit Definition*, Merriam-Webster, https://www.merriam-webster.com/dictionary/recruit (last visited June 1, 2023). The jury was instructed:

> Concerning [the marshalling instruction], the phrase "enticed, coerced, or recruited, or attempted to entice, coerce, or recruit, a person to engage in a commercial sexual activity" refers to any verbal

> statement, act, or conduct which invites a person to be a partner in a sex act for money or other thing of value, regardless of whether a sex act occurred or a person made an actual payment of any kind.
>
> The request, solicitation, or acceptance does not have to be in any particular form of words. It can arise from a gesture or other expression which indicates a sex act was to occur.

(Jury Inst. No. 17 Entice Coerce Recruit) (App. p. 15).

It is clear Fenton did not coerce or attempt to coerce Lowe; no threats or other demonstrations of force appear anywhere in the conversation. Turning to enticement or recruitment, the record demonstrates Lowe enticed or recruited Fenton rather than the other way around. Lowe asked, completely unprompted, if Fenton was going to bring him food. (Exhibit 7 Facebook Conversation p. 47) (Ex. App. p. 52). Lowe asked what Fenton would do for a threesome, and suggested "Girls like food and clothes lol". (Exhibit 7 Facebook Conversation p. 63) (Ex. App. p. 68). Lowe asked Fenton what he might want to do "after our time in the shower" and when Fenton said he liked to smoke marijuana Lowe said "Lol ok I'm down". (Exhibit 7 Facebook

Conversation p. 27) (Ex. App. p. 32). On the day they had planned to meet, Lowe indicated he would pay for both the shower and an Uber ride for Fenton. (Exhibit 7 Facebook Conversation p. 9) (Ex. App. p. 14). Each of these instances were initiated and encouraged by Lowe, and constituted attempts to entice Fenton. The evidence was insufficient to convince a rational juror beyond a reasonable doubt that Fenton enticed, coerced, or recruited Lowe, or attempted to do so.

Conclusion

The evidence was insufficient to establish Fenton offered anything of value in exchange for a sex act. His conviction should be vacated and the case remanded for dismissal.

III. The district court applied the wrong standard when evaluating Fenton's motion for new trial.

Preservation of Error

Fenton filed a motion for new trial, arguing "[t]he verdict is contrary to the law or evidence in violation of Iowa Rule of Criminal Procedure 2.24(2)(b)(6)." (Motion for New Trial p. 1)

(App. p. 17). The district court denied that motion. (Order Denying Defense Motions p. 1) (App. p. 20). Error was preserved. See State v. Scalise, 660 N.W.2d 58, 65 (Iowa 2003) (reviewing appellant's claim that the district court applied the incorrect standard to motion for new trial).

Standard of Review

A district court's ruling that a verdict was not contrary to the weight of the evidence is reviewed for an abuse of discretion. State v. Ary, 877 N.W.2d 686, 705 (Iowa 2016). While the court has broad discretion in ruling on a motion for new trial, it is not unlimited. State v. Reeves, 670 N.W.2d 199, 202 (Iowa 2003). To establish an abuse of discretion, the appellant "must show that the district court exercised its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable." Id. A district court abuses its discretion when it applies the incorrect standard when assessing the merits of a motion for new trial. Scalise, 660 N.W.2d at 66.

Discussion

Fenton filed a motion for new trial, arguing "[t]he verdict is contrary to the law or evidence in violation of Iowa Rule of Criminal Procedure 2.24(2)(b)(6)." (Motion for New Trial p. 1) (App. p. 17). In denying that motion, the district court laid out the standard for "reviewing challenges to the sufficiency of evidence supporting a guilty verdict," including that all evidence is "viewed in the light most favorably to the State, including all reasonable inferences that may be fairly drawn from the evidence." (Order Denying Defense Motions p. 1) (App. p. 20). The court concluded that "[v]iewing the evidence in the light most favorable to the State, Mr. Fenton's [motion for new trial] is without merit." (Order Denying Defense Motions p. 1) (App. p. 20).

The district court applied the incorrect standard to Fenton's motion for new trial. It expressly and repeatedly invoked the standard for assessing the sufficiency of evidence. But Fenton alleged the verdict was "contrary to the law or

evidence in violation of Iowa Rule of Criminal Procedure 2.24(2)(b)(6)." (Motion for New Trial p. 1) (App. p. 17). "Contrary to the evidence" means "contrary to the weight of the evidence" and requires the court to weigh the evidence and consider the credibility of witnesses. State v. Ellis, 578 N.W.2d 655, 658-59 (Iowa 1998). The court must independently consider whether the verdict is contrary to the weight of the evidence and whether a miscarriage of justice may have resulted. Id. The weight-of-the-evidence analysis is much broader than a sufficiency-of-the-evidence analysis in that "'it involves questions of credibility and refers to a determination that more credible evidence supports one side than the other.'" State v. Maxwell, 743 N.W.2d 185, 193 (Iowa 2008) (quoting State v. Nitcher, 720 N.W.2d 547, 559 (Iowa 2006)). Because a motion for new trial concedes that there is sufficient evidence to sustain a verdict, "'the trial court is under no obligation to view the evidence in the light most favorable to the verdict winner.'" Reeves, 670 N.W.2d at 202

(quoting Commonwealth v. Widmer, 560 Pa. 308, 744 A.2d 745, 751 (2000)).

The district court erred by applying the incorrect standard and failing to weigh the evidence without deference to the jury's findings. This case should be remanded with instructions for the district court to reconsider the motion under the correct standard. Ellis, 578 N.W.2d 659; Scalise, 660 N.W.2d at 66.

Conclusion

The district court applied the wrong standard when evaluating Fenton's motion for new trial. The case should be remanded for reconsideration of the motion under the correct standard.

IV. The district court imposed an illegal sentence by ordering Fenton to complete the sex offender treatment program while incarcerated.

Preservation of Error

A challenge to an illegal sentence may be brought at any time, and is not subject to error-preservation requirements. State v. Bruegger, 773 N.W.2d 862, 872 (Iowa 2009).

Standard of Review

"[R]eview of a sentence imposed in a criminal case is for correction of errors at law." State v. Damme, 944 N.W.2d 98, 103 (Iowa 2020) (citing State v. Formaro, 638 N.W.2d 720, 724 (Iowa 2002)).

Discussion

As part of his sentence, the district court ordered Fenton to "complete sex offender treatment program as a term of his incarceration." (Sentencing Tr. p. 9 L. 18–22). The district court does not have authority to order a defendant to participate in the sex offender treatment program, and therefore imposed an illegal sentence.

"An illegal sentence is one that is not permitted by statute." State v. Woody, 613 N.W.2d 215, 217 (Iowa 2000) (citing State v. Hess, 533 N.W.2d 525, 527 (Iowa 1995)). Iowa Code section 901.5 sets out the sentencing options available to district courts. See generally Iowa Code § 901.5. That list does not include ordering a defendant to complete the sex offender treatment program. Authority for such a requirement is vested in the Iowa Department of Corrections, not district courts. Dykstra v. Iowa Dist. Court for Jones County, 783 N.W.2d 473, 478–79 (Iowa 2010). While that agency may require Fenton to complete a treatment program, the district court cannot. See State v. Gardner, No. 22-0422, 2023 WL 153509, at *2 (Iowa Ct. App. Jan. 11, 2023) (unpublished table decision). Because the district court does not have statutory authority to require Fenton to complete the sex offender treatment program while incarcerated, that portion of his sentence is illegal.

Conclusion

The district court imposed an illegal sentence by ordering Fenton to complete the sex offender treatment program while incarcerated. That portion of the sentencing order should be vacated.

REQUEST FOR ORAL ARGUMENT

Counsel requests to be heard in oral argument.

ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was $5.32, and that amount has been paid in full by the Office of the Appellate Defender.

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION FOR BRIEFS

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) because:

> [X] this brief has been prepared in a proportionally spaced typeface Bookman Old Style, font 14 point and contains 5,573 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

Dated: *9/25/23*

Josh Irwin
Assistant Appellate Defender
Appellate Defender Office
Lucas Bldg., 4th Floor
321 E. 12th Street
Des Moines, IA 50319
(515) 281-8841
jirwin@spd.state.ia.us
appellatedefender@spd.state.ia.us