IN THE COURT OF APPEALS OF IOWA

No. 0-216 / 99-0147
Filed May 31, 2000

FILED
MAY 31 2000
CLERK SUPREME COURT

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MARTY BROWN,
Defendant-Appellant.

Appeal from the Iowa District Court for Mahaska County, Annette J. Scieszinski, Judge.

Defendant appeals from the judgment and sentence entered upon a jury verdict finding him guilty of three counts of second-degree sexual abuse in violation of Iowa Code sections 709.1(3) and 709.3(2) (1997). **REVERSED AND REMANDED WITH DIRECTIONS.**

Linda Del Gallo, State Appellate Defender, and Robert P. Ranschau, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney General, and Charles A. Stream, County Attorney, for appellee.

Considered by Streit, P.J., and Zimmer and Hecht, JJ.

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HECHT, J.

Marty Brown appeals from the judgment and sentence entered upon a jury verdict finding him guilty of three counts of second-degree sexual abuse in violation of Iowa Code sections 709.1(3) and 709.3(2) (1997). He contends the trial court erred in (1) failing to apply the proper standard to his motion for a new trial, or, if it did use the proper standard, in overruling his motion because the jury verdicts were not supported by the weight of the evidence, and (2) overruling his objection to the prosecutor's statement during closing arguments describing him as a monster. We reverse and remand to the district court with directions.

I. Factual Background and Proceedings. Marty Brown ("Brown") is the father of T.B. Brown and T.B.'s mother separated in 1992. T.B. and her brother, D.B., lived with their mother until 1993, when they were placed in foster care as a result of parental neglect. In August of 1995, T.B. and D.B. were placed in Brown's custody. After she moved in with Brown, T.B. informed her teacher that on several occasions Brown had engaged in oral and anal sexual intercourse with her. T.B. was nine years old at the time of the trial.

Jury trial in this matter commenced on October 7, 1998. The jury returned a verdict of guilty of three counts of sexual abuse in the second degree on October 8, 1998. Brown filed a motion in arrest of judgment and a motion for new trial on November 13, 1998. The district court denied both motions. Brown appeals his convictions.

II. Standard of Review. We review rulings on motions for new trial for abuse of discretion. *State v. Jefferson,* 545 N.W.2d 248, 249 (Iowa 1996).

When reviewing district court rulings on objections to arguments by counsel, we determine whether the district court abused its discretion. *State v. Deases*, 479 N.W.2d 597, 601 (Iowa App. 1991).

III. Motion for New Trial. In ruling on motions for new trial, the district court has broad but not unlimited discretion. Iowa R. App. P. 14(f)(3). This court is slower to interfere with the grant of a new trial than with its denial. Iowa R. App. P. 14(f)(4). The district court must apply the "weight of the evidence" test in its ruling on motions for new trial. *State v. Ellis*, 578 N.W.2d 655, 659 (Iowa 1998).

Brown filed a joint motion in arrest of judgment and for new trial contending his conviction was contrary to the law and to the evidence in the record. *See* Iowa R. Crim. P. 23(2)(b)(6). In its ruling, the district court noted, "there is substantial evidence in the record to support the jury's findings on all three counts" and denied the motion. Brown claims the district court applied the wrong legal standard in deciding his motion for new trial. We agree.

The words "contrary to . . . the evidence" in rule 23(2)(b)(6) mean "contrary to the weight of the evidence." *Ellis*, 578 N.W.2d at 658. They constitute the standard to be applied by the district court in deciding motions for new trial. *Id.* at 659. This standard is different in important respects from the "sufficiency of the evidence" test applied in ruling on motions for judgment of acquittal. *Id.* at 658. It draws the court into questions of credibility and requires an analysis of whether a greater amount of credible evidence supports one side of an issue or cause than the other. *Id.*

The record in this case indicates the district court applied the sufficiency of the evidence standard to Brown's motion for new trial. This was error, and we conclude the case must be remanded to the district court solely for application of the correct legal standard.

IV. Prosecutorial Misconduct. Brown also contends the prosecutor engaged in misconduct during his closing argument by stating "this man here is a monster." Closing arguments allow counsel to draw conclusions from the evidence introduced at trial and argue all permissible inferences derived from such evidence. *State v. Phillips,* 226 N.W.2d 16, 19 (Iowa 1975). Counsel should be given latitude to make comments and arguments within the framework of the legal issues and evidence. *See State v. Thornton,* 498 N.W.2d 670, 676 (Iowa 1993). On the other hand, counsel has no right to create evidence by argument or express personal beliefs. *State v. Melk,* 543 N.W.2d 297, 301 (Iowa App. 1995).

Prosecutorial misconduct warrants a new trial when it is "so prejudicial as to deprive the defendant of a fair trial." *State v. Pace,* 602 N.W.2d 764, 774 (Iowa 1999) (quoting *State v. Lyons,* 210 N.W.2d 543, 549 (Iowa 1973)). To establish the claim, a defendant must show both misconduct and prejudice. *State v. Escobedo,* 573 N.W.2d 271, 277 (Iowa App. 1997). Whether the incident was isolated or one of many is relevant; prejudice results more readily from persistent efforts to place prejudicial evidence before the jury. *State v. Greene,* 592 N.W.2d 24, 32 (Iowa 1999). In the present case, although we do not encourage the type of comment made by the prosecutor, the remark was an

isolated one during closing argument and not indicative of a continuing effort to inject prejudicial material before the jury. Consequently, Brown has not shown he was prejudiced by the prosecutor's statement and cannot succeed on his claim of prosecutorial misconduct.

V. Disposition. We reverse the trial court's ruling on Brown's motion for new trial and remand solely for the purpose of allowing the district court to rule on defendant's motion applying the correct weight-of-the-evidence standard. We do not grant a new trial.

REVERSED AND REMANDED WITH DIRECTIONS.

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