IN THE COURT OF APPEALS OF IOWA

No. 1-345 / 09-1932
Filed July 13, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

BRUCE MARCELL BRAGGS, III,
Defendant-Appellant.

Appeal from the Iowa District Court for Linn County, Marsha M. Beckelman, Judge.

Defendant appeals from his convictions for burglary in the first degree and sexual assault in the second degree. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Robert Ranschau, Assistant State Appellate Defender, for appellant.

Bruce M. Braggs, Anamosa, pro se.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney General, Harold L. Denton, County Attorney, and Brian Claney, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Doyle and Danilson, JJ. Tabor, J., takes no part.

SACKETT, C.J.

Defendant, Bruce M. Braggs, appeals his conviction and sentence for burglary in the first degree, in violation of Iowa Code sections 713.1 and 713.3(d) (2007), and sexual abuse in the second degree, in violation of sections 709.1 and 709.3(1). Braggs alleges the district court erred in (1) denying his challenge to the jury panel, (2) denying his motion to strike potential jurors for cause, (3) overruling his objection to expert testimony, (4) overruling his chain of custody objection to the admission of evidence, (5) permitting the jury to listen to a recording of the 911 call during deliberations, (6) refusing to give a spoliation instruction, and (7) denying his motion for a new trial. In addition, Braggs asserts in his pro se brief the district court erred in not merging the burglary charge with the sexual abuse charge under section 701.9, and erred in refusing to give an instruction on the lesser offense of attempted burglary in the first degree. We affirm.

I. BACKGROUND AND PROCEEDINGS. At 4:30 a.m. on June 3, 2007, Shawna Dolan was just going to bed after watching movies with a neighbor. She received a phone call around 4:50, and after hanging up, tried to go back to sleep. She noticed a figure at the door to her room. She got up thinking it was her roommate, Sheila Derrick. The figure entered her room and she realized it was a stocky, six-foot tall African-American man. She screamed and offered him forty dollars to leave. The man told her to shut up and sit down on the bed facing the wall. The man told her he would shoot her if she was not quiet. Her head was covered with a blanket and something round and hard was

pressed into her back, which she believed was a gun. The man told her to undress and asked if she had a condom. Shawna replied no, so the man used a white plastic bag with red lettering to cover his penis and then raped her.

Hearing a noise, he got up and asked if someone else was present in the apartment. Shawna said her roommates were home and they possibly went outside to have a smoke or to go to work. The intruder left the apartment for a few minutes, but then came back demanding Shawna perform oral sex. After a few more minutes, the man then informed Shawna one of his friends was there and he had to go get him outside. When the intruder left this time, Shawna got up and locked her front door. She tried to call the police but the intruder soon reentered the apartment through the living room window and she hung up the phone. He asked her who she was calling and she informed him she was calling her roommates to see where they were. He made her lay back down on the bed where he proceeded to perform anal sex.

Then there was a loud bang at the front door of the apartment. The man told Shawna to put her head down; he ripped the bedroom window screen and ran out of the apartment. Shawna opened the door to the apartment where the police were waiting. Shawna described her attacker as wearing baggy blue jeans, a red shirt, dark plaid underwear, and something blue over his head. She could not see his face because of the blanket, but said she did see his eyes.

Shawna's roommates, Sheila Derrick and Vicki Boots, had awoken when Shawna first screamed. They crawled to Shawna's bedroom door and heard a man tell Shawna to do what he said or he would shoot her. They also heard

Shawna offer the man money to leave her alone. They ran out of the apartment and dialed 911. They had recently moved in with Shawna and were not sure of the address. While outside, they saw a man exit the building wearing a white shirt and dark blue or black jeans. Vicki stated she thought the man was also wearing a purple jumpsuit coat. The man looked around and then attempted to reenter the apartment building. He was not able to get back in so he went around the building disappearing from sight. The police arrived while Sheila and Vicki were outside. They directed the officers to the apartment.

The police waited at the door the apartment listening to see if they could hear anything inside. When they did not hear anything, they knocked. They heard Shawna scream and then she opened the door. She informed the officers the intruder went out the window. One of the officers chased after the suspect and was able to see an African-American male running away from the apartment building wearing a red shirt and something blue on his head. While standing on her balcony, Shannon Fox, a resident on the third floor of the apartment building, also saw the suspect running toward the nearby woods and saw him remove a red shirt. The officer lost sight of the suspect, but set up a neighborhood perimeter.

At least three neighbors and a newspaper carrier saw an African-American male with no shirt walking around the neighborhood that morning. A man without a shirt was spotted by the apartment security guard entering another apartment building in the complex. The security guard followed the man into the building and apprehended him. The man, later identified as Braggs, was covered

in dirt, sweating, and wearing blue jeans. Braggs's pants, white underwear, socks and shoes were seized and placed in the police evidence locker. In the woods, the officers located and seized a plastic sack with red lettering, a red t-shirt, and a blue t-shirt. The items were placed in a paper bag and also put in the police evidence locker.

Shawna was taken to the hospital and a rape kit was used to collect samples. Her clothing was also taken and tested. The tests revealed no presence of semen or DNA foreign to Shawna in the vaginal, rectal or oral swabs. There was also no semen or DNA foreign to Shawna found on her underwear or shorts. There were no stains on the plastic bag. The tests on Braggs's underwear indicated the presence of seminal fluid but no spermatozoa. The underwear did have a mixture of DNA from more than one individual. Assuming Braggs was one contributor, the other contributor had a DNA profile consistent with Shawna. The test indicated that one out of one billion unrelated individuals would be expected to have the same profile. A penile swab was also taken from Braggs. It indicated a weak mixed DNA profile. Assuming Braggs was a partial contributor, the other contributor could have been Shawna, but the test indicated one out of three hundred seventy unrelated individuals would be expected to have this combined DNA.

Shelia and Vicki were interviewed at the hospital and asked to identify the man they saw from a photo lineup. Vicki was unable to identify anyone, but Sheila picked out Braggs's photo saying she was seventy-five percent sure he was the man she saw outside the apartment building.

Sergeant Clark investigated the apartment and spotted shoe impressions on the window ledge of the living room. Using fingerprint dust, he made the impressions more visible and lifted them from the ledge with fingerprint tape. Clark did seize Braggs's shoes when Braggs was brought back to the scene after being apprehended. Clark determined the impressions were not of sufficient detail to send to the police lab for testing. However, he did compare them by placing the shoes on top of the impression. While he has no training in shoe print identification, Clark was allowed to testify at trial, over the objection of Braggs, the shoes were consistent in size, shape, and pattern to the impression lifted off the ledge.

Braggs testified at trial that he was wearing a white t-shirt, jeans, white underwear, and tennis shoes on the morning of June 3rd. He had spent the evening with his girlfriend and a friend who both corroborated Braggs's attire. After drinking at a bar and an after-hours party, Braggs and his friend, Lashaun Perry, went back to Perry's residence. While there Braggs received a call from his friend, Chris Wright, who asked Braggs for a ride to the after-hours party. Braggs left Perry's home in Perry's vehicle and drove to the same apartment complex where Shawna lived. When he arrived at the complex, he got out of his car to look for Wright. He observed two women walking quickly up a hill. He saw one of the women, who he identified as Sheila, looking directly at him. He looked into the corridor of one of the buildings, but did not see Wright. When he could not find Wright, he started to walk toward the car to retrieve his cell phone to call Wright. At that time, Braggs saw the police enter the parking lot. Afraid the

police would arrest him for driving without a license and driving while intoxicated, he took off running. He said he took off his white shirt in an attempt to evade police, and fell while crossing the street. After hiding out in the neighborhood for an hour and a half to two hours, he entered an apartment building where he was apprehended by an armed security guard.

On June 11, 2007, a trial information was filed charging Braggs with one count of burglary in the first degree and one count of sexual abuse in the second degree. A jury trial commenced on September 21, 2009, where Braggs was found guilty as charged. He was sentenced to a term of imprisonment of twenty-five years on each charge to be served consecutively. From this judgment and sentence, Braggs appeals.

II. CHALLENGE TO THE JURY PANEL. Braggs's first claim is the district court erred in overruling his challenge to the all Caucasian jury panel. He claims the jury panel was not a representative cross section of the community in violation of the Sixth Amendment. Braggs's attorney made an objection during jury selection and offered into evidence a page from the census bureau website, which stated 3.5 percent of the Linn County population is African-American. Because of the disparity between the percent of African-Americans on the panel and in the county, Braggs requested the court include African-Americans on the panel. The trial court overruled Braggs's challenge finding Braggs failed to establish there had been systematic exclusion of African-Americans from the panel. We agree.

Because Braggs raises a constitutional issue, our review is de novo. *State v. Fetters*, 562 N.W.2d 770, 776 (Iowa Ct. App. 1997). The Sixth Amendment "entitles a criminal defendant to a jury panel designed to represent a fair cross-section of the community." *State v. Jones*, 490 N.W.2d 787, 792 (Iowa 1992). But this right does not require the jury panel to have the same proportion of distinct groups as the general population. *Id*. at 792–93. In order to show a violation of the Sixth Amendment, Braggs must show:

> (1) [T]hat the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group in the venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Id. at 792. We agree Braggs is a member of a distinctive group as he is African-American. However, Braggs's claim fails on the second and third prong.

In the second prong, we use the absolute disparity calculation to determine whether the representation of African-Americans was fair and reasonable. *Fetters*, 562 N.W.2d at 777. "Absolute disparity is determined by taking the percentage of the distinct group in the population and subtracting from it the percentage of that group represented in the jury panel." *Id*. In this case, the percentage of African-Americans in Linn county is 3.5 percent and the percent of this group on the jury panel is zero percent resulting in an absolute disparity of 3.5 percent. This disparity alone fails to establish a prima facie case. *See Swain v. Alabama,* 380 U.S. 202, 208-09, 85 S. Ct. 824, 829, 13 L. Ed. 2d 759, 766 (1965) (finding a disparity of as much as ten percent was insufficient to establish a prima facie case) *overruled on other grounds by Batson v. Kentucky,*

476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986); *United States v. Clifford,* 640 F.2d 150, 155 (8th Cir.1981) (holding an absolute disparity of 7.2 percent did not represent a substantial underrepresentation of native Americans on the jury panel); *Fetters*, 562 N.W.2d at 777 (finding a disparity of 4.52 percent did not establish a violation of the Sixth Amendment).

The third prong also fails as Braggs fails to show the underrepresentation is the result of systematic exclusion. Braggs must show the exclusion is the result of the particular jury selection procedure. *Fetters*, 562 N.W.2d at 777. He has failed to offer any evidence of the jury selection procedure that was used let alone that the procedure utilized resulted in the systematic exclusion of African-Americans.[1] Based on the record before us, we can do nothing but conclude the lack of African-Americans on the jury panel was the result of chance and did not amount to a violation of the Sixth Amendment. The district court did not err in denying Braggs's challenge to the jury panel.

III. JUROR CHALLENGE FOR CAUSE. Next, Braggs claims the district court erred in denying his motion to strike four jurors for cause. Braggs asserts he should have been allowed to strike for cause jurors Morris, Chahine, Swyers, and Rasmussen. We begin by noting jurors Morris, Chahine, and Swyers were stricken using three of Braggs's six peremptory strikes. The other three peremptory strikes were used on other panel members and juror Rasmussen was left on the panel. Pursuant to *State v. Neuendorf*, 509 N.W.2d 743, 747 (Iowa 1993), the "partiality of a juror may not be made the basis for

[1] There was no evidence and Braggs does not assert the Linn County Clerk's office failed to comply with Iowa Code chapter 607A.

reversal in instances in which that juror has been removed through exercise of a peremptory challenge." Because jurors Morris, Chahine, and Swyers were stricken from the jury with the use of peremptory strikes, the trial court's refusal to allow Braggs to strike these jurors cannot be used as a basis to seek a new trial. However, juror Rasmussen did serve on the jury; and therefore, we will analyze whether the court erred in overruling Braggs's challenge for cause.

We review a trial court's denial of a challenge for cause under an abuse-of-discretion standard. *State v. Mitchell*, 573 N.W.2d 239, 239–240 (Iowa 1997). The trial court is vested with broad discretion when ruling on a challenge for cause. *State v. Tillman*, 514 N.W.2d 105, 107 (Iowa 1994). In order show a trial court abused its discretion in denying a challenge for cause, Braggs must show,

> (1) an error in the court's ruling on the challenge for cause; and (2) either (a) the challenged juror served on the jury, or (b) the remaining jury was biased as a result of the defendant's use of all the peremptory challenges.

Id. at 108. In order to determine whether the trial court erred when it ruled on Braggs's challenge for cause under Iowa Rule of Criminal Procedure 2.18(5)(*k*), we must determine "whether the juror holds such a fixed opinion on the merits of the case that he or she cannot judge impartially the guilt or innocence of the defendant." *Neuendorf*, 509 N.W.2d at 746.

During voir dire, Rasmussen alerted the court and counsel she had been informed one of her students at the local college was absent from class that week in order to testify as a victim in a different sexual assault case. The court inquired of Rasmussen whether that knowledge would affect her ability to base

her decision in this case on the evidence that is going to be presented. Rasmussen stated,

> I definitely would like to see myself as a fair minded person, and at first I did not think that it would affect me as much. But it has been on my mind, and I want to be certain that I can be fair and impartial, and I think it may affect my ability to do that.

The court and counsel further questioned Rasmussen who admitted she knew only very few details of her student's case and the student was new to the college, having only been in Rasmussen's class for three weeks. Rasmussen agreed she was willing and able to follow the instructions the court will give requiring her to set aside any bias or sympathy and base her decision on the evidence presented. The court ultimately overruled Braggs's motion to strike for cause finding,

> I believe that she was being extremely careful and out of an abundance of caution letting us know that because of how closely we have been examining people on this particular issue. But I don't think she's indicated in any way that she's incapable of basing a decision on the evidence presented in this case.

We find the trial court did not err in denying Braggs's challenge for cause to juror Rasmussen. While Rasmussen expressed concern that her student's situation may affect her ability to be fair and impartial, she did state should could and would follow the court's instructions and decide the case based on the evidence she heard. Based on this assertion, we do not find the trial court abused its broad discretion in overruling Braggs's challenge for cause.

IV. SHOE PRINT EXPERT. Braggs alleges the district court erred in overruling his objection to the opinion testimony of Sergeant Clark with respect to the shoe prints left on the window ledge. Braggs asserts Clark has no training in

shoe print identification, and thus, should not have been allowed to offer an opinion regarding whether the shoes he was wearing at the time of his arrest matched the impression. In addition, Braggs claims the print left on the window ledge was of such poor quality that any such opinion tying the impression to shoe was unreliable and should have been excluded.

We review a trial court's decision on the admission of opinion testimony for abuse of discretion. *State v. Rodriquez*, 636 N.W.2d 234, 245 (Iowa 2001). The general rule in our state is one of "liberality in the admission of opinion evidence." *Id.* A trial court's decision will not be reversed "absent a manifest abuse of discretion to the prejudice of the complaining party." *Mensink v. American Grain*, 564 N.W.2d 376, 380 (Iowa 1997).

Iowa Rule of Evidence 5.702 states,

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise.

Clark testified he did not have any unique training in the comparison of shoe prints, but does have training in fingerprint and palm print analysis. He stated the same methodology can be applied in both fingerprint and shoe print identification. He testified after lifting the shoe prints from the window ledge, he sat the shoes that were seized from Braggs over top of the impression. He testified he concluded, "The shoes that were seized from Mr. Braggs were consistent with the size, the shape, and the pattern of the lift off the window ledge."

He went on to state there was not enough detail on the impression to conclude that Braggs's shoes made the impression to the exclusion of all other shoes, but the shoes were similar in general characteristics. He also made the decision not to send the impression and shoes to the state laboratory for analysis by a shoe print expert, because in his experience, there was not sufficient detail in the impression for the expert to be able to make an individualization as to the source of the print.

Braggs challenges Clark's expertise in shoe print analysis, but we note, "the witness need not be a specialist in the particular area of testimony so long as the testimony falls within the witness' general area of expertise." *Hunter v. Bd. of Trs. of Broadlawns Med. Ctr.*, 481 N.W.2d 510, 520 (Iowa 1992) (permitting a professor of marketing management to testify on the issue of general corporate structure where the professor indicated the principles of management are essentially the same throughout the field of business administration). While Clark was not an expert in shoe print analysis, he was not asked to render an opinion on whether Braggs's shoes caused the print on the window ledge to the exclusion of all other shoes. He simply said based on observation and training in finger and palm print analysis, the shoes were of similar shape, size, and pattern to the impression. The lack in specific training for shoe print analysis goes to the weight of the evidence rather than its admissibility. *Id*.

Braggs also challenges the reliability of the testimony as Clark stated the shoe prints were not of sufficient quality to justify sending them to the state

laboratory for analysis. However, our courts have not required testimony on shoe print analysis to be able to establish the defendant's shoes were the only ones that could have caused the print before it is admissible. In *State v. Mark*, 286 N.W.2d 396, 409 (Iowa 1979), the court stated an absolute or positive identification is not required, but "there must be a sufficient number of similar identifying characteristics to afford a basis of a reliable comparison." Based on this rule, the court in *State v. Campbell*, 326 N.W.2d 350, 354 (Iowa 1982) stated it would not be an abuse of discretion to admit testimony and exhibits from a criminalist that the shoe prints at the crime scene had a similar pattern, size, and amount of wear to the defendant's shoes. In addition, "the requirements for the admissibility of footprint identification testimony have been held to be less stringent where there is other evidence connecting the defendant with the crime scene." *Campbell*, 326 N.W.2d at 354.

While the impressions were not available at the time of trial, as will be discussed in the sections below, the jury was able to look at the photographs of the impression and compare them to the shoes to reach their own determination about whether the size, shape, and pattern of the impression matched. We find the trial court did not abuse its discretion in overruling Braggs's objection to Sergeant Clark's testimony on his analysis of the shoe print impressions at the crime scene.

V. CHAIN OF CUSTODY. Braggs claims the district court erred when it admitted evidence over his chain of custody objections. The evidence he believes was improperly admitted was the red t-shirt and blue t-shirt allegedly

located in the woods near the apartment complex, and the belt, jeans, socks, and shoes Braggs was allegedly wearing when he was arrested.

Braggs's chain-of-custody claim arises out of the flood that hit Cedar Rapids in June of 2008. The evidence admitted at trial was stored in the police evidence locker in the basement of the police station. The station was flooded resulting in nearly seven feet of river water and sewage in the evidence locker. After waiting for the water to recede and the health hazards to abate, the evidence locker was opened and the police officers began clean-up efforts. The water and sewage had damaged the majority of evidence located in the locker. The officers attempted to prioritize the recovery of evidence and focused their efforts on serious felony cases, cases that were still pending, and cases that were within the statute of limitations.

The water had moved boxes from their shelves and separated some case tags from the pieces of evidence. Also, when the boxes were removed from the shelf, they would disintegrate causing items to spill out because the boxes were saturated. The officers estimated they disposed of approximately ninety percent of the evidence located in the locker. The other ten percent of stored evidence was able to be identified as belonging to a particular case, so it was set aside and sent to a third party restoration company, Munters. Unfortunately, the officers did not inventory the items they recovered before sending evidence to Munters.

The evidence from this case was located, set aside, and sent to Munters. However, when the evidence was requested back from Munters only the red and

blue t-shirts, and Braggs's belt, jeans, socks, and shoes were returned. Because the officers did not maintain an inventory of items found after the flood or items sent to Munters, it is unclear whether the other pieces of evidence were lost in the flood, disposed of, or lost by Munters. In addition, no one from Munters testified at trial as to their collection, preservation, and storage of the items admitted into evidence and no from the State testified as to Munters's procedures and processes.

Challenges to the admission of evidence over chain of custody objections are reviewed for abuse of the trial court's discretion. *State v. Mehner*, 480 N.W.2d 872, 877 (Iowa 1992). The purpose of requiring proof of the chain of custody is to insure "tampering, substitutions, or alternations did not occur." *State v. Collier*, 372 N.W.2d 303, 308 (Iowa Ct. App. 1985). Only a prima facie showing of identity and connection to the crime is required, not positive proof. *Id.* In addition, when exhibits are solid objects not easily susceptible to undetected alteration, evidence may be admitted despite a break in the chain of custody. *State v. Houston*, 439 N.W.2d 173, 179 (Iowa 1989). Contrary speculation regarding the identity of evidence usually affects the weight of the evidence and not its admissibility. *Id.* The State, in admitting evidence, is also given the presumption that "State agents would not tamper with the evidence." *State v. Piper*, 663 N.W.2d 894, 907 (Iowa 2003), *overruled on other grounds by State v. Hanes*, 790 N.W.2d 545, 551 (Iowa 2010).

In this case, the clothing admitted into evidence is not something that is easily susceptible to undetected alteration. The exhibits were identified at trial by

the officers who initially collected the evidence. The clothing was entered into evidence for the general purpose to corroborate and connect the eye witnesses' testimony describing what the suspect was wearing to the scene and the defendant. We cannot say the trial court abused its discretion in overruling Braggs's chain of custody objections to the clothing admitted into evidence.

VI. 911 RECORDING. During deliberations, the jury requested to listen to the 911 recording, which was placed into evidence and played for the jury during the trial. The court consulted with the attorneys and Braggs about the request. Braggs, through his attorney, objected contending playing the 911 recording again would overemphasize the evidence to the exclusion of other witness testimony, for which the jury had to rely on their memory. The court ultimately ruled the jury would be allowed to listen to the 911 recording one time during deliberation. Braggs contends this ruling was in error.

"Submission of exhibits to the jury is a matter resting in the trial court's discretion." *Brooks v. Holtz*, 661 N.W.2d 526, 532 (Iowa 2003). The trial court's decision will not be reversed unless is it is clearly unreasonable or rests on untenable grounds. *Id.* A ground is untenable when "it is not supported by substantial evidence or when it is based on an erroneous application of the law." *Id*.

Under Iowa Rule of Criminal Procedure 2.19(5)(*e*), "Upon retiring for deliberations the jury may take with it all papers and exhibits which have been received in evidence, and the court's instructions; provided, however, the jury shall not take with it depositions . . . ." By using the word *may*, the legislature left

it up to the court to determine what if any evidence the jury can take into the deliberation room in a criminal case.[2] The court, when determining whether to allow the jury to have exhibits during deliberation, can consider the following factors:

> (i) whether the material will aid the jury in a proper consideration of the case;
> (ii) whether any party will be unduly prejudiced by submission of the material; and
> (iii) whether the material may be subjected to improper use by the jury.

State v. Shea, 218 N.W.2d 610, 615 (Iowa 1974).

Under the facts of this case, we cannot say the trial court abused its discretion in allowing the jury to listen to the 911 recording once during deliberation. The recording aided the jury in properly considering the case; neither party was unduly prejudiced by its submission as it had been properly admitted into evidence during the trial; and the court's order, allowing the recording to be played only one time, prevented overemphasizing the evidence and prevented the jury from using the recording improperly. *Compare State v. Gathercole*, 553 N.W.2d 569, 575 (Iowa 1996) (finding the court properly exercised its discretion in permitting the jury to use a tape recorder to listen to a tape of the defendant's interview), *with State v. Baumann*, 236 N.W.2d 361, 365–66 (Iowa 1975) (finding the court did not abuse discretion in refusing to allow the jury to listen to tape recordings of phone conversations of the defendant).

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[2] This is in contrast to a civil case, where the jurors "may take their notes with them and shall take with them all exhibits in evidence except as otherwise ordered. Iowa R. Civ. P. 1.926(2).

VII. SPOLIATION INSTRUCTION. Braggs's next claim on appeal is the trial court erred in refusing to submit a spoliation instruction based on the evidence lost as a result of the flood and clean up. As stated above, the evidence locker in the basement of the police station flooded. During the clean up, approximately ninety percent of the evidence in the locker was thrown away because it was destroyed or the officers were unable to connect it with a particular case file. The police made a special effort to locate items connected with Mr. Braggs's case and did locate some items. The items located were sent to Munters. When the evidence was requested back from Munters, certain items were missing. At trial, counsel requested a spoliation instruction based on the missing bedding and underwear of both Shawna and Braggs.[3] When the evidence room was being cleaned, the officers did not keep a list of items recovered. Thus, we do not know whether the bedding and underwear were disposed of in the clean-up efforts because it could not be traced to Braggs's case, or whether the evidence was sent to Munters but never returned. The trial court ultimately refused to give the requested spoliation instruction asserting it did not believe the State knowing and intentionally destroyed evidence.

We review a trial court's refusal to give a spoliation instruction for correction of errors at law. *State v. Hartsfield*, 681 N.W.2d 626, 630 (Iowa 2004). A spoliation instruction is given only when a party intentionally destroys evidence. *Id*. The instruction informs the jury they may drawn an inference that the

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[3] On appeal, Braggs also asserts the sexual assault kit, shoe impression, video of the defendant's questioning and anal and vaginal washes were lost. However, defense counsel did not request the spoliation instruction based on these missing items and thus we need not address them here.

evidence destroyed was adverse to the party responsible for its destruction. *Id.* In order to be entitled to a spoliation instruction, Braggs must show:

> (1) the evidence was "in existence"; (2) the evidence was "in the possession of or under control of the party" charged with its destruction; (3) the evidence "would have been admissible at trial"; and (4) "the party responsible for its destruction did so intentionally."

Id. (quoting *State v. Langlet*, 283 N.W.2d 330, 335 (Iowa 1979)). Before giving the instruction, the court must determine whether "a jury could appropriately deduce from the underlying circumstances the adverse fact sought to be inferred." *Id*. at 630. If substantial evidence supports the elements above, the spoliation instruction should be given and the trial court does not have discretion to refuse it. *Id.* at 630–31.

In this case we agree with the trial court that Braggs failed to demonstrate the State intentionally disposed of the bedding and underwear. The officers testified they specifically looked for evidence connected to Braggs's case while going through the evidence room after the flood. They were able to locate some items and placed them to the side so they could be sent to Munters. While the police did intentionally throw away ninety percent of the evidence in the room, they did not intentionally dispose of evidence they were able to connect to Braggs's case. They threw away items that were destroyed by the flood or separated from their evidence tag which made the evidence unidentifiable. Just as evidence destroyed under a routine neutral destruction policy is not considered intentional, *id*. at 632, we find evidence destroyed as a result of a natural disaster is also not intentionally destroyed.

Braggs, in his pro se brief, alleges the trial court's refusal to give the spoliation instruction amounts to a violation of his due process rights. In this case the disposed-of underwear and bedding were only potentially exculpatory. The DNA found in the underwear had already been tested and the bedding had been fluoresced and no DNA evidence was found. Where the State is alleged to have failed to preserve potentially exculpatory evidence, the defendant must show bad faith on the part of the State before a due process violation can be found. *State v. Atley*, 564 N.W.2d 817, 821 (Iowa 1997).

The only allegation of potential bad faith Braggs makes is his former attorney made a motion to continue the trial in January of 2008, approximately five months before the flood. In that motion, the attorney requested the trial be continued so independent DNA testing could be done. The DNA testing was not done in the ensuing five months for unknown reasons and now, as a result of the flood, the underwear and bedding are lost.

We find this allegation does not amount to bad faith. There is no indication that the police officer found the underwear and bedding, but intentionally disposed of it in order to prevent Braggs from conducting an independent test. In addition, according to Braggs's own expert at trial, even if the underwear and bedding had been located, any DNA on the clothing would have been destroyed by the flood water and sewage. Because there is no evidence of any bad faith on the part of the State, Braggs's due process claim has no support.

VIII. WEIGHT OF THE EVIDENCE. Braggs also asserts the district court erred when it overruled his motion for a new trial based on the weight of the evidence. Braggs contends substantial evidence introduced at trial supports a sexual assault did not occur, and he points to the doctor who examined Shawna stating there was no evidence she was anally raped. Braggs also cites the lack of his DNA on Shawna or her clothing. He points to the discrepancy in the description of the suspect's clothing and the lack of credibility in Shawna's in court identification. Shawna described her attacker as wearing a red shirt and something blue on his head, which was corroborated by the officer that chased the suspect from the apartment building. Shawna also testified the suspect was wearing dark plaid boxer underwear. Neither Shawna nor the officer saw the suspect's face. Shawna told the investigators after the attack she could not identify her attacker because she did not see his face. However, at trial Shawna positively identified Braggs as her attacker solely by looking at his eyes.

Shawna's roommates testified they saw Braggs in a white shirt walking outside the apartment building appearing like he was looking for someone. The roommates saw Braggs's face and one of the roommates was able to pick Braggs out of a photo lineup. Braggs testified he went to the apartment complex wearing a white shirt looking for his friend who had called him for a ride. Braggs's girlfriend and friend both corroborated the testimony that Braggs was wearing a white shirt that morning. When Braggs was arrested, he was wearing white briefs not dark plaid boxer underwear.

Braggs also asserts the DNA evidence found in his underwear and on the penile swab is not credible. Braggs's expert at trial, Dr. Soll, testified the DNA results from the penile swab were unsatisfactory because the test failed to register a result on five of the fifteen genetic markers that are routinely tested in cases such as this. Dr. Soll testified if one of his employees had provided him with such an incomplete test, he would have asked the test be redone. Also troubling to Dr. Soll in the penile swab was the lack of male DNA. He considered this highly unusual considering the swab was taken from Braggs's penis.

Dr. Soll also had concerns about the DNA test performed on Braggs's underwear. Dr. Soll testified that the result registered a nearly perfect proportioning mixture of Braggs's DNA and Shawna's DNA. This was troubling considering the poor weak mixture that was in the penile swab. Dr. Soll testified either the result from the underwear was serendipitous or there was a sampling error by the technician who could have mixed the DNA when running the test. Ultimately, Dr. Soll was unable to run any independent DNA tests on the penile swab, or the underwear as this evidence was under water and sewage as a result of the flood, which would have destroyed the DNA.

Dr. Soll also did testing to determine whether the plastic bag, which the suspect supposedly used as a condom, could have transferred DNA. The bag seized in the woods was a Menards bag. Dr. Soll tested bags from four different stores including a bag from Menards. Of the four, the Menards bag was the only bag that did not leak. If the bag did not transfer Braggs's DNA to Shawna as demonstrated by the lack of Braggs's DNA in the samples taken from Shawna, it

should not have been able to transfer Shawna's DNA to Braggs's penis or his underwear.

Based on the different eyewitness testimony regarding the suspect's clothing, the lack of credibility in Shawna's in court identification and the DNA evidence that Dr. Soll called into question, Braggs asserts he is entitled to a new trial due to the weight of the evidence.

Upon our review of the record made on Braggs's motion for a new trial, we determined the trial court failed to make a specific finding addressing the weight-of-the-evidence claim or apply the weight-of-the-evidence standard established in *State v. Ellis*, 578 N.W.2d 655, 659 (Iowa 1998). On June 13, 2011, we remanded the case to the district court for the limited purpose of determining whether the verdict was contrary to the weight of the evidence. On June 22, 2011, the district court entered an order finding the verdict was not contrary to the weight of the evidence based on *Ellis*, 578 N.W.2d at 659.

The district court has broad discretion in ruling on a motion for a new trial. *State v. Reeves*, 670 N.W.2d 199, 202 (Iowa 2003). On appeal, we review the court's decision for an abuse of discretion. *Id*. Our review is limited to "a review of the exercise of discretion by the trial court, not of the underlying question of whether the verdict is against the weight of the evidence." *Id.* at 203. In reviewing the trial court's decision, the standard we should apply is stated as follows:

> The discretion of the trial court should be exercised in all cases in the interest of justice, and, where it appears to the judge that the verdict is against the weight of the evidence, it is his imperative duty to set it aside. "We do not mean . . . that he is to substitute his

> own judgment in all cases for the judgment of the jury, for it is their province to settle questions of fact; and, when the evidence is nearly balanced, or is such that different minds would naturally and fairly come to different conclusions thereon, he has no right to disturb the findings of the jury, although his own judgment might incline him the other way. In other words, the finding of the jury is to be upheld by him as against any mere doubts of its correctness. But when his judgment tells him that it is wrong, that, whether from mistake, or prejudice, or other cause, the jury . . . erred, and found against the fair preponderance of the evidence, then no duty is more imperative than that of setting aside the verdict, and remanding the question to another jury."

Id. (citations omitted). We find the trial court did not abuse its discretion.

IX. MERGING CHARGES. In his pro se brief, Braggs contends the trial court erred in refusing his motion to merge the burglary in the first degree charge with the sexual abuse in the second degree charge under Iowa Code section 701.9.[4] We review a trial court's decision on merging charges for correction of errors at law. *State v. Bullock*, 638 N.W.2d 728, 731 (Iowa 2002).

The Iowa Supreme Court directly addressed the question of whether a charge of burglary in the first degree merges with sexual abuse in the second degree in *Bullock*. *Id*. The *Bullock* court found the two charges do not merge because a defendant can be found guilty under the elements of burglary in the first degree without also being found guilty under the elements of sexual abuse in the second degree. *Id.* at 732–33. Sexual abuse in the second degree requires the display of a dangerous weapon during the commission of the act or requires

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[4] Iowa Code section 701.9 provides:

> No person shall be convicted of a public offense which is necessarily included in another public offense of which the person is convicted. If the jury returns a verdict of guilty of more than one offense and such verdict conflicts with this section, the court shall enter judgment of guilty of the greater of the offenses only.

the use or threatened use of force creating a substantial risk of death or serious injury to any person. *Id*. at 733. Because "each crime contains an element or elements not present in the other offense" the two charges do no merge. *Id.* We find no reason to depart from this decision; and therefore, find the district court did not err when it refused to merge Braggs's charges.

X. LESSER INCLUDED OFFENSE INSTRUCTION. Finally, Braggs contends in his pro se brief the district court erred in refusing to submit a jury instruction on attempted burglary in the first degree. Braggs's trial counsel requested the following attempted burglary in the first degree instruction to be given to the jury.

> Regarding Count I of the trial information, the State must prove all of the following elements of Attempted Burglary in the First Degree.
>
> 1. On or about the 3rd day of June, 2007, the defendant broke into the apartment of Shawna Dolan.
> 2. The apartment was an occupied structure as defined in Instruction No. ____.
> 3. One or more persons were present in the occupied structure.
> 4. The defendant did not have permission or authority to break into the apartment.
> 5. The defendant did so with the specific intent to commit an assault.
> 6. During the incident, the defendant attempted to perform or participate in a sex act with Shawna Dolan which would constitute sexual abuse.
>
> If the State has proved all of the elements the defendant is guilty of Attempted Burglary in the First Degree. If the State has failed to prove any one of the elements, the defendant is not guilty of Burglary in the First Degree, and you will then consider the charge of Burglary in the Second Degree, as explained in Instruction No. ___.

The trial court refused to give this instruction, preferring at first to give its own attempted burglary in the first degree instruction,[5] but then ultimately deciding no attempted burglary in the first degree instruction would be given based on the evidence and its review of Iowa Code chapter 713. Braggs maintains it was error for the trial court to refuse his proposed instruction as attempted burglary is a lesser-included offense of burglary; and pursuant to *State v. Blanton*, 454 N.W.2d 901, 903 (Iowa Ct. App. 1990), his case must be remanded for a new trial.

Our review of a trial court's refusal to submit jury instructions for lesser included offenses is for correction of errors at law. *State v. Rains*, 574 N.W.2d 904, 915 (Iowa 1998). As long as the requested instruction correctly states the

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[5] The court initial proposed instruction on attempted burglary in the first degree stated,

> The State must prove all of the following elements of Attempted Burglary in the First Degree:
>
> 1. On or about the 3rd day in June, 2007, the defendant attempted to enter an apartment at 105 Kirkwood Court SW, #4, Cedar Rapids, Iowa.
>
> 2. The apartment was an occupied structure as defined in Instruction No. ___.
>
> 3. One or more persons were present in the occupied structure.
>
> 4. The defendant did not have permission or authority to enter the apartment.
>
> 5. The apartment was not open to the public.
>
> 6. The defendant did so with the specific intent to commit a sexual abuse.
>
> If the State has proved all of the elements, the defendant is guilty of Attempted Burglary in the First Degree.
>
> If the State has failed to prove any one of the elements, the defendant is not guilty of Attempted Burglary in the First Degree and you will then consider the charge of Attempted Burglary in the Second Degree as explained in Instruction No. ____.

The main distinction between the two instructions is what element was *attempted*. Under the Braggs's proposed instruction, the elements would include Braggs breaking into the apartment and attempting to perform or participate in a sex act. In the court's proposed instruction, Braggs attempted to enter the apartment and had the specific intent to commit sexual abuse.

law, is applicable to the case, and is not stated elsewhere in the instructions, the court must give the instruction. *State v. Kellogg*, 542 N.W.2d 514, 516 (Iowa 1996). Even if the court erred, no reversal is required unless the complaining party was prejudiced by the omission. *State v. Negrete*, 486 N.W.2d 297, 299 (Iowa 1992).

Upon review of the attempted burglary in the first degree statute and the proposed jury instruction offered by Braggs's counsel, we find the trial court did not err in refusing to give the instruction. Attempted burglary is defined in Iowa Code section 713.2 as,

> Any person, having the intent to commit a felony, assault or theft therein, who, having no right, license, or privilege to do so, attempts to enter an occupied structure not being open to the public, or who attempts to remain therein after it is closed to the public or after the person's right, license, or privilege to be there has expired, or any person having such intent who attempts to break an occupied structure, commits attempted burglary.

Iowa Code section 713.4(1) provides the elements that aggravate an attempted burglary to attempted burglary in the first degree.[6]

The focus in the attempted burglary definitions is a person must attempt to commit a burglary. Braggs's proposed instruction informed the jury that to be convicted of attempted burglary in the first degree Braggs had to have actually committed the burglary by breaking into the apartment, and attempted to perform or participate in a sex act constituting sexual abuse. The attempted qualification

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[6] Iowa Code section 713.4(1) states,

> A person commits attempted burglary in the first degree if, while perpetrating an attempted burglary in or upon an occupied structure in which one or more persons are present, the person has possession of an explosive device or incendiary device or material, or a dangerous weapon, or intentionally or recklessly inflicts bodily injury on any person.

is on the wrong element in Braggs's proposed instruction. Because Braggs's instruction was an improper statement of the law, the trial court correctly refused to give the requested instruction.

XI. CONCLUSION. We find the district court did not err in denying Braggs's challenge to the jury panel nor did it err in denying his motion to strike juror Rasmussen for cause. The trial court did not abuse its discretion in permitting the testimony from Sergeant Clark on his observation of the shoe print impression made on the window ledge. There was no abuse of discretion in overruling Braggs's chain of custody objection or in permitting the jury to listen to a recording of the 911 call during deliberations. The district court did not err in refusing to give a spoliation instruction, and we find the trial court did not abuse its discretion in denying Braggs's motion for a new trial based on the weight of the evidence. In addition, we find the trial court properly denied Braggs's motion to merge the burglary charge with the sexual abuse charge under Iowa Code section 701.9, and properly refused to give Braggs's proposed instruction on the lesser offense of attempted burglary in the first degree as it was not a proper statement of the law.

AFFIRMED.