IN THE COURT OF APPEALS OF IOWA

No. 1-419 / 10-1234
Filed July 27, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JONATHAN RYAN SCHIEFER,
Defendant-Appellant.

Appeal from the Iowa District Court for Johnson County, Patrick R. Grady (motion to suppress) and Ian K. Thornhill (trial), Judges.

The defendant appeals his conviction and sentence for first-degree burglary. **AFFIRMED.**

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

Thomas J. Miller, Attorney General, Bridget A. Chambers, Assistant Attorney General, Janet M. Lyness, County Attorney, and Anne Lahey, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., Vaitheswaran, J., and Huitink, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

VAITHESWARAN, J.

The district court found that Jonathan Schiefer entered a woman's apartment without her permission and sexually assaulted her. The court adjudged Schiefer guilty of first-degree burglary.[1]

On appeal, Schiefer contends: (1) there was insufficient evidence he acted with the specific intent to commit a sexual assault; (2) the district court abused its discretion in admitting the results of a preliminary breath test; and (3) the district court should not have overruled his motion to suppress the results of DNA testing.

I. Sufficiency of the Evidence

The district court set forth the elements of first-degree burglary as follows:

> 1. On or about the 6th day of April, 2008, Defendant broke or entered into 427 North Dubuque Street, Apartment #4, Iowa City, Johnson County, Iowa;
> 2. 427 North Dubuque Street, Apartment #4, was an occupied structure not open to the public;
> 3. One or more persons were present in 427 North Dubuque Street, Apartment #4;
> 4. Defendant did not have permission or authority to break or enter into 427 North Dubuque Street, Apartment #4;
> 5. Defendant broke or entered into 427 North Dubuque Street, Apartment #4, with the specific intent to commit a felony, to-wit: sexual abuse; and
> 6. During the incident Defendant performed or participated in a sex act with [a woman] which would constitute sexual abuse.

See also Iowa Code §§ 713.1, .3(d) (2007) (setting forth elements for first-degree burglary based on sexual-abuse alternative). Schiefer challenges the evidence supporting the fifth element, his specific intent to commit sexual abuse. On this element, a reasonable fact finder could have found the following facts.

[1] The court also found Schiefer guilty of third-degree sexual abuse but merged that conviction with the burglary conviction.

Early one morning, a young woman went to bed in one of the bedrooms of her ground-floor apartment. After about five or ten minutes, she saw a shadow outside her window. She froze momentarily, then sat up and looked at the bedroom door she had closed before going to bed. She saw it was cracked open and there was "an eye peeking through." Schiefer walked in, pushed her down on the bed, and committed a sex act. Schiefer left only after the woman screamed that her boyfriend was on his way there.

Following the assault, the woman's two apartment mates, who were out of town when the attack occurred, informed the police they previously saw a man looking into their bedroom windows. Police set up surveillance of the apartment and planted a female police decoy inside, with the expectation that Schiefer would return.

Schiefer did return. In July 2008, he approached the apartment's sliding glass door, bent down as if to tie his shoelaces, and looked in the door for a few seconds. He then stood up and walked away but returned about thirty minutes later. Schiefer again walked to the sliding glass door and again put his face to the glass and peered in.

Police immediately arrested Schiefer for trespassing. As he was being handcuffed, he said, "My life is over."

A month later, during an unrecorded police interview, Schiefer told a detective he had entered the apartment in April with hopes of having sex with the woman. According to the detective, he further stated the woman was "resistive," and "was fighting and screaming and telling him no." He admitted to holding the woman down on the bed and struggling.

These facts amount to substantial evidence in support of the specific-intent element of the burglary count. *See State v. Johnson*, 770 N.W.2d 814, 823 (Iowa 2009) (stating if the court's findings are supported by substantial evidence, those findings will not be disturbed on appeal); *State v. Finnel*, 515 N.W.2d 41, 43 (Iowa 1994) (holding defendant's "violent, nonconsensual entry," knowledge that contact would be offensive, threats, and assaultive actions constituted sufficient evidence from which a court could infer an intent to commit assault); *see also State v. Lambert*, 612 N.W.2d 810, 813 (Iowa 2000) ("Intent may be derived from actions preceding, or subsequent to, an accused's unauthorized entry, as well as all circumstances attendant thereto.").

In reaching this conclusion, we have considered Schiefer's defense that he was not able to form the specific intent to commit an assault because he was intoxicated with a mixture of alcohol, marijuana, and Dexedrine, a prescription medication for attention deficit hyperactivity disorder (ADHD). *See State v. McVey*, 376 N.W.2d 585, 587 (Iowa 1985) (allowing evidence of mental unsoundness establishing lack of capacity to form requisite criminal intent). The district court categorically rejected this assertion, known as the defense of diminished responsibility. *See Veverka v. Cash*, 318 N.W.2d 447, 449 (Iowa 1982) ("In Iowa, proof of diminished mental capacity, or diminished responsibility, is admissible on the issue of the defendant's ability to form a *specific* intent, where such intent is an element of the crime charged.").

The court reasoned as follows:

> [T]he Court does not find Defendant's self-serving testimony about the number of drinks he had, or the condition he was in on April 5-6, 2008, to be credible. Defendant's actions on April 6, 2008,

> evince purposeful, goal-directed conduct. Defendant surveilled the apartment and his target. Defendant made quiet entry into the apartment. Defendant moved swiftly and violently in his attempt to subdue his victim upon entering her bedroom. [The woman] saw the determination and the "evil look" in Defendant's eyes as he assaulted her. Finally, Defendant's retreat was also quick and covert.
>
> In hearing and evaluating the evidence, the Court finds the testimony of [the woman] to be particularly credible. . . . She . . . testified as to the absence of any indications Defendant was intoxicated on April 6, 2008. Defendant did not smell of alcohol, he did not stumble or lack physical coordination, and he did not slur his words when he threatened to hurt her. . . .
>
> The Court also finds Defendant's actions on July 19, 2008, to be relevant to its finding Defendant possessed the required specific intent during the April 6, 2008 attack. Despite his claims that he drank two bottles of vodka per week, smoked marijuana every day, and took extra amounts of his ADHD medication during this time period in 2008, Defendant was neither intoxicated nor of diminished faculties when he again scouted for a victim at 427 North Dubuque Street, Apartment #4. In his videotaped interview after this incident, Defendant admitted to having drunk only three beers that night. Defendant also appeared calm and sober throughout the interview. The Court finds, beyond a reasonable doubt, Defendant was in the same coherent condition on April 6, 2008, that he was in on July 19, 2008.

These fact-findings, like the others, are supported by substantial evidence. Additionally, the court's credibility findings were exclusively within its purview as fact-finder. *See State v. Lopez*, 633 N.W.2d 774, 785–86 (Iowa 2001). Finally, it is worth noting that Schiefer's experts, who were called to bolster his diminished responsibility defense, provided equivocal testimony. His psychologist specifically noted the purpose of his evaluation was "not to look into [Schiefer's] intent. It was to look into personality factors and situational factors that might have been relevant to what happened." The psychologist also provided a detailed narrative of what Schiefer told him about the incident, a narrative that was inconsistent with Schiefer's simultaneous statements that his memory was

impaired by substance abuse. The second expert, who was asked to opine on whether Dexedrine affected Schiefer's judgment, simply stated that a person who had ingested this combination of substances "wouldn't be thinking quite as well as if he was sober."

Based on this record, we affirm the district court's finding of guilt.

II. Preliminary Breath Test Results

Following Schiefer's July 2008 arrest for trespass, police transported him to the police station. Based on Schiefer's assertion that he had consumed alcohol that evening, the police administered a preliminary breath test (PBT). The test showed no alcohol in his system.

At trial, the prosecutor asked a detective about the test result. Defense counsel objected, arguing, "Lack of foundation. PBTs are not admissible in court." The district court noted the objection but allowed the detective to respond that the "PBT registered zeros."

Schiefer contends the court abused its discretion in admitting the PBT result. Even if the result should not have been admitted, we conclude the error was harmless, as the district court did not rely on the result in finding Schiefer guilty of first-degree burglary. *See* Iowa R. Evid. 5.103(*a*) ("Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected. . . ."); *State v. Sullivan*, 679 N.W.2d 19, 29 (Iowa 2004) (recognizing not all evidentiary errors require reversal); *see also Johnson v. Kaster*, 637 N.W.2d 174, 181 (Iowa 2001) (finding no error in admission of hearsay where district court did not rely on the hearsay in determining the issue in dispute).

III. Suppression Motion

After Schiefer's July 2008 arrest for trespass, Schiefer was placed in a closed room at the police station and questioned by officers on camera. Following some initial questions about why Schiefer was in the vicinity of the apartment, one of the officers told Schiefer he would be cited for trespass and released. The officer then said, "I'm going to get a couple of buccal swabs. Is that ok?" Schiefer consented. The swabs of his saliva were tested and compared with samples obtained from the woman who was assaulted. The Department of Criminal Investigation found the "male DNA profile previously developed from the breast swab [of the woman] matched the known DNA profile of JONATHAN SCHIEFER." The department further found "[f]ewer than 1 out of 100 billion unrelated individuals would be expected to have this same profile."

Schiefer moved to suppress the DNA evidence obtained from the buccal swabs. He argued that "[a]ny consent to the buccal swab was not knowing and voluntary." The district court denied the motion. The court reasoned as follows:

> The Court has reviewed the video recording of Schiefer's interview with the police. Though it took place in a locked room with two officers present during part of the fifty-some minute session, the tone of the interview was more relaxed than confrontational. Early on, Schiefer's handcuffs were removed from behind him to the front based on his complaints of discomfort. The questioning was done in a calm fashion and the officers engaged in small talk during portions of the session. The officers did discuss what charge would be filed and whether Schiefer could be given a promise to appear. However, there was never any hint that Schiefer's release was in any way contingent on providing the sample. It appeared that decision had already been made prior to actually taking the sample. This court finds that the State has shown that Schiefer's consent to the taking of the saliva samples was voluntarily obtained.

On appeal, Schiefer reiterates that, "[l]ooking at all the attendant circumstances, it cannot be said that [his] consent to the taking of the buccal swabs was voluntary and knowing." *See State v. Reinier*, 628 N.W.2d 460, 465 (Iowa 2001) ("Consent is considered to be voluntary when it is given without duress or coercion, either express or implied."). On our de novo review of this constitutional issue, we disagree.

Although Schiefer was clearly in custody, this fact alone "is insufficient to demonstrate a coerced consent to search." *State v. Garcia*, 461 N.W.2d 460, 462 (Iowa 1990). As the district court found, the digital video recording of the interview reveals no evidence of pressure, threats, or improper inducement. *See State v. Holland*, 389 N.W.2d 375, 381 (Iowa 1986). The interview was informal and low-key. The officer asked for a "couple of swabs" only after stating Schiefer would more than likely be charged with misdemeanor trespass. The officer specifically asked if the collection of saliva was okay with Schiefer. Schiefer said it was. The officer then explained what area of Schiefer's mouth would be swabbed and again asked if that was okay. Schiefer again responded that it was. *See State v. Lane*, 726 N.W.2d 371, 378 (Iowa 2007) (considering the substance of the discussion between the consenter and the police before consent was obtained). Schiefer further commented, "It's like CSI," and willingly opened his mouth for the collection of the samples. We agree with the district court that Schiefer voluntarily consented to the taking of his saliva, and we affirm the denial of his motion to suppress.

IV. Disposition

We affirm Schiefer's judgment and sentence for first-degree burglary.

AFFIRMED.