

IN THE COURT OF APPEALS OF IOWA

No. 3-579 / 12-1630
Filed July 10, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MOHAMMAD YOUNIS HAMEED,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Nancy S. Tabor,
Judge.

Hameed appeals his conviction for sexual abuse in the third degree,
claiming the trial court erred in denying his motions for a judgment of acquittal
and a new trial. **AFFIRMED.**

S.P. DeVolder of The DeVolder Law Firm, Norwalk, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney
General, Michael J. Walton, County Attorney, and Melisa K. Zaehring,
Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Vaitheswaran and Bower, JJ. Tabor, J.,
takes no part.

VOGEL, P.J.**I. Factual and Procedural History**

Muhammad Hameed was found guilty by a jury of one count sexual abuse in the third degree, in violation of Iowa Code section 709.4(1) (2011), a sex act done by force or against the victim's will. As we find sufficient evidence to support the verdict, we affirm his conviction.

At trial, the following evidence was shown. On March 8, 2011, the victim, S.M., and her friend, A.L., attended a Mardi Gras event at the Chorus Line, a gentlemen's club in Davenport, Iowa, managed by Hameed. The victim and her friend's testimony conflict as to whether they consumed alcohol before arriving. As they were both under the legal age to consume alcohol, they were denied beer, which was being served out of a keg. Hameed, who knew the young women from previous events at the Chorus Line, approached them and suggested they come to a back room.

S.M. and A.L. then went back to the office area of the club, where Hameed handed each of them a red cup containing about a shot of an unidentified liquid. A.L. testified it was some type of alcohol. Both girls drank the contents of the cup and then went into an adjacent bathroom for a few minutes. Both testified they could not remember anything from that point in the night until the next morning. In his defense, Hameed testified that neither young woman was provided alcohol, given their underage status.

Connor Thinnes, the victim's friend and club promoter, testified he went to the back office shortly after midnight. The entrance door was locked, at which point Thinnes knocked on the door and waited about five minutes before

Hameed opened it. Thinnes observed the victim pulling up her pants and Hameed sweating profusely. Thinnes also testified that Hameed asked if Thinnes “would like it.” Later, Thinnes, with the assistance of a bouncer, got the victim into his car and drove her home. During the drive, the victim made sexual overtures to Thinnes, which he refused. The victim could not direct Thinnes to where she lived, so Thinnes called another one of her friends, T.S., who told him the address of the victim’s apartment complex. When they arrived, the victim could not recall in which apartment she lived and, after getting out of Thinnes’s car while it was still moving, began knocking loudly on various doors. She inserted a key into what turned out to be her own apartment, but it broke in the lock.

After failing to retrieve the key and pick the lock, Thinnes offered his couch to both T.S. and the victim so they could sleep. The victim got into T.S.’s car, and they followed Thinnes to his home. Upon arrival, T.S. went into Thinnes’s house to tell him the victim would not get out of the car. Both went back to T.S.’s car and discovered the victim was missing. They began searching for her and reported her missing to the police. Thinnes characterized the victim’s behavior as belligerent and incoherent, and T.S. described her as “there, but she wasn’t like there.”

The victim testified her next memory after drinking the liquid Hameed handed her was walking alone on the Davenport streets about 4:00 or 5:00 the next morning, crying out for help. When a man stopped to assist her, she asked him to call the police. Shortly thereafter the victim was arrested on an outstanding failure-to-appear warrant. Later, when T.S. picked her up at the

police station, the victim discovered she was “a little scraped up,” felt sick to her stomach, her clothes were dirty, and her underwear was balled up inside her pant leg. Consequently, she went to the hospital and was examined by a sexual assault nurse, who found traces of semen inside of the victim.

At trial, the State’s expert criminologist testified as to the DNA collected and analyzed. The State then introduced Exhibit 31, the expert’s report, which stated: “The DNA profile developed from the sperm fraction of the vaginal swab matched the known DNA profile of MUHAMMAD HAMEED (10). The probability of finding this profile in a population of unrelated individuals, chosen at random, would be less than 1 out of 100 billion.” This evidence was admitted over a foundation objection from the defense. There was also a video of the victim entering the club.

Hameed and club photographer Robert Griffin testified in Hameed’s defense. Griffin stated he saw the victim in Hameed’s office sitting on his lap, hugging and kissing him. Hameed also produced photographs showing the victim with Hameed. While admitting he and S.M. had sex, Hameed claimed she was the aggressor and the sex was consensual.

Hameed made two motions for a judgment of acquittal, one at the close of the State’s evidence and one at the close of all the evidence. In both motions he reargued his prior motion to dismiss based on speedy trial grounds, asserted there was insufficient evidence to show a sex act occurred based on the inadmissibility of the criminologist’s testimony, the State’s evidence was insufficient to establish guilt under either subsection (1) or (2)(a) of Iowa Code section 709.4, and the testimony of the State’s witnesses was too inconsistent to

be believed. The trial court granted the motion for a judgment of acquittal as to subsection (2)(a), a sex act performed while the victim was mentally or physically incapacitated or physically helpless,¹ and denied the other motions. Hameed's motion for a judgment of acquittal was renewed at the close of all the evidence, and was again denied. As such, the case was submitted to the jury only under Iowa Code section 709.4(1), a sex act committed by force or against the victim's will. The jury returned a guilty verdict on July 12, 2012. Hameed moved for a new trial, raising the same bases of error, which was denied.

On appeal, Hameed contends the trial court erred in denying his motions for a judgment of acquittal and a new trial. To support this claim, Hameed raises the following issues: (1) there was insufficient evidence showing he committed a sex act by force or against the victim's will; (2) there was insufficient evidence showing a sex act had occurred, as the DNA evidence should have been excluded because the criminologist did not adequately explain her methodology; (3) the State's main witnesses were too inconsistent to be believed; and (4) the case should have been dismissed because trial did not proceed within one year of Hameed's arraignment.

¹ From the transcript, it appears the district court interpreted subsection 709.4(2)(a) as requiring proof of mental incapacitation due to some type of drug in the victim's system. Given there was no blood test performed on the victim, and thus no evidence the victim consumed a drug such as Rohypnol or GHB, the district court concluded there was no "evidence that there was a narcotic or aesthetic used at that time," and dismissed the 709.4(2)(a) alternative.

II. Sufficiency of the Evidence

Hameed asserts several theories of why the trial court erred in failing to grant his motions for judgment of acquittal and new trial. We will address his claims individually.

A. Whether there was sufficient evidence Hameed committed a sex act by force or against the victim's will

Hameed contends there was not sufficient evidence to satisfy the “against the will” prong contained in Iowa Code section 709.4(1). Hameed first argues that sexual abuse was not sufficiently proven, given the definition found in Iowa Code section 709.1, as there was no evidence the victim was “under the influence of a drug inducing sleep or [was] otherwise in a state of unconsciousness.” Iowa Code § 709.1(1). Hameed next asserts that, because the trial court granted his judgment of acquittal as to the mental incapacitation alternative under Iowa Code section 709.4(2)(a), there was not sufficient evidence to convict him under the “by force or against the will” standard. He claims the State’s only evidence that the sexual intercourse was against the victim’s will was her inability to consent, due to intoxication. As such, given the mental incapacitation theory under subsection 709.4(2)(a) was dismissed, he claims there was not sufficient evidence the sex act was against the victim’s will.

We review the trial court’s denial of a judgment of acquittal for errors at law. *State v. Serrato*, 787 N.W.2d 462, 465 (Iowa 2010). A guilty verdict must be supported by substantial evidence, which is where “a rational trier of fact could find the defendant guilty beyond a reasonable doubt.” *Id.* (quoting *State v. Hagedorn*, 679 N.W.2d 666, 668-69 (Iowa 2004)). All evidence must be

considered, both the evidence that detracts from the verdict as well as that which supports the verdict. *Id.* However, we view the evidence in the light most favorable to the State, “including legitimate inferences and presumptions that may fairly and reasonably be deduced from the record evidence.” *Id.* (internal quotations omitted).

Iowa Code section 709.4(1) states:

A person commits sexual abuse in the third degree when the person performs a sex act under any of the following circumstances: (1) The act is done by force or against the will of the other person, whether or not the other person is the person’s spouse or is cohabiting with the person.

“Sexual abuse” is further defined in Iowa Code section 709.1(1), which states:

Any sex act between persons is sexual abuse by either of the persons when the act is performed with the other person in any of the following circumstances: (1) The act is done by force or against the will of the other. If the consent or acquiescence of the other is procured by threats of violence toward any person or if the act is done while the other is under the influence of a drug inducing sleep or is otherwise in a state of unconsciousness, the act is done against the will of the other.

When interpreting Iowa Code section 709.4(1), our supreme court has noted that, even if specific acts are not included in the nonconsent categories listed in the statute, these acts can nonetheless satisfy the “by force or against the will” standard. *State v. Meyers*, 799 N.W.2d 132, 144 (Iowa 2011). The court has further noted that “the mental state of the victim is a proper circumstance to consider in determining if a sex act is nonconsensual.” *Id.*; see also *State v. Farnum*, 554 N.W.2d 716, 718 (Iowa Ct. App. 1996) (“There was sufficient evidence from which the jury could find the victim was incapacitated by intoxication and could not consent to sexual intercourse with defendant.”).

Here, the jury was given very broad instructions with respect to what constitutes sexual abuse under Iowa law. Instruction thirteen read:

The State must prove both of the following elements of Sexual Abuse in the Third Degree:

1. On or about the 8th day of March 2011, the defendant performed a sex act with [the victim] AND
2. The sex act was done by force or against the will of [the victim].

If the State has proved both Elements 1 and 2 beyond a reasonable doubt, the defendant is guilty of Sexual Abuse in the Third Degree. If the State has failed to prove either Elements 1 or 2, the defendant is not guilty of Sexual Abuse in the Third Degree and you will then consider the lesser charge of Assault with Intent to Commit Sex Abuse, as explained in Instruction No. 16.

Instruction fourteen defined a sex act as an act that “includes any sexual contact by penetration of the penis into the vagina or anus.” Instruction fifteen stated that:

The State must prove that the defendant committed a sex act “by force or against the will” of [the victim]. In order to do so, however, the State does not have to prove that [the victim] physically resisted the defendant’s acts.

You may consider all of the circumstances surrounding the defendant’s act in deciding whether the act was done by force or against the will of [the victim].

At trial, Hameed did not request any additional instruction defining acts that could constitute “against the will” under Iowa Code section 709.1(1), an issue which he now raises on appeal. When a party fails to object to a jury instruction, the right to assert error on appeal is waived. *State v. Ondayog*, 722 N.W.2d 778, 783–84 (Iowa 2006). Furthermore, “the instruction, right or wrong, becomes the law of the case.” *State v. Taggart*, 430 N.W.2d 423, 425 (Iowa 1988) (quoting *Froman v. Perrin*, 213 N.W.2d 684, 689 (Iowa 1973)). Here, rightly or wrongly, the jury was charged to consider “all of the circumstances

surrounding the defendant's act" when determining whether the sex act was consensual.

During the presentation of the evidence, there was substantial testimony regarding the victim's intoxication. The victim, as well as her friend, testified they could not remember anything from the point in the night they consumed the contents of the red cup until the next morning. Thinnes and T.S. testified about the victim's mannerisms on the drive home and the fact she appeared extremely intoxicated. The victim testified she did not consent to any sex act between her and Hameed or even have a memory of any events beyond a few minutes after drinking the contents of the red cup. Taking these facts in the light most favorable to the State, under the instructions as given, a rational jury could find the sex act between her and Hameed was "against [her] will," as instructed. Therefore, there is sufficient evidence to support the conviction under Iowa Code section 709.4(1), and the trial court's denial of Hameed's motion for a judgment of acquittal is affirmed.

B. Whether there was sufficient evidence to show a sex act occurred after the close of the State's case in chief, based on the criminologist's testimony regarding the DNA evidence

Hameed claims the trial court's denial of his motion for judgment of acquittal was error based on the trial court's improper admission of the DNA evidence. Hameed argues the DNA evidence lacked foundation and should have been excluded, and without that evidence, the State did not meet its burden to show a sex act occurred. Specifically, Hameed challenges the foundation laid for criminologist Tara Scott's testimony, arguing that she did not adequately explain the methodologies and principles supporting her opinion that the DNA

tested matched Hameed's. This argument is based on Scott's testimony that she could not remember or describe the exact protocol used to test the semen sample for DNA, and the written protocol was not produced as evidence at trial.

We review the trial court's ruling admitting expert testimony for an abuse of discretion. *Quad City Bank & Trust v. Jim Kircher & Assoc.*, 804 N.W.2d 83, 92 (Iowa 2011). The trial court's decision is only reversed when it exercised its discretion on untenable or unreasonable grounds, as in the decision was not supported by substantial evidence or was based on an erroneous application of the law. *Id.*

To admit expert testimony, the court must first find that the testimony will assist the jury to understand the evidence or determine a fact in issue. As such, the expert witness must be able to rely on a dependable body of scientific, technical, or other specialized knowledge as a basis for her testimony. *State v. Belken*, 633 N.W.2d 786, 799 (Iowa 2001). The court must next determine whether the witness is qualified to testify as an expert based on her training, experience, skill, or education in the requisite field. *Id.* at 800. Our supreme court has noted that "we have traditionally adhered to a liberal rule when reviewing claims concerning the admissibility of expert testimony." *Id.* at 799 (internal citation omitted).

Here, the criminologist has worked for the State analyzing DNA evidence since 2007, and receives yearly training in the field. She testified she always has the protocol in front of her when she tests the DNA and follows the steps precisely. Additionally, Scott went into considerable detail on direct examination when questioned on the procedures she employed. The fact that she could not

recite the exact protocol from memory is not sufficient to disqualify her as an expert or undermine the procedures for DNA testing. See *id.* at 798 (“DNA analysis has gained widespread acceptance since it was first introduced to the field of law enforcement Today, the initial controversy over the scientific validity of forensic DNA testing has largely disappeared”). Furthermore, the trial court determined any deficiencies in her testimony went to the weight, rather than the admissibility, which is within the province of the jury. See *Ranes v. Adams Lab. Inc.*, 778 N.W.2d 677, 688 (Iowa 2010) (“A lack of absolute certainty goes to the weight of the expert’s testimony, not to its admissibility.” (internal citations omitted)). As such, the trial court did not abuse its discretion when admitting her testimony. The DNA evidence had an adequate foundation on which to be admitted, and the State provided enough evidence for a reasonable fact finder to determine a sex act occurred. Based on these grounds, the trial court properly denied Hameed’s first motion for judgment of acquittal.

We also agree with the trial court’s denial of Hameed’s renewed motion for judgment of acquittal at the close of all the evidence. Hameed conceded he had sexual intercourse with the victim. When asked on direct examination, “Did you have sex with [A.L.]? I’m sorry, with [the victim]?” Hameed responded, “Yes.” Later, the following exchange occurred:

Q: All right. So how long did the sex event last? A: It didn’t last because I came premature, and I was—I went to the bathroom and then I clean myself and then open the doors

Q: With respect to Defendant’s Exhibit A, [a photograph] was that taken before or after you had sex with [the victim]? A: This was before.

Q: With respect to Exhibit B, was that taken before or after you had sex with [the victim]? A: This was after.

Q: And with respect to Exhibit E, was that taken before or after you had sex with [the victim]? A: After.

Based on these admissions, there was sufficient evidence for the jury to find a sex act occurred. Therefore, the trial court's denial of the renewed motion for a judgment of acquittal was also correct.

C. Whether the State's witnesses were too inconsistent to be believed

Hameed claims there were many inconsistencies in the testimony of the State's witnesses. Specifically, the testimony of the victim and A.L. differed as to whether they had previously agreed to attend the event at the Chorus Line, whether they had consumed alcohol prior to arriving, and whether the victim carried a plastic bottle into the club with her that night. Additionally, Thinner testified the victim demanded sex from him, which Hameed claims supports his assertion that the sexual intercourse with him was consensual. Hameed argues these inconsistencies are so extreme that they undermine any support for his conviction.

Generally, the determination of witnesses' credibility is left to the jury. *State v. Mitchell*, 568 N.W.2d 493, 503 (Iowa 1997). However, when the testimony is impossible, absurd, or self-contradictory, then the testimony may be so deprived of probative force that it is not sufficient to uphold a guilty verdict. *Id.*; *State v. Smith*, 508 N.W.2d 101, 103 (Iowa Ct. App. 1993) (testimony of girls, which was the only evidence of abuse, was so "inconsistent, self-contradictory, lacking in experiential detail, and at, times, border[ed] on the absurd" that it was not enough to support a conviction).

Here, the minor inconsistencies in the witnesses' testimony are not so impossible, absurd, or self-contradictory such that they do not support a conviction. Rather, these contradictions are more probative of the witnesses' credibility, which is a determination within the province of the jury. As such, the trial court properly denied the motion for judgment of acquittal on this ground.

III. Speedy Trial

Hameed claims the trial court erred in denying his motion to dismiss based on the violation of his right to be brought to trial within one year of his arraignment, under Iowa Rule of Criminal Procedure 2.33(2)(c) .

A. Procedural Background

On June 7, 2011, a warrant issued for Hameed's arrest. On June 9, 2011, the warrant was served, and Hameed attended court for his initial appearance, where counsel was appointed, bond was set, and an order for his arraignment was issued. On June 16, 2011, Hameed filed a written arraignment and plea of not guilty, waiving his right to the ninety-day speedy trial. On July 11, 2011, the State filed the trial information. The district court then entered an arraignment order on July 14, 2011, stating Hameed waived his right to a ninety-day speedy trial and scheduling a jury trial for August 22, 2011.

The State filed three motions for continuances before February 2012, with the trial then being set for February 17, 2012. On February 17, Hameed moved to retain new counsel and continue trial, which were granted. Another trial date was set for April 6, 2012, at which point the defense filed a waiver of a jury trial, and a bench trial was then set for June 29, 2012. Hameed withdrew his waiver

of a jury trial on June 29, 2012, and trial was again rescheduled. Hameed's jury trial proceeded on July 9, 2012.

At the beginning of trial, Hameed moved for a dismissal, claiming his one-year speedy-trial right was violated. He again raised this issue in his motion for a judgment of acquittal. The trial court concluded that, while one year had passed from the date of Hameed's written arraignment, the State had met its burden to show good cause existed to hold the trial outside of the one-year time period; specifically, that Hameed had acquiesced in the delay.

B. Analysis

Iowa Rule of Criminal Procedure 2.33(2)(c) requires that "[a]ll criminal cases must be brought to trial within one year after the defendant's initial arraignment pursuant to rule 2.8 unless an extension is granted by the court, upon a showing of good cause." Iowa R. Crim. P. 2.33(2)(c). To allow the trial to proceed outside the one-year time period, the State must prove: (1) the defendant waived speedy trial; (2) the delay was attributable to the defendant; or (3) there was good cause for the delay. *State v. Winters*, 690 N.W.2d 903, 908 (Iowa 2005). On appeal, we review the trial court's ruling with respect to speedy trial for an abuse of discretion. *Id.* at 907. However, the discretion given to the trial court narrows when the speedy-trial rule is at issue. *Id.*

Rule 2.8 defines arraignment as consisting "of reading the indictment to the defendant or stating to the defendant the substance of the charge and calling on the defendant to plead thereto. The defendant shall be given a copy of the indictment or information before being called upon to plead." Iowa R. Crim. P. 2.8(1). The State argues that, because there was no trial information at the time

of Hameed's filing of a written arraignment, the June 16 filing did not constitute a formal arraignment. However, we agree with the trial court's conclusion that June 16, 2011, was the arraignment date for purposes of the speedy trial calculation. This was the day Hameed entered a plea of not guilty, despite the lack of a formal reading of the information. See *State v. Hempton*, 310 N.W.2d 206, 208 (Iowa 1981) (interpreting arraignment for purposes of the speedy-trial rule as the proceeding in which a plea is entered). Therefore, the State was required to show good cause for the delay or acquiescence by Hameed.

The trial court concluded Hameed's motion to substitute counsel, motion for a bench trial, and subsequent withdrawal of that motion were enough to show good cause existed to hold the trial outside of the one-year speedy trial deadline. We agree. See generally *Winters*, 690 N.W.2d at 908 ("[A] defendant must accept the passage of time that is reasonably necessary for a court to hear and rule on dispositive pretrial motions."). Therefore, the trial court did not abuse its discretion when it denied Hameed's motion to dismiss and judgment of acquittal based on speedy-trial grounds.

IV. Motion for a New Trial

Hameed claims the trial court erred in denying his motion for a new trial, which asserted the same claims previously raised in his motions for a judgment of acquittal. Specifically, he argues: (1) there was insufficient evidence showing he committed a sex act by force or against the victim's will; (2) there was insufficient evidence showing a sex act had occurred, as the DNA evidence should have been excluded because the criminologist did not adequately explain her methodology; (3) the State's main witnesses were too inconsistent to be

believed; and (4) the case should have been dismissed because trial did not proceed within one year of Hameed's arraignment.

We review the trial court's denial of a motion for a new trial for an abuse of discretion. *Serrato*, 787 N.W.2d at 472. To establish an abuse of discretion, the defendant "must show that the district court exercised its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable." *Id.* (quoting *State v. Reeves*, 670 N.W.2d 199, 202 (Iowa 2003)).

Having already addressed each of these issues and for the reasons stated above, we find the trial court did not abuse its discretion in denying Hameed's motion for a new trial.

AFFIRMED.