IN THE COURT OF APPEALS OF IOWA

No. 6-518 / 04-0900
Filed August 23, 2006

STATE OF IOWA,
Plaintiff-Appellee,

vs.

PETER CHRISTIAN,
Defendant-Appellant.

Appeal from the Iowa District Court for Johnson County, David M. Remley, Kristin L. Hibbs, and Larry J. Conmey, Judges.

Peter Christian appeals from his conviction for third-degree sexual abuse. **AFFIRMED.**

Clemens Erdahl, Cedar Rapids, for appellant.

Thomas J. Miller, Attorney General, Karen Doland, Assistant Attorney General, J. Patrick White, County Attorney, and Anne Lahey and Victoria Dominguez, Assistant County Attorneys, for appellee.

Considered by Huitink, P.J., and Mahan and Zimmer, JJ.

HUITINK, P.J.

Peter Christian appeals from his conviction for third-degree sexual abuse in violation of Iowa Code section 709.4 (2001). We affirm.

I. Background Facts and Proceedings.

Peter Christian a/k/a Christian Glass was charged with burglary and sexual abuse based on allegations he entered Emily D.'s Iowa City apartment without her consent and engaged in a nonconsensual sex act with her while she was unconscious. According to Emily's version of events, she went out drinking with her roommates, Shannon and Sarah, on the evening of October 25, 2002. Emily left a party at approximately 2:30 a.m. on October 26 and returned home in a taxicab. She recalled leaving the door to her apartment unlocked and lying down on the couch to watch T.V. The next thing she remembered was being awakened by her roommates who were screaming, "Who was that guy?!"

According to Shannon and Sarah, they returned to their apartment at approximately 3:30 a.m. They found the door to the apartment was locked. When they entered the apartment they saw an unidentified man jump up off of the couch where he was lying with Emily and pull his pants up. Believing they had encountered an embarrassing situation, they left the room. After conferring, Shannon and Sarah concluded something was wrong. They returned to confront the man lying on the couch with Emily and demanded that he leave their apartment. The man left after explaining Emily had fallen at some point and he had helped her return to the apartment. In the course of trying to awaken Emily, Shannon and Sarah noticed that Emily's pants were undone and pulled down,

prompting them to take Emily to the hospital to determine if she had been sexually assaulted.

Emily was examined by emergency room physician Dr. Thomas Mitten. Dr. Mitten collected specimens from Emily's vagina and clothing. His examination did not disclose the presence of any sperm in Emily's vagina or cervix. He was also unable to conclusively determine whether Emily's vagina had been penetrated.

Iowa City police investigators subsequently sent the sexual assault kit used in Emily's examination, her underwear, a blanket, and a comforter to the Iowa Department of Criminal Investigation (DCI) laboratory for DNA analysis. The DCI criminalist who examined these items found a seminal stain on the inner crotch of Emily's underwear. The DNA sample extracted from this stain matched an unknown sample of DNA obtained in another unsolved sexual abuse case in Johnson County that occurred on December 15, 2002.

For reasons not entirely clear from the record, Christian was a suspect in both cases. In April 2003 Iowa City Police Officer Jennifer Clarahan was informed by the Iowa City Rape Victim Advocacy Program (RVAP) that Christian would be interviewed for a volunteer position with RVAP on April 23, 2003. Clarahan arranged to sit in on the interview to attempt to obtain a DNA sample from Christian by furnishing him with a bottle of water that would be subsequently retained for DNA testing. Clarahan attended the April 23 interview. She brought four bottles of water to the meeting. During the course of the meeting, Christian drank from two of the water bottles and ate a piece of cake with a fork furnished

to him by RVAP employees. Clarahan seized the first water bottle furnished to Christian before he was finished with it and substituted another bottle of water containing approximately the same amount of water in it so that Christian would not become suspicious of her activities. When the interview was completed, Christian left without the second water bottle or the fork. Clarahan collected these items and forwarded them to the DCI lab for analysis. The test results indicated that the DNA samples obtained from these items matched the DNA samples obtained from Emily's underwear, as well as the unknown DNA sample collected in the companion case. The test results were incorporated in a subsequent search warrant application requesting authority to detain Christian for collection of cheek swabs for additional DNA testing. These DNA tests confirmed that the DNA samples already obtained from Christian matched those found in Emily's underwear and the samples collected in the companion sexual abuse case. Christian was charged with two counts of sexual abuse in the third degree and burglary in the first degree.

Christian filed a motion to suppress all DNA test results, claiming the DNA samples obtained from the water bottles and fork were products of an illegal warrantless search. He also claimed the subsequent search warrant authorizing police to obtain cheek swabs was issued without probable cause, necessitating suppression of any resulting DNA tests. The trial court granted Christian's motion concerning samples obtained from the first water bottle seized on April 23, 2003. The court reasoned that Christian had an expectation of privacy in that water bottle and had not abandoned it because it was seized before he left

RVAP. The court declined to suppress the DNA test results based on samples taken from the second water bottle and fork, citing Christian's subsequent abandonment of those items. The court also determined that the search warrant was supported by the required probable cause even if the challenged DNA samples were not considered.

Christian also filed an application for a bill of particulars concerning count III of the trial information. Christian alleged that the trial information and attached minutes of testimony failed to "apprise the Defendant of the necessary legal elements that constitute burglary in the first degree . . . ." The trial court denied Christian's application for a bill of particulars, citing adequacy of the trial information as supplemented by the State's response to the motion providing further information concerning the factual basis of the burglary count. Christian's other pretrial motions included two motions in limine, as well as one or more motions concerning discovery issues. The substance and resolution of those motions, as well as additional pertinent facts regarding them, will be later addressed as necessary to resolve any related issues raised on appeal.

At trial, Emily testified that she remembered everything that occurred on October 26 "up until the time she fell asleep on the couch." She denied consent to sexual contact with anyone and that she even knew anyone was having sexual contact with her.

Christian's self-described theory of his defense at trial was:

1. The putative victim was walking home, Defendant and his friend assisted her and she invited them in her apartment.
2. They engaged in small talk and some romantic activity of a consensual nature occurred between her and the Defendant.

3. He ejaculated prematurely.
4. When her roommates came home he asked them to wake her up so she could explain that he was invited in the apartment.
5. He did not flee; but, rather, was rudely escorted out without having the opportunity to speak with the putative victim.
6. The putative victim had functioned in a "black out" [alcohol induced amnesia] that allowed her to remain lucid and apparently capable of consent, but left her confused about how she got home and most details of what happened after she got there.

He expressly denied sexual intercourse with Emily. Other evidence and testimony at trial implicated by evidentiary rulings and constitutional issues raised on appeal will be addressed to the extent needed to resolve those issues.

Christian's motions for directed verdict were overruled. The jury convicted Christian of sexual abuse in the third degree and acquitted him on the burglary count. The court entered a judgment of conviction and sentence in accordance with the verdict.

On appeal Christian argues the following in the brief submitted by his attorney:

I. The court erred by not suppressing the DNA evidence secretly acquired by the state and committed further error by simultaneously finding that the subsequent search warrant affidavit contained probable cause to search if the DNA evidence was removed.
II. Errors of the district court allowed conviction without sufficient proof beyond a reasonable doubt.
III. Prosecutorial misconduct coupled with errors of the court and counsel deprived defendant of his theory of defense and thereby deprived him of his Fifth and Sixth Amendment rights.

In Christian's pro se brief, he argues the following:

I. The trial court's failure to suppress illegally obtained DNA evidence was reversible error.

II. Christian's right to due process was violated.
III. Officer Lippold's testimony was speculative, conclusory and prejudicial, in violation of *State v. Graves*.

II. Motion to Suppress.

A motion to suppress implicates the Fourth and Fourteenth Amendments of the United States Constitution. *State v. Wiese,* 525 N.W.2d 412, 414 (Iowa 1994) *overruled on other grounds by State v. Cline,* 617 N.W.2d 277 (Iowa 2000). We review constitutional issues de novo and independently evaluate the totality of the circumstances as shown by the entire record. *State v. Howard,* 509 N.W.2d 764, 767 (Iowa 1993). "We give deference to the district court's fact findings due to its opportunity to assess the credibility of witnesses, but we are not bound by those findings." *State v. Turner,* 630 N.W.2d 601, 606 (Iowa 2001). In reviewing the trial court's ruling, we consider both the evidence presented at the suppression hearing and the evidence introduced at trial. *State v. Breuer*, 577 N.W.2d 41, 44 (Iowa 1998).

To establish a violation of the Fourth Amendment, Christian must show that he had a legitimate expectation of privacy in the item seized. *Minnesota v. Carter*, 525 U.S. 83, 88, 119 S. Ct. 469, 472, 142 L. Ed. 2d 373, 379 (1998). "When individuals voluntarily abandon property, they forfeit any expectation of privacy in it that they might have had." *United States v. Jones*, 707 F.2d 1169, 1171 (10th Cir. 1983. Warrantless seizure of abandoned property does not violate the Fourth Amendment. *Abel v. United States*, 362 U.S. 217, 241, 80 S. Ct. 683, 698, 4 L. Ed. 2d 668 (1960). In other words, "[v]oluntary abandonment of property in the constitutional sense occurs when an individual no longer has a

reasonable expectation of privacy." *State v. Bumpus*, 459 N.W.2d 619, 625 (Iowa 1990). To determine whether a person has voluntarily abandoned property, we consider whether the person intended to abandon the property. *Id*. Intent to abandon the property "may be inferred from words, acts, and other objective facts." *Id*.

Christian arrived at the meeting with the RVAP staff member and the undercover officer carrying some paperwork and a magazine. As noted earlier, during the meeting he drank from two bottles of water, one of which was covertly taken by Clarahan and the other he left when the meeting concluded. Christian also ate a piece of cake that was served at the meeting. When he left the meeting, he left the fork which he had used to eat the cake, but he took with him the paperwork and magazine which he had brought to the meeting. By leaving both the water bottle and the fork and taking the magazine and the paperwork, Christian demonstrated he was not interested in keeping either the water bottle or the fork. He abandoned the second water bottle and the fork and therefore, had no reasonable expectation of privacy in the either the bottle or the fork. In the absence of any definitive authority to the contrary, we are unable to say Christian had a subjective or objective expectation of privacy in the DNA shed on the items seized. In any event, we believe the same abandonment analysis applies equally to the items seized or the shed DNA samples obtained from them.

We also reject Christian's claims that the DNA test results should be suppressed because he was tricked into furnishing an incriminating DNA sample

to the police. In another context, our supreme court has held that incriminating statements obtained by deception need not be suppressed as long as the deception was not coercive or so fundamentally unfair as to deny due process. *State v. Cooper*, 217 N.W.2d 589, 597 (Iowa 1974); *see also United States v. Flynn*, 309 F.3d 736, 739 (10th Cir. 2002) (holding ruse created to cause defendant to abandon item was not illegal); *People v. LaGuerre*, 815 N.Y.S.2d 211, 214 (N.Y. App. Div. 2006) (holding no due process violation when DNA sample taken from chewing gum defendant discarded in course of police contrived Pepsi taste test). Based on the foregoing facts, we do not find Clarahan's conduct so coercive or fundamentally unfair as to deny Christian's right to due process of law. We therefore affirm the trial court's ruling denying Christian's motion to suppress the DNA test results seized without a warrant. Because we have affirmed on this issue, we need not address the merits of Christian's challenge to the search warrant.

III. Bill of Particulars.

Christian claims that the trial court erred in denying his request for a bill of particulars. He claims the State did not allege a sex act as required by the charges of both burglary and sex abuse in the third degree. The State maintains that Christian did not adequately preserve this issue because his request for a bill of particulars only related to the charge of burglary in the first degree and Christian was found not guilty of burglary in the first degree.

"A defendant does not have an absolute right to a bill of particulars; trial courts have discretion to determine the adequacy of an indictment in light of

minutes attached." *State v. Doss*, 355 N.W.2d 874, 880 (Iowa 1984). "We will not disturb a trial court's denial of a motion for bill of particulars in absence of an abuse of discretion." *Id*. "A bill of particulars is a request for a more specific statement of the details of the offense charged." *State v. Watkins*, 659 N.W.2d 526, 533 (Iowa 2003). "Its purpose is to provide additional information that the indictment and minutes of testimony do not give." *Id*. "A bill of particulars should be allowed when the charge and minutes do not sufficiently inform the defendant of the criminal acts of which she is accused." *Id*.

Here, the request for a bill of particulars filed by Christian only referenced the burglary charge and only requested more specific evidence on that charge. Christian was found not guilty on the burglary charge. He did not argue before the trial court that he was entitled to a bill of particulars on the charge of sexual abuse in the third degree. It is unfair to fault the trial court for failing to rule correctly on an issue it was never given the opportunity to consider. *DeVoss v. State*, 648 N.W.2d 56, 60 (Iowa 2002). Moreover, "it is unfair to allow a party to choose to remain silent in the trial court in the face of error, taking a chance on a favorable outcome, and subsequently assert on appeal if the outcome in the trial court is unfavorable." *Id*. (quoting 5 Am. Jur. 2d *Appellate Review* § 690, at 360-61 (1995)). Accordingly, his argument that he was entitled to a bill of particulars regarding the charge of sex abuse in the third degree was not preserved.

***IV. Directed Verdict*.**

At the close of the evidence, Christian's attorney made the following argument in support of his motion for directed verdict:

> There has been no proof or evidence elicited by any of the witnesses we heard today that would support a finding of any one of those listed defined meanings of the word "sex act" or "sexual activity" as required for the purpose of Sex Abuse in the Third Degree or Burglary First premised upon that charge.

The prosecution argued:

> So I think there's certainly circumstantial evidence from which the jury could find that a sex act occurred, that there was intimate contact under the definition of a sex act; that there, obviously, was contact with her genital area, because his semen was essentially found on an area where her genitalia was as far as the inner crotch of her panties.

The court ruled:

> The court is required to by the standard in this case and, actually, in all criminal cases, all civil cases and that standard is to consider the evidence in the light most favorable to the nonmoving party, which in this case is the State. The Defendant's Motion for Directed Verdict of Acquittal is overruled on both charges.

Christian seizes on the trial court's reference to civil cases, claiming the trial court applied the wrong legal standard in the resolution of Christian's motion. He also argues that the State's case failed as a matter of law because there was no proof of the requisite sex act element of the crime of sexual abuse. We disagree.

We review rulings on motions for directed verdicts for errors of law. Iowa R. App. P. 6.4. The trial court correctly noted that the evidence must be considered in the light most favorable to the nonmoving party. *State v. Bass*, 349 N.W.2d 498, 500 (Iowa 1984). We fail to see how the trial court's reference to the viewed-in-the-light-most-favorable-to-the-nonmoving-party standard common

to both civil and criminal cases resulted in application of a lesser standard of proof than required here.

The State correctly notes that in deciding a motion for directed verdict, the court is simply deciding whether the State's evidence has generated a jury question. *Doss*, 355 N.W.2d at 877. Although the evidence must be such that, when considered as a whole, "a reasonable person could find guilt beyond a reasonable doubt," all "legitimate inferences arising reasonably and fairly from the evidence may be indulged in to support the verdict." *Id*. An inference is a reasonable deduction from proven facts, a permissible finding based on the existence of other facts. *State v. Hansen*, 203 N.W.2d 216, 219 (Iowa 1972). An inference leaves the trier of fact free to infer the elemental fact from the basic facts. *State v. Shoemaker*, 338 N.W.2d 874, 879 (Iowa 1983). Due process standards are met if there is a rational connection between the basic facts that the prosecution proved and the ultimate fact presumed, and the latter is more likely to flow from the former. *State v. Post*, 286 N.W.2d 195, 203 (Iowa 1979).

Christian was charged with sexual abuse in the third degree in violation of Iowa Code sections 709.1, 709.4(1), and 709.4(4). Section 709.1 defines sexual abuse, in pertinent part, as any sex act done between persons if the act is done while otherwise in a state of unconsciousness. Section 709.4(1) defines sexual abuse in the third degree as occurring if the person performs a sex act by force or against the will of the other person. Section 709.4(4) also defines sexual abuse in the third degree as occurring if the sex act is "performed while the other

person is mentally incapacitated, physically incapacitated, or physically helpless." Sex act is defined as follows:

> any sexual contact between two or more persons by penetration of the penis into the vagina or anus; contact between the mouth and genitalia or by contact between the genitalia of one person and the genitalia or anus of another person; contact between the finger or hand of one person and the genitalia or anus of another person…

Iowa Code § 702.17.

The record includes abundant evidence from which a reasonable juror could infer the foregoing elemental facts. Christian was seen lying on top of Emily with his pants down. Emily's pants were also pulled down. Christian ejaculated but did not know where it went. The inner crotch of Emily's underwear contained a semen stain matching Christian's DNA. Dr. Mitten testified he could not confirm the fact or absence of penetration. Even without the additional evidence that semen drained from Emily's vagina, we find the record sufficient to support the trial court's ruling on Christian's motion for a directed verdict. We affirm on this issue.

V. State's Theory of the Crime at Trial.

Christian claims the State's sex act theory advanced at trial was different than that described in the trial information and minutes of testimony. He argues the resulting surprise and prejudice violated his right to due process under both the Iowa and United States Constitutions. Because Christian failed to raise this issue in the trial court, we decline to consider it on appeal. *DeVoss*, 648 N.W.2d at 60.

VI. Prosecutorial Misconduct.

To prevail on a claim of prosecutorial misconduct, a defendant must establish that misconduct occurred, and that he was so prejudiced by the misconduct that he was deprived of a fair trial. *See State v. Bowers*, 656 N.W.2d 349, 355 (Iowa 2002); *State v. Greene*, 592 N.W.2d 24, 30-31 (Iowa 1999). Thus it is the prejudice resulting from misconduct, not the misconduct itself, that entitles a defendant to a new trial. *Greene*, 592 N.W.2d at 31. In determining whether prosecutorial misconduct warrants a new trial, the court should consider such misconduct within the context of the entire trial, including the court's instructions. *Id.* at 32. Whether the misconduct was isolated or pervasive and the strength of the evidence against the defendant are appropriate considerations for the trial court. *State v. Belken*, 633 N.W.2d 786, 802 (Iowa 2001); *Greene*, 592 N.W.2d at 32.

Christian argues the prosecution's questions concerning his familiarity with police reports and discovery depositions amounted to an impermissible comment on the exercise of his right to remain silent. Even if we assume he has preserved error on this issue, there is nothing in the prosecution's questions that can be fairly interpreted as a comment on his right to remain silent. The purpose of that inquiry was to discredit Christian's claim that Emily was awake and engaged in small talk with him during their encounter on October 26.

Christian also claims he was denied a fair trial by the State's failure to disclose testimony by Officer Clarahan concerning the identity and work schedule of a taxicab driver. Christian has not preserved error on this issue by making a

timely objection or otherwise challenging the admissibility of Clarahan's testimony at trial. *DeVoss*, 648 N.W.2d at 60.

Christian raises five additional claims implicating his due process right to a fair trial or specific instances of prosecutorial misconduct. Our review of the record fails to disclose any timely objections or motions raising those claims in the trial court. Christian has therefore failed to preserve error on any of the five remaining claims of prosecutorial misconduct. To the extent Christian's remaining claims implicate his right to effective assistance of counsel, they are preserved for postconviction relief proceedings.

Lastly, we have carefully reviewed and considered the issues raised by Christian in his pro se brief. It is sufficient to note that the resolution of those issues is either controlled by the foregoing, or they have no merit.

Christian's conviction of sexual abuse in the third degree is affirmed in its entirety.

AFFIRMED.