IN THE SUPREME COURT OF IOWA

STATE OF IOWA Plaintiff-Appellee, v. PATRICK H. BOOKER, JR., Defendant-Appellant	Supreme Court No. 20-1551

APPEAL FROM THE IOWA DISTRICT COURT
FOR DUBUQUE COUNTY
HON. MONICA L. ZRINYI WITTIG, JUDGE

APPELLANT'S APPLICATION FOR FURTHER REVIEW OF THE DECISION OF THE IOWA COURT OF APPEALS FILED FEBRUARY 16, 2022

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CERTIFICATE OF SERVICE

On March 3, 2022, the undersigned certifies that a true copy of the foregoing instrument was served upon Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to Patrick Booker, Jr., #6910268, Iowa State Penitentiary, 2111 330th Avenue, PO Box 316, Fort Madison, IA 52627.

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QUESTIONS PRESENTED FOR REVIEW

I. DID THE DISTRICT COURT ERR IN OVERRULING BOOKER'S BATSON CHALLENGE FOLLOWING THE STATE'S PEREMPTORY STRIKE OF JUROR NO. 38 AND IN GRANTING THE STATE'S MOTION TO STRIKE JUROR NO. 24 FOR CAUSE WITHOUT SUFFICIENT REASON AND WITHOUT ARTICULATING ITS REASONING?

II. WAS THE EVIDENCE SUFFICIENT TO WARRANT A CONVICTION FOR SEXUAL ABUSE IN THE THIRD DEGREE?

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STATEMENT IN SUPPORT OF FURTHER REVIEW

COMES NOW Patrick H. Booker, Jr., by and through counsel, and hereby requests that the Supreme Court grant further review of the Court of Appeals decision State v. Booker, No. 20-1551, 2022 WL 468725 (Iowa Ct. App. February 16, 2022), and in support thereof states the following:

In his appellate brief, Booker requested that the Supreme Court retain this case as one of first impression pursuant to Iowa R. App. P. 6.903(2)(d) and 6.1101(2)(c) based upon the question "Does a pretextual reason for striking a minority juror qualify as a 'race-neutral reason?'" (Appellate Brief p. 12). Booker is black and the juror in question, number thirty-eight, is also black. (Vol II p. 66 L 5-13).

1. The district court erred in overruling Booker's Batson Challenge: The Court of Appeals found that Booker failed to make a prima facie showing of discrimination by failing to show a pattern of discriminatory behavior. State v. Booker at *3.

Showing a pattern of discriminatory behavior is not the only means of establishing a prima facie case of racial discrimination.

> "For example, a 'pattern' of strikes against black jurors included in the particular venire might give rise to an inference of discrimination. Similarly, ***the prosecutor's questions and statements during voir dire examination and in exercising his challenges may support or refute an inference of discriminatory purpose.***" Batson v. Kentucky, 476 U.S. 79, 96-97, 106 S.Ct. 1712, 1723, 90 L.Ed.2d 69 (1986). (*Emphasis added*).

In this case, the prosecutor's questioning of Juror Number 38 and the resulting strike are adequate for finding the existence of a prima facie case of racial discrimination.

The prosecutor asked a hypothetical question involving a man and a woman drinking alcohol, the man being invited into the house and prior to a sexual act being consummated the woman indicating she did not wish to go any further. Juror Number 38 agreed with the prosecutor that she should be able to say no any time prior to engaging in a sexual act. (Vol. II pp. 24 L 16-25, 25-27 L 1-25, 28 L 1-19).

Next, the prosecutor asked if he knew of any cases similar to the hypothetical case. The juror answered in the affirmative and went on to relate a sex abuse case involving his cousin who was sentenced to a 50-year term of incarceration. (Vol. II pp. 28 L 20-25, 29 L 1-25, 30 L 1-3).

It is no secret that Iowa incarcerates a disproportionate percentage of black inmates as compared to the percentage of Iowa's black population. Black Iowans constitute 4.1% of the state's population. https://www.iowadatacenter.org/Publications/aaprofile2022.pdf.

Between the years 2016 and 2020, 22.3% of those admitted to Iowa's prisons were black. *Iowa Prison Population Forecast FY 2020-2030 Appendix VII Race by Offense Class,* https://humanrights.iowa.gov/sites/default/files/media/2020%20Iowa%20Prison%20Population%20Forecast.pdf.

Therefore, asking a black juror if he had any familiarity with criminal cases of this type is discriminatory because a

black juror is far more likely to know someone involved in the criminal justice system than are non-black jurors. This assertion is further supported by the prosecutor's statement that someone with exposure to sexual assault cases shouldn't be serving on a jury. (Vol. II pp. 79 L 9-25, 80 L 1-2). If acted upon, this belief would lead to the exclusion of more black jurors than non-black jurors.

The Court of Appeals also erred in determining that "…the State provided multiple race-neutral explanations for using a peremptory challenge on potential juror number thirty-eight." State v. Booker, No. 20-1551, 2022 WL 468725, at*4 (Iowa Ct. App. February 16, 2022).

The State's assertion that the juror worked third shift and may not be alert during trial "…if he continued to go to work" is without merit. The court offered to provide the juror with a written excuse from work and the juror requested he do so. (Vol II. pp. 56 L 21-25, 57 L 1-18).

Nor is the State's assertion that juror number thirty-eight "could be defense oriented" a legitimate race-neutral reason for allowing him to be stricken. The juror was questioned about the prosecution of a family member for sexual assault and he said that he thought both the defendant and the victim were equally to blame, but admitted that his opinion was based solely on the information he received from the defendant (his cousin). (Vol. II pp. 28 L 15-25, 29 L 1-25, 30 L 1-3).

Juror Number thirty-eight said he would listen to the evidence and base his decision on that evidence. (Vol. II p. 71 L 17-22).

The reasons given by the State, and accepted by the court, are not among the 16 reasons given in Iowa R. Crim. P. 18 for allowing a juror strike for cause. Iowa R. Crim. P. 2.18(5)(a-p) (2020). Neither are the reasons proper in striking a minority juror in a peremptory challenge.

The existence of prejudice can be substantiated by the results of a Duke University Study cited by this Court in State v. Plain:

> "…where there was one or more black jurors, black and white defendants had roughly equal rates of conviction; however, all-white juries convicted African-American defendants 81% of the time and white defendants only 66% of the time."

State v. Plain, 898 N.W.2d 801, 826 (Iowa 2017) *citing* Shamena Anwar, et al., *The Impact of Jury Race in Criminal Trials*, 127 Q.J. Econ. 1017, 1027–28, 1032 (2012).

Booker has been prejudiced as he was denied an impartial jury composed of his peers. U.S. Const. Amend. VI, Iowa Const. Art. I § 10.

2. The district court erred in overruling Booker's motion for judgment of acquittal: The record does not contain substantial evidence supporting Booker's conviction.

The complaining witness, C.H., provided testimony that was inconsistent with prior statements both sworn and unsworn. She asserted that stains on her kitchen wall were

from injured lip, then admitted she could not remember if she actually suffered an injury to her lip. (Vol. II pp. 148 L 25, 149 L 1-18, Vol. II pp. 157 L 19-25, 158 L 1-25, 159 L 1-10, 09/14/20 Deposition p. 56 L 9-24, Vol. III p. 12 L 1-11).

C.H. claimed that she had a "permanent dent to her head, but both the examining physician and nurse saw no signs of physical trauma. (Vol. II pp. 107 L 9-24, 109 L 2-5, 117 L 1-10).

C.H. testified that two other men saw Booker sexually assault her, but both men denied this assertion. (Vol. II p. 131 L 11-25, Vol. III p. 95 L 24-25, Vol. IV p. 36 L 11-23, 38 L 21-23).

Witnesses familiar with C.H., including a friend, a neighbor and a former roommate, testified regarding her reputation for dishonesty. (Vol. III pp. 111 L 8-11, 119 L 17-23, 123 L 7-10, 126 L 8-21, Vol. III pp. 129 L 16-19, 132 L 8-18).

Also undermining C.H.'s credibility are her convictions for crimes of dishonesty including Theft in the Second Degree and

misdemeanor theft. (Vol. II pp. 76 L 22-25, 77 L 1-19). *See* Iowa R. Crim. P. 5.609(a)(1)(B)(2) (2020).

The Court of Appeals found evidence corroborative of C.H.'s testimony consisting of "…photos of her ripped shirt, her injured lip, and the blood-stained wall where Booker allegedly slammed her head." State v. Booker, at *2.

C.H.'s shirt has little probative value as the tear is not jagged, as would be expected if the shirt were torn from one's body, but is straight. (Vol. II pp. 141 L 18-25, 142 L 1-8,). (Ex. App. p. 30).

As was discussed above, C.H.'s lip injury was not established at trial as she could not remember if the lip was injured and two medical professionals testified that, upon examining C.H., they could find no injury.

Additionally, if the red stains on C.H.'s kitchen wall were blood (there was no evidence that it was tested), the blood was not deposited on the wall during the incident in question as there was no injury.

Booker asserts that this decision is in conflict with prior Supreme Court decisions addressing the substantial evidence standard for deciding insufficiency of evidence claims. Iowa R. App. P. 6.1103(1)(b)(1). Most recently, the Supreme Court reiterated that "Substantial evidence is evidence sufficient to convince a rational trier of fact the defendant is guilty beyond a reasonable doubt." State v. Hall, 969 N.W.2d 299 (Iowa 2022) *citing* State v. Sanford, 814 N.W.2d 611, 615 (Iowa 2012). The evidence in this case does not satisfy the reasonable doubt standard. (*See* State v. Smith, 508 N.W.2d 101 (Iowa Ct. App. 1993)).

Booker further asserts that this case conflicts with published authority regarding the weight of the evidence standard. State v. Ellis, 578 N.W.2d 655 (Iowa 1998).

WHEREFORE, for the reasons asserted herein, Patrick H. Booker, Jr., submits that this case is appropriate for further review submission.

STATEMENT OF THE CASE

Nature of the Case: This is an application for further review of the Court of Appeals decision , by Patrick H. Booker, Jr., following the filing of the Court of Appeals decision affirming his conviction of Sexual Abuse in the Third Degree in violation of Iowa Code §§ 709.4(1)(a) 902.14(1)(b) and 901A.2 (2017). State v. Booker, 2022 WL 468725 (Iowa Ct. App. February 22, 2022).

Facts: The Defendant-Appellant accepts the facts recited by the Court of Appeals in addition to those referenced in this application.

ARGUMENT

I. THE DISTRICT COURT ERRED IN OVERRULING BOOKER'S BATSON CHALLENGE FOLLOWING THE STATE'S PEREMPTORY STRIKE OF JUROR NO. 38 AND IN GRANTING THE STATE'S MOTION TO STRIKE JUROR NO. 24 FOR CAUSE WITHOUT SUFFICIENT REASON.

Standard of Review: Systematic exclusion of distinct groups from a jury pool are reviewed de novo. State v. Williams,

929 N.W.2d 621, 628 (Iowa 2019) *citing* State v. Plain, 898 N.W.2d 801, 811 (Iowa 2017).

Review of the district court's ruling on a motion to strike a juror for cause is for abuse of discretion. State v. Jonas, 904 N.W.2d 566, 571 (Iowa 2017) (citations omitted).

Preservation of Error: Error regarding the Batson challenge was preserved by Booker's resistance to the State's use of a peremptory challenge to strike Juror No. 38, the hearing that followed and the court's denial of the challenge. (Vol II pp. 62 L 20-25, 63-73 L 1-25, 74 L 1-19).

Error was preserved regarding the removal of juror No. 24 by virtue of the juror's examination, the State's motion to strike for cause, Booker's resistance to the strike and the court's ruling which allowed the strike. (Vol. I pp. 50 L 24-25, 51-57 L 1-25, 58 L 1-23).

Discussion: The State posed the following question to Juror No. 39:

> "MR. KIRKENDALL: Let me just ask you a little bit. How about somebody wearing almost nothing, very scantly clad, walking through, you know, a neighborhood with a lot of bars, a lot of alcohol, a lot of drunk people, people looking to, you know, hook up with somebody else? Does that person potentially deserve what they get?
> JUROR NUMBER 39: Nope."

(Vol. II p. 23 L 17-24).

The prosecutor extended the hypothetical to include an individual who invites the other party to their residence where alcohol is available and ultimately declines to engage in sex. Juror 39 agreed that sex should not be forced upon an individual under those circumstances. (Vol. II pp. 23 L 25, 24 L 1-24).

The prosecutor asked Juror No. 38 if he agreed with Juror No. 39 and he responded "I would say pretty much the same. There's always two sides to a story." (Vol. II pp. 24 L 25, 25 L 1-5).

Juror No. 38 agreed with the State that even if excessive drinking and consensual "touching" the man would not be

"entitled to something". (Vol. II pp. 25 L 6-25, 26 L 1-10). The State asked if the act occurred and both individuals were drunk would that still be a crime to which Juror No. 38 replied "Yeah". (Vol. II p. 26 L 11-20).

After more discussion about the alcohol component the State asked "…but it would still have to stop if the woman said no?" Juror No. 38 replied "Yeah". (Vol. II pp. 26 L 21-25, 27 L 1-25).

Juror No. 38 was asked if there were ever incidents of false accusations made by women against men and he replied "Yes. I'm familiar with that". (Vol II. p. 28 L 1-23).

Juror 38 related an incident in which his cousin was involved in which "…four or five guys had sex with a girl…" and he thought that "both parties were to blame." However, he admitted that his opinion was based solely upon what his cousin told him. (Vol II pp. 28 L 24-25, 29 L 1-25, 30 L 1-3).

Responding to questions posed by the defense, Juror No. 38 indicated he would not "go with the flow" but would "…try to go on facts…" (Vol. II pp. 46 L 19-25, 47 L 1-20).

He expressed some confusion regarding the concept that the defendant was under no obligation to prove anything, but agreed to follow the instructions of the court. (Vol. II pp. 53 L 24-25, 54 L 1-25, 55 L 1-4).

When asked if he would feel as if he hadn't done his job if he did not vote to convict he replied "No. I think it's all about the facts. You know, you have to go by facts." (Vol. II pp. 58 L 18-25).

The court, realizing that that juror worked third shift, offered to provide him with a written notice to his employer excusing him from work. Juror No. 38 replied "I work at Bimbo, so they really don't care. They just want a body there, you know." (Vol II. pp. 56 L 21-25, 57 L 1-3).

The juror requested that the court contact his employer's human resource department to procure the excuse and the court agreed to do so. (Vol. II 57 L 4-18).

After the parties executed their strikes, the defense requested that the court disallow the State's strike of Juror No. 38 as he is black and Mr. Booker is also black. (Vol II p. 66 L 5-13).

The State responded as follows:

> "MR. KIRKENDALL: Your Honor, Juror Number 38 during the defense questioning was obviously uncomfortable with sitting through the length of the trial. He was talking about work he would miss, and miss going forward. Even when talked to by Your Honor, he was likely to go to work, and I believe he will continue to go to his third-shift job, and we had concerns about his ability to pay attention. More concerning than that was his answer concerning his cousin's apparent sex abuse conviction. The lesson he drew from his cousin has a 50-year prison sentence was that there were two sides to every story, and that the victim and his cousin were probably equally to blame. That this is a sexual assault case, the State felt it was going to be a difficult opinion to overcome, considering how these cases are likely determined by the jury."

(Vol II pp. 67 L 16-25, 67 L 1-7).

Later in the proceedings, the State asserted that Juror No. 38 "… talked about another sexual assault case where he's blaming the victim for her part in it. That has to rise to a level for a peremptory challenge." (Vol. II p. 71 L 13-16).

The court responded as follows:

> "THE COURT: I don't know that I understood that's what he was saying. I can understand he says he disagrees with his analysis that there are always two sides to a story, but I believe he would be able to sit here and listen to the evidence and base his decision on that evidence."

(Vol. II p. 71 L 17-22).

The State made further argument to the court regarding its desire to strike Juror No. 38. (Vol. II pp. 71 L 23-25, 72 L 1-10).

The court declared a recess and returned announcing the previous finding that the strike was improper was being abandoned and the State's strike would be granted. The court gave the following explanation for the changed ruling:

> "THE COURT: Okay. Have a seat. Sorry I took so long. All right. I have looked at the Supreme Court's positioning with regard to the Batson challenge, and

the one case I'm referring to in particular that spells out the requirements for the Court to render a decision on such a challenge is State versus Mootz, Supreme Court of 2012, found at 808 Northwest 2nd, 207. When I am to render a decision, of course, this is a little bit different in the facts, because the Court raised the Batson challenge itself under this decision, I have to look at a showing that there is a prima facie case of racial discrimination. I've looked at the notes that I keep during the voir dire process, which show me that there are a variety of different things that came up with the individuals that the State struck. The only thing that I found that I couldn't use to support any position one way or the other, because there were a couple of people that the State struck who were really not addressed during voir dire, so I don't know that they can give me any support one way or the other, but I cannot say that there is a pattern of racial discrimination in the use of the peremptory strikes. There seem to be individuals that do have problems in their past with regard to opinions concerning knowing someone who has been involved with those questions, particularly based on the sex and the assault cases posed by the Court, and there were also individuals that were really vocal with regard to how upsetting it was to them that some people had suffered through either being falsely accused or who have had family members who were victims.

So I will take back my previous decision and indicate that the State has established the necessary shifting of burden concerning the reasons for its use of peremptory strike, and so the panel is as it is, and I will instruct the Clerk to call -- or, excuse me, participate in the ICN conference to bring in the 16 people that I've placed on the record. So the three

> individuals that were in here, 37, 38, and 39, having all been struck, the Court Attendant will let them know that they can go home."

(Vol II pp. 72 L 16-25, 73 L 1-25, 74 L 1-6).

The court was incorrect in its finding that Booker failed to make a prima facie case of discrimination. "…the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'" Batson v. Kentucky, 476 U.S. 79, 96, 106 S.Ct. 1712, 1723, 290 L.Ed.2d 69 (1986).

Juror No. 38 related a case in which he thought that all of the parties involved shared the blame. He admitted that his opinion was based solely on the information he received from the defendant, who was his cousin. (Vol. II pp. 28 L 15-25, 29 L 1-25, 30 L 1-3).

The State's reasons for striking Juror No. 38 were pretextual as the juror agreed to judge the case based on the evidence and the law.

In State v. Thomas, this court found that striking a juror who emphatically expressed his opinion that police officers were not credible was held to be a race-neutral reason for being stricken. State v. Thomas, 847 N.W.2d 438 (Iowa 2014). Juror No. 38 did not express any inflexible opinion of the police, or of Booker's guilt or innocence.

As the court initially noted, the juror said he would listen to the evidence and base his decision on that evidence. (Vol. II p. 71 L 17-22).

The court's ultimate decision was based on the fact that some of the jurors indicated they "…had suffered through either being falsely accused or who have had family members who were victims." (Vol. II p. 73 L 17-21).

The court's reasoning lacks a detailed explanation in support of allowing the strike. Based upon the U.S. Supreme Court case Snyder v. Louisiana, 552 U.S. 472, 128 S.Ct. 1203, 170 L.Ed.2d 175 (2008), a two-step process has been suggested: "First, ensure that you provide a detailed and specific

explanation for your ruling on a Batson challenge so that your rationale is not questioned on appeal. Second, when confronted with multiple race-neutral reasons for striking a juror, choose the reason that addresses the juror's demeanor."

Jennifer Lynn Moore, *Bring Batson Back to Life? An Analysis of Snyder v. Louisiana* 46 No. 5 Crim. Law Bulletin ART 5.

Judges are encouraged to facilitate clearer records for appellate review. *Jury Selection — Batson Challenges*, 122 Harv. L. Rev. 346, 354 (2008).

Because the court's reasoning is vague and discusses more than one reason without specifying which it was relying on (i.e. jurors upset by the facts of sexual abuse versus jurors expressing concerns about false accusations), without any specific reference to Juror 38, and because there is no reference to his demeanor by the court, it was error for the court to grant the State's strike.

Iowa R. Crim. P. 2.18(5) Addresses challenges for cause and mandates that a challenge for cause must "…distinctly

specify the facts constituting the causes thereof." Iowa R. Crim. P. 2.18(5) (2020).

The rule goes on to provide 16 scenarios allowing the removal of a juror for cause. Iowa R. Crim. P. 2.18(5)(a-p) (2020). The reasons given for removing juror Number 38 do not qualify under any of the 16 alternatives specified by the rule. Iowa R. Crim. P. 2.18(5)(a-p) (2020).

"First, trial court is vested with broad, but not unlimited discretion in ruling upon a challenge for cause." State v. Williams, 285 N.W.2d 248, 267 (Iowa 1979) *citing* State v. Winfrey, 221 N.W.2d 269, 273 (Iowa 1974); State v. Beckwith, 242 Iowa 228, 232, 46 N.W.2d 20, 23 (1951) (overruled on other grounds).

While it is true that this Court has determined that a defendant was not prejudiced by the district court granting a challenge for cause without specific facts, that case dealt with a juror who was "unquestionably disqualified" for having formed an opinion as to the guilt or innocence of the defendant and that

was the only reason for challenge. State v. Prins, 113 Iowa 72, 84 N.W. 980, 981 (Iowa 1901).

Amendment VI to the U.S. Constitution, and Article I § 10 of the Iowa Constitution, provide guarantees of an impartial jury composed of one's peers. The striking of Juror No. 38, without sufficient reasons offered by the State, or articulated by the court, deprived Booker of both of these rights.

Booker has been prejudiced as the striking of Juror No. 38 deprived him of having a trial before an impartial jury of his peers.

II. THE EVIDENCE WAS INSUFFICIENT TO WARRANT A CONVICTION FOR SEXUAL ABUSE IN THE THIRD DEGREE, THE VERDICT WAS CONTRARY TO THE WEIGHT OF THE EVIDENCE AND THE STATE FAILED TO PROVE THAT THE PRIOR CONVICTION IS APPROPRIATE FOR ENHANCEMENT.

Standard of Review: The standard of review for sufficiency of evidence claims is for errors at law. State v. Thomas, 561 N.W.2d 37, 39 (Iowa 1997).

Review of rulings on motions for a new trial based upon the weight of the evidence is for abuse of discretion. State v. Nitcher, 720 N.W.2d 547, 559 (Iowa 2006).

Preservation of Error: Error was preserved by Booker's motions for judgment of acquittal in first phase of the trial and the court's subsequent adverse rulings. (Vol. III pp. 59 L 15-25, 60-65 L 1-25, 66 L 1, Vol. IV pp. 81 L 1-22).

Additionally, Booker filed motions in arrest of judgment and for new trial which were overruled. (10/29/20 Motions in Arrest of Judgment and for New Trial and Motion for New Trial, 11/19/20 Order Re Motion in Arrest of Judgment) (App. pp. 22-33).

Discussion: The ultimate burden is on the State to prove every fact necessary to constitute the crime with which the defendant is charged. State v. Gibbs, 239 N.W. 2d 866, 867 (Iowa 1976). The evidence presented must raise a fair inference of guilt and do more than create speculation, suspicion, or conjecture. State v. Hamilton, 309 N.W.2d 471, 479 (Iowa

1981). A verdict is binding unless the findings is clearly against the weight of the evidence. State v. Schrier, 300 N.W.2d 305, 306 (Iowa 1981).

CH's testimony was inconsistent to the point of being discredited by the many changes in her story and the refutation of her claims.

Despite claiming that Booker beat her head against the wall repeatedly, none of those present, nor her surrounding neighbors reported hearing any banging or thumping noises during the times in question.

CH was asked about the wall depicted in State's Exhibits 9, 10 and 11. She asserted that her blood was visible upon the wall. (Vol. II pp. 148 L 25, 149 L 1-4, Exhibits 9, 10 & 11 photographs of kitchen wall) (Ex. App. pp. 4-6). She did not know if the blood came from her lip or her head. (Vol. II 149 L 15-18).

CH told Officer Salazar that the red stains on the kitchen wall were blood stains from her injured lip. (Vol. III p. 12 L 1-11).

Later, when confronted with her deposition testimony, she said she could not remember if she actually suffered an injury to her lip. (Vol. II pp. 157 L 19-25, 158 L 1-25, 159 L 1-10, 09/14/20 Deposition p. 56 L 9-24).

The following exchange took place:

> EXAMINATION
>
> BY MR. DRAHOZAL:
> Q. Did you ever suffer a cut to your lip that weekend?
> A. No.
> MR. DRAHOZAL: Okay. Thanks. That's all I have.
>
> EXAMINATION
>
> BY MR. KIRKENDALL:
> Q. Just to be clear, do you recall suffering a cut to your lip?
> A. I don't recall that.
> Q. Are you 100 percent positive that you didn't get a cut to your lip?
> A. I mean, I'm not a hundred percent positive, but I don't remember.

(12/13/19 Deposition of CH p. 56 L 9-24).

Mercy One physician Dr. Zittek testified that upon examining CH he saw no signs of physical trauma. (Vol. II pp. 107 L 9-24, 109 L 2-5). Even though CH claimed to have incurred a permanent dent to her head when Booker knocked it against a wall, nurse Trisha Heston examined CH and found no evidence to support this claim. (Vol. II p. 117 L 1-10).

CH testified that both Cheeks and Earley witnessed Booker assaulting her sexually, but both men denied this. (Vol. II p. 131 L 11-25, Vol. III p. 95 L 24-25, Vol. IV p. 36 L 11-23, 38 L 21-23).

CH claimed that Booker tore her clothing off and proceeded to assault her despite her request to him that he stop. (Vol. II p. 131 L 16-25).

However, State's Exhibit 4, a photograph of the shirt torn in the assault, is curious as the tear is not jagged, as would be expected, but is torn in a straight line. (Vol. II pp. 141 L 18-25, 142 L 1-8, State's Exhibit 4 photo of shirt) (Ex. App. p. 30).

These facts and inconsistencies are relevant to determining whether any sex act was performed by force or against the will of CH. (Jury Instruction No. 15, Element 2) (App. p. 9).

Another consideration germane to the issue of whether the sex act was against the will of the complaining witness is the fact that CH was planning on engaging in a ménage à trois with Booker and Cheeks prior to the incident.

Admittedly, an individual has the right to withdraw consent, however, the credibility of the complaining witness is relevant to the issue of whether consent was withdrawn. "The focal point of the crime of sexual abuse is consent." State v. Kelso-Christy, 911 N.W.2d 663, 666 (Iowa 2018). (*citations omitted*). "This critical element does not inquire into the mind of the defendant to create a specific-intent crime, but turns on the intentions and mental state of the victim." *Id.*

Several witnesses who knew CH testified that she has a reputation for dishonesty including neighbor and friend April

Saunders (Vol. III pp. 126 L 8-21, 1119 L 20-23), former roommate Ashanti Eason (Vol. III 126 L 11-21), neighbor Nancy Martin (Vol. III p. 132 L 8-18).

CH's sister testified that CH was "always honest" despite knowing she had been convicted of felony Theft in the Second Degree. (Vol. IV pp. 68 L 1-25, 69 L 1-24, 70 L 13-24).

When she was recalled as a rebuttal witness, CH revealed that she was also convicted of misdemeanor theft in Scott County. (Vol. IV pp. 76 24-25, 77 L 1-18).

Additionally, on rebuttal she contradicted her sworn deposition testimony by claiming the attack occurred on Sunday as opposed to her earlier testimony saying it happened on Saturday. (Vol. IV pp.73 L 4-7, 74-75 L 1-25, 76 L 1-23).

This matter should be reversed and remanded for dismissal based on insufficient evidence. State v. Smith, 508 N.W.2d 101 (Iowa Ct. App. 1993).

For the same reasons, the court erred in finding that the verdict was supported by the weight of the evidence. CH

provided the only evidence of being sexually assaulted against her will.

There were inconsistencies in her testimony and witnesses who know her well testified that she is dishonest.

Additionally, she has been convicted of two crimes involving dishonesty. *See* Iowa R. Crim. P. 5.609(a)(1)(B)(2) (2020).

The jury's finding that the complained of sex act was against CH's will is clearly against the weight of the evidence as CH's testimony lacks credibility. State v. Ellis, 578 N.W.2d 655 (Iowa 1998).

This matter should be reversed and remanded for dismissal for lack of evidentiary sufficiency, or retrial based upon the weight of the evidence standard.

CONCLUSION

WHEREFORE, Defendant Patrick H. Booker respectfully requests that this Court grant further review for the reasons urged above.

ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument to Application for Further Review was $4.28, and that amount has been paid in full by the Office of the Appellate Defender.

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION FOR FURTHER REVIEW

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) because:

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/s/ Stephan J. Japuntich Dated: 3/3/22

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