

IN THE SUPREME COURT OF IOWA

STATE OF IOWA,)
)
 Plaintiff-Appellee,)
)
 v.) S.CT. NO. 16-0134
)
 MICHAEL KELSO-CHRISTY,)
)
 Defendant-Appellant.)

APPEAL FROM THE IOWA DISTRICT COURT
FOR MARION COUNTY
HONORABLE GREGORY A. HULSE, JUDGE

APPELLANT'S BRIEF AND ARGUMENT
AND
REQUEST FOR ORAL ARGUMENT

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CERTIFICATE OF SERVICE

On the 21st day of February, 2017, 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 Michael Cory Kelso-Christy, No. 6746067, Newton Correctional Facility, 307 S. 60th Avenue, West, Newton, IA 50208-9064.

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TABLE OF CONTENTS

	<u>Page</u>
Certificate of Service	2
Table of Authorities.....	4
Statement of the Issue Presented for Review	6
Routing Statement.....	8
Statement of the Case	8
Argument.....	12
Conclusion.....	21
Request for Oral Argument	21
Attorney's Cost Certificate.....	22
Certificate of Compliance	23

TABLE OF AUTHORITIES

<u>Cases:</u>	<u>Page:</u>
Commonwealth v. Culbreath, 36 Va. Cir. 188, 1995 WL 1055824 at *1 (Va. Cir. Ct. 1995)	20
People v. Hough, 159 Misc. 2d 997 (N.Y. Dist. Ct. 1994)	19
State v. Bolsinger, 709 N.W.2d 560 (Iowa 2006)	16
State v. Holderness, 293 N.W.2d 226 (Iowa 1980)	14
State v. Morris, 677 N.W.2d 787 (Iowa 2004)	20
State v. Sutton, 636 N.W.2d 107 (Iowa 2001)	14
State v. Trainer, 762 N.W.2d 155 (Iowa Ct. App. 2008).....	20
State v. Truesdell, 679 N.W.2d 611 (Iowa 2004)	13, 14
Suliveres v. Com., 865 N.E.2d 1086 (2007)	18
<u>Statues and Court Rules:</u>	
Iowa Code § 709.1 (2015)	16
Iowa Code § 713.1 (2015)	15
Iowa Code § 713.5 (2015)	15
Iowa Code § 716.7(2)(a) (2015)	21
Iowa Code § 716.8 (2015)	21
Iowa R. Crim. P. 2.19(8)(a)	14

Other Authorities:

H.S.B. 113, 83rd G.A., 1st Sess. (2009).....	14
H.S.B. 118, 82nd G.A., 1st Sess. (2007).....	19
H.S.B. 519, 82nd G.A., 2nd Sess. (2008).....	19
Rollin M. Perkins & Ronald N. Boyce, Criminal Law, ch. 9, § 3 at 1079 (3d ed. 1982).....	18
S.S.B. 1030, 83rd G.A., 1st Sess. (2009)	19
S.S.B. 1130, 82nd G.A., 1st Sess. (2007)	19
S.S.B. 3023, 82nd G.A., 2nd Sess. (2008)	19
Uniform Jury Instr. No. 1610.1	21

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

WHETHER THE EVIDENCE WAS INSUFFICIENT TO SUPPORT KELSO-CHRISTY'S CONVICTION FOR BURGLARY IN THE SECOND DEGREE BECAUSE THE SEX ACT HE INTENDED TO COMMIT WHEN HE ENTERED HER HOUSE WAS CONSENSUAL AND DID NOT CONSTITUTE SEX ABUSE?

Authorities

State v. Truesdell, 679 N.W.2d 611, 615 (Iowa 2004)

Iowa R. Crim. P. 2.19(8)(a)

State v. Holderness, 293 N.W.2d 226, 230 (Iowa 1980)

State v. Sutton, 636 N.W.2d 107, 110 (Iowa 2001)

Iowa Code sections 713.1 and 713.5 (2015)

Iowa Code § 709.1 (2015)

State v. Bolsinger, 709 N.W.2d 560, 562 (Iowa 2006)

Rollin M. Perkins & Ronald N. Boyce, Criminal Law, ch. 9, § 3 at 1079 (3d ed. 1982)

Suliveres v. Com., 865 N.E.2d 1086, 1090 (2007)

People v. Hough, 159 Misc. 2d 997, 1000 (N.Y. Dist. Ct. 1994)

S.S.B. 1130, 82nd G.A., 1st Sess. (2007)

H.S.B. 118, 82nd G.A., 1st Sess. (2007)

S.S.B. 3023, 82nd G.A., 2nd Sess. (2008)

H.S.B. 519, 82nd G.A., 2nd Sess. (2008)

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Commonwealth v. Culbreath, 36 Va. Cir. 188, 1995 WL 1055824 at *1 (Va. Cir. Ct. 1995)

State v. Morris, 677 N.W.2d 787, 789 (Iowa 2004)

State v. Trainer, 762 N.W.2d 155,159 (Iowa Ct. App. 2008)

Uniform Jury Instr. No. 1610.1

Iowa Code section 716.7(2)(a) (2015)

Iowa Code section 716.8 (2015)

ROUTING STATEMENT

The defendant-appellant believes this case involves the routine application of the principles announced in State v. Bolsinger, 709 N.W.2d 560 (Iowa 2006), and the plain language of Iowa Code sections 709.1 and 709.4 (2015). Accordingly, the case should be routed to the court of appeals. Iowa R. App. P. 6.903(2)(d) and 6.1101(3)(a).

However, whether section 709.1 covers the exact fact pattern presented in this case—a man who pretends to be someone else and a woman willingly engages in sex acts with him under the false belief that he is the other person—has not been addressed in Iowa. In that regard, this case presents an issue of first impression which should be resolved by the Supreme Court. Iowa R. App. P. 6.903(2)(d) and 6.1101(2)(c).

STATEMENT OF THE CASE

Nature of the Case: This is an appeal by the defendant-appellant, Michael Kelso-Christy, from his conviction, judgment, and sentence for burglary in the second

degree, following a bench trial on the minutes in the Marion County District Court.

Course of Proceedings: The State charged Michael Kelso-Christy with burglary in the first degree, a class B felony in violation of Iowa Code section 709.1 and 709.3(1)(d) (2015) and sex abuse in the third degree, a class D felony in violation of Iowa Code section 709.4(1)(a) (2015). (Trial Information) (App. pp. 5-6). Kelso-Christy filed a motion for bill of particulars regarding the element of “by force or against the will” in the allegation of sex abuse. (Motion for Bill of Particulars) (App. pp. 9-10). The State responded, arguing that deception as to the defendant’s identity rendered the sex acts against the will of the victim. (State’s Response) (App. pp. 11-13). The court denied Kelso-Christy’s motion. (Order) (App. pp. 14-15).

Kelso-Christy filed a motion to dismiss, contending that consensual intercourse is not sex abuse when the consent of one party is obtained through fraud or impersonation of another. (Motion to Dismiss) (App. pp. 17-19). The district

court denied Kelso-Christy's motion. (Ruling on Defendant's Motion to Dismiss) (App. pp. 20-24).

The parties agreed to a bench trial on the minutes. The State amended the trial information to include a single count of burglary in the second degree, a class C felony in violation of Iowa Code section 713.5 (2015). The parties also agreed that if Kelso-Christy was found guilty on the second degree burglary charge, he would be sentenced to a ten-year term with all the collateral consequences of a sex crime. (Amended Trial Information; Trial Tr. p. 3 L. 17 –p. 4 L. 10) (App. pp. 25-26). The State entered into evidence the minutes of testimony, police reports, and DCI reports. (Trial Tr. p. 12 L. 2 – 20; Exs. 1 & 2) (App. pp. 29-86).

Kelso-Christy moved for judgment of acquittal on the same grounds articulated in his earlier motion for bill of particulars and motion to dismiss. (Trial Tr. p. 13 L. 8 – 16). The court denied the motion. (Trial Tr. p. 13 L. 18 – p. 14 L. 7).

The court found Kelso-Christy guilty of second degree burglary. (Verdict) (App. pp. 87-90). He was sentenced to an

indeterminate ten-year prison term, and a suspended minimum fine of \$1000, plus surcharges. He was ordered to register as a sex offender. (Sentencing Tr. p. 7 L. 6 – p. 10 L. 3; Judgment and Sentencing) (App. pp. 92-96).

Kelso-Christy filed a timely notice of appeal. (Notice of Appeal) (App. p. 97).

Facts: According to the minutes of testimony, and the findings of the district court, in April 2015, Michael Kelso-Christy created a Facebook account under the name of Slater Poe. On April 26, 2015, he sent S.J.G. a friend request. S.J.G. accepted. Poe, S.J.G., and Kelso-Christy had been classmates in high school. (Minutes, S.J.G.; Deputy Reed Report) (App. pp. 31; 48-50).

Kelso-Christy, posing as Poe, communicated with S.J.G. throughout the day on Facebook and later via text messages. The messages became sexual in nature, and S.J.G. sent explicit photos to Kelso-Christy. The two arranged a sexual encounter for later that night at S.J.G.'s house in which S.J.G. would be

blindfolded and handcuffed. (Minutes, S.J.G.; Deputy Reed Report) (App. pp. 31; 48-50).

The tryst occurred as planned. Because S.J.G. was blindfolded, she never saw the person with whom she had sex, but believed it was Slater Poe. Her suspicions were aroused the next day when Kelso-Christy/Poe stopped responding to her messages. She eventually contacted the real Poe and discovered that he had never been to her house. She reported the incident to the police who linked the phone number used to send the text messages to Kelso-Christy. Police also matched a fingerprint left on a condom wrapper in S.J.G.'s bathroom to Kelso-Christy. (Minutes, S.J.G.; Deputy Reed Report) (App. pp. 31; 48-50).

ARGUMENT

THE EVIDENCE WAS INSUFFICIENT TO SUPPORT KELSO-CHRISTY'S CONVICTION FOR BURGLARY IN THE SECOND DEGREE BECAUSE THE SEX ACT HE INTENDED TO COMMIT WHEN HE ENTERED HER HOUSE WAS CONSENSUAL AND DID NOT CONSTITUTE SEX ABUSE.

Error Preservation. “To preserve error on a claim of insufficient evidence for appellate review in a criminal case, the

defendant must make a motion for judgment of acquittal at trial that identifies the specific grounds raised on appeal.” State v. Truesdell, 679 N.W.2d 611, 615 (Iowa 2004).

Kelso-Christy moved for a bill of particulars and to dismiss arguing the conduct alleged in this case did not constitute sex abuse because Kelso-Christy’s impersonation of another person did not render an otherwise consensual sexual encounter “by force or against the will” of S.J.G. The motions were denied. (Motion for Bill of Particulars; Order; Motion to Dismiss; Ruling on Defendant’s Motion) (App. pp. 9-10; 14-15; 17-19; 20-24).

At the conclusion of the State’s evidence, Kelso-Christy moved for a judgment of acquittal on the same grounds as urged in the previous motions. (Trial Tr. p. 13 L. 9 – 17). The court denied the motion. (Trial Tr. p. 13 L. 18 – p. 14 L. 6). Thus, error has been preserved.

Although Kelso-Christy did not renew his motion at the close of all evidence, this does not preclude review by the appellate court. Rule 2.19(8)(a) provides that a defendant may rely on his motion for judgment of acquittal even if it is not

renewed after he offers evidence. Iowa R. Crim. P. 2.19(8)(a).
See State v. Holderness, 293 N.W.2d 226, 230 (Iowa 1980).

Standard of Review. Claims of insufficient evidence to support a conviction are reviewed for correction of errors at law. Truesdell, 679 N.W.2d at 616. A verdict is supported by substantial evidence if “the record reveals evidence that a rational trier of fact could find the defendant guilty beyond a reasonable doubt.” Id. To make this determination, the court will view the evidence in the light most favorable to the verdict, but will consider all of the evidence, not just the evidence supporting guilt. Id.; State v. Sutton, 636 N.W.2d 107, 110 (Iowa 2001).

The circumstances of this case do not support a finding that Kelso-Christy intended to commit sex abuse when he entered S.J.G.’s home. A conviction for second degree robbery requires the State to prove that (1) Kelso-Christy entered the residence of S.J.G; (2) the residence was an occupied structure; (3) Kelso-Christy did not have permission or authority to enter the residence; (4) the residence was not open

to the public; (5) when Kelso-Christy entered the residence he had the specific intent to commit sexual abuse; (6) one or more persons were present in the residence. Iowa Code sections 713.1 and 713.5 (2015). (Amended Trial Information) (App. pp. 25-26).

The evidence was insufficient to support Kelso-Christy's conviction because the evidence does not establish that he intended to commit sex abuse when he entered S.J.G.'s residence. Specifically, the evidence shows that he intended to have sex with S.J.G. while impersonating another person, Slater Poe, and that S.J.G. consented to the sexual encounter believing she was having sex with Poe. At no time during the sexual encounter did S.J.G. realize she was not having sex with Poe—it wasn't until the next day that she found out Poe had never been to her house. Because a sexual encounter procured by imitating another person is not sex abuse, the evidence does not support a finding that Kelso-Christy intended to commit sex abuse when he entered S.J.G.'s house.

Sex abuse is defined, in relevant part, as a sex act committed “by force or against the will” of another. Iowa Code section 709.1. A sex act constitutes sexual abuse when

[t]he 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.

Iowa Code § 709.1 (2015). Thus, the statute does not explicitly include “sex by fraud” as a form of sex abuse or mandate that if consent to a sex act is obtained through fraudulent means, the sex act is rendered “against the will” of the other person.

The Iowa Supreme Court has addressed a similar instance of “sex by fraud” and concluded that it was not covered by the sex abuse statute. In State v. Bolsinger, Bolsinger, a supervisor at a state facility for delinquent boys, took several young men into a private room and touched their genitals, falsely telling them he was checking for bruises, scratches, hernias, and other medical conditions. State v. Bolsinger, 709 N.W.2d 560, 562 (Iowa 2006). The boys testified that he asked

their permission to touch them and the boys were not aware that they were being touched in a sexual manner. However, they testified that if they had been aware that he was touching them for a sexual purpose, they would not have consented to the touching. The jury was instructed that the a sex act was “against the will” of another if that person’s consent was obtained through “deception, which may include deception concerning the nature of the act or deception concerning the defendant’s right to exercise authority over the other under the circumstances.” Id. at 563. Bolsinger was convicted of third degree sexual abuse, but the Iowa Supreme Court reversed his conviction.

The court’s analysis of the issue distinguished between fraud in the factum and fraud in the inducement.

[I]f deception causes a misunderstanding as to the fact itself (fraud in the factum) there is no legally-recognized consent because what happened is not that for which consent was given; whereas consent induced by fraud is as effective as other consent, so far as direct and immediate legal consequences are concerned if the deception relates not to the thing done but merely to some collateral matter (fraud in the inducement).

Id. at 564 (quoting Rollin M. Perkins & Ronald N. Boyce, Criminal Law, Ch. 9, § 3 at 1079 (3d ed. 1982)). The court concluded that Bolsinger's deception regarding the medical purpose the touching was fraud in the inducement, collateral to the acts to which the boys consented. Because each of the young men was told what the touching would consist of and then was touched in the manner expected, their consent was valid. Accordingly, the court concluded the evidence was insufficient to support Bolsinger's convictions for sex abuse in the third degree. Id. at 564-565.

Likewise, the deception at issue in this case—Kelso-Christy pretending to be someone else—is also fraud in the inducement. S.J.G. consented to the sexual acts that occurred, just as the boys did in Bolsinger. Although S.J.G. was misled about the identity of her sexual partner, that issue is collateral to the sex acts to which she consented, just as the sexual purpose was to the boys in Bolsinger. See Suliveres v. Com., 865 N.E.2d 1086, 1090 (Mass. 2007) (concluding deception as to identity of sexual partner was fraud in the

inducement). See also People v. Hough, 159 Misc. 2d 997, 1000 (N.Y. Dist. Ct. 1994) (concluding defendant who tricked his twin brother's girlfriend into having sex was not guilty of sexual misconduct).

Importantly, in the eleven years since Bolsinger was decided the legislature has declined to amend the statutory definition of sex abuse to include a situation in which consent for a sex act was obtained through fraud. In fact, the legislature has considered numerous bills that would have amended the statute in such a way and has failed to pass any of them. See S.S.B. 1130, 82nd G.A., 1st Sess. (2007) (suggesting an amendment to section 709.1 to define by force or against the will as including "deception as to the sexual nature of the act" in response to State v. Bolsinger); H.S.B. 118, 82nd G.A., 1st Sess. (2007); S.S.B. 3023, 82nd G.A., 2nd Sess. (2008) (same); H.S.B. 519, 82nd G.A., 2nd Sess. (2008) (same); S.S.B. 1030, 83rd G.A., 1st Sess. (2009) (same); H.S.B. 113, 83rd G.A., 1st Sess. (2009) (same).

Although the Court deplors Defendant's alleged actions and regrets the victim's suffering, the Court has no choice but to grant defendant's motion to dismiss the indictment. The law in Virginia and in the majority of states is that no rape occurs where a person impersonates another in order to obtain the victim's consent to sexual intercourse.

Commonwealth v. Culbreath, 36 Va. Cir. 188, 1995 WL 1055824 at *1 (Va. Cir. Ct. 1995).

Remedy. When the evidence is insufficient on one element of a conviction and the remaining elements support a conviction for a lesser included offense, the appellate court will normally direct the district court to enter judgment on the lesser included offense. See State v. Morris, 677 N.W.2d 787, 789 (Iowa 2004). Trespass is a lesser included offense of second degree burglary. State v. Trainer, 762 N.W.2d 155,159 (Iowa Ct. App. 2008). However, in this case, the court did not consider trespass as a lesser included offense. Even if it had, the elements of trespass are not met. A conviction for trespass requires that the defendant (1) entered property without the express permission of the owner; (2) had the specific intent to commit a crime, harass another, or use, place, alter, or remove

property when he entered the property. Uniform Jury Instr. No. 1610.1.; Iowa Code section 716.7(2)(a) and 716.8 (2015). If the court determines that the sexual encounter planned by Kelso-Christy was not sex abuse so that he did not have the requisite specific intent for second degree burglary, then the intent requirement of trespass is also not satisfied. There is no indication in the record that Kelso-Christy had the intent to do anything other than engage in consensual sexual activity while in S.J.G.'s home. Accordingly, his conviction for second degree burglary should be vacated and his case remanded with instruction to dismiss.

CONCLUSION

Because the evidence in this case is insufficient to support Kelso-Christy's conviction for second degree burglary, his conviction should be vacated and his case remanded for dismissal of the charge.

REQUEST FOR ORAL ARGUMENT

Counsel requests to be heard in oral argument.

ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was \$ 2.39, and that amount has been paid in full by the Office of the Appellate Defender.

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