IN THE SUPREME COURT OF IOWA
Supreme Court No. 16-0134

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MICHAEL CORY KELSO-CHRISTY,
Defendant-Appellant.

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

APPELLEE'S BRIEF

THOMAS J. MILLER
Attorney General of Iowa

SHERYL SOICH
Assistant Attorney General
Hoover State Office Building, 2nd Floor
Des Moines, Iowa 50319
(515) 281-5976
(515) 281-4902 (fax)
Sherri.Soich@iowa.gov

EDWARD BULL
Marion County Attorney

ATTORNEYS FOR PLAINTIFF-APPELLEE

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ROUTING STATEMENT

As the defendant notes, to the extent this precise scenario has not been presented to an Iowa appellate court, it could be considered an issue of first impression. Defendant's Brief, 8. However, because the case can be decided by the application of existing legal principles to the facts, transfer to the Court of Appeals would be appropriate. Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

Nature of the Case.

Michael Kelso-Christy was convicted of one count of second-degree burglary in violation of Iowa Code section 713.5 (2015) after a bench trial based on stipulated evidence, including the minutes of testimony and investigative reports. The charge stemmed from allegations that Kelso-Christy assumed another man's identity on the social media site Facebook and duped a woman into consenting to a sexual encounter with his alter ego.

Course of Proceedings Below.

The State agrees with the defendant's rendition of the case's procedural history.

Facts.

In ruling on a motion to dismiss, the trial court summarized the facts:

> Defendant Michael Cory Kelso-Christy created a Facebook account on April 26, 2015 under the false name Slater Poe. Slater Poe is a real person, acquainted with both the Defendant and the alleged victim, [SJG]. The Defendant sent a friend request to [SJG] the same day. [She] accepted the request. The Defendant and [SJG] communicated via Facebook, and the conversation became sexual. The parties agreed to an intimate encounter at [SJG's] house that same evening. The Defendant, still masquerading as Slater Poe, requested that she be blindfolded and restrained during sexual intercourse. [SJG] was agreeable to these requests. Subsequently, the Defendant entered [SJG's] home where she was already blindfolded. The Defendant disputes he placed the handcuffs on [SJG], but that fact is ultimately irrelevant to the present question. The Defendant had sex with [SJG] and left her house shortly thereafter. The following day, April 27, 2015, [SJG] contacted the actual Slater Poe and determined he had not been present at the events of the previous night.

Ruling on Motion to Dismiss, 1-2; App. 20-21.

According to the minutes of testimony, the victim and Slater Poe had known each other since they attended high school together years earlier. Minutes of Testimony; App. 31. In 2015, SJG consented to a sexual encounter with Slater Poe. Minutes of Testimony; App. 31. She did not consent to have sex with anyone other than Slater Poe, and had no knowledge that Michael Kelso-Christy was pretending to be Slater Poe. Minutes of Testimony; App. 31. When the defendant sent her a friend request while impersonating Slater Poe, he told SJG that his old Facebook account had been hacked and he had been forced to create a new account. Witness Statement; App. 55-56. SJG indicated that she did not consent to the defendant entering her home and she did not consent to having sex with Michael Kelso-Christy. Minutes of Testimony; App. 31. She became suspicious when he left abruptly after the sexual encounter and proved impossible to reach afterward. Minutes of Testimony; App. 31. Authorities were led to Kelso-Christy after examining numbers in the victim's telephone, and discovering a condom wrapper containing his fingerprint in SJG's bathroom. Minutes of Testimony – Police Reports; App. 48-54.

As indicated, the trial court found the defendant guilty of second-degree burglary. Additional facts will be discussed as relevant to the argument below.

ARGUMENT

I. The State Presented Substantial Evidence Establishing That the Defendant Committed Second-Degree Burglary; the Defendant Had the Intent to Commit Sexual Abuse When he Impersonated Another Man Who Was Known to the Victim to Fraudulently Obtain her Consent to Engage in a Sex Act.

Standard of Review.

Review is for the correction of errors at law. *State v. Turner*, 630 N.W.2d 601, 610 (Iowa 2001). The jury's verdict will be upheld if supported by substantial evidence. *Turner*, 630 N.W.2d at 610.

Preservation of Error.

The defendant preserved error by moving for a judgment of acquittal. *See* Trial on the Minutes Tr. p. 13, line 8 – p. 14, line 16.

Merits.

Michael Kelso-Christy raises one claim on appeal, challenging the sufficiency of the evidence against him. He contends that the evidence establishing the element of intent to commit sexual abuse was lacking, arguing that consent obtained under false pretenses is nonetheless consent. This court, like the trial court, should reject that

claim and find that the victim did not truly consent to a sexual encounter with Kelso-Christy. His conviction for second-degree burglary should be affirmed.

In evaluating a sufficiency of the evidence claim, the appellate court reviews the record in a light most favorable to the State. *State v. Shanahan*, 712 N.W.2d 121, 134 (Iowa 2006). The court makes any legitimate inferences and presumptions that may fairly and reasonably be deduced from the evidence in the record. *State v. Wheeler*, 403 N.W.2d 58 (Iowa Ct. App. 1987); *State v. Bass*, 349 N.W.2d 498, 500 (Iowa 1984). The test for whether the evidence is sufficient to withstand appellate scrutiny involves an inquiry as to whether the evidence is "substantial." *State v. Musser*, 721 N.W.2d 758, 760 (Iowa 2006).

The findings of the factfinder are to be broadly and liberally construed, rather than narrowly, and in cases of ambiguity, they will be construed to uphold, rather than defeat, the verdict. *State v. Price*, 365 N.W.2d 632, 633 (Iowa Ct. App. 1985). Evidence meets the threshold criteria of substantiality if it could convince a rational factfinder that the defendant is guilty beyond a reasonable doubt. *State v. Williams,* 695 N.W.2d 23, 27 (Iowa 2005). Substantial

evidence to support the conviction may exist even if substantial evidence to the contrary also exists. *State v. Frake*, 450 N.W.2d 817, 818-19 (Iowa 1990). "Inherent in our standard of review of jury verdicts in criminal cases is the recognition that the jury [is] free to reject certain evidence, and credit other evidence." *State v. Nitcher*, 720 N.W.2d 547, 556 (Iowa 2006).

To convict Kelso-Christy of second-degree burglary here, the State was required to prove:

> 1. On or about April 26, 2015, Defendant entered the residence of SJG;
>
> 2. The residence was an occupied structure, located in Marion County, Iowa;
>
> 3. Defendant did not have permission or authority to enter the residence;
>
> 4. The residence was not open to the public;
>
> 5. *Defendant entered the residence with the specific intent to commit sexual abuse*;
>
> 6. One or more persons were present in or upon the occupied structure.

Findings of Facts, Conclusions of Law, and Verdict, 2; App. 88; (emphasis added) *see also* Iowa Code § 713.5 (2015).

On appeal, as noted, Kelso-Christy focuses on the element of intent to commit sexual abuse. In essence, he contends that because

the victim agreed to a sexual encounter, he did not commit, nor intend to commit, sexual abuse. Because SJG did not agree to a sexual encounter with Michael Kelso-Christy, however, the sex acts were against her will.

In *State v. Vander Esch*, 662 N.W.2d 689, 690-91 (Iowa Ct. App. 2002), *overruled by State v. Bolsinger*, 709 N.W.2d 560, 564-65 (Iowa 2006), the Court of Appeals was first faced with the question of whether a sex act was "against the will" of the other participant when consent was obtained by fraud or deception. *State v. Vander Esch*, 662 N.W.2d at 691-94. Vander Esch owned several Pizza Ranch restaurants, and asked his young male employees to donate semen, ostensibly for scientific research. *Id.* at 690-91. He promised to pay the victims in exchange for the semen donations, made it appear as if he was maintaining the samples on ice, and on at least one occasion, delivered the semen sample to the University of Iowa Hospitals with the young donor in tow. *Id.* Vander Esch told his victims that the presence of air would destroy the samples, so he would need to assist them in ensuring that semen was deposited directly into a semen "collection device," or condom. *Id.* at 691. Vander Esch also

manipulated the boys' penises as they ejaculated to "get out all the semen." *Id.*

Vander Esch pleaded guilty to four counts of third-degree sexual abuse, but challenged his convictions on appeal, claiming that the statute did not cover his conduct because it did not explicitly provide that fraud or deception negated consent. *Id.* The Court of Appeals disagreed, finding Vander Esch's conduct to fall within the purview of statute. *Id.* at 692-93. The *Vander Esch* court also responded to the defendant's concern that "the claims of lack of consent based on deception under [this] standard would easily include that 'he didn't really love me, he just said he did to get me into bed' and 'it wasn't voluntary because I would never have agreed if I had known he was married.'" *Id.* at 693. The court drew a distinction between the concepts of fraud in the inducement and fraud in the *factum*:

> [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 any 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).

Vander Esch, 662 N.W.2d at 693, *citing Boro v. Superior Court*, 163 Cal. App. 1224, 1228, 210 Cal. Rptr. 122, 124 (1985) and R. Perkins & R. Boyce, *Criminal Law* (3rd ed. 1982), ch. 9, § 3, p. 1079.

The *Vander Esch* court concluded that the defendant's fraudulent representations to the boys constituted fraud in the *factum* and he was therefore guilty of third-degree sexual abuse:

> The victims in the present case consented to a pathological, or medical, procedure. They did not consent to be participants in a sex act. Thus, the fraud in this case is fraud in the *factum*, and not fraud in the inducement. When consent is caused by fraud in the *factum*, there is no legally recognized consent. The statements and fears outlined by Vander Esch above clearly come within the ambit of fraud in the inducement, which does not negate consent.

Id. at 694.

Four years later, the Iowa Supreme Court overruled *State v. Vander Esch* in *State v. Bolsinger*, 709 N.W.2d 560, 562 (Iowa 2006). In *Bolsinger*, young boys at a delinquency boot camp were misled into permitting the defendant, the boot camp director, to touch their genitals under the guise of performing mandatory testicular examinations and hernia checks. *State v. Bolsinger, id.* Despite the fact that Bolsinger had no authority to perform the

exams, had no medical training, and was discovered in possession of hundreds of pornographic narratives of teenage boys engaging in sex acts, the court concluded that the consent of each boy was based on fraud in the inducement rather than fraud in fact, and the acts were thus not against the will of the victims. *Bolsinger, id.* at 564. The court found that the victims were "touched in exactly the manner represented to them." *Bolsinger, id.*

In this case, Kelso-Christy likens his behavior to Bolsinger's, arguing that the victim agreed to participate in the sex acts that occurred at her home. Any fraud, the defendant argues, was fraud in the inducement rather than fraud in the *factum*, and thus the sex acts were not performed against the victim's will. This court, like the trial court, should reject that claim and conclude that SJG consented to have sex with Slater Poe, not with Michael Kelso-Christy. The sex acts Kelso-Christy performed while impersonating Slater Poe were consequently against the victim's will.

A. Deception as to a Sexual Partner's Identity Constitutes Fraud in the *Factum* in This Case.

State v. Vander Esch and *State v. Bolsinger* are the two Iowa cases that specifically address fraud in the inducement and fraud in the *factum* as those concepts relate to sexual consent. As noted, both

cases involved defendants who deceived their victims as to the nature of the act as clinical or medical, rather than sexual. *Vander Esch, id.* at 690-91; *Bolsinger, id.* at 562. The Iowa appellate courts have not yet decided a case that involves fraud regarding the identity of the perpetrator, rather than the nature of the act. Because *Vander Esch* and *Bolsinger* differ factually from this case, they ultimately offer little guidance in determining whether identity is a central or a collateral matter as it relates to consent. The court should conclude that under the unusual facts of this case, the defendant's deception as to his identity rendered any ostensible consent by the victim invalid.

The sexual abuse laws contained in Iowa Code Chapter 709 prohibit a person from engaging in a sex act with another "by force" or "against the [other person's] will." *See* Iowa Code § 709.1(1) and 709.4(1) (2015). As the Iowa Supreme Court noted in *State v. Meyers*, 799 N.W.2d 132, 143 (Iowa 2011), the "overall purpose of Iowa's sex abuse statute is to protect the freedom of choice to engage in sex acts." *Meyers, id., citing State v. Sullivan*, 298 N.W.2d 267, 271 (Iowa 1980). "Unwanted or coerced intimacy" is criminalized, and consent "remains the lynchpin of the crime" of sex abuse in all its forms. *Meyers*, 799 N.W.2d at 142.

It is not "necessary to establish physical resistance by a person in order to establish that an act of sexual abuse was committed by force or against the will of the person." Iowa Code § 709.5 (2015). "The circumstances surrounding the commission of [an act of sexual abuse] may be considered in determining whether the act was done ... against the will of the other." Iowa Code § 709.5 (2015). That provision

> specifically directs that the question whether the sexual act was committed "by force or against the will" of the victim should be decided by considering the circumstances surrounding the act. This, we take it, means all the circumstances, subjective as well as objective.

State v. Bauer, 324 N.W.2d 320, 322 (Iowa 1982) (upholding a sex abuse conviction where the defendant crawled through an open window at 2:00 a.m. and had intercourse with a woman who later testified that she "actively assist[ed] him when he was having difficulty achieving penetration" and was too frightened to voice an objection other than to say she was menstruating.) ; *see also Meyers*, id. at 144. ("...[W]e recently observed the legislature never intended to limit the circumstances that could be used to vitiate consent under the 'by force or against the will' standard section 709.4(1) by

specifically listing the circumstances under which consent may be vitiated.").

The teaching of *Meyers* is that non-consent can be determined from a host of circumstances. Some are specifically listed in the sexual abuse statute, such as the existence of a mental defect or the influence of an intoxicant, while other circumstances that invalidate consent are not explicitly set out in the statute. *See Meyers*, *id.* at 144; *Bolsinger, id.* at 564-65 ("Contrary to Bolsinger's argument, we believe that [the factors listed in sections 709.4 (2), (3), and (4)] are not the only circumstances in which consent can be vitiated and that fraud in fact should be held to vitiate consent in sexual abuse cases just as it does in any other criminal case.").

Here, the circumstances surrounding the sex acts, both subjective and objective, establish that SJG did not consent to participate in any sex act with this defendant. Kelso-Christy used an elaborate ruse to enable him to take advantage of a trusting victim. Her freedom of choice in regulating her own intimate behavior was negated by the defendant's deception as to his true identity. As the *Meyers* court noted, "*meaningful* consent is the important inquiry, and this inquiry normally takes into account circumstances indicating

any overreaching by the accused, together with circumstances indicating any lack of consent by the other person." (emphasis added).

The reasoning in *State v. Ramsey*, a first-degree kidnapping case, is analogous. In the context of a kidnapping charge where the victim initially agreed to give the defendant a ride in his car, the court rejected Ramsey's argument that the victim consented to his own removal. *State v. Ramsey*, 444 N.W.2d 493, 494 (Iowa 1989). The court found that the defendant's deception as to his true motive for the ride vitiated the victim's consent:

> Ramsey is confusing means with ends. Ramsey's intent...was to remove an innocent person to a remote location, shoot him, and steal his car. Whether the removal was accomplished by force or artful deception, the end result remains the same.

Ramsey, id. at 494; *see also Bolsinger, id.* at 565 (*quoting Ramsey*)

Here, similarly, the defendant's aim was achieved through artful deception rather than force, but the end result was the same: He had sex with a woman who did not consent to have sex with him. Identity of one's sexual partner is a critical component, if not the most critical component, of the decision to consent to a sexual act.

See United States v. Booker, 25 M.J. 114, 116 (Ct. of Mil. App. 1987). There, the court noted:

> The question is what is fraud in the *factum* in the context of consensual intercourse? The better view is that the "*factum*" involves both the nature of the act and some knowledge of the identity of the participant....[W]hile it is arguable that there may be people who are willing to hop into bed with *absolutely* anyone, we take it that even the most uninhibited people ordinarily make some assessment of a potential sex partner and exercise some modicum of discretion before consenting to sexual intercourse. Thus, consent to the act is based on the identity of the prospective partner.

Id. (emphasis in original); *see also United States v. McKenzie*, 2001 WL 765641, *2-3 (U.S. Air Force Ct. Crim. App. June 7, 2001) (affirming a rape conviction in which the defendant appeared in the darkened bedroom of an intoxicated, sleeping victim and began to have sex with her - when she awoke, she assumed the man was her boyfriend and called his name several times, to which the defendant replied "yeah"; the court rejected the defendant's defense of consent and concluded that evidence of the rape conviction was legally and factually sufficient); *United States v. Traylor*, 40 M.J. 248, 248-49 (U.S. Ct. Mil. App. 1994) (finding that the victim, who consented to rear-entry intercourse with one man, did not consent to a sex act with

the defendant when he took the place of the first man without the victim's knowledge). These cases are more persuasive than those that reach the opposite conclusion, such as *People v. Hough*, 159 Misc. 997, 1000 (N.Y. Dis. Ct. 1994), cited by Kelso-Christy. In *Hough*, the court reversed the defendant's sexual misconduct conviction when he impersonated his twin brother and tricked his brother's girlfriend into having sex with him in an unlit bedroom. *Id.* In another case of impersonation, the court of Military Appeals declined to follow *Hough*, noting that "a woman must be agreeable to the penetration of her body by a particular 'membrum virile', *i.e.*, a particular male sex organ." *United States v. Hughes*, 48 M.J. 214, 216 (CMA 1998), *quoting Booker, id.* at fn. 2.

Obviously, consent to have a sexual encounter with one person is irrelevant to the issue of consent to have sex with another, as the rape shield laws have long recognized. *See* Iowa R. Evid. 5.412 (excluding evidence of a sex abuse victim's prior sexual history except in limited circumstances); *State v. Ball*, 262 N.W.2d 278, 280 (Iowa 1978) ("We have never adopted the principle that a victim's consent to intercourse with one man implies her consent in the case of another, and we reject it now."). The potential partner's identity

informs the decision to consent. Sexual partners are not fungible commodities who may be covertly substituted. Whether the impersonation of another is accomplished by use of social media and a blindfold or simply a darkened room in the middle of the night, the fact remains that a person deceived as to the very identity of her sexual partner has not actually consented to that sexual encounter. To hold otherwise would unfairly blame an unwary victim for choices that further deliberation might reject, when the defendant's deceitful acts should be the primary focus of whether the consent was validly obtained. The State is mindful of the concern of a "slippery slope," when a defendant has lied to a potential sexual partner about an unimportant matter. The fraud in fact/fraud in the inducement distinction and common sense will ensure that an inconsequential lie will not transform a cad into a criminal. *See generally State v. Pearson*, 514 N.W.2d 452, 456 (Iowa 1994) ("Whether certain conduct constitutes 'sexual contact' is a fact question…Common sense and reasonableness, together with the standards set forth above, will protect the innocent person from an arbitrary perversion of the sexual abuse laws."). Here, because SJG consented to have sex with Slater Poe and not Michael Kelso-Christy pretending to be Slater Poe, the

sex acts that occurred were without meaningful consent and were thus against her will. This court should reject the defendant's contention to the contrary, and affirm his conviction for second-degree burglary.

B. If *State v. Bolsinger* is Revisited, it Should be Overruled.

If this case reaches the Iowa Supreme Court and the court declines to distinguish *State v. Bolsinger,* it should overrule it. The State maintains that because deception as to a sexual partner's identity is factually distinct from deception regarding the nature of the act, *Bolsinger* does not compel a particular result here. However, if the court takes the opportunity to revisit *Bolsinger,* it should find that it was wrongly decided. The conclusion reached – that the young boot camp victims were touched "in exactly the manner represented to them" – is incorrect, and reduces the issue to a simple inquiry of contact between body parts. To suggest that the victims agreed to a sex act when they were tricked into submitting to a purported medical procedure is to ignore the fundamental character of the contact. *C.f. State v. Monk*, 514 N.W.2d 448, 450 (Iowa 1994); *State v. Pearson*, 514 N.W.2d 452, 455 (Iowa 1994) ("Not all contact is a 'sex act.' The contact must be between the specified body parts … and must be

sexual in nature.") (emphasis in original). Bolsinger's contact with the boys constituted fraud in fact because they did not agree to participate in a sex act with the defendant. They were *not* touched in exactly the manner represented to them, because a sex act is vastly different than a clinical or medical procedure. *See United States v. Carr*, 65 M.J. 39, 41-42 (U.S. C.M.A. 2007) (a defendant who falsely told women he was training to become a gynecologist to induce them to submit to pelvic examinations employed fraud in the *factum*); *People v. Quinlan*, 231 Ill. App.3d 21, 596 N.E.2d 28, 29-31 (1992) (the defendant, a respiratory therapist, convinced a patient suffering from pneumonia that she should submit to a fictitious medical test involving digital and rectal penetration; the court affirmed the defendant's criminal sexual assault conviction under a statute requiring that "the accused knew that the victim was unable to understand the nature of the act or was unable to give knowing consent.")

The facts of *Boro v. Superior Court*, in contrast, demonstrate fraud in the inducement in a medical setting. In *Boro*, the defendant posed as a doctor and telephoned a woman to tell her that she had contracted a "dangerous, highly infectious and perhaps fatal disease"

from using public toilets. *Id.* "Dr. Stevens" told his victim that she had two options: she could submit to a painful $9,000.00 surgical procedure requiring six weeks of uninsured hospitalization, or she could have sexual intercourse with an anonymous donor who had been injected with a special disease-curing serum for $4,500.00. *Id.* Because the victim believed "it was the only choice I had," she consented to intercourse with the donor. *Id.* The donor, later identified as "Dr. Stevens," met the victim at a hotel after she withdrew $1,000.00 from her bank account as a down-payment, and administered the intercourse "treatment." *Id.*

Boro was charged with rape under a statute requiring that "a person is at the time unconscious of the nature of the act, and this is known to the accused;" the court was faced with the question of whether the defendant's fraud rendered the victim's consent invalid. *Boro*, 163 Cal. App. at 1227, 210 Cal. Rptr. at 124. The court recognized the difficulty of this subject, noting "as a matter of degree, where consent to intercourse is obtained by promises of travel, fame, celebrity and the like -- ought the liar and seducer be chargeable as a rapist? Where is the line to be drawn?" *Id.*, fn. 5. The court concluded that the lies of "Dr. Stevens" were fraud in the inducement

because the victim "precisely understood the 'nature of the act,' but motivated by a fear of disease, and death, succumbed to petitioner's fraudulent blandishments." *Boro*, 163 Cal. App.3d at 1231, 210 Cal. Rptr. at 126. The victims in *Bolsinger*, to the contrary, had no inkling that they were participating in a sex act. If revisited, *Bolsinger* should be overruled.

CONCLUSION

For all of the reasons stated above, the State respectfully requests that this court affirm Michael Kelso-Christy's conviction for second-degree burglary.

CONDITIONAL REQUEST FOR ORAL SUBMISSION

The defendant has requested oral submission. If the court grants the defendant argument, the State asks to be heard as well.

Respectfully submitted,

THOMAS J. MILLER
Attorney General of Iowa

SHERYL SOICH
Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-5976
Sherri.Soich@iowa.gov

CERTIFICATE OF COMPLIANCE

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Dated: February 22, 2017

SHERYL SOICH
Assistant Attorney General
Hoover State Office Bldg., 2nd Fl.
Des Moines, Iowa 50319
(515) 281-5976
Sherri.Soich@iowa.gov