

IN THE SUPREME COURT OF IOWA

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

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

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APPELLANT'S APPLICATION FOR FURTHER REVIEW  
OF THE DECISION OF THE IOWA COURT OF APPEALS  
FILED JUNE 7, 2017

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MARK C. SMITH  
State Appellate Defender

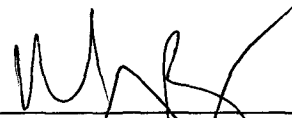
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**CERTIFICATE OF SERVICE**

On June 26, 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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**QUESTION PRESENTED FOR REVIEW**

**Does obtaining consent to a sex act by impersonating another person render an otherwise consensual sex act “against the will” under Iowa sex abuse statutes?**

## TABLE OF CONTENTS

	<u>Page</u>
Certificate of Service .....	2
Question Presented for Review .....	3
Table of Authorities.....	5
Statement in Support of Further Review .....	6
Statement of the Case .....	9
Argument.....	11
Conclusion.....	15
Attorney's Cost Certificate.....	15
Certificate of Compliance .....	16
Opinion, Iowa Court of Appeals (6/7/17) .....	17

## 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).....	14
People v. Hough, 159 Misc. 2d 997 (N.Y. Dist. Ct. 1994) ....	13
State v. Bolsinger, 709 N.W.2d 560 (Iowa 2006).....	6, 12
Suliveres v. Com., 865 N.E.2d 1086 (2007) .....	13
<u>Statutes:</u>	
Iowa Code § 709.1 (2015).....	7, 12
<u>Other Authorities:</u>	
H.S.B. 113, 83rd G.A., 1st Sess. (2009).....	14
H.S.B. 118, 82nd G.A., 1st Sess. (2007).....	14
H.S.B. 519, 82nd G.A., 2nd Sess. (2008).....	14
Rollin M. Perkins & Ronald N. Boyce, Criminal Law, ch. 9, § 3 at 1079 (3d ed. 1982).....	12
S.S.B. 1030, 83rd G.A., 1st Sess. (2009) .....	14
S.S.B. 1130, 82nd G.A., 1st Sess. (2007) .....	14
S.S.B. 3023, 82nd G.A., 2nd Sess. (2008) .....	14

## **STATEMENT IN SUPPORT OF FURTHER REVIEW**

Because the court of appeals has entered a decision in conflict with a decision of this court on an important matter, Michael Kelso-Christy respectfully requests this court accept further review on the question of whether impersonation of another renders a sexual encounter “by force or against the will” for purposes of Iowa sex abuse statutes. Iowa R. App. P. 6.1103(b)(1) (2015).

Specifically the decision of the court of appeals conflicts with the holding in State v. Bolsinger, 709 N.W.2d 560 (Iowa 2006), concluding that misrepresentation about the sexual nature of a touching does not mitigate the consensual nature of the contact or render the contact “by force or against the will.” This case is indistinguishable from Bolsinger in that the sex act was planned by and agreed to by both participants, although one of them was misled about the identity of her sexual partner rather than the sexual nature of the contact.

In addition, the court of appeals decision is unsupported by the plain language of the statute, which does not expressly include “sex by fraud” or “misrepresentation” a form of sex abuse. See Iowa Code section 709.1 (2015). Indeed the legislature has considered amending the relevant statute on six separate occasions to overrule the Bolsinger opinion and has declined to do each time.

The court of appeals decision that misrepresentation by one sexual partner negates the consent of the other partner creates a slippery slope. What sort of misrepresentation will vitiate consent? Because the statute does not address the issue, and the court of appeals’ decision provides no guidance on the issue, the court of appeals’ interpretation of section 709.1 raises concerns about unconstitutional vagueness.

The question in this case is not whether Mr. Kelso-Christy’s behavior *should* be criminalized but rather whether the statute that exists does criminalize fraudulently induced sexual contact. Because section 709.1, as interpreted in Bolsinger, currently does not punish the fraudulent

inducement of sex as a crime and the legislature has declined to amend the statute to do so, Kelso-Christy respectfully requests this court grant further review of the court of appeals' June 7, 2017, decision.



## **STATEMENT OF THE CASE**

**Nature of the Case:** Michael Cory Kelso-Christy seeks further review of the court of appeals decision affirming 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:** After a bench trial on the minutes, Michael Kelso-Christy was convicted of burglary in the second degree and sentenced to an indeterminate ten-year prison term. (App. pp. 87-90). A conviction for second-degree burglary requires the State to prove that Kelso-Christy had the specific intent to commit sex abuse when he entered the victim's residence. See Iowa Code sections 713.1 and 713.5 (2015). (App. pp. 25-26). He appealed his conviction, judgment and sentence, and the court of appeals affirmed his conviction. (App. p. 97; Opinion). He now seeks further review of the decision of the court of appeals.

**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. (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. (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. (App. pp. 31; 48-50).

## **ARGUMENT**

**BECAUSE IMPERSONATING ANOTHER IS FRAUD IN THE INDUCEMENT UNDER IOWA CODE SECTION 709.1 AS INTERPRETED IN STATE V. BOLSINGER, A CONSENSUAL SEX ACT INDUCED BY PRETENDING TO BE SOMEONE ELSE IS NOT SEX ABUSE AND KELSO-CHRISTY'S CONVICTION FOR BURGLARY IN THE SECOND DEGREE IS NOT SUPPORTED BY SUFFICIENT EVIDENCE.**

The evidence in this case does not establish that Kelso-Christy 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. 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 to support a conviction for second-degree burglary.

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). The statute does not expressly 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.

In State v. Bolsinger, 709 N.W.2d 560 (Iowa 2006), this court concluded sex procured by fraud was not covered by the sex abuse statute:

[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)). Because the victims in Bolsinger agreed to be touched by Bolsinger even

though they were deceived about the sexual nature of the touching, 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 deplores 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).

## **CONCLUSION**

Because the evidence in this case is insufficient to support Kelso-Christy's conviction for second degree burglary, Kelso-Christy requests this court accept his application for further review, vacate the decision of the court of appeals, vacate his conviction and remand his case for dismissal.

## **ATTORNEY'S COST CERTIFICATE**

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Application for Further Review was \$ 2.28, and that amount has been paid in full by the Office of the Appellate Defender.

MARK C. SMITH  
State Appellate Defender

MELINDA J. NYE  
Assistant Appellate Defender

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

This application complies with the typeface and type-volume requirements of Iowa R. App. P. 6.1103(4) because:

[X] this application has been prepared in a proportionally spaced typeface using Bookman Old Style, font 14 point and contains 1,535 words, excluding the parts of the application exempted by Iowa R. App. P. 6.1103(4)(a).



Dated: 6-22-17

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IN THE COURT OF APPEALS OF IOWA

No. 16-0134  
Filed June 7, 2017

**STATE OF IOWA,**  
Plaintiff-Appellee,

vs.

**MICHAEL CORY KELSO-CHRISTY,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Marion County, Gregory A. Hulse,  
Judge.

A defendant appeals his conviction for burglary in the second degree,  
challenging the sufficiency of the evidence. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Melinda J. Nye, Assistant  
Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, and Sheryl A. Soich, Assistant  
Attorney General, for appellee.

Considered by Potterfield, P.J., Bower, J., and Scott, S.J.\*

\*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2017).

**SCOTT, Senior Judge.**

Michael Kelso-Christy appeals his conviction for second-degree burglary, in violation of Iowa Code section 713.5 (2015). Kelso-Christy asserts there was insufficient evidence to support his conviction; specifically, he asserts his impersonation of another person did not satisfy the element of intent to commit sexual abuse because the sex act he intended when he entered the victim's home was a consensual sex act. Because Kelso-Christy's impersonation of another person who was known to the victim amounts to fraud in fact, we conclude the victim's consent to the sex act was vitiated and Kelso-Christy's conviction is supported by sufficient evidence.

Our review of a challenge to the sufficiency of the evidence is for the correction of errors at law. *State v. Shorter*, 893 N.W.2d 65, 70 (Iowa 2017).

The district court's finding of guilt is binding upon us unless we find there was not substantial evidence in the record to support such a finding. In determining whether there was substantial evidence, we review the record evidence in the light most favorable to the State. Substantial evidence means such evidence as could convince a rational trier of fact that the defendant is guilty beyond a reasonable doubt.

*State v. Dalton*, 674 N.W.2d 111, 116 (Iowa 2004) (citation omitted).

Kelso-Christy consented to a trial on the minutes of evidence. Those minutes provided the victim would testify:

[S]he was contacted by Facebook by an individual who represented that he was [a former classmate]. She will testify that she knew [the former classmate] from high school. She will testify that she engaged in numerous Facebook [messages] and texts with this person. She will testify that over time these messages turned sexual in nature. She will testify that she agreed to have sex with an individual she believed was [the former classmate]. She will testify that the nature of the sexual encounter involved blindfolding herself and being handcuffed by who she believed was [the former

classmate]. She will testify that she invited this individual into her home and that he restrained her, had sexual intercourse, and abruptly left saying he had to go. This witness will testify that she consented to having sex with [the former classmate]. This witness will testify that she did not know that the defendant was impersonating [the former classmate], and that she did not consent to having sex on that date with anyone other than [the former classmate]. She will testify that she began to become suspicious when the person she had been communicating with stopped responding to her texts. She will also indicate that the Facebook page was no longer active. This witness will testify that she observed a condom wrapper which she moved to her bathroom trash can. This witness will testify that all of the events occurred in Marion County, Iowa, on April 26, 2015. She will testify she notified the police on April 27, 2015. She will testify that she did not consent to the defendant entering her home and did not consent to having sex with him.

The minutes provided that Kelso-Christy's fingerprint was on the condom wrapper the victim found in her bedroom. In addition, minutes related to the former classmate of the victim stated he would testify:

[H]e has, on Facebook, an account. He will testify that he has not created a second account in his name. This witness will testify that he did not engage the victim in conversation at any time during this investigation or prior to it. He will testify that he has not been to the victim's home. He will testify that he did not have sex with the victim. He will testify he was made aware of this investigation by the Marion County Sheriff's office. This witness will testify that after being made aware of the investigation, he was contacted by other men who were angry that he was soliciting their wives and girlfriends for sex.

The district court articulated the elements of second-degree burglary in this case as:

1. On or about April 26, 2015, defendant entered the residence of [the victim];
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.

Based on its review of the minutes, the district court found:

That defendant did enter [the victim's] residence on April 26, 2015. That residence was an occupied structure. Defendant did not have authority or permission to enter that residence. [The victim] had given permission or authority for the person defendant was impersonating to enter the residence, but she did not give permission or authority to defendant to enter the residence. [The victim] was in the residence at the time defendant entered. The residence was not open to the public. Defendant entered the residence with the specific intent to commit sexual abuse.

Kelso-Christy's challenge on appeal centers on the district court's finding he had the intent to commit sexual abuse when he entered the occupied structure. Instead, he asserts the evidence is only sufficient to prove that when he entered the victim's residence he had the intent to have a consensual sexual encounter with the victim while he was impersonating another person and that the victim consented to the sexual encounter believing that he was the other person. He asserts, because consent to sex by imitating another person is not sexual abuse, the evidence does not support his conviction.

Sexual abuse is defined in the code to mean, in part, a sex act "done by force or against the will of the other." Iowa Code § 709.1(1). When determining whether a sex act is done by force or against the will of another, the code advises that it is not necessary to show physical resistance by the victim but "the circumstances surrounding the commission of the act may be considered in determining whether or not the act was done by force or against the will of the other." *Id.* § 709.5. The Iowa Supreme Court has found that fraud, in certain

circumstances, can vitiate consent. See *State v. Bolsinger*, 709 N.W.2d 560, 564–65 (Iowa 2006). The supreme court was careful to distinguish between “fraud in fact” and “fraud in the inducement.” *Id.* at 564. “If an act is done that is different from the act the defendant said he would perform, this is fraud in fact. If the act is done as the defendant stated it would be, but it is for some collateral or ulterior purpose, this is fraud in the inducement.” *Id.* Only fraud in fact will negate consent. *Id.*

Thus, we must answer the question of whether deception regarding one’s identity, specifically impersonating another person known to the victim, is fraud in fact or fraud in the inducement. While there is disagreement regarding the effect of a concealed identity on the validity of a person’s consent to a sexual act,<sup>1</sup> we conclude the better and more contemporary view is that the identity of one’s sexual partner is material and essential to a person’s decision to consent to a sexual encounter, and concealment and misrepresentation regarding that identity is thus fraud in fact. The victim in this case consented to a sexual encounter with a specific former classmate. Instead, she experienced a different act—a sexual encounter with an entirely different person. This was not the act to which she consented. Kelso-Christy’s concealment of his identity was not a “collateral or ulterior purpose.”

The better view is that the “factum” involves both the nature of the act and some knowledge of the identity of the participant. . . . Further, while 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

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<sup>1</sup> J. Richard Broughton, *The Criminalization of Consensual Adult Sex After Lawrence*, 28 Notre Dame J.L. Ethics & Pub. Pol’y 125, 133–41 (2014) (articulating the development and evolution of the criminalization of sex by deception).

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.

This is not to suggest that knowing the partner's true name or anything about him or her is necessary to consent. The use of a false name may well amount to fraud in the inducement, but it does not alone vitiate consent. . . . Where there is fraud in the factum, there is no actual consent.

*United States v. Booker*, 25 M.J. 114, 116 (C.M.A. 1987).

Our supreme court has recognized a sexual act is more than just the physical act but is an act done with a specific person. In addressing our state's rape shield statute, the supreme court stated: "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." *State v. Ball*, 262 N.W.2d 278, 280 (Iowa 1978).

While some people tell a multitude of lies in order to induce another to engage in sexual activity, Kelso-Christy did more than just tell a lie; he impersonated a specific person, known to the victim, with the knowledge and intent that the impersonation would cause the victim to consent to sexual activity. He then took steps to ensure his identity would remain secret until after the sexual act was completed—blindfolding and restraining the victim and leaving the victim's residence before she could ascertain his true identity. Based on the unique facts of this case, we conclude sufficient evidence exists to conclude Kelso-Christy had the intent to commit sexual abuse by deception when he entered the victim's residence. We thus affirm his conviction and sentence.

**AFFIRMED.**