

IN THE COURT OF APPEALS OF IOWA

No. 0-210 / 09-0844
Filed June 30, 2010

DAVID R. DESIMONE,
Applicant-Appellant,

vs.

STATE OF IOWA,
Respondent-Appellee.

Appeal from the Iowa District Court for Clinton County, David H. Sivright Jr., Judge.

David DeSimone appeals from the denial of his application for postconviction relief. **AFFIRMED.**

Mark R. Lawson of Mark R. Lawson, P.C., Maquoketa, for appellant.

Thomas J. Miller, Attorney General, Sheryl Soich, Assistant Attorney General, Matthew Remissong, Student Legal Intern, Mike Wolf, County Attorney, and Ross Barlow, Assistant County Attorney, for appellee State.

Heard by Sackett, C.J., and Eisenhauer and Mansfield, JJ. Tabor, J., takes no part.

MANSFIELD, J.**I. Introduction.**

David DeSimone appeals the denial of his application for postconviction relief challenging his 2005 conviction for sexual abuse in the third degree in violation of Iowa Code sections 709.1 and 709.4 (2003). DeSimone contends the State committed a *Brady*¹ violation by withholding documentary evidence which established that a prosecution witness could not have seen the victim fleeing from DeSimone's residence on the night in question. He also contends his trial counsel was constitutionally ineffective for raising DeSimone's own alleged prior bad acts. For the reasons set forth herein, we affirm.

II. Background Facts and Procedural History.

DeSimone's conviction stems from the events of October 16-17, 2004, when he hosted a party at his residence attended by Samantha, who was seventeen years old at the time. The residence was located on Camanche Avenue in Clinton. In our opinion affirming DeSimone's conviction on appeal, we summarized the relevant facts as follows:

In October of 2004, Samantha, a minor, attended a birthday party for her friend, Ashley, at the defendant's house. Defendant had been given money by others to purchase a keg of beer for the party. Samantha drank six to twelve glasses of beer and admitted blacking out or passing out twice. Following the second episode, Samantha found herself naked in defendant's bed. She noticed her tampon was missing. She said the defendant forced her to engage in sexual intercourse and fellatio. She left defendant's house after

¹ See *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97, 10 L. Ed. 2d 215, 218 (1963) (holding the suppression by the prosecution of evidence favorable to an accused can violate due process).

midnight, went to a nearby store, and called a friend and the police.²

After talking briefly with Samantha, the police took her to the hospital, where she was examined for sexual assault. She told police she had vomited on the defendant's bed, the bedroom floor, and her hair. She also said the defendant had grabbed her neck and choked her. The hospital examination did not find any evidence of trauma to her neck or genital area. The laboratory examination of the sexual abuse protocol kit returned no evidence of semen.³

The police obtained a search warrant and seized bedding from the defendant's home. The laboratory examination of the items seized from the defendant's home found evidence of the defendant's blood and dried semen. The tests did not reveal any blood, vomit, or other biological materials attributable to Samantha on the items seized.

State v. DeSimone, No. 05-1740, 2007 WL 750649 (Iowa Ct. App. Mar. 14, 2007). We rejected DeSimone's contention that there was insufficient evidence to support his conviction.

Prior to trial, DeSimone filed a motion in limine to exclude evidence of prior bad acts. Those bad acts included allegations that DeSimone had sexually abused both his stepdaughter and a niece of his estranged wife. DeSimone had been charged in both cases, but had been acquitted. Hence, the trial of DeSimone on the charge of sexually abusing Samantha was his third on this type of charge. In addition, an allegation had been made that DeSimone molested his own daughter. At the time of trial, DeSimone had been separated from his wife for at least two years. The motion in limine was granted without opposition from the prosecution.

² Samantha testified that she ran out of DeSimone's residence onto Camanche Avenue, where she was nearly hit by a car. She then reached a Hy-Vee about four blocks away. An employee there let her use a phone to call a friend. After speaking with the friend, Samantha called the police. The 911 call from the store to the police occurred at 3:06 a.m. The police arrived at the Hy-Vee at the same time that Samantha's friend arrived, along with another friend.

³ Samantha testified that DeSimone told her he was not going to ejaculate on her, so as not to leave any evidence.

Samantha was the State's first witness. According to his later postconviction hearing testimony, DeSimone noticed that his estranged wife was sitting in the courtroom and pointed this out to his trial counsel "in passing." DeSimone didn't "know why I would have said it, other than to show, you know, everybody is out to get me. But I don't know exactly why I mentioned it." Despite the previous granting of the motion in limine, DeSimone's counsel decided to ask Samantha about DeSimone's estranged wife. The cross-examination of Samantha on this topic proceeded as follows:

Q. Do you know this lady sitting back here in the pink shirt [DeSimone's estranged wife]? A. Yes, I do.

Q. How long have you known her? A. Since after it happened.

Q. After what happened? A. I had gotten raped.

Q. Pardon me? A. After I had gotten raped.

Q. Okay. How did you get to know her? A. I forget who introduced us. I guess her daughter. She has two daughters [one by DeSimone], and I guess they were both molested, so we wanted to talk and figure out what a sick man he was. That's what I really found out.

Q. Is that Mr. DeSimone's ex-wife back there? A. His girlfriend, as far as I knew.

Q. Did you know if they were married? A. No.

Q. Did you know that they were divorced? A. No. It wasn't my business to be asking those kind of questions.

Q. Did you know they had a custody dispute with his children? A. Couple months ago.

Q. Did you know they were in Juvenile Court because of an allegation that she made about him molesting his own kids? A. Yes. After the fact.

Q. Did you know that that case was dismissed? A. I know for his daughter. I know for [the niece] and [the daughter] that they were acquitted.

Q. Did she tell you that case was dismissed or not? A. I didn't ask.

Q. But she didn't tell you? No. Oh, I'm sorry. Yes, 'cause her daughter didn't speak in time.

Q. Okay. A. Under their standards.

Later, DeSimone's counsel elicited admissions from Samantha that she had known and lived with the niece of DeSimone's estranged wife (i.e., one of the alleged prior rape victims) before October 16-17, 2004. Samantha also admitted that the friend she called from the Hy-Vee early on the 17th was at the niece's house when she received Samantha's call. Additionally, according to Samantha, both the friend and the niece came to the Hy-Vee together in response to the early morning call.

In addition to Samantha, the State presented a number of other witnesses at DeSimone's trial.

To corroborate Samantha's testimony that she had gone into Hy-Vee to call a friend after being sexually assaulted by DeSimone, the State offered the testimony of a store checker who had been working that night. The checker testified that a woman had come into the Hy-Vee early in the morning of October 17, with her clothes "all disheveled," her hair "messed up," "crying very bad," who "stated a big long sentence, something about rape." He had let her use a phone to call her friend. After talking to her friend, Samantha phoned 911.

In addition, the State called Joseph Baker, who had attended the party at DeSimone's. Baker testified that as the party was winding down, he knocked on a bedroom door to get his coat. The defendant was standing in the bedroom, dressed, and Samantha was in the bed sleeping with her clothes on. Baker testified that he had consumed over ten beers and did not feel well. Therefore, instead of going home at that time, Baker decided to sit on the couch in the living room. He turned on the TV and fell asleep. Baker later awoke as it was getting light out, went back to the bedroom and knocked on the door. At that time, he

saw the defendant sleeping in the bed alone. On cross-examination, DeSimone's counsel made the point that Baker did not hear any screaming or awaken, despite Samantha's testimony that as she was being sexually assaulted, "I kept screaming" and her screaming was "loud." Baker testified that a single wall separated the bedroom and the living room and that "most times" he would wake up to a "loud scream that went on and on for no less than five minutes."

Baker also testified that earlier in the evening, DeSimone and Samantha had been locked in a downstairs bathroom together. DeSimone had explained to Baker that he took Samantha down to use that bathroom because the upstairs bathroom "was occupied pretty much throughout the night with as many people that were there, and Samantha, I guess, needed to use the bathroom."⁴ Samantha appeared to be intoxicated when Baker saw her leaving the downstairs bathroom.

Additionally, the State called Officer Brad Nolan with the Clinton Police Department. Consistent with Samantha's testimony, Officer Nolan reported that he had been called to the Hy-Vee where he met Samantha, who was very distraught and reported that she had been sexually assaulted by a "David." Officer Nolan also described executing a search warrant at DeSimone's residence on the 17th and seizing the bedding. He testified that some bedding was found in the basement area where the washer/dryer for the residence was located.

⁴ The house where the party took place was a two-story residence. DeSimone apparently rented the upstairs, which included a bedroom, living room, and bathroom, and there was a separate living area downstairs.

The State also offered the testimony of an emergency room nurse whose notes of her interview of Samantha were generally consistent with Samantha's trial testimony. In addition, the State called the attending physician who had treated Samantha. Although he did not find any signs of a sexual assault when examining her, this physician testified that her menstrual flow as of October 17, 2004, was "rather light" and that it was the end of her menstrual flow.

In addition, the State called Nicole. Nicole was a high school senior who testified she got to know Samantha approximately two months before trial. She testified that after Samantha discussed what had happened to her at a residence located on Camanche Avenue, she (Nicole) recalled an incident when she was driving home from work on Camanche Avenue at about 2:30 a.m.⁵ and a girl ran "right in front of my vehicle to try to get me to stop, but I almost hit her, so I swerved." Nicole did not stop to help the girl because she "was really scared," but she also did not contact the police or report the incident to anyone else. Nicole explained that she had been working late at Burger King that night and just got off work. Nicole's testimony coincided with Samantha's testimony about being nearly hit by a car after running out on Camanche Avenue following the sexual assault, except Nicole initially testified that the incident occurred on October 13. However, the prosecutor followed up:

Q. The incident involving [Samantha] occurred on or about October 16 or October 17, but you saw someone on October 13, is that correct? A. It was somewhere around there. I can't—I thought it was the 13th, but it might not have been. It was a long time ago.

⁵ As we have noted, Samantha's 911 call occurred at 3:06 a.m. on the 17th.

DeSimone's counsel conducted only a brief, perfunctory cross-examination of Nicole.

After we affirmed DeSimone's conviction and sentence, he filed the present application for postconviction relief. The application alleged, among other things, that DeSimone received ineffective assistance of counsel because his trial counsel unilaterally raised DeSimone's own prior bad acts, thereby allowing the jury to learn of allegations that DeSimone had molested his wife's daughters and niece. The application also alleged that the State had committed a *Brady* violation. It turned out that prior to trial, Burger King had informed the Clinton police that Nicole had not got off work on October 17 until 3:30 a.m. Thus, she could not have encountered Samantha early that morning, since Samantha's 911 call took place at 3:06 a.m. DeSimone was able to obtain Nicole's timecard from Burger King himself, but not until March 2006, after he had already been sentenced to prison.

A hearing was held on March 4, 2009, on DeSimone's application for postconviction relief. DeSimone, who is currently incarcerated at the Fort Dodge Correctional Facility, appeared by videoconference. DeSimone testified that he had been fighting with his estranged wife for custody of their children at the time of his trial on the charge of sexually abusing Samantha. He and his counsel, William Vilmont, discussed the possibility before trial of trying to show that Samantha was part of a conspiracy involving DeSimone's wife to have DeSimone sent to prison by fabricating charges of sexual abuse. However, prior to trial, they rejected that strategy. Thus, DeSimone claimed he was very surprised when his trial counsel started cross-examining Samantha about "this

lady sitting back here in the pink shirt,” i.e., his wife. He claimed he tried to stop Vilmont without making a scene in front of the jury. DeSimone also testified as to how he obtained Nicole’s timecard from Burger King while he was in prison, and stated that he had not been aware of such information before trial.

Vilmont testified at the postconviction hearing, but had only limited recollection of the trial. He could not remember why he cross-examined Samantha about the allegations DeSimone had faced in the past relating to his wife’s daughters and niece. He did acknowledge that those allegations would not have been admissible if he had not cross-examined Samantha about them. He did recall generally that he and DeSimone “collectively felt” they were false allegations “made against him in order to help [the wife] in her endeavors insofar as custody and visitation of children”

Regarding the records of Nicole’s hours worked at Burger King, Vilmont testified he did not recall receiving any of this information before trial. He further testified that if he had received it, he would have forwarded it to his client and used it in cross-examining Nicole, since it undermined her entire testimony.

The prosecutor at DeSimone’s trial, Ross Barlow, did not testify at the hearing but instead made a professional statement. In his statement, Barlow acknowledged receiving and opening an e-mail from Burger King six days before trial that established Nicole did not leave work until 3:30 a.m. on October 17. Barlow stated that he did not have any recollection of providing the e-mail to Vilmont, but that it would have been his usual practice to do so. Barlow also testified that the Clinton County Attorney’s Office has an open file policy, under which defense attorneys are free to review the State’s evidence at any time.

On May 14, 2009, the district court filed a ruling denying DeSimone's application for postconviction relief. The court found that DeSimone had failed to prove by a preponderance of the evidence "that the State suppressed the information from Burger King." The court found in any event that Nicole's testimony was not material to the issue of guilt. As to Samantha's bad acts testimony, the district court concluded that DeSimone had failed to establish prejudice, i.e., "a reasonable probability that, but for counsel's line of questioning here at issue, the result of the trial would have been different." The district court also rejected several other grounds for relief asserted by DeSimone.

DeSimone now appeals.

III. Standard of Review.

Postconviction proceedings are law actions ordinarily reviewed for errors of law. *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001). But when the basis for relief is a constitutional violation, such as a *Brady* violation or ineffective assistance of counsel, the review is de novo. *Id.*

IV. Merits.

A. *Brady* Issue.

To establish a *Brady* violation, DeSimone must prove that the prosecution suppressed evidence that was favorable to the defendant and material on the issue of guilt. *Harrington v. State*, 659 N.W.2d 509, 516 (Iowa 2003). Evidence is suppressed when information is discovered after trial which had been known to the prosecution but unknown to the defense. *Id.* at 522.

DeSimone argues the prosecutor withheld information about Nicole's work schedule at Burger King on October 17 that would have established,

conclusively, she did not see Samantha on Camanche Avenue running away from DeSimone's residence. This claim of suppression may be true. Although the State argues that the Clinton County Attorney's office had an "open file" policy, we agree with the district court that such a policy is not an excuse for failing to affirmatively disclose exculpatory information that comes into the State's hands shortly before trial. As the district court put it,

[I]t is fair to assume Vilmont had earlier completed his review of the State's evidence and did not anticipate a need to do so again on the eve of trial, since the State would be required to divulge any late-appearing exculpatory evidence.

Also, since the evidence concerning Nicole's actual work hours eliminates the possibility that she saw Samantha on the 17th, DeSimone's defense counsel most likely would have used it to cross-examine Nicole if he had been aware of it.⁶

However, DeSimone must also show that the suppressed evidence was material to the issue of guilt, i.e., there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different. *Id.* at 523. This does not mean DeSimone has to prove he would have been acquitted. *Id.* Rather, the question is whether "our confidence in the verdict is undermined," taking into account "the totality of the circumstances." *Id.* at 523-24.

⁶ Notably, the prosecutor steered Nicole in the direction of testifying that her encounter with the woman running on Camanche Avenue could have occurred on October 17. Like DeSimone's postconviction counsel, we do not claim that the prosecutor *knew* that the encounter could not have occurred on the 17th. However, the evidence suggests the prosecutor should have known it did not occur on the 17th.

Upon our de novo review, our confidence in this verdict is not undermined. Samantha's story was consistent. She related the same version (in varying degrees of detail) to the Hy-Vee checker, to Officer Nolan, and to the emergency room nurse. Furthermore, Baker testified that he saw Samantha and DeSimone together in DeSimone's bedroom, clothed and presumably before the sexual assault occurred.

DeSimone argues that this case was essentially devoid of physical evidence. No evidence of his DNA was found in the rape kit collected at the hospital. Samantha also had no choke marks or injuries, despite her testimony that DeSimone choked her. There was no evidence of vomit in the bedroom, despite Samantha's testimony that she "was getting sick everywhere." No blood of Samantha's was found, despite her testimony that she was menstruating. Moreover, Baker testified he spent the rest of the night on the couch next door in the living room, and never awakened despite Samantha's testimony that she screamed loud and long. The prosecution offered explanations for why much of the physical evidence was missing. For example, it raised the inference that DeSimone could have washed some of the bedding before the search warrant was executed. Samantha herself testified that DeSimone said he would not ejaculate on her in order to avoid leaving evidence. The attending physician testified that Samantha had a rather light menstrual flow by the 17th and thus might not have bled even with her tampon out. Still, the State's case depended to a high degree on Samantha's credibility.

Nonetheless, we do not believe Nicole's trial testimony was particularly important to bolstering Samantha's credibility. For one thing, that Samantha ran

out of DeSimone's residence and down Camanche Avenue and immediately told others she had been raped is not really disputed. At most, Nicole confirmed Samantha's vignette of being nearly hit by a car. Furthermore, even without being impeached by her work records, Nicole's testimony already seemed to creak under the weight of coincidence it was bearing. The jury was asked to believe that Nicole and Samantha "started hanging out" and becoming friends, only to discover that Nicole had been driving on Camanche Avenue at the exact moment early in the morning on October 17 when Samantha was fleeing from DeSimone's residence.

DeSimone claims that the work records would have demonstrated to the jury that Samantha and Nicole were colluding and fabricating testimony, but we agree with the district court that they do not go so far. Nicole originally testified that the near-collision occurred on October 13, until she backed off that date somewhat at the prosecution's urging. If Nicole had been colluding with Samantha, one would have expected her to get the date right. Use of the Burger King records would have undermined Nicole's testimony, but we do not believe it would have led the jury to conclude that Samantha was lying about the events of October 17. Thus, while we find the failure to pass along the information about Nicole's work hours to DeSimone's trial counsel troubling, if that is what occurred, our "collective confidence in the soundness of the defendant's conviction is [not] significantly weakened." *Id.* at 524. Accordingly, we reject DeSimone's *Brady* claim.⁷

⁷ In determining DeSimone's *Brady* claim, we have also taken into account the points made on this subject by DeSimone in his pro se appellate brief.

B. “Bad Acts” Issue.

We now turn to DeSimone’s claim that his trial counsel William Vilmont was ineffective when he brought up allegations that DeSimone had sexually abused his wife’s daughters and niece. To establish ineffective assistance of counsel, DeSimone must prove by a preponderance of the evidence both that his trial counsel failed to perform an essential duty and that prejudice resulted from his counsel’s failure. *Strickland v. Washington*, 446 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984); accord *Millam v. State*, 745 N.W.2d 719, 721 (Iowa 2008).

DeSimone contends his trial counsel made a sudden, unauthorized, and inexplicable about-face from a pretrial decision they had made *not* to go into these allegations. At the postconviction hearing, Vilmont could not recall why he questioned Samantha about the allegations, although his general thinking was that the allegations had been trumped up against his client to gain advantage in a custody dispute. Upon our review, we agree with the district court’s analysis of this issue. The unanticipated presence of the estranged wife in the courtroom presumably led Vilmont to reconsider the strategy of not bringing up the allegations. Instead, Vilmont decided to establish that Samantha had been in contact with DeSimone’s wife, who was now attending the trial, that Samantha was close to the niece of DeSimone’s wife even before October 17, 2004, that there had been a custody dispute arising out of the marriage, and that the prior allegations against DeSimone involving the niece and others had not been sustained. “Improvident trial strategy or miscalculated tactics do not necessarily constitute ineffective assistance of counsel.” *Wemark v. State*, 602 N.W.2d 810,

814 (Iowa 1999). “Miscalculated trial strategies and mere mistakes in judgment normally do not rise to the level of ineffective assistance of counsel.” *Millam*, 745 N.W.2d at 721.

The potential weakness in the strategy was highlighted by the prosecution on redirect. Samantha reiterated on redirect that she did not know DeSimone’s wife prior to October 17, 2004. Yet, Samantha made an immediate report on that date that she had been raped. However, it appears DeSimone’s trial counsel tried to neutralize Samantha’s testimony that she did not know DeSimone’s wife personally before the 17th by establishing Samantha had been close to his wife’s niece—one of the prior accusers—before then. While the overall strategy may not have been successful, it does not amount to ineffective assistance.

The record also gives us reason to question DeSimone’s subsequent testimony that he wanted no part of this strategy. The trial transcript reveals that a twenty-five minute afternoon break occurred in the middle of Vilmont’s cross-examination of Samantha. Even after that break, during which time DeSimone had every opportunity to speak privately with Vilmont, Vilmont returned to the general subject of the prior allegations to establish that Samantha not only *knew* the niece beforehand, but *had been living* with the niece at the time of the incident in question. In short, after the afternoon break occurred, DeSimone’s counsel did not veer away from the conspiracy theory, but instead delved further into it.⁸

⁸ We note that the closing arguments were not reported in this case. Therefore, we are unable to determine how Vilmont summed up the evidence or presented this possible conspiracy theory to the jury. What we can say is that based on the record before us, DeSimone has been unable to demonstrate the decision to question

In any event, we conclude that DeSimone has failed to establish prejudice from the line of questioning. DeSimone must show “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 722. A reasonable probability is one sufficient to undermine confidence in the outcome. *Id.*

Here, on our de novo review of the record, we agree with the district court that DeSimone has failed to make that showing. It is true that the questioning revealed previous allegations that DeSimone had molested his wife’s daughters and niece, and Samantha’s stated belief that the allegations were true. However, Samantha also admitted that DeSimone had been acquitted of the criminal charges and that the other matter had resulted in a dismissal. She admitted she was living with the niece at the time and that the niece even showed up at the Hy-Vee that night. In a case centering on Samantha’s credibility, this testimony was a mixed bag for both parties. It does not, in our view, undermine our confidence in the verdict.

V. Conclusion.

For the foregoing reasons, we affirm the denial of DeSimone’s application for postconviction relief.

AFFIRMED.

Eisenhauer, J., concurs; Sackett, C.J., dissents.

Samantha about the prior bad acts falls outside “the wide range of reasonable professional assistance.” *State v. Hepperle*, 530 N.W.2d 735, 739 (Iowa 1995); see also *Ledezma*, 626 N.W.2d at 142 (“we avoid second-guessing and hindsight”).

SACKETT, C.J. (dissenting)

I respectfully dissent. I would reverse the denial of postconviction relief and order a new trial. I believe that DeSimone has shown both that his trial attorney was ineffective and that the State failed to disclose exculpatory evidence and as a result he has suffered prejudice.

The facts are clearly set out in the majority's well-written opinion and for the most part I agree with the rendition of facts.

I would find, however, that DeSimone has shown his trial counsel was ineffective. Despite having successfully obtained a ruling keeping out of the trial evidence of DeSimone's alleged prior bad acts, his trial attorney asked questions that opened the door to the evidence. DeSimone's trial attorney could not articulate a reason for doing so and neither can I. I disagree with the majority that this was a miscalculated trial strategy or mistake in judgment that does not rise to the level of ineffective assistance of counsel.

I also would find that DeSimone has shown that the State failed to disclose exculpatory evidence, namely a time card that would have impeached a State witness. The State was unable to show it was disclosed. The majority wisely recognizes that, "This claim of suppression may be true."

DeSimone clearly has shown he was prejudiced both by his trial attorney's ineffectiveness and by the State's failure to disclose. To convict the jury would have had to either believe the victim Samantha, or have been prejudiced against DeSimone by trial counsel's opening the door to the fact DeSimone's former wife made allegations he allegedly molested his own children. I believe it is quite probable that the latter supported the jury's verdict.

This is because Samantha's testimony about the alleged sexual abuse and the facts immediately surrounding it are substantially discredited by undisputed facts and impeaching testimony. Samantha testified DeSimone forced her to engage in vaginal and oral intercourse and that he tried to choke her. She further testified she had been drinking heavily at the time and she screamed loudly while he raped her. Her testimony was that she was menstruating at the time it happened and after the rape she blacked out, waking in DeSimone's bed without a tampon she allegedly had in place prior to the incident. She also testified she became sick to her stomach, and vomited on the bed sheets and beside the bed before running outside. None of this evidence is corroborated. All of it is contradicted by other testimony and undisputed physical evidence.

A witness who was sleeping in the room next to the one where Samantha claimed to be raped testified he did not hear her alleged screaming. Samantha's testimony was impeached in part by her call to 911.

A search warrant was issued and executed on the morning of the incident. The officers conducting the search found no evidence or smell of vomit in the bedroom nor was any evidence of Samantha's blood or DNA found in the room or on the bedding of the bed where the alleged assault occurred. The underwear she claimed to have left behind was not found.

Soon after Samantha's report of sexual abuse she submitted to a medical examination. There was no evidence of seminal fluid in a vaginal swab taken from her, nor was there any evidence of the presence of DeSimone's DNA. A

physical examination found no evidence Samantha had been sexually assaulted, nor was there any redness or evidence of injury on her throat.

The only relevant evidence I find that could be found to support Samantha's complaint is scant. A witness testified he saw her lying on DeSimone's bed fully clothed. A witness from a Hy-Vee store where she made the reporting phone call testified Samantha was upset.

There also was testimony at trial by a witness who met Samantha after the event who claimed to have seen Samantha running from DeSimone's house near the time of the alleged rape. This testimony may have been considered credible by the jury at the time but we now know it was not. Prior to trial the State received the copy of the witness's time card showing she was working at her place of employment at the time she claimed to have seen Samantha run from DeSimone's home.

The scant support for Samantha's testimony as to the events, coupled with testimony impeaching hers and the lack of physical and medical evidence to support the same, convince me that the attorney's actions clearly prejudiced DeSimone. The attorney's conduct allowed the jury to convict him because he was a bad guy and not because there was evidence beyond a reasonable doubt to support the conviction.

Furthermore the failure of the State to disclose the exculpatory evidence denied DeSimone's trial attorney the opportunity to impeach Nicole's testimony

and create the inference that her friendship with Samantha, not her observation of events, was the reason for her testimony.⁹

⁹ One has reason to wonder why the State called her as a witness when the time card should have informed the prosecutor that her testimony was not credible.