

**IN THE COURT OF APPEALS OF IOWA**

No. 7-816 / 06-0576  
Filed December 28, 2007

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

**vs.**

**RICK ANTHONY BRANDES,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Chickasaw County, James C. Bauch, Judge.

Defendant appeals his conviction and sentence for first-degree kidnapping. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Patricia Reynolds, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Bridget Chambers, Assistant Attorney General, W. Patrick Wegman, County Attorney, and Scott Brown, Assistant County Attorney, for appellee.

Heard by Sackett, C.J., and Vaitheswaran and Baker, JJ.

**BAKER, J.**

In this appeal, we are asked to decide whether the State met its burden of proving requisite specific intent where an expert psychiatric witness testified that the defendant lacked the capacity to form such intent, and the State presented other evidence, but no testimony from a psychiatric expert, that the defendant was capable of forming the requisite specific intent. Having reviewed the issues raised on appeal, we affirm the defendant's conviction and sentence for first-degree kidnapping.

**I. Background and Facts**

On May 26, 2005, the victim was working as a bartender at McShanney's Bar in New Hampton. Rick Brandes and Travis Alve were at the bar, drinking and playing pool. They repeatedly invited the victim to an after-hours party at Brandes's apartment. She initially refused, but eventually agreed to go with them. She testified that she accepted the invitation because she had recently moved to New Hampton and wanted to meet people. Her husband was in jail at the time.

After the victim closed the bar at 2:00 a.m., Brandes and Alve stayed while she locked up. The three walked the block to Brandes's apartment. When they arrived, Brandes locked the front door, and then offered the victim a beer, which she declined. The three sat at the kitchen table and smoked cigarettes. When nobody else showed up after about ten minutes, the victim began to feel uncomfortable and told the men she needed to go home to let her dog out.

Brandes told the victim he had something for her, took her to the nearby bedroom, and gave her a Seroquel, a prescription medication used to treat

bipolar disorder. The victim did not take the pill, but kept it and later hid it in her sock. When she tried walking toward the door of the bedroom, Alve grabbed her from behind. She was unable to remove Alve's hands from her waist. She pulled out a knife. Brandes told Alve about the knife. When the victim started to scream, Alve started to strangle her and told her they would slit her throat if she screamed. She stopped screaming. While Brandes was trying to get the knife from the victim's hand, his hand was cut. During the struggle, Alve got his forearm around the victim's throat and leaned her back into the bed so her feet did not touch the floor. She lost consciousness. When she came to, she was face-down on the floor, her nose was bleeding, and she was lying in a pool of blood. Brandes and Alve were standing over her, telling her they were going to teach her a lesson for pulling a knife on them. Brandes was holding her knife and told her they were going to use the knife on her.

Alve began removing most of the victim's clothing. Alve then repeatedly anally raped her. She testified that, while Alve was raping her, Brandes was in the living room much of the time, but would come into the bedroom "every so often." Brandes would ask her if she wanted him to touch her, and she replied no, she just wanted to go home. Brandes also held the knife to her throat and told her he was going to slit her throat and watch her bleed and laugh at her. At some point during the night, Brandes used the knife to cut off her shirt. On two occasions, Brandes held a knife to her throat and forced her to perform oral sex on him. Brandes also performed oral sex on her several times.

Brandes and Alve held the victim in Brandes's apartment for over four hours. Two or three times the men allowed her to get dressed and told her they

were going to let her leave, but then prevented her from leaving. Brandes kept her from leaving by dragging her around by her hair, arms, and legs. The victim testified that Brandes and Alve continually threatened to kill her and told her that, if she went to law enforcement authorities, “they would have the Sons of Silence and the Hells Angels come after [her] and they would do worse.” She also testified that Brandes told her it wouldn’t matter if she went to the authorities because “everyone knows that he’s crazy and that he would get away with it” and that he would come in the bar and make sure she did not tell anyone.

Alve eventually fell asleep on the couch. The victim testified that Brandes kept saying he was going to keep her hostage, but Alve said she could go. Brandes told her to wake Alve up to see if she could go. She did and initially Alve said something about killing her. Brandes then came toward her with a knife. She ducked in a corner and started screaming. Alve then woke up and told Brandes that the victim needed to leave before she woke up Alve’s mother and girlfriend, who were in an upstairs apartment with his two-week-old son. The men told the victim she had five minutes to leave, or she would not be leaving at all. She left and walked to her home.

At home, the victim threw her shirt in the garbage and her other clothes in the laundry and took a shower. Later that day, she visited her mother and husband, who told her to go to the police. Later that afternoon, she went to the sheriff’s office in New Hampton and reported the incident. New Hampton Police Officer Jeff Jackson interviewed the victim and sent her to the hospital for an examination.

The doctor who examined the victim found tenderness in her neck area, hemorrhages in her posterior left scalp, where her hair had been forcibly removed, tearing and swollenness around her nose, and a contusion on her shoulder, consistent with a rug burn. The doctor also noted tenderness and several tears around her rectal area, consistent with non-consensual sex. He noted multiple hemorrhages in both eyes, consistent with the increased pressure in the blood vessels that occurs when a person has been strangled or the neck has been forcibly constricted.

That evening, Officer Jackson obtained a warrant to search Brandes's apartment. Jackson executed the warrant shortly after midnight. He discovered bloodstains on the bedroom floor and several bloody towels. Testing confirmed it was the victim's blood on the carpet and towels.

While Jackson was drafting the application for the search warrant, the police received a report of a man at Josie's bar threatening patrons with a knife. Officer Jeremy Copp responded to the call. The man with a knife was reportedly walking south from the bar. Copp eventually found the man and turned his spotlight on him. He recognized the man as Brandes. Copp got out of his squad car, drew his weapon, and told Brandes to keep his hands up and get on the ground. Brandes did not comply, but continued to walk away. Eventually, Copp tackled Brandes. Foster's knife was found in the grass approximately twenty feet from where Copp first spotted Brandes. After his arrest, Jackson observed and photographed an injury to Brandes's left hand.

A June 3, 2005 trial information charged Brandes with kidnapping in the first degree, in violation of Iowa Code sections 710.1 and 710.2 (2005) and going

armed with intent in violation of section 708.8. On January 20, 2006, Brandes filed a notice of his intent to rely on the defense of diminished responsibility. He also waived his right to a jury trial. A bench trial commenced on February 15 and concluded on February 23, 2006.

Brandes testified that when he was eighteen or nineteen, his car hit a train, and after that he began to see psychiatrists and was diagnosed with mental illness. He also testified that his mind races and that for a year he has been hearing voices telling him to hurt himself. At the time of trial, he was not working but was drawing social security disability. He admitted he took Seroquel, but denied giving a pill to the victim. He testified that, on May 26, 2005, he started drinking around 12:30 in the afternoon and had seven to nine beers before he went to McShanney's around 10:00 p.m.

At trial, Dr. Raja Akbar, a psychiatrist who had treated Brandes since 1998, testified that Brandes had been diagnosed with bipolar disorder with psychosis. He testified that for years Brandes had intermittently been paranoid and delusional, and reported hearing voices. Akbar testified that Brandes's "thinking process was sufficiently impaired" that he could not form the intent needed to understand that the victim was being confined against her will or that she was not consenting to participation in sex acts. His opinion was primarily based upon the combination of taking prescription medications and drinking alcoholic beverages, which left Brandes without the capacity to understand the danger of the situation.

The trial court convicted Brandes of first-degree kidnapping and sentenced him to a term of life in prison. The court granted the State's motion to dismiss the charge of going armed with intent.

## II. Merits

Brandes appeals his conviction and sentence for first-degree kidnapping, contending the record contains insufficient evidence to support his conviction, his trial counsel was ineffective, and the trial court erred in refusing to allow him to present evidence which was vital to his theory of defense.

### A. Sufficiency of the Evidence

Brandes contends the record contains insufficient evidence to support his conviction, based upon his incapacity to form the requisite specific intent. We review challenges to the sufficiency of the evidence for correction of errors at law. Iowa R. App. P. 6.4; *State v. Bower*, 725 N.W.2d 435, 440-41 (Iowa 2006). The trial court's findings of guilt are binding on appeal if supported by substantial evidence. *State v. Thomas*, 561 N.W.2d 37, 39 (Iowa 1997).

Substantial evidence is evidence upon which a rational finder of fact could find a defendant guilty beyond a reasonable doubt. We review the facts in the light most favorable to the State. Furthermore, we consider not only evidence which supports the verdict, but all reasonable inferences which could be derived from the evidence.

*State v. Rohm*, 609 N.W.2d 504, 509 (Iowa 2000) (internal citations and quotations omitted). “[T]he State must prove every element of the crime charged beyond a reasonable doubt. The State’s evidence must raise a fair inference of guilt and do more than create speculation, suspicion, or conjecture.” *State v. Williams*, 674 N.W.2d 69, 71 (Iowa 2004) (internal citations and quotations omitted).

A person commits kidnapping when he confines another person, knowing that he “has neither the authority nor the consent of the other to do so” and the

act is accompanied by “[t]he intent to inflict serious injury upon such person, or to subject the person to a sexual abuse.” Iowa Code § 710.1. Brandes relies on the defense of diminished responsibility. Where specific intent is an element of the charged crime, the diminished responsibility defense allows a defendant to present evidence of diminished mental capacity. *State v. Jacobs*, 607 N.W.2d 679, 684 (Iowa 2000). Brandes contends the State failed to meet its burden to prove that he was capable of forming the requisite specific intent to sexually abuse the victim.

The record contains sufficient evidence to support a conclusion that Brandes had the capacity to form the requisite specific intent. The physical evidence supports the non-consensual nature of the victim’s confinement, the forceful nature of the sex acts, and that sexual abuse occurred. Brandes’s actions in holding a knife to the victim’s throat, cutting her shirt from her body, and in forcing her to perform oral sex and forcing her to submit to oral sex demonstrate his specific intent to sexually abuse her. Brandes’s threats to kill her and his warnings to her to not go to the police demonstrate that he had the capacity to form the specific intent to sexually abuse her. See *State v. Wheeler*, 403 N.W.2d 58, 64 (Iowa Ct. App. 1987) (finding substantial evidence of specific intent, despite expert’s testimony that defendant was unable to form such intent, where defendant shot father at close range after hours of deliberation). Additionally, there have been lengthy periods when Brandes’s mental illness has been under control. The evidence supports an inference that he was experiencing one of those periods at the time of the kidnapping.

Dr. Akbar testified that Brandes did not have the capacity to form the requisite specific intent. Iowa appellate courts have held that trial courts are “not obligated to accept opinion evidence, even from experts, as conclusive.” *Jacobs*, 607 N.W.2d at 685. Such holdings, however, typically occur in the context of conflicting testimony between experts. *See, e.g., id; Wheeler*, 403 N.W.2d at 64. It has also been said that “[t]he fact finder is not obliged to accept expert testimony, even if it is uncontradicted, although testimony should not be arbitrarily and capriciously rejected.” *Waddell v. Peet’s Feeds, Inc.*, 266 N.W.2d 29, 32 (Iowa 1978).

We hold that the trial court was free to reject Akbar’s opinion that Brandes lacked the capacity to form the requisite specific intent in spite of the State’s failure to present expert mental health testimony to refute Akbar’s opinion. In other jurisdictions, courts have come to similar conclusions. *See, e.g., Nelson v. State*, 850 So. 2d 514, 530-31 (Fla. 2003) (holding the trial court was entitled to reject uncontroverted opinion testimony of defense mental health expert that defendant suffered from brain damage if court found there was competent, substantial evidence refuting the claim that defendant lacked capacity to appreciate the criminality of his acts); *W.D.B. v. Com.*, \_\_\_ S.W.3d \_\_\_, \_\_\_ (Ky. 2007) (holding defense expert’s testimony, although uncontroverted by another mental health expert, was refuted by other evidence and inconclusive on the issue of defendant’s criminal capacity); *State v. Dickerson*, 543 N.E.2d 1250, 1255 (Ohio 1989) (upholding trial court’s finding that diminished capacity had not been established in spite of expert testimony by psychiatrists that defendant lacked capacity to appreciate the criminality of his conduct).

Important factors which convince us that the trial court was entitled to reject Akbar's opinion include the previously-noted other substantial evidence supporting Brandes's capacity to form the requisite specific intent, e.g., holding a knife to the victim's throat and warning her not go to the police, and Akbar's reliance on incomplete, insufficient, and/or inaccurate information. Akbar relied on Brandes's account of the events and information from Brandes's attorney to form his opinion. He was unaware of many of the facts of the case, including evidence that on the day following the kidnapping, Brandes told Vivien Stenhard about his actions with the victim and that he planned to take another woman back to his apartment at knifepoint. The information relied upon by Akbar to form his opinion was, therefore, incomplete at best. See *Jacobs*, 607 N.W.2d at 685 (affirming the trial court's rejection of diminished responsibility defense where the expert's opinion "was undermined by the fact that the doctor was not fully aware of the extent of the efforts the defendant had taken to conceal his illegal activities"). The trial court was free to reject Akbar's opinion because it was inconsistent with other substantial evidence supporting Brandes's capacity to form the requisite specific intent and was based on incomplete information. We find sufficient evidence supports the conviction and affirm on this issue.

#### **B. Ineffective Assistance**

Brandes next contends that, should this court refuse to consider the issue of the sufficiency of the evidence due to his trial counsel's failure to timely file notice of the affirmative defense of diminished capacity, we should find his trial counsel ineffective in order to reach the issue. Because we have considered Brandes's sufficiency argument, we need not consider this issue. Were we to

consider the issue, however, we would find that, although Brandes's defense counsel failed to file a timely notice of his intent to rely on the defense of diminished responsibility, Brandes was not prejudiced by the failure as he was permitted to present the defense. See *State v. Simmons*, 714 N.W.2d 264, 276 (Iowa 2006) (noting that to establish ineffective assistance, defendant must show both that counsel failed to perform an essential duty and that prejudice resulted); *State v. Tejada*, 677 N.W.2d 744, 754 (Iowa 2004) (noting that, should a defendant fail to prove prejudice, we need not consider whether his trial counsel performed competently).

### **C. Admission of Evidence**

Brandes also contends the trial court erred in granting the State's motion and refusing to allow him to present scientific evidence which was vital to his theory of defense. We review the trial court's evidentiary rulings for an abuse of discretion. *State v. Shortridge*, 589 N.W.2d 76, 81 (Iowa Ct. App. 1998). To the extent Brandes raises constitutional issues, our review is de novo. *State v. Heuser*, 661 N.W.2d 157, 162 (Iowa 2003).

Brandes argues the trial court erred in excluding evidence that sperm was found on a vaginal smear taken during the victim's sexual assault examination. Brandes sought to admit evidence that DNA testing proved the sperm could not have come from Alve or Brandes, and that, because a sperm fragment can survive in the vagina for a maximum of seventy-two hours, the victim's husband could not have been the source of the sperm because he had been incarcerated more than seventy-two hours prior to the examination.

It was Brandes's theory that the source of the sperm was another man with whom the victim had consensual sex, that she had consensual sex with Alve and consented by gesture to Brandes performing oral sex on her, and that she made up the story about being held against her will and raped because she feared her jealous husband would be upset if he knew the truth. Brandes further theorized that the source of her injuries was likely sex with the other man, whose semen remained in her vagina, after her night at Brandes's apartment. The trial court excluded the evidence as inadmissible under the rape shield statute, not relevant to any issue in the case, and not constitutionally required. We agree.

Evidence of the past sexual behavior of a sexual assault victim is generally inadmissible. Iowa R. Evid. 5.412. Rape shield laws like Iowa's "were enacted to (1) protect the privacy of victims, (2) encourage reporting, and (3) prevent time-consuming and distracting inquiry into collateral matters." *State v. Mitchell*, 568 N.W.2d 493, 497 (Iowa 1997); see also *U.S. v. Morris*, 47 M.J. 695, 704 (N-M. Ct. Crim. App. 1997) (noting rape shield laws were "adopted in response to the regular defense practice of eliciting the most intimate details about a rape victim's sexual history"). Pursuant to section 5.412(c)(3), however, if the court determines that the "evidence which the accused seeks to offer is relevant and that the probative value of such evidence outweighs the danger of unfair prejudice, such evidence shall be admissible in the trial."

"Evidence is relevant when it has 'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'" *Mitchell*, 568 N.W.2d at 498 (quoting Iowa R. Evid. 401). Brandes contends the evidence that the victim

had engaged in sexual liaisons was relevant to demonstrate her motive to fabricate her claims she was held against her will and raped, and relevant to show the source of her injuries was another man. We find such inferences to be highly attenuated. There was no demonstrated relationship between a sperm cell in the victim's vagina and her anal injuries. Further, the evidence would have little probative value on who imposed the injuries to the victim, as there was no claim that Alve or Brandes engaged in vaginal sex with her. Further, any probative value of such evidence would be outweighed by the danger of unfair prejudice. See *State v. Gettier*, 438 N.W.2d 1, 4 (Iowa 1989) (finding evidence of victim having sex with another person, and its insinuation that she is a bad person, to be unduly prejudicial); *Morris*, 47 M.J. at 704 ("Other than when certain exceptions apply, there is no purpose for eliciting such evidence other than to impose an additional indignity on the victim.").

We also reject Brandes's claim that he was denied his constitutional right to confrontation and due process due to the trial court's refusal to allow discovery and cross-examination on the subject of the victim's other sexual activity in the days before the sexual assault examination.

Evidence that is irrelevant is not constitutionally required to be admitted. Further, the trial court has a duty to protect a witness from questions which go beyond the bounds of proper cross-examination merely to harass, annoy, or humiliate. Even relevant evidence is not constitutionally required to be admitted if the prejudicial effect outweighs the probative value.

*State v. Clarke*, 343 N.W.2d 158, 161 (Iowa 1984) (internal citations omitted).

### **III. Conclusion**

Because the trial court was free to reject Akbar's opinion and because there was other compelling evidence to support a conclusion that Brandes had the capacity to form the requisite specific intent, we find sufficient evidence supports Brandes's conviction. Upon our de novo review, we find Brandes's constitutional rights were not impinged upon by the trial court's exclusion of victim's prior sexual activity, and the trial court did not abuse its discretion in excluding the evidence as inadmissible under the rape shield statute and not relevant to any issue in the case.

**AFFIRMED.**