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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 2-332 / 91-983

STATE OF IOWA,

Appellee,

vs.

BOBBY JOE JEFFERSON,

Appellant.

Appeal from the Iowa District Court for Des Moines County, D. B. Hendrickson, Judge.

Bobby Joe Jefferson appeals his conviction, following a jury trial, of third-degree sexual abuse. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Shari Barron, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Bruce Kempkes, Assistant Attorney General, Patrick C. Jackson, County Attorney, and John Jellineck, Assistant County Attorney, for appellee.

Considered by Oxberger, C.J., and Schlegel and Hayden, JJ.

SCHLEGEL, J.

The defendant, Bobby Joe Jefferson, appeals his conviction, following a jury trial, of third-degree sexual abuse in violation of Iowa Code section 709.4 (1991). He contends the district court erred in refusing to submit a spoliation jury instruction and in denying Jefferson's motion for judgment of acquittal based upon the alleged insufficiency of the evidence.

In January 1991 the State filed a trial information charging Jefferson with kidnapping in the first degree pursuant to Iowa Code section 710.2 (1991) and possession of a controlled substance pursuant to Iowa Code section 204.410(3) (1991). The jury trial on these charges commenced in April 1991, and the jury found Jefferson guilty of sexual abuse in the third degree. The district court entered judgment and sentenced Jefferson to serve a term of imprisonment not to exceed ten years.

On January 22, 1991, the victim, Pam, had planned to go out for dinner with her boyfriend, Vince Allen, to celebrate Pam's birthday. However, Vince had been placed in jail and was unable to attend. Instead, Pam met her sister and several friends in a bar named Flower's Place in Burlington, Iowa, at approximately ten o'clock in the evening. At some point during the evening the defendant, Jefferson, joined the group. Pam had met Jefferson two weeks earlier at Flowers, and Jefferson and another man had come to her house to purchase drugs. However, when the two

men returned home later in the evening, they realized they had purchased baking soda instead of drugs.

While inside Flowers on January 22, Pam drank four or five shots of schnapps and several beers. After Flowers closed at approximately 1:45 a.m., the group traveled to an Illinois strip bar called the Wayside. During the trip to the Wayside both Jefferson and Pam smoked marijuana and, according to certain testimony, methamphetamine as well. The group members stayed at the Wayside until closing at 5 a.m. Several witnesses at the trial testified Jefferson and Pam appeared to be together in the Wayside that evening. One witness even stated she saw Pam kiss Jefferson on the cheek and saw Pam put her arm around Jefferson's neck.

Jefferson drove the group back to Burlington where he dropped off all the group members except Pam, who he took to his mother's house where he was living. The testimony concerning the events which followed conflicts. According to Pam, she woke up, thanked Jefferson, and told him she would see him later. She contends Jefferson then informed her she was not leaving. She claims Jefferson told her she had "set him up" in the drug deal the night they had met, and he said she was "going to pay [him] back."

Pam asserts she then opened the car door, ran into the nearest house, ran upstairs and proceeded into one of the bedrooms. Jefferson followed her, dragged her out of the house, put her in the car, and drove her to Hunt Woods where he forced her to engage in sexual intercourse.

Jefferson claims he and Pam went into his mother's house when they arrived, and the two drank more beer and did more drugs. He claims while he and Pam were walking out to the car, she began screaming and suddenly ran into the wrong house. He followed her to see what was wrong with her, and he helped her out of the house. He contends the two then went back to the car where Pam began to cry. He asked Pam to come with him, and she gave him directions to a park where the two "parked." Jefferson testified the two had consensual sexual intercourse. He claims afterward Pam reached for her cigarettes and discovered her purse was missing.

Pam lost her purse while inside the house. The testimony is not in conflict regarding the purse. The occupants of the house in which Pam lost the purse gave the purse to the police. The purse contained three pills which apparently resembled "white cross," an amphetamine. When the police later came to Pam's house and took her to the hospital, Pam initially lied to the police about the pills. She told them the pills were for asthma, and she later told the police they were diet pills.

Jefferson's theory of defense was Pam lied about the rape to keep her boyfriend, Vince, from knowing she had consensual sexual intercourse with Jefferson. Jefferson contends Pam was afraid Vince would harm her if he discovered she had been with Jefferson. Evidence was admitted indicating Vince had beaten her in the past.

Jefferson contends Pam knew she could not keep her whereabouts on the evening of the alleged rape a secret after she realized the police had her purse which contained a controlled substance. As a result, Jefferson argues, Pam created the story concerning the rape to avoid physical abuse by Vince.

Officer Daniel Luttenegger checked the pills out of the police evidence locker and destroyed them. He testified he was aware the pills were suspected to be a controlled substance. Luttenegger stated he went to the evidence locker to remove the pills and to flush them down the toilet. He also testified he destroyed his interview notes concerning this case as well.

Jefferson requested a spoliation jury instruction due to Luttenegger's destruction of the pills. The district court refused to give the instruction. Jefferson contends the court erred in refusing to give a spoliation instruction because the instruction would have supported his theory that Pam fabricated the rape accusation. Jefferson further contends the State failed to present sufficient evidence he was guilty of third-degree sexual abuse.

First, Jefferson assigns as error the trial court's refusal to give a so-called "spoliation" instruction, a direction to the jury it could infer from the State's failure to preserve the pills that the evidence would have been adverse to the State. Our review is for abuse of

discretion. "We leave largely in the discretion of the trial court the determination whether a jury should be instructed concerning inferences it may draw from missing evidence." State v. Vincik, 398 N.W.2d 788, 795 (Iowa 1987); see State v. Langlet, 283 N.W.2d 330, 335 (Iowa 1979). In order to show an abuse of discretion, one generally must show the court exercised its discretion "on grounds or for reasons clearly untenable or to an extent clearly unreasonable." State v. Blackwell, 238 N.W.2d 131, 138 (Iowa 1976) (quoting Weeks v. Burnor, 132 Vt. 603, 606, 326 A.2d 138, 140 (1974)).

An inference that destroyed evidence was unfavorable to the party responsible for its spoliation should be submitted to the jury only where substantial evidence exists to support findings that such evidence had been in existence, in possession of or under control of the party, that it would have been admissible at trial, and that the party responsible for its destruction did so intentionally. Langlet, 283 N.W.2d at 335. In the present case, the trial court should have given the spoliation jury instruction. The fact that Officer David Luttenegger, a police officer and detective with ten years' experience, checked Pam's pills out of the police evidence locker and flushed them down the toilet when he knew the pills had been logged into evidence as suspected narcotics is unconscionable.

However, we cannot say the destroyed pills were material evidence to Jefferson's defense. The crux of Jefferson's defense is Pam lied about the rape allegations for two reasons: (1) Pam was afraid she would get into trouble concerning the drugs; and (2) Pam was afraid Vince would ultimately discover she had been with Jefferson and would physically abuse her. We find no connection whatsoever between the destroyed pills and this theory of defense. First of all, Pam later admitted to the police the pills were illegal drugs, and the jury heard this evidence.

Secondly, the jury heard evidence Pam and Jefferson had been seen together by three of Vince's friends sometime around daybreak on the morning of the alleged rape. The admission of these pills into evidence could not have affected the undisputed evidence indicating several persons had seen Pam and Jefferson together in two bars over the course of several hours late at night, nor could such evidence affect the testimony indicating three of Vince's friends saw Pam and Jefferson alone in her car early in the morning.

We find Jefferson's contention that the pills would have assisted in establishing Pam's fabrication of the rape charge unpersuasive. Demonstrating to the jury that the pills were controlled substances would add nothing new to the alleged fear-of-boyfriend motive underlying the victim's rape allegations. Consequently, the trial court's

refusal to administer the spoliation instruction to the jury was without prejudice.

Next, Jefferson contends the court erred in denying his motion for acquittal based upon insufficiency of evidence. Jefferson claims the State failed to prove beyond a reasonable doubt he committed third-degree sexual abuse. The basis for his motion is Pam's alleged motive to fabricate the rape allegations, her myriad of lies and inconsistencies in her own testimony, and the inconsistencies between her testimony and the testimony of other witnesses. The jury heard this evidence as well as Jefferson's arguments construing this evidence. The jury rejected the defendant's theory of defense. As the court in State v. Blair, 347 N.W.2d 416, 420 (Iowa 1984) noted:

> [T]he jury is at liberty to believe or disbelieve the testimony of witnesses as it chooses, and give such weight to the evidence as in its judgment the evidence was entitled to receive. The very function of the jury is to sort out the evidence presented and place credibility where it belongs. [Citations omitted.]

To convict the defendant, the State must prove sufficient evidence so a rational trier of fact can find, beyond a reasonable doubt, the defendant committed each and every element of the offense. Jackson v. Virginia, 443 U.S. 307, 317-19, 99 S. Ct. 2781, 2788-89, 61 L. Ed. 2d 560, 572-73 (1979). In applying this standard, the court considers the evidence in the light most favorable to the State, considering all the evidence presented at trial. State v. Robinson, 288 N.W.2d 337, 340 (Iowa 1980). The

evidence presented "must raise a fair inference of guilt and do more than create a speculation, suspicion, or conjecture." State v. Hamilton, 309 N.W.2d 471, 479 (Iowa 1981).

Having thoroughly reviewed this record, we conclude sufficient evidence exists to support the jury's verdict finding Jefferson guilty of third-degree sexual abuse. We hold the trial court did not err in denying Jefferson's motion for a judgment of acquittal.

AFFIRMED.