FILED
AUG 2 3 1989
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 9-264 / 88-574

STATE OF IOWA,

Appellee,

vs.

JOHN FITZGERALD SYKES,

Appellant.

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Appeal from the Iowa District Court for Black Hawk County, James L. Beeghly, Judge.

Defendant appeals his conviction, following, a jury trial, on two counts of second-degree sexual abuse. **AFFIRMED.**

William L. Wegman, State Public Defender, and Shari Barron, Assistant State Public Defender, for appellant.

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

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

HAYDEN, J.

The defendant, John Fitzgerald Sykes, appeals his conviction resulting from a jury trial, of two counts of second degree sexual abuse. Defendant asserts the trial court erred in denying his motion, made pursuant to Iowa Code section 810.2, to compel a rape victim's boyfriend to provide a saliva sample for analysis. We affirm.

On the evening of June 3, 1986, the victim struck up a conversation with three men parked in a convenience store parking lot: Orlando Proctor, Richard Harris, and the defendant. A few minutes later she agreed to go for a ride and got into the car. After driving around awhile, they stopped at a park and drank some beer. The victim was then dragged from the car and raped by all three men. She testified the defendant and Proctor each raped her twice. She dressed and began walking when she was picked up by a woman who drove her to the police station where she told the police she was forced into a car and raped. She was taken to a hospital, examined, and had specimens taken.

The victim was less than forthcoming with the police. Although she recognized a photograph of the defendant when looking at a photo array at the police station, she denied it. In August she admitted to the police she knew the names of two of the three assailants. In December she told the police she had not been kidnapped, but had voluntarily gotten into the car. She explained she didn't tell them

the truth initially because she was afraid they wouldn't help her and her family would discover she had a black boyfriend.

In February 1987, the defendant and Harris were charged with sexual abuse in the second degree. The charges against Proctor were dropped in exchange for his testimony against the defendant. Harris agreed to testify in return for a guilty plea of assault with intent to commit sexual abuse. The defendant presented the defense of alibi, maintaining he was with his girlfriend the night of the rape.

During the trial, the victim, as well as Harris and Proctor, identified the defendant as the one who dragged her from the car and raped her twice.

Blood and saliva samples were taken from the victim as well as defendant, Proctor and Harris. An ABO test, a secretor test, and a PGM test were performed. The results were compared with semen found on the victim's jeans. The State's expert witness concluded the defendant was the only one of the three men who could have provided the seminal fluid found on the victim's clothing. Additionally, only 4.7 percent of the black population could have been donors of seminal fluid with the specific characteristics identified in the defendant's semen and found on the jeans. The jury found defendant guilty of two counts of sexual abuse in the second degree and he was sentenced to a term of imprisonment not to exceed twenty-five years.

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The defendant appeals the trial court's ruling denying his pretrial motion to compel the victim's boyfriend to provide a saliva sample. He asserts that Iowa Code section 810.2 entitles a defendant to a nontestimonial identification order on request provided he show the evidence will be of material aid in determining whether the defendant committed the offense.

The defendant maintains the saliva sample might be exculpatory if the characteristics of this sample match those found in the semen on the victim's jeans. This, according to defendant, could show a greater probability that the seminal fluid was from the boyfriend rather than the defendant.

Our review is for the correction of errors at law. Iowa R. App. P. 4. When the issue on appeal is denial by the trial court of defendant's request for nontestimonial identification procedures under Iowa Code section 810, the standard of review is abuse of discretion. State v. Anderson, 308 N.W.2d 42, 48 (Iowa 1981).

Iowa Code section 810 was taken from the 1971 proposed additions to the Federal Rules of Criminal Procedure. 4 J. Yeager and R. Carlson, Iowa Practice: Criminal Law and Procedure § 921 (1979). Section 810.2 provides a mechanism by which a person arrested or charged with an offense may request an order from the district court judge for nontestimonial identification procedures. The statute

allows this request if the procedure will be of material aid in determining whether the defendant committed the offense.

The trial court's discretion is guided by this material aid standard. State v. Anderson, 308 N.W.2d at 48. In Anderson, the supreme court upheld the trial court's denial of defendant's request for a pretrial lineup. Id. In applying the material aid standard, the court can properly consider the adequacy of other evidence offered for identification. Id.

> The trial court could have reasonably concluded that, in light of the blood tests and the positive identification of Anderson by the victim shortly after the crime, a lineup seven months later would not materially aid in determining if he committed the offense.

Id.

The trial court in this case did not abuse its discretion in denying defendant's request for a saliva sample from the victim's boyfriend. Defendant's motion merely stated a saliva sample could show there was a greater probability the seminal fluid on the alleged victim's clothing came from the boyfriend rather than the defendant. The defendant does not explain, however, how a greater probability would be established even if the boyfriend might have been the donor of the seminal fluid on the victim's jeans. No one is accusing the boyfriend of the crime. A hospital medical report written immediately after the rape notes the victim hadn't had intercourse for

three weeks prior to the rape. The defendant offered no evidence to show the seminal fluid on the jeans could be that of the boyfriend. The defendant didn't offer any evidence to show the victim and her boyfriend engaged in sexual intercourse.

The victim and the two other men who participated in the crime have identified the defendant as being present and participating in the rape. Expert testimony at trial identified the defendant as the only one of the three assailants who could have been the donor of the semen. Defendant alleges he was not present when the rape occurred. He asserts a saliva sample from the boyfriend which might show the boyfriend could have been the donor of the semen sample on the jeans is of material aid in determining whether he committed the offense. We disagree. Before the boyfriend of a rape victim, who has not been accused of the crime, is required to provide a saliva sample at the defendant's request, a much greater showing of material aid must be made.

AFFIRMED.