FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 9-600 / 89-279

STATE OF IOWA,

Appellee,

380

vs.

TONY NEAL KERSHNER,

Appellant.

Appeal from the Iowa District Court for Johnson County, John R. Sladek, Associate Judge.

Defendant appeals from his convictions, by a jury, for indecent exposure and assault with intent to commit sexual abuse. **AFFIRMED.**

Clemens Erdahl, Iowa City, for appellant.

Thomas J. Miller, Attorney General; Sheryl A. Soich, Assistant Attorney General; and J. Patrick White, Johnson County Attorney; for appellee.

Considered by Schlegel, P.J., and Hayden and Habhab, JJ.

PER CURIAM

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Defendant was charged with indecent exposure and assault with intent to commit sexual abuse. The jury found him guilty of these crimes.

Defendant's first claim on appeal is the trial court improperly admitted evidence of semen-stained clothing. The record discloses, at the time these articles of clothing were offered into evidence, no objection was made by defendant's attorney at trial. We affirm on this issue because no issue is preserved for appeal. State v. McKee, 312 N.W.2d 907, 912 (Iowa 1981). We cannot review an issue unless it was raised in the trial court. State v. Holbrook, 261 N.W.2d 480, 482 (Iowa 1978).

Next defendant claims his United States constitutional fifth and fourteenth amendment rights were violated because of insufficient evidence to convict him. Confronted with alleged constitutional violations, we resolve the issue by making our own independent evaluation of the totality of the circumstances. Our review is de novo. State v. Hilleshiem, 29 N.W.2d 314, 316 (Iowa 1980).

In this area defendant claims: (1) the victim never directly identified him; (2) the State presented no D.N.A. analysis of the semen stains; and (3) some of the victim's statements were inconsistent.

We review some of the salient facts. Defendant, Tony Kershner, met Angelo Cremer at a party at the Iowa Land

Lodge in Coralville, Iowa, on the evening of September 1, 1988. They talked and drank beer for about thirty minutes. They went cruising around the Iowa City area. While doing so they stopped several times to buy cigarettes, go to the restroom, buy a six-pack of beer, and pick up job application forms.

At some time near 11:30 that night Ms. Cremer asked defendant to take her back to the Iowa Land Lodge. Defendant testified Ms. Cremer appeared anxious and she was worried about not being there to meet her boyfriend. Defendant testified he turned the car around on a gravel road and returned to the motel.

In her version of the incident, Ms. Cremer alleged defendant pulled onto a gravel road and pulled the car onto the shoulder of the road and attempted to kiss her and fondle her breasts. She claims to have resisted these advances, but defendant exited the car, opened the passenger door, and began to masturbate over her, while pinning her to the seat of the car. Ms. Cremer then made contradictory statements as to her actions while returning to the Iowa Land Lodge. In a statement to Officer Lalla she claimed to have tried to rip her semen-soaked shirt off after the assault while still in the car, but she could not tear through her collar. She then took her shirt off, but put it back on because she didn't want to be out in the middle of nowhere without a shirt on. Ms. Cremer later

testified she only removed her shirt after having returned to the motel.

After returning to the Iowa Land Lodge from cruising with Ms. Cremer, defendant returned to his room and went to sleep. He was later awakened by friends of Ms. Cremer who threatened and accused him of raping Ms. Cremer. Next, the police came to defendant's apartment. They instructed him to get dressed and accompany them to the police station. At this time they also took a shirt and pair of shorts from off the foot of defendant's bed. He was then taken to the police station where he was placed under arrest several hours later.

I. Defendant claims the victim, Ms. Cremer, never directly identified him at a lineup or at trial.

Officer Henderson testified Ms. Cremer knew her assailant by first name. She identified him as Tony. She described him and identified his car as being the one they were in during the assault. Henderson also testified they received teletype information the vehicle which was registered to a Tony Kershner. They went to his room where management told them where he was and woke him up. Defendant testified at trial he was with Ms. Cremer the night of September 1, 1988. Also, he drank with her and went driving with her.

Identity is a fact question for the jury. We hold the jury was presented with sufficient evidence from which it

could determine defendant committed the offenses in question.

II. Defendant claims the State's evidence is insufficient because no D.N.A. analysis was made or presented at trial.

The clothing found on the floor at the foot of defendant's bed matched the description given by Ms. Cremer. Semen was found on this clothing. This is circumstantial evidence. It is sufficient to support the jury's verdict, coupled with other evidence presented in this case. The State is not required to provide a D.N.A. analysis of the seminal fluid stains.

III. Defendant's third sufficiency complaint is some of Ms. Cremer's statements were inconsistent.

The factfinder's function is to sort the evidence presented and to place credibility where it belongs. State v. Blair, 347 N.W.2d 416, 420 (Iowa 1984); State v. Lampman, 342 N.W.2d 77, 81 (Iowa App. 1983). The jury is at liberty to believe part of a witness's testimony and disbelieve another part. State v. Metcalf, 260 N.W.2d 857, 860 (Iowa 1977). Here it was for the jury to sort through the evidence and to decide where to place emphasis and credibility and where to withhold it. The jury performed its function.

In State v. Wheeler, 403 N.W.2d 58, 60 (Iowa App. 1987), this court recently summarized the standards governing sufficiency of evidence challenges:

> We will uphold a verdict where there is substantial evidence in the record tending to support the charge. State v. Aldape, 307 N.W.2d 32, 39 (Iowa 1981).
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> When reviewing a challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the state, including legitimate inferences and presumptions which may fairly and reasonably be deduced from the evidence in the record. State v. Hall, 371 N.W.2d 187, 188 (Iowa App. 1985); State v. Bass, 349 N.W.2d 498, 500 (Iowa 1984). Direct and circumstantial evidence are equally probative so long as the evidence raises "a fair inference of guilt and [does] more than create speculation, suspicion, or conjecture.["] State v. Hamilton, 309 N.W.2d 471, 479 (Iowa 1981). It is necessary to consider all the evidence in the record and not just the evidence supporting the verdict to determine whether there is substantial evidence to support the charge. Hall, 371 N.W.2d at 188; Bass, 349 N.W.2d at 500. Substantial evidence means evidence which would convince a rational factfinder that the defendant is guilty beyond a reasonable doubt. Hall, 371 N.W.2d at 188; State v. LeGear, 346 N.W.2d 21, 23 (Iowa 1984).

We affirm on the sufficiency of evidence issue.

We do not consider defendant's claim of ineffective assistance of counsel in this appeal. This claim is preserved unto the defendant to pursue at a later time. Trial counsel is entitled to an opportunity to explain trial decisions and a complete record may be provided for a reviewing court. State v. Coil, 264 N.W.2d 293, 296 (Iowa 1976).

AFFIRMED.