FILED
AUG 17 1995
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 5-253 / 93-1660

STATE OF IOWA,

Appellee,

vs.

RICKY EARL WAGNER,

Appellant.

Appeal from the Iowa District Court for Guthrie County, Peter Keller, Judge.

Defendant appeals his convictions of first-degree kidnapping, first-degree sexual abuse, and first-degree murder. **AFFIRMED IN PART AND VACATED IN PART.**

Linda Del Gallo, State Appellate Defender, and Sharon Ruth Stevens, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber and Thomas H. Miller, Assistant Attorneys General, and David S. Bruner, County Attorney, for appellee.

Heard by Hayden, P.J., Cady, J., and Schlegel, S.J.*

*Senior Judge from the Iowa Court of Appeals serving by order of the Iowa Supreme Court.

HAYDEN, P.J.

Ricky Wagner was arrested and charged with the kidnapping, rape, and murder of his three-year-old great-niece, Nicole Daggett. Upon his arrest, police confiscated defendant's underwear for analysis of a red spot believed to be blood.

At trial, evidence was presented hair and blood found in defendant's car was consistent with Nicole's. Also, blood found on underwear allegedly taken from defendant and submitted to the department of criminal investigations (DCI) was consistent with Nicole's blood. Semen taken from Nicole's vagina had characteristics similar to defendant's. Defendant challenged the chain of custody of the underwear, contending they were obviously not his because they were too big and were not the brand he buys. Defendant also testified he loaned his car to Jimmy Daggett the night Nicole disappeared.

In closing arguments the prosecutor made the following statement:

> And ladies and gentlemen, when his testimony proves his own guilt to you, you're entitled to use that as evidence as well. And that's what it does in this case. Because yesterday Ricky Wagner took that witness stand and told a totally new story, came up with a completely different scenario than what he told over and over and over again on the day of this murder, rape, and kidnapping, he told a story in which now for the first time he claims Jimmy Daggett --

At this point, defendant objected and moved for a mistrial contending the prosecutor had impermissibly commented "on his silence after arrest until his testimony at this trial that he never told this story before." The motion was overruled.

Defendant was found guilty of first-degree kidnapping, first-degree sexual abuse, and first-degree murder. The trial court entered judgment on all charges and sentenced defendant to three concurrent life terms of imprisonment.

Defendant appeals, contending (1) the underwear was admitted into evidence without a proper chain of custody; (2) the prosecutor impermissibly commented in closing argument about his silence; (3) his trial counsel were ineffective in failing to properly object to and make a proper record of an issue of jury misconduct; and (4) the first-degree sexual abuse conviction must be set aside on double jeopardy grounds.

I. Chain of Custody.

State's Exhibit 30 is a pair of men's underwear. According to the State's evidence, they were taken from defendant when he was booked into Guthrie County Jail. A DCI agent found the front of the underwear was stained with blood consistent with that of three percent of the Caucasian population including Nicole Daggett. The DCI tests further showed the blood stain was not consistent with the blood of Sheila Daggett, Jimmy Daggett, Ricky Wagner, or Judy Wagner. Defendant argues the State failed to establish a chain of custody showing the underwear tested by DCI were the same underwear taken from him when he was booked. Accordingly, defendant argues the trial court should not have admitted into evidence either the underwear or the results of the tests. Whether the prosecution has established a proper chain of custody is a matter committed to the sound discretion of the trial court. *State v. Lamp*, 322 N.W.2d

48, 57 (Iowa 1982). Reversal is warranted only where there has been a clear abuse of discretion. *Id.* (citation omitted).

As a foundational prerequisite to the admissibility of physical evidence, the prosecution is required to show a sufficient custody to establish the article has not been altered between the time it was obtained and the time it is introduced at trial. *State v. Langlet*, 283 N.W.2d 330, 336 (Iowa 1979). The showing required is that it is reasonably probable tampering, substitution, or alteration did not occur. *State v. Gibb*, 303 N.W.2d 673, 681 (Iowa 1981) (citation omitted). The sufficiency of the showing is dependent on the susceptibility of the article to alteration or substitution. *See State v. Bakker*, 262 N.W.2d 538, 543 (Iowa 1978). The State's burden is heavier when the exhibit offered is an item which is very susceptible to tampering, such as drugs. *State v. Mehner*, 480 N.W.2d 872, 877 (Iowa 1992) (citation omitted). Conversely, however, where the exhibits consist of solid objects which are not easily susceptible to undetected alteration, a less elaborate foundation is required. *State v. Houston*, 439 N.W.2d 173, 179 (Iowa 1989). Clothing -- such as the underwear at issue in this case -- falls within the class of "solid objects" for which a less elaborate foundation is required. *See State v. Hutchison*, 341 N.W.2d 33, 37 (Iowa 1983) (gloves are a "solid object"); *Lamp*, 322 N.W.2d at 59 ("Since blood stained clothing is less susceptible to alteration than blood samples, a less elaborate foundation is required for admission.") (citations omitted); *State v. Moses*, 320 N.W.2d 581, 585 (Iowa 1982) (clothing is "solid property not easily tampered with")

We have carefully reviewed the record. We determine the State has shown a sufficient chain of custody here. The State has provided testimony showing defendant's underwear were in official custody, and not in contact with any unauthorized persons, from the moment Officer Rodney Robson and Deputy Mark Behr took them from defendant to the moment DCI agent Doug Alrick took them to the DCI lab and subjected them to tests. We can presume none of the officers would tamper with the evidence. *Mehner*, 480 N.W.2d at 877 (citation omitted).

Defendant testified the underwear were not his, because they were not his size or brand. Defendant's speculation as to substitution or tampering goes only to the weight of the evidence, not the admissibility. *Houston*, 439 N.W.2d at 179 (citation omitted). The jury is free to believe or disbelieve the testimony of witnesses as it chooses. *State v. Hawkins*, 519 N.W.2d 103, 104 (Iowa App. 1994) (citations omitted).

The chain of custody evidence provided an adequate foundation for admission of the underwear. Under this record, we cannot say the trial court clearly abused its discretion. We affirm on this issue.

II. Closing Argument.

Defendant claims the trial court erred in overruling his motion for a mistrial. The motion claimed the prosecutor violated defendant's constitutional right to due process by commenting in his closing argument on defendant's post-*Miranda* invocation of his right to remain silent. As defendant raises a constitutional claim, our review is de novo with respect to factual as well as legal determinations. *State* v.

Spencer, 519 N.W.2d 357, 359 (Iowa 1994) (citation omitted), *cert. denied*, 115 S. Ct. 642 (1994).

Miranda warnings contain an implicit assurance a defendant will not be penalized for maintaining silence after receipt of such warnings. *Doyle v. Ohio*, 426 U.S. 610, 618, 96 S. Ct. 2240, 2245, 49 L. Ed. 2d 91, 98 (1976). Consequently, "'it does not comport with due process to permit the prosecution during the trial to call attention to [defendant's] silence at the time of [receipt of warnings] and to insist that because he did not speak about the facts of the case at that time, as he was told he need not do, an unfavorable inference might be drawn as to the truth of his trial testimony.'" *Id.* at 619, 96 S. Ct. at 2245, 49 L. Ed. 2d at 98 (quoting *United States v. Hale*, 422 U.S. 171, 182-3, 95 S. Ct. 2133, 2139, 45 L. Ed. 2d 99, 108 (1975) (White, J., concurring)).

However, courts distinguish between calling attention to a defendant's silence after receipt of *Miranda* warnings, and calling attention to the fact after receipt of *Miranda* warnings the defendant did not remain silent but made a statement which is inconsistent with defendant's testimony at trial. The United States Supreme Court has stated:

> *Doyle* bars the use against a criminal defendant of silence maintained after receipt of governmental assurances. But *Doyle* does not apply to cross-examination that merely inquires into prior inconsistent statements. Such questioning makes no unfair use of silence because a defendant who voluntarily speaks after receiving *Miranda* warnings has not been induced to remain silent. As to the subject matter of his statements, the defendant has not remained silent at all.

Anderson v. Charles, 447 U.S. 404, 408, 100 S. Ct. 2180, 2182, 65 L. Ed. 2d 222, 226 (1980) (per curiam) (citations omitted). Following this reasoning, courts hold that it is proper for the prosecutor to cross-examine the defendant concerning an inconsistency between his post-*Miranda* statements and his trial testimony. *United States v. Perry*, 857 F.2d 1346, 1353 (9th Cir. 1988) (citation omitted); *United States v. Schultz*, 698 F.2d 365, 367 (8th Cir. 1983); *accord State v. Bass*, 349 N.W.2d 498, 503 (Iowa 1984). Similarly, in cases directly on point with the present case, courts hold that it is proper for the prosecutor to comment in closing argument on such an inconsistency. *Depree v. Thomas*, 946 F.2d 784, 792-93 (11th Cir. 1991); *United States v. DeVore*, 839 F.2d 1330, 1331-32 (8th Cir. 1988).

In closing arguments the prosecutor made the following statement:

> And ladies and gentlemen, when his testimony proves his own guilt to you, you're entitled to use that as evidence as well. And that's what it does in this case. Because yesterday Ricky Wagner took that witness stand and told a totally new story, came up with a completely different scenario than what he told over and over and over again on the day of this murder, rape and kidnapping, he told a story in which now for the first time he claims Jimmy Daggett --

The prosecutor's argument was focused on defendant's inconsistent trial testimony. Although defendant made numerous statements to several witnesses after the victim disappeared, defendant did not tell those witnesses the story he told at trial. At trial, defendant claimed after returning to the Daggett house about 11 p.m. on the night of the crime, he loaned his car to Jimmy Daggett and went to sleep in his trailer.

only to be awakened some time later by Jimmy Daggett, who had blood on his fingers.

To the extent the prosecutor based his argument on the inconsistency between testimony defendant gave at trial, and statements defendant made to several witnesses early in the morning of August 20, the prosecutor's argument was permissible. This part of the prosecutor's argument cannot be used to support a *Doyle* claim because defendant had not received *Miranda* warnings at the time he made statements to those witnesses. "[A] prerequisite for a *Doyle* violation is some type of implicit assurance from the government that silence will not be used against [the defendant]." *Grancorvitz v. Franklin*, 890 F.2d 34, 41 (7th Cir. 1989) (citation omitted), *cert. denied*, 495 U.S. 959 (1990).

Further, to the extent the prosecutor based his argument on statements made to police after receiving *Miranda* warnings, the prosecutor's argument was still permissible. The prosecutor pointed out the inconsistencies between what defendant said after receipt of *Miranda* and what defendant said at trial. *Anderson*, 447 U.S. at 408, 100 S. Ct. at 2182, 65 L. Ed. 2d at 226; *Bass*, 349 N.W.2d at 503.

Although we hold no *Doyle* violation occurred, we do not necessarily approve of the prosecutor's conduct during closing argument. Despite our concerns about the prosecutor's actions, we hold there was no *Doyle* violation. We also affirm on this issue.

III. Ineffective Assistance of Counsel.

Defendant argues he was denied effective assistance of counsel by his attorney's handling of an alleged incident of jury misconduct. Defendant and the State agree the present record is not sufficient to permit us to decide his claim.

Where the record on direct appeal is not adequate to permit us to resolve the issue, we preserve the defendant's claim for postconviction proceedings so the facts may be so developed. *State v. Koenighain*, 356 N.W.2d 237, 238 (Iowa App. 1984). This also gives the allegedly-ineffective attorney the opportunity to explain his or her conduct. *State v. Coil*, 264 N.W.2d 293, 296 (Iowa 1978). We agree with both parties there is an inadequate record for us to adjudicate defendant's claim without counsel's explanation for his/her conduct. We therefore preserve defendant's ineffective assistance of counsel claim for a later proceeding.

IV. Double Jeopardy Issue.

The Double Jeopardy Clause of the United States Constitution provides no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V. Among other protections, the Double Jeopardy Clause prohibits multiple punishment for the same offense. *See State v. McKettrick*, 480 N.W.2d 52, 56 (Iowa 1992) (citation omitted). This protection is enforceable against the states through the Fourteenth Amendment to the United States Constitution. *Id.* (citation omitted).

Additionally, pursuant to the Iowa Code, a criminal defendant may not be sentenced on both a greater and lesser included offense:

> No person shall be convicted of a public offense which is necessarily included in another public offense of which the person is convicted. If the jury returns a verdict of guilty of more than one offense and such verdict conflicts with this section, the court shall enter judgment of guilty of the greater of the offenses only.

Iowa Code § 701.9 (1993).

Defendant argues pursuant to both double jeopardy principles and statutory requirements, the trial court erred in entering judgment on both first-degree kidnapping and first-degree sexual abuse. The State agrees. Because defendant's constitutional rights are implicated, our review is de novo. *Spencer*, 519 N.W.2d at 359 (citation omitted).

A review of Iowa precedent demonstrates both parties are correct. Our supreme court has held that second-degree sexual abuse is a lesser-included offense of first-degree kidnapping. *State v. Mitchell*, 450 N.W.2d 828, 831 (Iowa 1990). Specifically, our supreme court stated:

> We hold that the reference in the kidnapping statute to sexual abuse embraces all the various degrees of sexual abuse identified in chapter 709, including the crime of second-degree sexual abuse for which [defendant] has been convicted here.

Id.

Given our supreme court's explicit command, the trial court was required to merge the kidnapping and sexual abuse convictions. Accordingly, both the State and defendant are correct the trial court erred in entering judgment on sexual abuse in the

first-degree. We must vacate defendant's conviction and sentence on the charge of first-degree sexual abuse. On all other issues we affirm.

AFFIRMED IN PART AND VACATED IN PART.