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ATTORNEY FOR APPELLANT:

ATTORNEYS FOR APPELLEE:

JOHN PINNOW
Greenwood, Indiana

GREGORY F. ZOELLER
Attorney General of Indiana

IAN MCLEAN
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

DAVID CASSIDY,)

Appellant-Defendant,)

vs.)

No. 49A02-0808-CR-751

STATE OF INDIANA,)

Appellee-Plaintiff.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Grant Hawkins, Judge
Cause No. 49G05-0803-FA-59287

March 20, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

David Cassidy appeals his convictions for Class A felony rape and criminal deviate conduct. We affirm.

Issue

Cassidy raises one issue, which is whether the trial court abused its discretion by refusing to give his tendered jury instruction regarding missing or lost evidence.

Facts

On September 7, 1994, sixteen-year-old J.C. was at an intersection when she noticed a man, Cassidy, waving at and walking toward her car. J.C. ignored him, but he opened the unlocked passenger door and got in as she waited at a stop sign. Cassidy held up a knife and told J.C. he wanted a ride to his boss's house.

Cassidy ordered J.C. to drive to the parking lot of a nearby apartment complex. Once there, he forced her to the passenger seat and he took the driver's seat. He held the knife to her throat and ordered her to take off her clothes. Cassidy raped and sodomized J.C. She continued to scream and attempted to fight him off during the attack. When he was finished, Cassidy told her "I'm a Christian, I'm sorry. Go to the hospital, tell them you've been raped, and go get checked out." Tr. p. 64.

J.C. drove to her boyfriend's house, he called her parents, and they called police. An emergency room physician performed an examination and confirmed redness and swelling consistent with forced vaginal and anal penetration. The physician took swabs

of those areas, internally and externally. J.C. gave verbal and written statements to Detective Carmita Godan of the Marion County Sheriff's Department ("MCSD").

DNA samples were analyzed and coded into a multi-departmental database. In 2002, Cassidy's DNA was entered into the database and matched the samples taken from J.C.'s clothing and body. In February of 2007, Detective Randall Taylor of the Indianapolis Metropolitan Police Department ("IMPD") was made aware of the DNA match and re-opened the investigation.¹ By this time, J.C. was twenty-nine years old and living out of state. Detective Taylor prepared a photo array, and J.C. identified Cassidy as her rapist. Cassidy's fingerprints were also matched to those found on the passenger side door of the car where J.C. was raped.

On March 13, 2008, the State charged Cassidy with Class A felony rape and Class A felony criminal deviate conduct. A two-day jury trial was held in 2008. Testimony during trial revealed that while the DNA and fingerprint evidence was intact, the clothing J.C. was wearing that night had been misplaced or lost during a consolidation of the police forces' evidence rooms. The jury found Cassidy guilty of both counts. The trial court sentenced Cassidy to forty-five years on each count, to run consecutively. This appeal followed.

Analysis

The purpose of jury instructions is to inform the jury of the law applicable to the facts without misleading the jury and to enable it to comprehend the case clearly and

¹ In the interim, the law enforcement division of MCSD merged with the Indianapolis Police Department and formed the IMPD.

arrive at a just, fair, and correct verdict. Buckner v. State, 857 N.E.2d 1011, 1015 (Ind. Ct. App. 2006). Instructing the jury generally is within the trial court's discretion and we review its decisions only for an abuse of that discretion. Id. A defendant is entitled to a reversal only if he or she demonstrates that an instructional error prejudiced his or her substantial rights. Id.

If a trial court refuses an instruction, we must consider: (1) whether the instruction correctly states the law; (2) whether there is evidence in the record to support the giving of the instruction; and (3) whether the substance of the tendered instruction is covered by other instructions that are given. Jackson v. State, 890 N.E.2d 11, 20 (Ind. Ct. App. 2008). Instructions are to be read together as a whole and we will not reverse for an instructional error unless the instructions, as a whole, mislead the jury. Id.

Cassidy's tendered and refused instruction was: "If you find that either party lost or destroyed evidence in this case, you may infer that the evidence was against the party's interest." App. p. 152. Cassidy argues that J.C.'s shirt would have provided physical evidence that contradicted statements that her assailant "ripped" her shirt off. He contends the missing shirt provided exculpatory evidence because if it was intact, it would call into question J.C.'s credibility. Cassidy argues that the trial court's refusal to instruct the jury regarding this lost evidence amounted to a violation of his due process rights.

Indiana courts basically follow the United States Supreme Court's approach in determining whether a defendant's due process rights have been violated by the State's failure to preserve evidence. Nettles v. State, 565 N.E.2d 1064 (Ind. 1991); Chissel v.

State, 705 N.E.2d 501, 504 (Ind. Ct. App. 1999), trans. denied. “We first decide whether the evidence in question was ‘potentially useful evidence’ or ‘materially exculpatory evidence.’” Chissel v. State, 705 N.E.2d at 504 (citing Arizona v. Youngblood, 488 U.S. 51, 57, 109 S. Ct. 333, 337 (1988)).

A defendant must demonstrate that the State destroyed the potentially useful evidence in bad faith for such instance to constitute a denial of due process. Id. In Youngblood the United States Supreme Court explained that potentially useful evidence is “evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant.” Youngblood, 488 U.S. at 57, 109 S. Ct. at 337. For materially exculpatory evidence, however, the State’s good or bad faith in failing to preserve the evidence is irrelevant. Id.

Cassidy has never seriously argued that the State exercised bad faith in failing to preserve the shirt. Testimony from police officials indicated the clothing was lost during the consolidation of the evidence storage rooms of two departments and not by illicit conduct. Instead of contending the shirt was potentially useful, Cassidy argues the missing shirt was materially exculpatory evidence. Additional evidence about the shirt was submitted in the form of a report on its condition and testimony by the serologist, Shea Anderson, who examined the shirt. Anderson did not see any tearing or specific damage on the shirt. Anderson testified that if she observed any tearing or damage to the shirt, she would have noted the same in her report. The physical shirt itself was not the only way to show the jury that J.C. could have misstated the methods by which her

attacker undressed her. Even assuming it was intact, the shirt itself would only be cumulative of the report and the serologist's testimony.

Moreover, the language used by J.C. in describing her attack and how the perpetrator removed her clothing can be interpreted in different ways. J.C. testified that "he went to rip it [shirt] off." Tr. p. 58. She did not remember "if it got ripped off" or if she "eventually took it off" herself. *Id.* J.C. told police in 1994 that her attacker "started to rip open my shirt." Exhibits Vol. II p. 81. Despite Cassidy's insistence, these linguistic variations do not impair J.C.'s credibility. The jury heard the serologist testify that the shirt was not damaged, and they were free to assess J.C.'s credibility accordingly. This shirt is not a piece of exculpatory evidence. Even if the shirt was potentially useful evidence, Cassidy has not presented any evidence that the State acted in bad faith by failing to preserve it.

The trial court did not abuse its discretion by refusing Cassidy's tendered instruction regarding missing evidence. Cassidy was not prejudiced in any way by the omission of this instruction.

Conclusion

The trial court did not abuse its discretion by refusing to issue Cassidy's tendered instruction regarding missing evidence. We affirm.

Affirmed.

BAILEY J., and MATHIAS, J., concur.