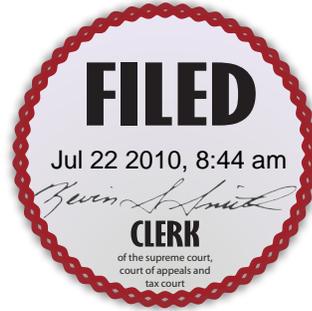


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



ATTORNEYS FOR APPELLANT:

ATTORNEYS FOR APPELLEE:

RUTH JOHNSON
Marion County Public Defender
Indianapolis, Indiana

GREGORY F. ZOELLER
Attorney General of Indiana

KAREN CELESTINO-HORSEMAN
Indianapolis, Indiana

NICOLE M. SCHUSTER
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

TREVOR BRIEGER,)
)
Appellant-Defendant,)
)
vs.) No. 49A02-0907-CR-617
)
STATE OF INDIANA,)
)
Appellee-Plaintiff.)

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Carol J. Orbison, Judge
Cause No. 49G22-0811-FB-254527

July 22, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Trevor Brieger appeals his convictions for rape¹ as a Class B felony and criminal deviate conduct² as a Class B felony. Brieger raises four issues that we consolidate and restate as: whether the trial court abused its discretion when it admitted DNA evidence obtained from a buccal swab taken from Brieger during a two-hour police interview.

We affirm.

FACTS AND PROCEDURAL HISTORY

In 2000, C.B. and Brieger, then both teenagers, resided near each other on South Moreland Avenue in Indianapolis, and the two became involved in a romantic relationship. The relationship became physical, and ultimately C.B. claimed Brieger had raped her. The allegation was investigated, but law enforcement did not pursue formal charges. Brieger moved away from the area in 2000 and had no communication with C.B. after that time.

In October 2007, Brieger moved back to the South Moreland Avenue residence to temporarily reside with his mother. C.B. was still residing a block or so down the street, now in a garage apartment located at the rear of her mother's home. Brieger "became acquainted again" with the neighbors, including C.B., and their relationship began to develop. *Tr.* at 212-13. One evening sometime in October 2007, Brieger entered C.B.'s apartment, and Brieger claims they had consensual intercourse; C.B. states that Brieger raped her, but she did not report it to authorities or otherwise tell anyone.

Later in the month, on October 18, 2007, at around 2:00 a.m., C.B. awoke to find that

¹ See Ind. Code §35-42-4-1.

² See Ind. Code §35-42-4-2.

Brieger was standing by her futon bed.³ Brieger told C.B. that she “owed” him for having claimed that he raped her in 2000. *Id.* at 73. Brieger forced C.B. to have oral and vaginal sexual intercourse, and at some point, he punched her in the back of the head and slammed her hand in the door when she attempted to leave. Eventually, Brieger left her apartment, and C.B. went to the front of her house and woke her mother, who called the police.

Indianapolis Metropolitan Police Detective Linda White responded to the dispatch call and interviewed C.B. at her home. Thereafter, she drove C.B. to the hospital, where a sexual assault examination was performed. Meanwhile, at approximately 6:00 a.m., Detective White went to Brieger’s mother’s residence on South Moreland to locate Brieger. Detective White advised Brieger of C.B.’s rape allegation and asked Brieger if he would come to the police station for questioning, and he agreed. While being transported, Brieger was in handcuffs, pursuant to department policy, which was explained to Brieger. Once there, the handcuffs were removed, and Brieger met with Detective White in a room for questioning. Detective White read Brieger his *Miranda* rights, and Brieger signed a form waiving those rights. During Detective White’s interview with Brieger, he reported having had consensual oral and vaginal sex with C.B. about seven to ten days prior, but he denied having sex with her anytime since then. After about forty minutes of questioning, Detective White left Brieger in the room for a while. When she returned, she asked Brieger to consent to a cheek

³ C.B. testified that her garage apartment door did not have a lock. *Tr.* at 66.

swab (also known as a buccal swab⁴), which she explained would help him prove his assertion that he had not recently had sex with C.B. Brieger consented and signed a form that at the top stated, “PERMISSION TO SEARCH (Not in Custody).” *State’s Ex. 13*. After the buccal swab was completed, Detective White drove Brieger home.

About two weeks later, the State charged Brieger with two counts of Class B felony rape, one count of Class B felony criminal deviate conduct, one count of Class B felony attempted criminal deviate conduct, and one count of Class D felony intimidation. Prior to trial, Brieger filed a motion to suppress the DNA evidence obtained through the buccal swab, arguing that the evidence was obtained in violation of the United States and Indiana Constitutions and that his consent was invalid. At the hearing on the motion to suppress, Brieger’s counsel argued that Brieger was in custody at the time he gave his consent to the buccal swab, and, therefore, under *Pirtle v. State*, 263 Ind. 16, 323 N.E.2d 634 (1975), he should have been advised that he had the right to have counsel present prior to giving his consent to the buccal swab search. The trial court later denied the motion.⁵

At trial, a forensic scientist from the Marion County Forensic Services Agency (also known as the “Crime Lab”) testified, over Brieger’s objection, to her findings, which revealed the presence of Brieger’s DNA in C.B.’s robe and genital swabs taken from C.B. while at the hospital in the early morning hours of October 18. Brieger testified later in the

⁴ “A buccal swab is a specialized applicator with a sponge or foam tip, which is rubbed on the inside of the cheek to collect epithelial cells. This procedure is noninvasive and pain free.” *Balding v. State*, 812 N.E.2d 169, 173 (Ind. Ct. App. 2004) (citing to <http://www.forensicswabs.com/buccal-swabs.htm>)

⁵ An entry in the Chronological Case Summary (“CCS”) reflects that the trial court denied the motion on April 9, 2009. To our knowledge, there is no separate written order or findings.

trial and stated that he and C.B. had engaged in consensual vaginal intercourse sometime in the afternoon or evening of October 17; he admitted this was contrary to what he had told Detective White in the police interview, where he had denied having sex with C.B. for at least a week to ten days. The jury found Brieger guilty of rape and criminal deviate conduct.⁶ He now appeals.

DISCUSSION AND DECISION

Brieger claims that the buccal swab taken from him during police questioning was an illegal search under both Article I, Section 11 of the Indiana Constitution and the Fourth Amendment to the United States Constitution, and, consequently, the DNA evidence obtained through that search should have been suppressed and not admitted at trial.

I. Standard of Review

As a preliminary issue, we note that Brieger asserts that the trial court abused its discretion when it denied his motion to suppress the results of the buccal swab. *Appellant's Br.* at 4. However, a ruling on a pretrial motion to suppress is not intended to serve as the final expression concerning admissibility, and once the matter proceeds to trial, the question of whether the trial court erred in denying a motion to suppress is no longer viable. *Kelley v. State*, 825 N.E.2d 420, 424-25 (Ind. Ct. App. 2005). Rather, the issue is appropriately framed as whether the trial court abused its discretion by admitting the evidence at trial. *Miller v. State*, 846 N.E.2d 1077, 1080 (Ind. Ct App. 2006), *trans. denied*; *Kelley*, 825

⁶ The jury found Brieger not guilty of attempted criminal deviate conduct and of the second rape charge. The trial court entered a directed verdict on the intimidation allegation.

N.E.2d at 425. Our standard of review of rulings on the admissibility of evidence is essentially the same whether the challenge is made by a pre-trial motion to suppress or by trial objection. *Miller*, 846 N.E.2d at 1080. We will reverse a trial court’s ruling on the admissibility of evidence only when the trial court abused its discretion. *Kelley*, 825 N.E.2d at 427. An abuse of discretion occurs when a decision is clearly against the logic and effect of the facts and circumstances before the court. *Id.* We do not reweigh the evidence, and we consider conflicting evidence most favorable to the trial court’s ruling. *Miller*, 846 N.E.2d at 1080. We must also consider the uncontested evidence favorable to the defendant. *Id.*

II. Claim under the Indiana Constitution

Brieger first claims that the buccal swab constituted an illegal search under Article I, Section 11 of the Indiana Constitution (“Section 11”), which provides:

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable search or seizure, shall not be violated; and no warrant shall issue, but upon probable cause, supported by oath and affirmation, and particularly describing the place to be searched, and the person or thing to be seized.

Although the language of Section 11 tracks the Fourth Amendment to the United States Constitution, we proceed somewhat differently when analyzing a claim under Section 11 than when considering a claim under the Fourth Amendment. *Miller*, 846 N.E.2d at 1080. Whereas the Fourth Amendment analysis focuses on a defendant’s reasonable expectation of privacy, Section 11 analysis focuses on the actions of the police officer and whether the search is reasonable under the totality of the circumstances. *Id.*

In this case, Brieger argues that the consent to search that he gave to Detective White was invalid because he was “in custody,” and, therefore, he was entitled to certain advisements under *Pirtle v. State*, where our Indiana Supreme Court, citing to both the Sixth Amendment of the United States Constitution and Article I, Section 13 of the Indiana Constitution, held that:

[A] person who is asked to give consent to search while in police custody is entitled to the presence and advice of counsel prior to making the decision whether to give such consent.

Pirtle, 323 N.E.2d at 640; *Torres v. State*, 673 N.E.2d 472, 474 (Ind. 1996). The right to receive a *Pirtle* advisement “can only be said to have attached if [the defendant] was in custody when he consented to the search.” *Joyner v. State*, 736 N.E.2d 232, 241 (Ind. 2000).

As Brieger is claiming that he was entitled to receive a *Pirtle* advisement before consenting to the search, we must first determine whether he was in custody when he consented to the search. Whether an individual is in custody requires application of an objective test that asks whether a reasonable person under the same circumstances would believe that he was under arrest or not free to resist the entreaties of the police. *Torres*, 673 N.E.2d at 474; *Miller*, 846 N.E.2d at 1081. Several circumstances have been held to be relevant to the issue, including: whether the person is read his *Miranda* rights or handcuffed or restrained in any way; the manner in which the person is questioned; whether the person freely and voluntarily accompanies police officers; and the police officer’s perception as to the person’s freedom to leave at any time. *West v. State*, 755 N.E.2d at 173, 179 (Ind. 2001). In examining the issue, we recognize that not every police questioning constitutes custodial

interrogation, as ““Any interview by police will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime.”” *Luna v. State*, 788 N.E.2d 832, 834 (Ind. 2003) (quoting *Oregon v. Mathiason*, 429 U.S. 492, 495, 97 S. Ct. 711, 50 L. Ed. 2d 214 (1977)). We further recognize that giving an arrestee *Miranda* warnings before beginning interrogation does not sufficiently inform the arrestee of his right to consult with counsel before consenting to a search. *Joyner*, 736 N.E.2d at 241.

Here, the State urges that Brieger was not in custody and *Pirtle* advisements were not required, considering that Brieger voluntarily accompanied police to the station, he was reminded more than once that he was not under arrest, and he signed a “Permission to Search” form, which expressly stated “Not in Custody.” *State’s Ex. 13*. Brieger, however, argues that he was in custody based on the circumstances, where police awakened him at about 6:00 a.m., transported him in handcuffs to the police station, read *Miranda* rights to him, and questioned him for at least two hours about his involvement with a woman who alleged that he had raped her. Assuming without deciding that a reasonable person under the same circumstances would believe that he was in custody or not free to leave, that *Pirtle* advisements were required, and that the DNA evidence should have been excluded, we find that any such error in the admission of the DNA evidence was harmless.

Evidence admitted in error may not require reversal if the error is found to be harmless. *Overstreet v. State*, 783 N.E.2d 1140, 1156 (Ind. 2003), *cert. denied* 540 U.S. 1150, 124 S. Ct. 1145, 157 L. Ed. 2d 1044 (2004). Evidence meets this standard if it does

not prejudice the defendant's substantial rights. *Id.*; *Torres*, 673 N.E.2d at 474 (if error does not affect outcome of trial, we deem it harmless). The State must show that the admission of evidence did not contribute to the conviction. *Kelley*, 825 N.E.2d at 429. To say that an error did not contribute to a conviction is to conclude that the error is unimportant in relation to everything else considered by the trial court on the issue in question. *Id.*

To convict Brieger of Class B felony rape, the State was required to prove that he knowingly had sexual intercourse with C.B. when C.B. was compelled to do so by force or imminent threat of force. Ind. Code § 35-42-4-1. To convict him of Class B felony criminal deviate conduct, the State was required to prove that Brieger knowingly caused C.B. to perform or submit to deviate sexual conduct, an act involving Brieger's penis and C.B.'s mouth, when C.B. was compelled by force or imminent threat of force to submit to such deviate sexual conduct. Ind. Code § 35-42-4-2.

Had the trial court suppressed the evidence resulting from the buccal swab, it would have excluded the DNA evidence, the purpose of which was to show that Brieger had engaged in sexual intercourse with C.B. However, Brieger's own trial testimony established that fact when he admitted that he and C.B. had engaged in sexual intercourse on the afternoon or evening of October 17. The remaining issue, then, was whether it was consensual as claimed by Brieger, or whether it was rape as claimed by C.B., and the resolution of this issue turned on witness credibility and whom the jury chose to believe and not upon the DNA evidence. The jury heard C.B. testify to waking up in the early morning hours of October 18 to find Brieger standing over her bed and telling her that she "owed

him” for having accused him of rape in 2000. *Tr.* at 73. She detailed how Brieger proceeded to rape her, punch her in the jaw, and slammed the door on her hand when she tried to leave. Thereafter he forced her to perform oral sex upon him, before raping her vaginally again. Brieger testified at trial that he had lied to Detective White when he had told her that he had not had sex with C.B. for a week to ten days before October 18 and that he “actually did” have sex with C.B. on the afternoon or evening of October 17, explaining that it was consensual. *Id.* at 217. Under these circumstances, where the DNA evidence was not required to establish that Brieger had engaged in intercourse with C.B., we find that any error in the admission of the DNA evidence was harmless, as it was unimportant in relation to everything else considered by the trial court on the issue in question. *Contrast Pirtle*, 323 N.E.2d at 640 (“Prior to the search, the police had no evidence to connect appellant with the homicide.”).

III. Claim under the Fourth Amendment

Brieger also claims that the buccal swab was obtained in violation of the Fourth Amendment to the United States Constitution, which prohibits unreasonable searches and seizures and reads:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

As an initial matter, we address whether a buccal swab constitutes a “search” within the meaning of the Fourth Amendment. In *Balding v. State*, 812 N.E.2d 169 (Ind. Ct. App.

2004), the defendant was a convicted offender whose probation was revoked, and he was placed back in incarceration. The State filed a motion to compel him to submit to a buccal swab to provide a DNA sample to be included in Indiana’s DNA Database.⁷ The trial court granted the motion, and we affirmed. In the opinion, we expressly stated, “[T]he taking of a biological sample, such as a DNA sample, constitutes a “search” for purposes of the Fourth Amendment.” *Balding*, 812 N.E.2d at 172 (citations omitted). More recently, a panel of this court determined in *Garcia-Torres v. State*, 914 N.E.2d 268 (Ind. Ct. App. 2009), *trans. granted*,⁸ that taking a DNA sample from inside a suspect’s cheek with a swab was a limited search that required only reasonable suspicion, similar to the case of a pat-down following an investigatory stop, and therefore the cheek swab could be conducted without a warrant or consent.⁹ Judge Crone dissented, however, and concluded that “extracting a DNA profile is a search requiring probable cause under the Fourth Amendment[.]” *Garcia-Torres*, 914 N.E.2d at 279. In so doing, Judge Crone recognized that even though a cheek swab may involve only “a slight invasion of a person’s bodily integrity,” the Fourth Amendment also requires consideration of “the nature of the privacy interest upon which the search intruded.” *Id.* (quotations omitted). As Judge Crone explained, “It is difficult to imagine a more

⁷ See Ind. Code § 10-13-6-10.

⁸ Transfer was granted on December 10, 2009, and the Indiana Supreme Court heard oral argument on January 14, 2010. Accordingly, the appellate opinion has been vacated, and we mention the case only to illustrate the divergent views on the issue of whether a buccal swab requires a warrant or a valid exception to that requirement.

⁹ *Garcia-Torres* also determined that a cheek swab is not subject to *Pirtle*’s advice-of-counsel requirements. 914 N.E.2d at 276.

intrusive invasion of an individual's personal privacy than a DNA search," noting that the potential consequences of such a search are "significant." *Garcia-Torres*, 914 N.E.2d at 281. That is, a cheek swab may reveal not only whether the suspect committed the crime at issue, but also whether he or she has committed other crimes. *Id.* It might also reveal other legally significant information regarding paternity or maternity. *Id.* We are persuaded by Judge Crone's reasoning, and we likewise conclude that the taking of a buccal swab is a search that implicates Fourth Amendment probable cause and warrant requirements.

Generally, a search warrant is a prerequisite to a constitutionally proper search and seizure, unless an exception to the warrant requirement applies. *Van Pelt v. State*, 760 N.E.2d 218, 221 (Ind. Ct. App. 2001), *trans. denied* (2002). One such exception is a defendant's valid and voluntary consent. *Campos v. State*, 885 N.E.2d 590, 600 (Ind. 2008) (warrantless search based on lawful consent is consistent with both Indiana and Federal Constitutions); *Joyner*, 736 N.E.2d at 242. The burden is upon the State to prove that the consent was in fact voluntarily given rather than being the result of duress or coercion, express or implied. *Campos*, 885 N.E.2d at 600. Voluntariness is a question of fact to be determined from a totality of the circumstances. *Id.* (quotations omitted). The totality of circumstances from which the voluntariness of a detainee's consent is to be determined includes, but is not limited to, the following considerations: whether the defendant was advised of *Miranda* rights prior to the request to search; the defendant's degree of education and intelligence; whether the defendant was advised of his right not to consent; any previous encounters with law enforcement; whether the officer was deceptive as to his true identity or

the purpose of the search. *Meyers v. State*, 790 N.E.2d 169, 170 (Ind. Ct. App. 2003). Brieger claims that the search was not valid because it was conducted without a warrant and because his consent was not valid.

The facts at hand are that Brieger was read and waived his *Miranda* rights, he obtained his G.E.D. in 2002, he has had previous encounters with law enforcement, including within the two weeks preceding his police interview, and Detective White was not deceptive with Brieger about the purpose of the search. To the contrary, Brieger was well aware that he was being questioned because C.B. had reported to police that Brieger had raped her and that the cheek swab would provide Brieger's DNA sample. While the record before us does not indicate that Detective White verbally advised Brieger of his right not to consent, the "Permission to Search" form that Brieger signed expressly states the following above his signature: "THIS PERMISSION IS GIVEN KNOWINGLY AND VOLUNTARILY UPON FULL KNOWLEDGE OF MY RIGHT TO REFUSE SUCH PERMISSION." *State's Ex. 13*(emphasis in original). We recognize that Detective White told Brieger that she would take him home after he completed the buccal swab, and although she did not state she would release him only if he completed the cheek swab, to the extent this could be interpreted as conditioning his release on his agreeing to the procedure, we disapprove. That said, based on the totality of the circumstances before us, we find that Brieger's consent was voluntary under our Fourth Amendment analysis and principles, and therefore the warrantless search was valid. Accordingly, the trial court did not abuse its discretion when it denied Brieger's motion to suppress and admitted the DNA evidence obtained through the buccal swab.

Finally, we note that by the same reasoning set out above relating to the Indiana Constitution, any error under the United States Constitution in the admission the DNA evidence would be harmless beyond a reasonable doubt.

Affirmed.¹⁰

FRIEDLANDER, J., and ROBB, J., concur.

¹⁰ We note that Brieger purports to seek reversal of his “convictions,” which are rape and criminal deviate conduct. *Appellant’s Br.* at 4, 12. However, his appellate issues and arguments are that the buccal swab (DNA evidence) should have been excluded; this evidence only served to prove the rape, not criminal deviate conduct (his penis in her mouth). Therefore, even if we had determined that it was error to admit the DNA evidence at trial, that determination would not have affected his criminal deviate conduct conviction.