

A Response to the Appeal Opinion in the Case 03-1906

State of Iowa
vs.
Jordan Robert Holm

Jordan Robert Holm
Inmate #6016946
406 N. High St.
Anamosa, IA 52205

December 30, 2005 – January 3, 2006

The following is a copy of the affirmed appeal with annotations and comments added by Jason, John, and Justin Holm, brothers of Jordan.

KEY:

Bold - Appellate Court Opinion

Yellow highlight – Items Jordan disputes

Green highlight – Items never mentioned, added by the Iowa Appellate Court

Blue highlight – Argument by State Appellate Defense refuted by Jordan

Gray highlight – Comments by John Holm

Italics – Comments by Jason Holm

Blue Font – Comments by Justin Holm

Gray Font – Comments written after sending a copy to Jordan on 1/4/06

To the Reader:

Please keep in mind that the comments we are making in this response are limited to the portion of Jordan's case that was addressed by the Court of Appeals. We feel that the Court wrote their response from a perspective that protects their decision. They could not have thoroughly explored the transcripts for themselves or they would have come to a different conclusion. They did, however, fully read the initial judge's explanations to his finding of guilt and proceeded to back these explanations through very little further explanation and some references to past legal proceedings which were intended to give weight to their opinions. There are numerous errors in both their understanding of the details of what happened on September 14 and 15, and their logic behind the affirmation of the trial court's decision. They blatantly ignored or did not give adequate time or thought to a great portion of the questionable circumstances that favor Jordan's innocence. Furthermore, they added completely false information that was never part of the transcript so as to paint Jordan as the guilty party. The purpose of this document is to explore some of these errors and to expose the obvious facts that have been dismissed and ignored by so many up to this point. It is written as an ongoing thought process and not meant to be well organized. This document isn't meant to argue from only a legal perspective but also from a simple logic perspective. We trust that although this document is not meant to be a fully exhaustive explanation of the events surrounding the alleged activities or previous court proceedings or all such arguments that should be used in court proceedings, it should stand to fully eliminate any question as to Jordan's innocence. And this is the challenge that we eagerly place before the reader- give full attention to this document and then try to give any sensible reasoning as to why he has spent the last 4 years in prison. It absolutely cannot be done. Work with us so that he doesn't spend the next 5 years there as well. Everyone can help.

IN THE COURT OF APPEALS OF IOWA

**No. 5-509 / 03-1906
Filed December 21, 2005**

**STATE OF IOWA,
Plaintiff-Appellee,**

vs.

**JORDAN ROBERT HOLM,
Defendant-Appellant.**

Appeal from the Iowa District Court for Johnson County, Denver D. Dillard, Judge.

**Jordan Robert Holm appeals from his conviction and sentence for third-degree sexual abuse.
AFFIRMED.**

**Linda Del Gallo, State Appellate Defender, and Patricia Reynolds, Assistant Appellate Defender,
for appellant.**

**Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney General, J. Patrick
White, County Attorney, and M. Veronica Dominguez, Assistant County Attorney, for appellee.**

**Heard by Hecht, P.J., Vaitheswaran, J., and Nelson, S.J.*
*Senior Judge assigned by order pursuant to Iowa Code section 602.9206 (2005).**

NELSON, S.J.

Jordan Robert Holm appeals from his conviction and sentence for third-degree sexual abuse. He contends there is insufficient evidence to support his conviction. He further contends the trial court violated due process and that his trial counsel rendered ineffective assistance in several respects. We affirm.

I. Background Facts and Proceedings. On Saturday, September 14, 2002, a party was held at a house on East Market Street in Iowa City. The home was the residence of Joe Bradley, Dan Gluba, and three other roommates. A very large crowd of people attended the party, including Bradley's on-and-off girlfriend of five years, Lindsay. Also in attendance was Holm, along with two friends, John Garvin and Dillon Long, with whom he had traveled to Iowa City that day from Cedar Falls.

Around 2:30 a.m., Holm became tired and decided to find a place to sleep. He was informed by someone at the house that he could sleep on one of the couches upstairs. Holm decided to try to find a place to sleep upstairs because the main floor of the house was loud, crowded with people, and awash in beer.

Upon arriving upstairs, Holm discovered three of the four bedroom doors were locked. However, the fourth bedroom door was one-quarter to one-third ajar. Holm entered the room and observed a couple in the bed. He decided to lie down on the floor at the foot of the bed. He removed his shoes and shirt and used his shirt as a pillow.

Unbeknownst to Holm, the couple in the bed was Bradley and his girlfriend, Lindsay. Although they had been arguing earlier in the evening, they had made up. Bradley and Lindsay had gone to Bradley's room, had intercourse, and fell asleep naked.

According to her testimony, Lindsay was awakened to the sensation of someone performing oral sex on her and fondling her genitals. Believing the person in question to be Bradley, Lindsay allowed the oral sex to continue. However, when she reached down to caress his hair, Lindsay realized it was not Bradley because the hair was longer and curly. She looked to her right and observed Bradley asleep next to her. She then screamed and began kicking at the intruder. Lindsay observed a man, who was not wearing pants, run from the room.

Lindsay's screams awakened Bradley and summoned several partygoers to the room. Lindsay was hysterical, screaming, and crying. She stated that she was awakened by a man she did not know performing oral sex on her.

Several people attending the party witnessed Holm running down the stairs, either putting on, pulling up, or fastening his pants. Believing that Holm was trying to leave the house, Dan Gluba, Jesse Hopkins, and Justin Peters cornered him in the kitchen to prevent him from leaving. When asked for identification, Holm first produced someone else's driver's license. He later provided his own.

When questioned about what had happened, Holm simply replied "nothing," or contended he did not know. Lindsay then came downstairs and identified Holm as the man who had been in her room because she recognized his hair. She heard Holm deny performing any sex act upon her and deny being in the bedroom. Lindsay was yelling (at her boyfriend, Joe Bradley, not Jordan) and hit Holm.

Bradley advised Holm to leave the house. Holm walked to a gas station and attempted to call the friends with whom he had come to Iowa City. When Holm was unable to reach anyone, he slept behind the gas station.

Gluba called the police regarding Lindsay's allegations. The police arrived and took Lindsay to University Hospital at approximately 2:00 a.m. (Steve Kivi, the policeman who recommended Lindsay go to the hospital, estimates she was at the hospital for one hour and fifteen minutes (tr. p. 104-105). She just arrived at the hospital "at about 10 til 6" (tr. p. 104-105). The police had responded to 706 East Market St., Joe's house, at "approximately 5:15 in the morning" on September 15, 2002 after receiving a call from Dan Gluba (tr. p. 101, tr. p. 19).) After waiting to be examined for two hours, Lindsay asked that she be taken back to the house because she was tired. (It is not surprising at all that Lindsay would be tired after a long and emotional night. It is, however, very surprising that she would become tired when she was finally called for to be examined. After waiting for two hours, what caused her to want

to leave when it was her turn? The exact same thing that caused her to not want to go to the hospital in the first place. The exact same thing that led her to apologize to the police for even being called in the first place. She either knew that she had lied or she had some serious doubts about what really happened in the bedroom that night.)

Holm returned to the house at approximately 7:00 a.m., looking for his friends or the key to the car. Bradley spoke with Holm, who stated he had been in the bedroom trying to find a place to sleep. Holm again denied having oral sex with Lindsay and offered to go to the police station to take a polygraph test.

Bradley called the police and informed them of Holm's presence in the house. (After Jordan had been at the house with the people he had just met the night before for at least a few hours.) (Police reports indicate Bradley called them at eleven am (tr. p. 53). The detective assigned to investigate, Robert Gass, was informed of this call at 11:30 in the morning on September 15, 2002 (tr. p. 127).) Officers arrived and Holm voluntarily accompanied them to the police station. Holm waited at the police station for over an hour for an investigator to arrive. Upon the investigator's arrival, Holm decided he should not speak without counsel.

At approximately 11:00 a.m., Lindsay was again taken to University Hospital. Samples were taken from her vagina, rectum, and inner thigh. A small amount of DNA matching Holm's was found on Lindsay's inner thigh. (How small? The amount of Jordan's DNA found on her thigh was less than what could easily fit on the pointed end of a pin (tr. p. 310-311). The DNA expert explained that larger quantities are often transferred by someone to a doorknob when opening a door, a pen when writing a short note, or another's hand when shaking hands. This understanding of forensics coupled with the far more relevant and significant FACT that NO DNA of Jordan's was found in the genital area, lead the DNA expert to rightly conclude the physical evidence is not consistent with the criminal accusation of oral sex. Jordan and Lindsay both testify to there having been substantial contact between them that was entirely noncriminal in nature and could easily explain the small amount of Jordan's DNA on Lindsay's thigh (i.e. Lindsay sitting up and reaching out to run her hands through Jordan's gel filled hair). It was further explained that "the thigh area being a flat, smooth area of skin would be much less likely to retain DNA than the genital area" (tr. p. 348). Therefore, the miniscule amount of DNA found on the thigh **further** proves that Jordan's DNA was never present in the genital area, where copious amounts of DNA would have been had oral sex occurred. The result of the thigh swab is only "consistent with a very casual contact, or potentially, secondary transfer" not oral sex (tr. p. 294-308, 310-313, 319-323, 332, 333). Furthermore, no DNA was found to indicate that Lindsay had any sexual relations earlier that night with her boyfriend, Bradley, as Lindsay testified. (The evidence points to NO INTERCOURSE between Joe and Lindsay. How does the fact finder in this case have the audacity to deem himself to be more of an expert than a true expert in the field? The prosecution certainly didn't dare try to refute the expert's testimony with an expert of their own. The judge went ahead and disputed it for them using all of the law school training that he received on the science of DNA- a vast amount I'm sure. Let's picture this same evidence in a different case. Let's say, for example, that Lindsay accused Joe of nonconsensual sex that evening. Let's say she went through the same process of going to the hospital after the same amount of time had elapsed and underwent a rape assessment with a rape kit from an experienced professional and the same results were found- Joe's DNA as being absent. Would the evidence be seen in Joe's favor or in Lindsay's favor? The obvious first conclusion that would have to be upheld without further evidence is that Joe did not rape Lindsay. I hold that for the prosecution to find Joe guilty they would have to present extensive, detailed information as to why the DNA was not present. They would have to prove the testing was faulty for x,y,z reasons, or give some other explanation preferably from an expert in the field of DNA evidence. Ahh, but in the real case, no explanation was provided that could explain the complete absence of Jordan or Joe's DNA from the genital area, but for the obvious conclusion that it was never there. They did not present even one possible explanation as to why the DNA was absent. In fact, the DNA expert addressed this matter at trial and affirmed, "I have not been presented with any evidence that makes me confident to say well, that would explain why there's nothing in the vaginal area," in reference to Jordan's DNA (tr. p. 349-350). Therefore, he explained, "it was never there" is the obvious "first choice and simplest explanation" (tr. p. 306, 333, 345-346) I'm not clear of the law surrounding this information, but my best guess is that it would be contrary to common practice for the judge to completely disregard the evidence presented to him and conclude the opposite based on his own personal opinion. The limited and

uneducated explanation that he uses repeatedly to discredit the expert is based on the testimony of two drunken individuals who claim to have had sex- as this would not be consistent with Joe's DNA being absent from the vaginal swab. Not only did the physical evidence indicate that they did not in fact have sex but they also testified to having been extremely tired and wanting to "just crash" (tr. p. 47). In Lindsay's original statement to the nurse examiner that same day she described that her and Joe had "cuddled" after going to bed around 2 am. She reported no sexual activity to have occurred between them that day when asked by the nurse. This early report is consistent with the physical facts. However, her testimony at trial ten months later gave a different account as she indicated that her and Joe had had "sexual relations" that evening. The judge decided to support his findings with this altered version of the events from that evening which conflict with the physical facts. Now that's solid stuff. Who needs a rebuttal to a highly respected DNA expert when you have that kind of straightforward testimony? It blows my mind that the judge gets away with this!)

Holm was charged with third-degree sexual abuse, in violation of Iowa Code sections 709.1, 709.4(1), and 702.17 (2001). Holm waived his right to a jury trial. At the bench trial, Holm testified in his defense. He claimed that after he entered the room and attempted to go to sleep, he heard moaning and groaning from the bed. Holm stated he sat up and saw a naked woman who appeared to be masturbating on the bed. Holm decided to leave to avoid embarrassment. When he started to stand up, Holm testified the woman looked at him and reached up for him, grabbing his head with her hands in an attempt to pull him on to the bed. Holm resisted and stood up, asking the woman what she was doing. At that point, Holm claims she began screaming and **kicking him**, and he fled the room.

At trial, Dr. Robert Benjamin testified for Holm as an expert witness in the field of forensic DNA. He testified that he would expect to find Holm's DNA in the swab of Lindsay's vagina if Holm had performed oral sex on her. [Dr. Robert Benjamin was not asked to comment on why no DNA from Bradley was present to support Lindsey's claim that Bradley and Lindsey engaged in sexual relations that night.](#) Dr. Benjamin opined that the small amount of Holm's DNA from the swab of Lindsay's thigh was likely the result of incidental transfer from Lindsay's hand, after touching Holm's head, to her thigh. Dr. Benjamin further testified that vaginal fluid is quite viscous and would likely be visible on Holm's face, even if dry. Because Lindsay was at the end of her menstrual cycle at the time of the incident, Dr. Benjamin felt it would have been even more apparent. No witness testified to seeing anything on Holm's face following the alleged attack.

On August 28, 2003, the district court found Holm guilty as charged. Holm filed a motion for new trial, a motion for judgment notwithstanding the verdict, and a motion for judgment of acquittal. The motions were denied and Holm was sentenced to a prison term not to exceed ten years. Holm was further ordered to register as a sex offender for ten years following his release. The court recommended that the parole board consider Holm for early release.

II. Sufficiency of the Evidence. Holm contends there is insufficient evidence to find him guilty. **He first claims there is insufficient evidence to establish the victim's lack of consent. He also claims there is insufficient evidence to establish he performed a sex act on the victim.**

We review claims of insufficient evidence for errors at law. *State v. Rohm*, 609 N.W.2d 504, 509 (Iowa 2000). We will uphold a finding of guilt if substantial evidence supports the verdict. *Id.* "Substantial evidence is evidence upon which a rational finder of fact could find a defendant guilty beyond a reasonable doubt." *Id.*

Holm denies any sex act took place between him and Lindsay. However, he argues that even if we are to assume the act did take place as Lindsay describes, he cannot be guilty of third-degree sexual assault as charge because the act was consensual. Holm was convicted of third-degree sexual assault pursuant to Iowa Code section 709.4(1). This section states a person commits third-degree sexual abuse when they perform a sex act "by force or against the will of the other person, whether or not the other person is the person's spouse or is cohabiting with the person." Iowa Code § 709.4(1). Section 709.1(1) defines acts done by force or against the will of the other.

If the consent or acquiescence of the other is procured by threats of violence toward any person or if the act is done while the other is under the influence of a drug inducing sleep or is otherwise in a state of unconsciousness, the act is done against the will of the other.

Iowa Code § 709.1(1). Holm argues the act described by Lindsay was not performed while Lindsay was under the influence of a drug inducing sleep or was otherwise in a state of unconsciousness. Holm contends a sleeping victim is covered under the definitions of physically helpless. See Iowa Code § 709.1A(2). Sexual assault of a physically helpless victim is covered by section 709.4(4), under which he was not charged.

The mere fact that the legislature mentioned sleeping victims in their definition of helpless victims, but not in the definition of victims abused against their will, does not mean sleeping victims are not included under the definition of “against the will.” See *State v. Farnum*, 554 N.W.2d 716, 721 (Iowa Ct. App. 1996) (holding the term “incapacity” defined in section 709.4(2)(a) (1993) could extend to a person rendered unconscious from intoxication, although unconscious victims are encompassed in section 709.4(1)). Our supreme court has recognized a person who is asleep is rendered unconscious. *Kaplan v. Kaplan*, 213 Iowa 646, 654, 239 N.W. 682, 685 (1931) (“His unconscious conduct while asleep, or semiconscious conduct while going to sleep. . .”). Furthermore, the definition of “against the will” itself implies sleep is a state of unconsciousness; if a drug inducing sleep renders one unconscious, natural sleep must also render one unconscious. We reject Holm’s contention that the act described by the victim does not fall under the definition of third-degree sexual abuse as defined in section 709.4(1).

Holm also argues there is insufficient evidence to establish Lindsay’s lack of consent because by her own testimony she legally consented. Lindsay did testify that once she was awakened by someone performing oral sex on her, “she was into it.” At the time, Lindsay believed the person performing oral sex was her boyfriend. Holm argues any fraud he used to obtain her consent was fraud in inducement, and therefore consent was legally given. See *State v. Vander Esch*, 662 N.W.2d 689, 693 (Iowa Ct. App. 2002) (holding consent induced by fraud is as effective as any other consent). However, no fraud was used to induce Lindsay to give consent. A sleeping person is not able to give consent, whether induced by fraud or otherwise. (This is the “for the sake of argument” argument part of Patricia Reynolds’ representation that Jordan strongly contested. He wrote her lengthy, in-depth letters giving her his reasons for not wanting to include the consent issue as part of his appeal. He offered several other legitimate alternative arguments to replace this, but his wishes were ultimately disregarded. We were told by Patricia that the two main reasons the argument was used were: the Supreme Court had a pending case concerning the subject of consent so either the Appellate Court would rule in Jordan’s favor to avoid being overturned by the Supreme Court, or the Supreme Court would want to use the case in its ruling on consent in the State of Iowa.)

Holm next contends there is insufficient evidence to establish that he performed a sex act on Lindsay. We conclude there is substantial evidence by which a reasonable trier of fact could find Holm performed oral sex on Lindsay. Numerous witnesses observed Holm going upstairs at approximately 2:30 a.m. They also heard Lindsay begin screaming **approximately ten minutes later.** (*The only thing mentioned in the trial in regard to the length of time Jordan was upstairs was “a few minutes” by Dan Gluba (tr. p. 65). No other witnesses reported otherwise and Jordan contends that it was probably 3-4 minutes total. It is unclear as to why the court chose the number 10 to represent “a few minutes.” This stretching of the time could make it seem more probable for the alleged criminal event to have occurred. On the other hand, for Jordan to have gone upstairs, found a sleeping girl, uncovered her, performed oral sex on her until she was “getting into it” all in a span of 3 to 4 minutes seems highly improbably even if it were to have been well premeditated.*) **Holm was observed coming down the stairs while pulling up his pants.** Immediately thereafter, Lindsay told her boyfriend and other witnesses that she was awakened by Holm performing oral sex on her. Her version of events—that she was awakened by who she thought to be her boyfriend performing oral sex on her, that she realized it was not Bradley when she touched his hair, that she looked over and saw Bradley asleep in bed next to her, and that she began screaming **and kicking** at Holm (*another reality check- Nowhere in Lindsay’s testimony, or in the nurse’s report or in the nurse’s testimony, is there*

any reference to, or use of the words “kicked,” “kicking,” or “kick.”) —remained constant from her initial report to witnesses, her explanation to the nurse who examined her, her account to the officers who interviewed her, to her testimony at trial. (What is completely ignored by the court is the fact that several important aspects of this testimony were in direct contradiction to the testimony of other witnesses- and they were even doing their best to support her.)

Holm testified for the first time at trial that it was Lindsay who grabbed him as he tried to leave the room. Holm did not tell this to any witnesses on the night in question. **He simply denied having been in the room, knowing Lindsay, touching her, or knowing what was going on.** (Although this statement helps the appellate court justify Jordan’s guilt in their minds, it’s not true, it never happened, and it’s not in the transcripts. This either exposes their initial perspective (“This kid’s guilty no matter what. We trust the opinion of a judge (one of our peers) over some kid who’s been sitting in prison for the past 2½ years”), or shows that they had to add false, but condemning information to make their ruling seem more credible. Jordan’s testimony, which is exactly corroborated by four witnesses who testified for the state (this makes up every witness who was there and testified, excluding Lindsay) was that he explained why he was in the room, where he was when he was in the room, and who he saw in the room. Anything further regarding what he saw and what happened was not anything he felt was either appropriate or necessary to share with everyone. Therefore, he explained nothing further at that time, other than that Lindsay’s allegation was not true.)

At trial, evidence was admitted in an attempt to bring Lindsay’s credibility into question. A witness familiar with Lindsay’s high school reputation testified that in high school she was called “schemin’ demon.” As the district court noted, “It is not credible to believe that Lindsay . . . would scheme against someone whom she had never met before and who was in her presence almost by chance.” (That’s fine. Maybe she didn’t have time to scheme, but that’s not even the point. The judge completely ignored the word demon: “An evil supernatural being; a devil.” according to *The American Heritage® Dictionary of the English Language*.) **It is much less credible to believe that Jordan (or 99.9999% of men in the world) . . . would perform a sexually predatory act against someone whom he had never met before who was in the same bed as her boyfriend at the time. All the witnesses testified that Lindsay was very upset, screaming, shaking, and crying after her encounter with Holm.**

Holm’s DNA was also found following a random swab of Lindsay’s thigh. Although Holm’s expert opined his belief that the DNA was the result of incidental transfer, he could not rule out the possibility that oral sex was the method of transfer. (In the same way, the DNA criminalist in this case, Scott Stocksleger, opined his belief that the miniscule amount of DNA he processed from Ms. Dodds’ thigh was from the defendant, but he could not rule out the possibility that it was from someone else. His testimony being, “Again, I can’t say with certainty that it’s his DNA” (tr. p. 199). If we use the appellate court’s logic, or choose to emphasize the least likely scenario, then this statement indicates that this was not in fact Jordan’s DNA. However, with respect for Scott Stocksleger’s professional opinion, we don’t contend the DNA is not Jordan’s, nor do we suggest the criminalist’s testimony supports that it is not Jordan’s. To do so would be to grossly mischaracterize and discredit his testimony, which is exactly what the court has done with Dr. Benjamin’s testimony. It is absurd to suggest Dr. Benjamin’s testimony actually supports the court’s final conclusion that oral sex did occur. His testimony was consistent throughout that the physical evidence refutes the accusation of oral sex. Yet the court has chosen to emphasize the improbable scenario that Dr. Benjamin could not rule out- that oral sex did occur and no evidence was found to support it.) (Have you seen the movie *Dumb and Dumber*? Remember when Lloyd Christmas (Jim Carrey) is told by Mary Swanson that his chances of ever being with her aren’t one in a hundred, they’re “More like one in a million,” and he exclaims, “So you’re telling me there’s a chance!” When a judge sends a innocent person to prison for ten years based on the same logic it’s not quite as funny. In fact, it’s only funny in the movie because it was an obviously dumb proposition in the first place, followed by an even dumber conclusion.) **As the district court stated in its decision:**

The defense expert actually supported the probability that saliva was more likely the source rather than epithelial cells picked up by Lindsay . . . when she touched the Defendant’s hair. The defense expert repeatedly testified to the excellent transfer capability of a viscous fluid such as saliva. The credibility instruction instructs the fact

finder to consider testimony which is “reasonable and consistent with other evidence you believe.” **In that respect, [Lindsay’s] testimony is more believable, and Defendant’s version is not credible.** (They really dropped the ball on this one so here we go again... In discussing “the excellent transfer capability of viscous fluid such as saliva,” the court failed to recognize that this is exactly why it makes no sense to conclude the absence of Jordan’s DNA in the genital area is not significant, given the specific accusation of oral sex. Further to purport there is a connection between the small amount of Jordan’s DNA swabbed from the thigh and oral sex, is illogical and contrary to the physical evidence in several ways. Let’s reason...

1. There is no evidence to suggest Jordan’s DNA was ever present in the vaginal area except for Lindsay’s testimony which directly contradicts the physical facts.
2. There is strong evidence to suggest Jordan’s DNA was never there, or that oral sex did not occur, based on the excellent ability of saliva to transfer DNA.
3. There is no testimony presented that would suggest a mechanism whereby Jordan’s potential DNA could have been removed from the vagina. In fact, Lindsay’s actions between the alleged event and the DNA testing are specifically talked about and no extensive washing or other such activity occurred. Yet still, Jordan’s DNA was not found to be present.
4. Let’s consider, for the sake of argument, that Lindsay had thoroughly washed, or somehow removed DNA from her body. Dr. Benjamin explained, “the thigh area being a flat, smooth area of skin would be much less likely to retain [DNA] than the genital area” (tr. p. 348). Therefore the miniscule amount of Jordan’s DNA found on the thigh further proves that it was never present in the genital area.
5. The amount of Jordan’s DNA that was found on the thigh is comparable to quantities that are often transferred in such non-criminal activities as shaking hands or turning a doorknob. It is “consistent with a very casual contact,” or potentially, “secondary transfer;” not the amount of DNA expected to be found after oral sex. And this is especially the case if one considers that the alleged victim was reportedly “getting into it,” which suggests a considerable amount of touching and saliva.
6. Every cell in one human body contains the same DNA. The source of Jordan’s epithelial cells found on the thigh cannot be determined apart from being epithelial in origin. To say the source is saliva would have to be a random guess.
7. There was no physical indication of any connection between the vaginal area and the small amount of Jordan’s DNA on the thigh.
8. No evidence has been presented to show the DNA in this case was processed or collected improperly.

In all of these respects, the defendant’s version is believable and Lindsay’s testimony is shown to be not credible.)

The district court found Lindsay to be more credible. Determinations of credibility are in most instances left for the trier of fact, who is in a better position to evaluate it. *State v. Weaver*, 608 N.W.2d 797, 804 (Iowa 2000). We give great weight to a district court’s credibility findings. *State v. O’Shea*, 634 N.W.2d 150, 156 (Iowa Ct. App. 2001). We conclude there is no reason why that deference should not be granted in this case.

III. Due Process. Holm next contends the district court violated his due process in its findings. We review his claim de novo. *Kane v. State*, 436 N.W.2d 624, 626 (Iowa 1989).

In making its credibility determination, the district court stated:

No evidence was presented which placed serious doubt on the truthfulness of [Lindsay’s] testimony. Without a firm reason to believe [Lindsay] was lying or had been dreaming, the verdict in this case cannot be not guilty.

Holm contends the court improperly shifted the burden of proof to him. We disagree. Lindsay's testimony, if believed, described the commission of third-degree sexual abuse. Her testimony was corroborated by witness testimony and physical evidence. The only evidence presented contrary to her testimony was that of Holm. *(Wrong. The physical evidence leans fully in Jordan's favor if we consider exactly what he was accused of. The question is not whether or not Jordan came into contact with Lindsay at any time in the night but rather whether or not his tongue came in contact with her genitals.*

Now, let's consider the witness testimony. For one, there were absolutely no eyewitnesses to the alleged crime. The only potential eyewitness was lying on the bed right next to her and he didn't even believe her story. The witnesses were only able to provide limited information that was not directly relevant to the accusation. Perhaps it was felt to be relevant that Jordan was seen zipping up his pants. If it was relevant, it was never directly stated so by the prosecution or the court. Was there some unspoken accusation that was not discussed in court, but just somehow understood? Was it felt that zipping up pants equates to evidence that Jordan was either pleasuring himself or had intent to penetrate? If so, then state this accusation openly. If not, then please explain how it is at all relevant. Jordan's lawyer allowed these assumptions to prevail and never gave full explanation as to the exact reasoning for why Jordan's pants were unzipped. It would not take any more than asking Jordan's family, or college roommates, or nearly any of his guy friends how often they see Jordan unzipping his pants to tuck in his shirt. And why was it not addressed that he was wearing a large fancy belt buckle that would make it even more necessary to open up the pants in order to tuck in the shirt? Granted, I understand that these testimonies may not hold much weight in court and they do not prove anything about the reasoning as to why his pants were unzipped, but they at least provide an alternative to the idea that he took his pants off in relation to committing a crime. In considering who the witnesses are, it should also be mentioned that their stories are going to be slanted toward Lindsay if any controversy does exist. Had this been at a wrestling party at Northern Iowa don't we think that the witnesses would have corroborated or at least leaned their testimony strongly in a direction that would suggest his innocence? Of course we're not talking about major events because, once again, the witnesses are not able to provide any information that is incriminating. We are talking about subtle differences that can be interpreted to mean something else. For example, let's get it straight, were his pants down around his ankles as he was running down the stairs or was he hurrying out of the room with his pants unzipped and tucking in his shirt? Did he provide an alternate ID in a way that would indicate he was trying to hide his identity or did he grab the wrong thing at first? Did he ever really claim to be someone else? Hadn't he already been introduced to a bunch of people as Jordan Holm? Was there really any hope or would there be any logic to him trying to hide his identity through an alternate form of identification? Wouldn't he have been better off running out of the house right away if he had done something wrong and were trying to escape? Another huge question- did he ever deny being in the room upstairs? Lindsay said he did. This is an absolutely ridiculous lie and Lindsay's testimony should be brought into serious question based on this very point alone. However, the court makes the outlandish decision to take this statement as fact in order to paint Jordan in a light as if HE was the one lying and trying to cover something up. I can't fathom this. This is illogical on so many levels. For one, would it make any sense whatsoever for Jordan to lie about whether he was in the room or not? He was seen coming down from upstairs where all of the other doors were locked aside from this one, he had just been told minutes before that he could find a place to sleep upstairs, and Lindsay was obviously screaming about someone being in her room so if not him, then who? But I guess we've painted Jordan out to be a twisted idiot and this would be consistent with the illogical acts he is accused of. It is maddening that the court can state that Lindsay's testimony is consistent with the testimony of the witnesses. Wouldn't another witness have overheard Jordan denying that he was ever in the bedroom? If I were a witness to that statement, I would be sure to mention it in court. In fact, the opposite is suggested. When Joe first walked downstairs, he asked who was just upstairs and Jordan acknowledged that it was he. Two witnesses acknowledged this on the record. So again, who is more credible, judge? Jordan vehemently denied having performed oral sex on Lindsay and even suggested that they take him in to the police station to set up polygraph test. However, he readily admitted to going upstairs to find a place to sleep, admitted that he was in the room, and then denied that anything took place.

In considering the witnesses it's also relevant that we're talking about a small private school group of friends who grew up together. Jordan is alone in this. And yet, in spite of that fact, her friends did NOT immediately believe her. In fact (and this speaks more volumes than anything else in the entire case in regard to her credibility), her very own BOYFRIEND didn't even believe her. He told Jordan on multiple occasions that he was on his side and that he was sorry for the whole mess. Now, we could make tons of inferences from this fact, but just think for a second about your girlfriend or wife accusing some other man of this crime. Would you doubt her for a second? Not if she had one shred of dignity and you were a halfway decent man. I know that I'd go down swinging against Mike Tyson if he was the one accused by my wife. It's absolutely absurd to think that he would apologize to Jordan instead of punch him in the face unless he knew a little about Lindsey and a little bit about her past and a little bit about the events that had taken place earlier that night.)

The district court was then required to determine whose version of events it believed. In doing so, it considered whether there was any question as to Lindsay's truthfulness. *(Now here is a monumental problem- the court did not hardly begin to consider whether there was any question as to Lindsay's truthfulness. And I don't place much blame on the court for this error. It isn't the job of the court to explore Lindsay's credibility but rather to make a decision about her credibility based on the facts that are presented. I understand that I'm talking about a difficult task to undertake for the lawyer representing Jordan. I understand why the rape shield law exists and the law should not be thrown out as it serves a very important purpose. Poor choices made in the past should not hinder victims from receiving justice (as best the courts can provide justice) for the horrible way in which they have been abused. However, if there were ever a case where some huge red lights were flashing as to the necessity of exploring the character of the accuser, this is it. But that's a lot of work for a lawyer and requires time, energy, money, and most likely would lead to increased press time and public outcry. We would all agree with this point having seen the national media attention given to the Duke case. It's a tough battle because all of the sudden we're suggesting that perhaps the accused could be the victim. That's a hard one to swallow for the public, especially in the state of Iowa where they are proud of the way in which women are protected. And they should be. But I really don't care that much about the public outcry, I care about the difference between right and wrong and the truth and lies. Most people just wrote Kobe Bryant off right away as a rapist, but his lawyers fought long and hard and they exposed the rape shield law for its weakness in that particular case, and it then became clear that she most likely wasn't a victim of force. And Kobe would probably be in prison right now if she were a perfectly upstanding citizen in a committed marriage relationship, having never strayed outside of it. If her character was found to be outstanding and witnesses were able to honestly testify on her behalf in a way that would suggest that she would never dream of having sex with some guy she just met, whether he was a superstar or not, the case would have been over quickly. How sad if Kobe were in prison because his lawyers didn't have the time or resources to explore every avenue of defense in his case in spite of his pleading. I'm guessing that 99% of the public believes that Kobe is guilty of adultery and innocent of rape. Why? Not because we think Kobe is a fantastic guy who has never cheated on his wife and not because we can't fathom that some big shot would believe that he should have anything he wants and shouldn't be denied. In fact, a large portion of the public would probably rather see it that way. We'd like to see a superstar like Kobe take a fall. The reason the public believes him is because the accuser was exposed. In addition, she had a big money motive.*

I can't say for sure what Lindsay's motive was but I can suggest based on the very little that I know about her that it was about grasping for attention and about playing the victim. She's very accustomed to these roles. And it's obviously not without precedent. People will do and say just about anything for attention when they feel like they're not getting it. How about the girl in Wisconsin who faked her kidnapping purely for attention? And it's obviously the number one reason behind the majority of suicide in this country. "You're not understanding how I feel, and you don't understand the degree to which I need help, and you're not willing or able to provide it so I'm going to shoot myself in the head. Maybe now you'll pay attention to me." Or in Lindsay's case it seems more along the lines of, "You don't love me enough to stand up for me. I'm being hit-on here. I'm being abused here. Don't you even care? You care more about how other people feel than how your own girlfriend feels. I'm not just a nobody who is going to always be there no matter how you treat me. You can't just win me without putting some effort in. I'm worth something. You have to earn me and you have to fight for me. In fact, if you really cared about me and if

you really appreciated my body, you'd be upset when some other guy is hitting on me. And if that doesn't do it, I know that you'll be upset if I have sex with another guy- especially if it's my ex-boyfriend. That should really light a fire under you. I really love you. Don't you care about me at all? Don't you want to protect me and to be with me? Aren't you jealous yet? I can see that you're bothered, but I want you to be angry, to show some passion. I'll keep scheming until I get what I want. What I want is 100% of your attention." So how could a person possibly scheme up such an accusation in a matter of seconds? How could a person possibly wake up to feeling another man's hair and then come up with a story about him performing oral sex on her? That just doesn't seem logical, right? No, it seems completely illogical. But then, I'm not sure if this isn't more illogical- a sexually inexperienced young man somehow deciding that he would get kicks out of performing oral sex on a girl who is at the end of her menstrual cycle and lying next to her boyfriend in bed. In addition, if Lindsay's account is accurate, he would have had to make a split second decision to perform this act and then perform it so well in a matter of three to five minutes (without alarming her or waking up Joe) that she was "getting into it" and desiring more. This sort of thing would obviously have to be premeditated to occur in such rapid fashion, and this was just not the case as Jordan had specific permission to go upstairs to find some place to sleep. He there found that two people were lying on the bed with a sheet covering them. He didn't know if it was a guy and a girl, two guys, or two girls. He just knew that he was tired and this was the only room available. What is being suggested by the court in a very presumptuous manner, having never been verbalized directly, is that a young man with no history of sexual deviance walked into a room, noted the two obvious people in the bed, one being a girl, immediately decided to further explore this girl's vulnerable state and decided to do so through oral sex. Let's explore more fully what must absolutely be assumed in order for this to be true. It must be assumed first of all that Jordan has a sexually deviant mind. No effort was placed into providing some sort of evidence to suggest that this was a possibility. This is not shocking, because it couldn't be done and would be too difficult to find the evidence to suggest it even if it were out there. What is shocking is that no evidence was provided to the contrary. This would not be hard evidence, but fairly strong evidence in Jordan's case as many men and women would testify that Jordan has never acted or even spoken in such a way as to suggest that he would not treat a girl with the utmost respect and act in a dignified manner around them. Since he was found guilty, many girls have come to me and told me that Jordan could not possibly have done this. There are girls who have known Jordan their whole lives, and there are girls who have been romantically involved with Jordan and there are girls who only briefly knew Jordan who all say the same thing. And ask the guys- Jordan was very well known for demanding clean conversation and not participating in talk demeaning toward girls. And this was in the presence of a pretty tough crowd of wrestlers. It was not ever in any part of his vocabulary to do so much as swear, much less to talk in a dirty manner or any kind of sexual manner about girls. And this is the kind of man who is assumed to be sexually deviant? I'm not an expert in the field of sexual predators, but let's find someone who is. Let's ask the court or this expert or any other man in the world if this seems consistent. Let's present this information to the judge and see if he still believes it to be possible that Jordan's mind swayed so far so rapidly in a "moment of weakness." And make no mistake about it, this is a deviant crime that he is accused of. I know that court records aren't always direct as to the matter of what form of assault took place in every sexual assault case, but if there is any way of finding out, I'd like to know if a crime such as this has ever taken place. Why oral sex? Has it ever been in the sexual interests of man to perform oral sex on strangers? Perhaps I'm just naïve and this sort of thing truly does happen all over as the judge would have us to believe. I went to a smaller Christian college so maybe I'm out of the loop. Let's go to the fraternities all around the country to see if any men are interested in this sort of thing. Let's ask the sorority girls if they have ever been abused by a random guy in this way. Sure, you'd find hundreds and probably thousands of girls who have been raped by guys they never knew who found them in vulnerable situations. But oral sex? If a man were looking for pleasure and he was trying to trick a girl into accepting this, would he really go for oral sex? Picture the situation. A young man passes up on the opportunity to have consensual sexual relations with any number of the drunk girls at this party but rather walks into a random room to find two people lying on the bed. He decides that he would like to be further aroused through this situation he has found himself in. He assumes that the one who is a girl must be naked. He uncovers her to see that she is in fact naked. He must not throw the covers all the way off so as to disturb the man lying next to her. He is not aroused enough by the fact that she is naked. She must still be sleeping or she would have recognized a foreign man. For his own sexual pleasure, he has the

options of looking at her, touching her, rubbing up against her..... and probably many other perverted options, all of which should be crimes in and of themselves. He however, bypasses all of these options and decides that he would be most pleased through performing oral sex on her. (I have to add a few obvious comments here. The average person (I, for one) typically avoids specifics when they are forced to think about disgusting things. A lot of the details that would have had to happen for Jordan to perform oral sex on her that night (the things I subconsciously ignore) make her story seem absolutely absurd when I force myself to think about them. For instance: imagine the exact and specific actions Jordan would have had to make and thoughts he would have possibly been thinking if Lindsey's story is true. OK, I know it's sick and disgusting and I don't want to think about things like that either, but it's crucial to not skip over small things like how a 200 lb. man could uncover and gingerly climb onto the bed of a woman (who was allegedly sober enough at the time to give a credible testimony) and her boyfriend (also allegedly sober enough) without waking them. That's not very likely, but I guess it's possible. Now imagine this man positioning himself and the woman (her body and legs, etc.) in such a way as to make vaginal-oral sex possible without waking either of the relatively sober people on the bed. Now imagine him putting his mouth on the vagina of a woman he doesn't know who is laying next to a man he doesn't know without waking her up...this is the point I realized he would have to be completely insane or demented because he's not inebriated or he would have woken them up for sure by now. He's definitely coherent enough to be careful and quiet and perform "good" oral sex. By the way, he's also stupid. Who unnecessarily takes their shoes and shirt off before committing a crime they will have to run away from except for a total idiot? Back to my point though, any person (especially a pre-med student knowledgeable about human biology) who would get so much pleasure from performing non-consensual oral sex on a sleeping woman he doesn't know that the benefits he received from it would outweigh his awareness of possibly licking another man's semen, fluid from her period, or any number of STDs (obviously she's sexually active), not to mention the criminal repercussions, is a sick and demented (and whatever other adjective you can come up with, I'd probably agree with you) person. It should be easy to come up with corroborating evidence of other similar bizarre behavior. How could a man who is sexually aroused leave a room so quickly he didn't have time to pull up his pants and have none of the eye witnesses at the bottom of the stairs notice anything? I don't want to get into a human anatomy lesson or anything, but any man understands that erections don't just go away in a matter of a few seconds, and any observant person would have noticed that, especially if his pants were down. Why weren't things like this addressed? There are so many other discrepancies and absurdities that I could continue to fill pages until you got even more angry or bored or just skipped to the next part, but that's enough from me for now.) Immediately, he must then notice through consistency of fluid or through taste that she is at the end of her menstrual cycle. This must be of no concern to him as he continues until she is "getting into it." Even if this crime has ever been committed by some horribly sick individual, I would be willing to bet anything that it has never occurred on a girl who is in the presence of another man who would object. And then on top of that, it is suggested that he was not hindered in any way by the fact that she was bleeding.

Next, it must be assumed that Jordan is extremely bold, cocky, and completely carefree in his decision-making abilities. It must not only be assumed that he made the choice to pleasure himself through performing oral sex on her, but also that he felt he would be able to perform such an act without being caught or at least without concern for the consequences of such an action. I've played cards with Jordan and it takes him longer than anyone I know to make the easiest decisions. The more difficult decisions are always extremely well thought out and made after weighing every last pro and con and seeking extensive counsel. In this case, however, it must be assumed that he made a split second decision to whip the covers off this girl, see that she was naked, climb his 200+ pound body up onto the bed without waking the man next to her, reposition her legs in such a way as to expose her vagina and commit the crime. Anyone who thinks there is an ounce of logic in committing an act such as this is a sick, perverted man who has developed a twisted sexual thought pattern that has developed over time. That's just not a natural human instinct- just like it's not natural for men to rape women with no premeditation and no prior sexual violence or at least some progressive fantasies, and just like it's not natural for men to rape little boys because that's just the kind of thing they have always found to be attractive. I'm not a psychologist or psychiatrist but I'm sure there are plenty out there who would back me up. We are not talking about just "some sex act" as the judge so passively referred to it. No, speak boldly judge- "some sex act" occurs every night across college campuses all over the US, and "some sex act" probably occurs

quite often in “a moment of weakness” even by those who hold to a high moral standard, but acts of a sexual predator stalking his prey are only done by sexual predators! A moment of weakness is choosing to enter a room where a girl is lying in the bed. A moment of weakness is turning to look at what all of the moaning is about. Jordan was not accused of “some sex act.” The court is accusing him of being a sexual predator and you had better stand up and boldly state the crime for which you are finding him guilty. What a complete shameful cop-out to generalize this accusation. It’s just not that difficult to accuse somebody of “some sex act.” It is extremely difficult to look Jordan and his family and his friends or anybody he has ever known for more than a day (that includes you judge, look in the mirror) in the eyes and call him a sexual predator.

So now that we have the illogical nature of both sides established, (granted, this was not done in court) we have to make the decision about 1. who was more motivated to make an illogical decision and then 2. who is found to have a more credible story and 3. in which direction the evidence (physical, testimonies, etc.) is pointing. This was not done. Only the last of these three means of defense was addressed during the trial with perhaps some weak references to the first two. The other lines of defense were most likely pondered by Jordan’s attorney, especially since Jordan requested that character be a part of the case from the very beginning. His lawyer did not deem them to be necessary for victory and certainly not worth all of the time and effort. This was to be an open and shut quiet case before a judge in which obvious lack of physical evidence was the entire foundation for acquittal. It was very ignorant and naïve of us to trust the insistence and professional leverage of Peterson in this regard. It is absolutely essential to the defense that Lindsay’s testimony be placed in doubt. Let’s refer back to the previous statement by the district court which the appellate court affirms.

In making its credibility determination, the district court stated:

No evidence was presented which placed serious doubt on the truthfulness of [Lindsay’s] testimony. Without a firm reason to believe [Lindsay] was lying or had been dreaming, the verdict in this case cannot be not guilty.

(This is an incorrect statement in that there was in fact a lack of physical evidence which did place Lindsay’s testimony in serious doubt, but the court is correct in that there is so much more that could have been explored as to why Lindsay’s testimony contained lies. I see this as absolutely essential to the defense, not optional. Essential, not optional. Without this emphasis the burden is placed on the fact finder to make his own conclusions in regard to who is more credible based on virtually nothing aside from gut instinct and past experience with respect to sexual assault cases. And I would venture to say that our court systems are not set up in such a way (and nor should they be) as to eliminate human nature’s desire to protect people from predators if given even a window of opportunity. In addition, the fact finder can chose to see the physical evidence as meaning something entirely different than how it is presented or can simply chose to throw it out along with the expert witness if he just flat out doesn’t believe Jordan’s testimony and does believe hers. For this reason, although it is sufficiently supports innocence, the physical evidence should not just be left to stand on its own. In dealing with such an emotionally charged accusation in the eyes of the public (especially in the state of Iowa), the judge must be given very strong evidence and motive as to why Lindsay’s story is inaccurate. Without it, he will easily default to the choice which would not lead to public questioning of his decision; that is- to convict the “perpetrator.” It is a bold decision, on the other hand to call Lindsay a liar and to stand up for a man who is a division one athlete. This would no doubt be seen by those less familiar with the evidence in the case as a blow to the protection of women, and a favor to a more prominent individual. In a state where judges are elected, this would be very, very bold. The timing of this case could not have been any worse in this regard as a division one basketball player had been recently accused of sexual assault and found guilty. (State of Iowa vs. Pierre Pierce (University of Iowa), he got a whole year of probation for rape.) Picketers were present at every basketball game that year protesting the fact that he was even allowed to sit on the bench. This was recently reported as one of the top ten stories of 2005 in Iowa. For the judge to rule on Jordan’s behalf would have been difficult for him to defend to the public, especially considering the lack of information that was presented to him. There was significant potential for his re-election to be hindered if

he were to find Jordan not guilty. Sorry, judge, if that sounds a little harsh, but look deep inside to see if you didn't allow politics to influence your decision in this case. I think you probably did.

A motive was never fully explored or suggested by the defense attorney. In this case, the court had to choose between Lindsay as the victim or Jordan as the victim. The court should have been given a better understanding as to why Jordan was in fact the victim in this case. My understanding of criminal law leads me to believe that establishing motive is essential for prosecuting crimes. Lindsay had a strong motive- a motive much more powerful than money or fame- that could have obviously been drawn out through exploring past behavior and interviewing friends, etc. What was Jordan's motive? This sort of thing is normally just implied in sexual assault cases- the man must have been seeking sexual pleasure. It's always a selfish act and the unspoken motive in this case is that he must have been sexually arousing himself through arousing a stranger. This unnatural manner of sexual arousal was previously discussed (although, once again, not in court).

The court was not given nearly enough evidence as to why Jordan's testimony was more consistent with the truth than Lindsay's. A psychologist would probably have little trouble picking up on the major theme in Lindsay's behavior pattern over a long period of time and more importantly, over that previous day, and presenting this as evidence that would suggest she is very capable of making such an illogical accusation even in a short amount of time. If a thought pattern is ingrained into someone's brain over a long period of time, the actions which result happen as an instinct. This is basic human nature. [A reputable schemer is decisively good at scheming.](#) And then there are other questions to explore in regard to the consistency of Jordan's testimony. [Bottom line is, the lawyer didn't even give much weight to Jordan's testimony as he did not discuss it with him in any sort of detail prior to him taking the stand. There was no discussion between Jordan and his attorney as to what points are crucial to mention. It was pretty much left to Jordan to state what happened without him knowing which parts to expound upon or which parts might be less important. I know that he would love to give the testimony all over again because he would not leave unexposed one tiny little detail of the events that happened that night. His lawyer was not interested in the details, and it was the details that eventually were used by the judge to speak against his credibility (for example, whether Jordan returned to the room to get his shoes or his friend's keys).] Was she in fact masturbating? Let's talk openly about this. What about the fact that Joe's DNA was not found in her genital region? Could they have been planning on having sex and instead fallen asleep? This is not without precedent as her ex-boyfriend claimed this is exactly what happened earlier in the evening when the two of them were making out. This would be the second time in the evening then that she had been sexually aroused but not fulfilled. I'm not a woman, but I could see that this would lead to some sexual tension and could perhaps increase the likelihood that she was having a fantasy dream of some sort and possibly masturbating without being fully consciously aware of it. Who knows, maybe she was fully aware. She was obviously at the point of "getting into it" with all of her moaning and was probably not in a state where she was highly attentive to her surrounding environment. To then wake up in a dazed state, further enhanced through excessive alcohol and perhaps other substances which were at the party, and see a man's hair somewhere down below you, would be extremely frightening and embarrassing at the same time- especially after having mistaken this man for your boyfriend and pulling him closer toward you. This is the stuff of the worst kind of nightmares, such intense fear and embarrassment all at the same time. This must have been a very frightening and confusing moment- obviously enough to make a person scream, which just ends up further adding to the embarrassment. Why in the world was a man's head somewhere down by my legs and why was I aroused? There are only so many explanations for that. Hers must have seemed like a logical one at the time, and one that easily could have popped into her head. "I can't believe I pulled him toward me, sick". The scheme didn't start there. If there was a scheme it began when she came out of the fog and confusion and stepped easily into her comfortable role as the victim. The confusion and fog were repressed as this conclusion seemed best. All of the sudden, her illogical decision seems to be quite plausible. I wasn't there of course, and I for sure don't know what was going on in her head and nobody can provide firm evidence that she was dreaming unless she had a polysomnograph hooked up, but it sure doesn't seem like a far-fetched story that she would make this up. In fact, after Jordan's character and integrity are further explored, it would seem far and away more illogical for him to make the decision to commit the crime of which he is accused. The lawyer failed to provide any of this essential information. **This act did not shift the burden of proof to Holm. It was simply the court's method of**

thoroughly weighing the evidence before it. (Once again, there is the statement that rightfully pulls some of the blame from the fact finder- he could only weigh the evidence presented to him.)

Holm also argues the court violated his due process rights by improperly considering his silence. At trial, Holm was asked on cross-examination if it was contradictory that he had expressed his eagerness to cooperate with the police investigation but then told an officer he should maybe talk to a lawyer. An objection to the question was sustained. In weighing Holm's credibility, the court stated:

Most compelling in the testimony of the corroborating witnesses is that the defendant never claimed to any of them nor to his friend John Garvin that Lindsay . . . was masturbating and somehow confused that act with an oral sex act. It is reasonable to conclude he would have made the explanation offered at the trial at some point earlier in the investigation if it had been true.

We conclude the district court's reference to "the investigation" did not equate with the consideration of Holm's constitutional right to remain silent. Rather, a reading of the court's decision shows it is in reference to the period of time at the party when witnesses were trying to ascertain what had happened. Accordingly, we conclude Holm's due process was not violated.

(This error in thinking by the judge speaks directly to his own personal character, and to the character of those criminals he has dealt with over the last twenty some years as a prosecuting attorney. The judge is basically saying, "If I were in that situation, I, or any other innocent man, would have spoken up loudly and defended myself right there at the time." This is an interesting thought, because perhaps he's right in the sense that he might have defended himself and many others might have defended themselves more thoroughly in this situation. However, the fact that Jordan didn't speak up in explaining the details is more a sign of being consistent with his choice to not openly discuss explicit sexual information in public and his gut instinct to not speak badly about others than it is a sign of guilt. "Being reviled, He reviled not again." Silence is a Christlike, and yet quite un-natural, un-explainable reaction to accusations. It is important to understand that upon coming down the stairs, Joe rather immediately stated he believed Jordan and not Lindsay. The court gives no regard to this in assuming how Jordan should have felt led to respond. It's logical to conclude that he would not have felt compelled to provide anyone with a detailed explanation to further incriminate Lindsay, having already heard that they didn't believe her story. Perhaps it's best described by Lindsay why Jordan's decision to not mention any embarrassing details was only appropriate and not a reason to find him not credible. In her description of the situation, she notes, "I was upset due to the fact that I went- no one believed me (tr. p. 37-38)." She was angry because NOBODY believed her. The court proceeds under an entirely different assumption and would have us to believe Jordan's trial testimony is not credible because he didn't explain during "the period of time at the party" what he had just observed Lindsay doing. This is ridiculous. Perhaps if there had been a strong feeling about him committing the alleged crime, he may have felt the need to speak out against her further. He, however, did not see the need to embarrass Lindsay any further than she was already embarrassing herself. He wasn't so perverted and rude as to go running down the stairs yelling, "Sick, you wouldn't believe what this girl is doing in a bed upstairs." He gave Lindsay the opportunity to explain her screaming as being due to a sudden fear without further shaming her. In fact, he was probably pretty embarrassed about the whole thing himself and thought it would be best if they didn't get into a big long discussion about it. This was the honorable and right thing to do. Now, even if the situation were as the court portrays it, and Jordan was in need of further explaining himself, it is well known among his friends and family that he doesn't openly discuss explicit sexual information any more than he swears or speaks in a way that is demeaning toward women. It is simply not in his nature or vocabulary to do this. Of course, even minimal character evidence would have revealed this to the court but his character was never addressed. So the assumptions made by the court were unfounded if not completely unreasonable given the true nature of the circumstance.

The court also finds it "most compelling" that Jordan, upon meeting up with his friend, Jon Garvin, the next morning, did not provide him with a detailed explanation of what had happened in the bedroom the night before. What is more compelling is that the judge is convinced that Jordan should have felt

compelled to do so. Garvin didn't need to hear anything from Jordan, much less the details. He knew that Jordan did not commit the alleged crime and Jordan knew that he knew this. Therefore, why should he express any details to him when he is already convinced without them? Jordan's innocence was not in question and no explanations were asked for. It was only in court where every detail was required, and this is where the details were openly disclosed.)

IV. Ineffective Assistance of Counsel. We review claims of ineffective assistance of counsel de novo. *State v. McBride*, 625 N.W.2d 372, 373 (Iowa Ct. App. 2001). Ordinarily, we preserve ineffectiveness claims raised on direct appeal for postconviction relief to allow full development of the facts surrounding counsel's conduct. *Berryhill v. State*, 603 N.W.2d 243, 245 (Iowa 1999). Only in rare cases will the trial record alone be sufficient to resolve the claim. *Id.* "Even a lawyer is entitled to his day in court, especially when his professional reputation is impugned." *State v. Kirchner*, 600 N.W.2d 330, 335 (Iowa Ct. App. 1999) (citing *State v. Coil*, 264 N.W.2d 293, 296 (Iowa 1978)).

To establish an ineffective assistance of counsel claim a defendant must show (1) counsel failed to perform an essential duty, and (2) prejudice resulted therefrom. *Wemark v. State*, 602 N.W.2d 810, 814 (Iowa 1999). The test of ineffective assistance of counsel focuses on whether counsel's performance was reasonably effective. *Strickland v. Washington*, 466 U.S. 668, 697, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). The defendant must show counsel's performance fell below an objective standard of reasonableness so that counsel failed to fulfill the adversarial role that the Sixth Amendment envisions. *Id.* A strong presumption exists that counsel's performance fell within the wide range of reasonable professional assistance. *Wemark*, 602 N.W.2d at 814. The defendant has the burden of proving both elements of his ineffective assistance claim by a preponderance of the evidence. *Ledezma v. State*, 626 N.W.2d 134, 145 (Iowa 2001).

Additionally, our courts have ruled that trial strategy, miscalculated tactics, mistake or inexperience do not constitute ineffective assistance. *Id.* at 143. We may dispose of the defendant's ineffective assistance claims under either prong. *Id.* In order to prove the prejudice prong, the defendant must show a reasonable probability that but for counsel's alleged errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 695, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698.

Holm first contends his counsel was ineffective in failing to conduct depositions. Specifically, he argues counsel should have deposed the nurse who examined Lindsay to question her regarding the exact location of the thigh swab. Because the record is not fully developed in regard to this matter, we conclude this matter is more appropriately addressed during postconviction relief.

Holm next contends his trial counsel was ineffective in failing to further investigate why Bradley's semen was not detected in the swab on Lindsay's vagina. In the court's ruling on Holm's motion for new trial, it stated:

Dr. Benjamin's testimony was not credible in light of the facts of this case. His testimony completely ignored the undisputed evidence that Lindsay . . . and Joseph Bradley had engaged in consensual sexual intercourse within a short time before this incident. (This "evidence" was disputed by the DNA test itself. The lack of DNA is the only possible proof they did not have sex. It's not like there could have been an eye witness of them not having sex. Since when does two drunken people's recollection trump a thorough DNA test and an expert opinion?) **The semen found on the bedsheet was consistent with Joseph Bradley. The vaginal swabbing had no DNA other than Lindsay. . . . The swabbing from the inner thigh was a mixed sample with a major contributor being Lindsay . . . and the minor contributor being consistent with the Defendant. From that inner thigh swabbing, Joseph Bradley was eliminated as a contributor. From those findings, which Dr. Benjamin testified he did not challenge, he drew conclusions which were not credible.** He concluded that an oral sex act by the Defendant would have absolutely (I just want to highlight that one word and repeat it: absolutely (absolutely) (absolutely).) produced a finding of the Defendant's DNA on the

vaginal swabbing. **Yet, Dr. Benjamin ignored the lack of Joseph Bradley's DNA on the vaginal swabbing.** Dr. Benjamin concluded that a minor, incidental transfer of epithelial cells from one touch of the Defendant's hair to a brief touch of the inner thigh was the reason for the presence of Defendant's DNA on that swabbing. **Yet, Dr. Benjamin ignored the lack of Joseph Bradley's DNA on the inner thigh swabbing.**

Holm claims his counsel was ineffective in failing to ascertain reasons why Bradley's sperm was not detected in the vaginal swab.

We conclude no prejudice resulted in counsel's failure to question Lindsay and Bradley regarding the use of a condom or ejaculation during intercourse. Even assuming something occurred to explain the complete absence of Bradley's DNA from the vaginal swab, the absence of his DNA from the inner thigh swab is still not explained, *(The appellate court is repeating a common error that is seen throughout this case in that they are placing the burden of evidence on the defense as if the expert is responsible for addressing why Joe's DNA is present. Furthermore, the expert was not given the opportunity to do this or he may very well have had a reasonable explanation. He, on the other hand, didn't even know prior to his testimony that Lindsay and Joe had claimed to have had sex. I'm sure that he would have addressed this had he known but this still doesn't place the responsibility on the defense to explain the lack of Joe's DNA on the thigh swab.)* and questions arise regarding Dr. Benjamin's theory of how Holm's DNA appeared on the inner thigh swab. If "questions arise" regarding a theory by such a formidable expert, then would not the entire table of evidence relating to DNA be so in-question as to not be the major basis upon which to put away a man for 10 years? *(Okay, here again, I take strong issue with the court. Stand up and say what you are implying. Was the DNA test faulty or was it accurate? The court would suggest that the DNA test is faulty in that Joe's DNA was not present in the vaginal swab. This was the only basis that the judge could use to justify why Jordan's DNA was not present in the vaginal swab. The court then implies that the DNA test is accurate in that it revealed Jordan's DNA to be present on the thigh swab. Is the thigh swab then accurate and the vaginal swab inaccurate? Aren't these things best left to be determined by people who have experience in the field of DNA evidence? The court is proposing that they are more knowledgeable about where DNA should and shouldn't be, whether or not a standard rape kit is accurate, how much DNA should be present, which locations for swabbing are felt to be more accurate, etc. than a highly qualified and experienced professor of forensic biology. No, they are not more knowledgeable about such things and should not make decisions as if they are. At the very least, the prosecution should have responded with a rebuttal to the expert witness or provided an expert of their own. The court suggests on its own however that the DNA test is both inaccurate (Joe's DNA should be there, and Jordan's should be found on the vaginal swab) and accurate (Jordan's DNA on the thigh proves his guilt). In fact neither of these thought processes are close to accurate. I understand the evidence to strongly support that the alleged crime did not occur. At the very most, all the court should be able to say is that the entirety of the DNA must be inaccurate (although they are not qualified to do so). If the entirety of the DNA evidence is inaccurate then we are back to a case of he said/ she said and character must be strongly considered along with accuracy of testimony. We're going in circles here, but again, both of these point strongly toward Lindsay as the perpetrator and Jordan as the victim.)*

Holm also contends his counsel was ineffective in failing to properly supplement the record. Following the court's ruling on the motion for new trial, counsel filed a supplemental brief that contained an affidavit of Dr. Benjamin which opined the DNA results did not indicate Lindsay had intercourse leading to ejaculation in the twenty-four hours preceding her thigh swab. Holm argues counsel should have introduced this evidence at trial. **We conclude this evidence was not relevant to the issues in this case.** *(Actually, they might be right on this one. Joe and Lindsey having sex or not is a completely separate incident and is not relevant to the case other than helping to prove the State's point of view that the DNA test was faulty. I don't agree with the process by which the alleged error in the DNA test was accepted as fact based on Joe and Lindsey's testimonies, but...well, sometimes it's easier for me to explain things using equations. This might be easier to understand:*

The State's reasoning:

a, to initially assume Lindsey is telling the truth = b, to initially assume Jordan is guilty (this would shift the burden of proof, correct?)

b, Jordan is not telling the truth = **c**, the DNA test is wrong

(if our known variable is that Jordan is guilty then DNA test must be wrong)

c, the DNA test is wrong = **d**, Joe is telling the truth

(ok, fine, so these “equations” aren’t very complicated. **a=b=c=d**.)

The problem with this is that in the real world (the one that mathematicians, scientists, DNA experts, and everyone who watches CSI live in) problems are solved by using known information to find the unknown (the solution, or verdict). **c** is our only known variable, but it is inversely true:

c, the DNA test is right = all the assumptions made by the judge concerning the other variables have no basis other than his own imagination or disproportionately biased opinion.)

Holm contends counsel was ineffective in submitting a renewed motion for new trial with attached unsigned affidavits from two witnesses. Holm argues counsel was ineffective in failing to discover and present this evidence at trial. We conclude Holm has failed to demonstrate how this evidence would have changed the outcome of the trial. (How can anything be demonstrated about evidence that cannot be evaluated? One affidavit was from Lindsey’s ex-boyfriend who stated that she was kicked out of a bar for fighting with her boyfriend earlier that day. She then went home with her ex and they made out/kissed until Lindsey passed out...)

Holm next contends counsel was ineffective in failing to present evidence regarding his good character at trial. We conclude such evidence was irrelevant to the issues in this case, and therefore counsel had no duty to present such evidence. (Jordan told me he feels this is one of the most unjustifiable mistakes made by the court. How can a person’s good character be irrelevant to a judgment based almost solely upon their credibility? The judge had no idea who Jordan was other than an athlete and pre-med student at the University of Northern Iowa accused of sexual assault.) “The issues” in this case clearly and emphatically do involve character & credibility-based opinions. Dodds was deemed “more credible” based upon the witness of her own friends who referred to her as “Schemin’ Demon.” Add the fact that women are more likely to be viewed as the victim in sexual situations ... plus the proficiency of Dodds in consistently holding to her story. To deny Jordan character witnesses is to deny Jordan his day in court.

Finally, Holm requests that this court preserve for postconviction relief the issue of whether he made a knowing and intelligent waiver of trial by jury. He claims his trial counsel practically assured him that he would receive an acquittal from a bench trial, rather than a jury trial, due to the complex nature of the scientific evidence. However, the record of Holm’s waiver establishes that it was **knowing** and voluntary. (All Jordan knew about waiving his right to a jury he learned from his lawyer, Michael Peterson. He was forbidden to talk about the case with anyone, but he talked about the waiver with a couple of us brothers. The only information we had to evaluate the situation was from him and we all agreed that it didn’t sound right, but lawyers are supposed to be smarter than us, right? They are our advocates when we are unsure and insecure and helpless and they know and want justice and what is best for us. Jordan can only be blamed for trusting in that ideal, and barely at that. I used to trust them too. I and the rest of our family were also forbidden from talking about any part of the case with anyone, even each other. We didn’t even know most of the details until the trial. Jordan had promised his lawyer so there was no point in even bringing it up. Is that normal practice? Maybe in a guilty person’s case, but how could that have been good for Jordan? We wanted to shout it from the rooftops, “Injustice! He’s innocent! Analyze his entire life, he has nothing to hide!” But I guess wrestling one more season was more important.) **Counsel stated on the record strategic reasons for waiving the jury trial, and indicated Holm had spent a great deal of time thinking about it and discussing it with family.** Help us understand fully the court’s definition of the word “family” please. Jordan never did ask the opinion of his mother or father on whether he should defer his right to a jury. Peterson was strategically pressuring Jordan—using all his professional experience as badgering weight—to keep the trial hush-hush and out of the media upon the express request of the University of Northern Iowa. He [Michael Peterson] then stated, “I think we’re prepared to take our chances with the judge rather than with a jury on that kind of evidence.” This decision does not amount to ineffective assistance of counsel. *Ledezma*, 626 N.W.2d at 143.

We affirm Holm's conviction.

AFFIRMED.