**IN THE COURT OF APPEALS OF IOWA**

No. 1-485 / 00-1987
Filed August 29, 2001

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CLERK SUPREME COURT

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

**vs.**

**TERRY LEE SIMMONS,**
**Defendant-Appellant.**

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Appeal from the Iowa District Court for Marshall County, Carl D. Baker, Judge.

Defendant appeals from the judgment and sentence entered following his conviction of second-degree sexual abuse, lascivious acts with a child, indecent contact with a child, and exhibition of obscene material to a minor. *See* Iowa Code §§ 709.1, 709.3(2), 709.8, 709.12(1), 728.2 (1999). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and James G. Tomka, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Bridget A. Chambers, Assistant Attorney General, James DeTaeye, County Attorney, and Paul Crawford, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Vogel and Vaitheswaran, JJ.

**SACKETT, C.J.**

Defendant-appellant Terry Lee Simmons appeals the judgment and sentence entered against him following his convictions for 1) sexual abuse in the second degree, in violation of Iowa Code sections 709.1 and 709.3(2) (1999); 2) lascivious acts with a child, in violation of Iowa Code section 709.8 (1999); 3) indecent contact with a child, in violation of Iowa Code section 709.12(1) (1999); and 4) exhibition of obscene material to a minor, in violation of Iowa Code sections 728.2 and 728.1(5) (1999). Defendant claims on appeal that there was insufficient evidence to support his conviction on each of the four counts. Defendant also claims that Count III, indecent contact with a child, should have been merged into Count II, lascivious acts with a child. We affirm.

Defendant, age 27, lives with his mother, Vickie Duffy, at her home. On June 7, defendant's sister, Tammy Padilla, sent her four children to her mother's home for child care so that she and her husband could travel to Chicago. Ms. Padilla returned for her children on June 9. Her three boys went home with their mother, but her eleven-year-old daughter, J.F., remained at her grandmother's (and defendant's) home.

J.F. stayed at the home from June 7 until June 11. It was during this time that she alleges defendant sexually abused her by, among other things, putting his "private" in her "private." According to J.F. he also transported her during the night from her grandmother's bed to his own, where he touched and licked her pubic area and showed her pornographic magazines and videos. J.F. also testified that defendant fondled her breasts when they were doing a paper route. It is unclear exactly which nights defendant's acts occurred; testimony by eleven-

year-old J.F. at trial was not entirely consistent regarding the frequency of the acts. On June 11, J.F. returned home and was taken by her mother to the emergency room in Marshalltown, where she was examined by Dr. Lance Van Gundy and then later in Ames by Dr. Kathleen Opdebeeck. Evidence obtained from these examinations was inconclusive. The only physical abnormality J.F. exhibited was irritation on the left side of the vestibule and hymen. Such irritation may result from partial penetration, but it can also be merely a reaction to soap or a bubble bath.

The jury returned a guilty verdict after defendant's motion for directed verdict was denied by the court on the basis that the issue at hand was one of credibility for determination by the jury. The defendant appeals the verdict on the grounds that there was insufficient evidence to submit the case to the jury.

In reviewing a motion for judgment of acquittal based upon insufficient evidence, we review all of the evidence presented in the light most favorable to the State to determine if any rational trier of fact could have found defendant guilty beyond a reasonable doubt. *State v. Dominguez,* 482 N.W.2d 390, 392 (Iowa 1992). Evidence which raises merely suspicion, speculation, or conjecture is insufficient. *State v. LaPointe,* 418 N.W.2d 49, 51 (Iowa 1988). In our review we look at the record for substantial evidence supporting a guilty verdict. Substantial evidence is such evidence as could convince a rational trier of fact that defendant is guilty of the crime charged beyond a reasonable doubt. *State v. Aldape,* 307 N.W.2d 32, 39 (Iowa 1981).

We find there was substantial evidence to support the jury's guilty verdict on all four counts. In denying the defendant's motion for a judgment of acquittal,

the district court acknowledged the inconsistency of some of the testimony, but ruled that issues of credibility and consistency were properly within the purview of the jury. We agree.

Given the evidence and testimony, a rational fact finder could have found the defendant guilty beyond a reasonable doubt. Under Iowa Rule of Criminal Procedure (20)(3), a guilty verdict does not require evidence of guilt beyond the victim's own testimony. J.F. testified in detail about defendant's fondling her breasts during a paper route and touching her "private" and "humping" her in his room. Additionally, J.F.'s testimony was corroborated by extrinsic evidence. A physical examination showed physical irritation in J.F.'s pubic region consistent with a finding of sexual abuse. Even had there been no such sign of irritation, testimony by one of the examining doctors demonstrated that partial penetration may still have occurred. Further, evidence at trial regarding pornography J.F. testified defendant had shown her, the contents of which J.F. was able to describe with detail, was found in defendant's living quarters at his mother's home. We find the evidence presented at trial substantially supported the jury's guilty verdict on all four counts.

Defendant also claims that the lesser charge of indecent contact with a child should have been merged into the charge of lascivious acts with a child. This merger issue is properly before us because defendant is not required to raise the merger issue at the trial level. *State v. Halliburton,* 539 N.W.2d 339, 343 (Iowa 1995). Because of the number of acts defendant allegedly committed, some qualifying as "lascivious," some as "indecent contact," we find that defendant was properly charged with each distinct count. Because the

convictions were based on distinct acts, the Iowa statute does not bar multiple convictions arising out of the series of separate, distinct acts of sexual misconduct by defendant. *State v. Constable,* 505 N.W.2d 473, 477-78 (Iowa 1993); *State v. Spilger,* 508 N.W.2d 650, 651-52 (Iowa 1993).

**AFFIRMED.**