IN THE COURT OF APPEALS OF IOWA

No. 0-464 / 99-1103
Filed August 30, 2000

FILED
AUG 30 2000
CLERK SUPREME COURT

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ERIC D. HERNDON,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Artis Reis, judge (trial), and Leo Oxberger, senior judge (sentencing).

Defendant appeals from the judgment and sentence entered upon a jury verdict finding him guilty of third-degree sexual abuse. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Dennis D. Hendrickson, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Mary E. Tabor, Assistant Attorney General, John P. Sarcone, County Attorney, and Steve Foritano, Assistant County Attorney, for appellee.

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

STREIT, J.

The defendant, Eric Herndon, maintains a willing partner in sex on one occasion is a willing partner thereafter. Herndon claims his conviction for third-degree sexual assault was not supported by substantial evidence because there was insufficient evidence to support a finding he engaged in a sex act with his victim against her will. The victim's testimony and other evidence were sufficient to support Herndon's conviction, and we affirm.

I. Background Facts & Proceedings.

Eric Herndon and Rosa B., friends since the summer of 1998, occasionally had sexual relations. In January of 1999, after a weekend of such relations in Rosa's apartment, Herndon and Rosa argued about Herndon's loud use of the phone. Rosa asked Herndon to leave. Herndon shoved Rosa, threw her to the floor, tore off her sweatpants, and had sexual intercourse with her. During the next six to seven hours, Herndon attempted to have vaginal, oral, and anal sex with Rosa. Rosa testified she never consented to any of these sexual acts. The next morning Rosa fled from her apartment and called the police.

The jury found Herndon guilty of third-degree sexual abuse. Herndon appeals, claiming there was insufficient evidence he committed third-degree sexual abuse.

II. Standard of Review.

We review claims of insufficient evidence for errors at law. Iowa R. App. P. 4. A jury's guilty verdict is binding upon us unless we conclude the record lacks substantial evidence to support such a finding. *State v. Bush*, 518 N.W.2d

778, 779 (Iowa 1994). Substantial evidence means such evidence as could convince a rational trier of fact the defendant is guilty of the crime charged beyond a reasonable doubt. *State v. Taft*, 506 N.W.2d 757, 762 (Iowa 1993). Substantial evidence does not, however, denote some elevated quantity of proof. *State v. Anderson*, 517 N.W.2d 208, 211 (Iowa 1994). Rather, the relevant question in our review of the case "is whether, after viewing all the evidence in the light most favorable to the prosecution, any rational trier of facts could have found the essential elements of the crime beyond a reasonable doubt." *Id.*

III. The Merits.

A person commits third-degree sexual abuse when he or she performs a sex act with another person and does so "by force or against the will" of the other person. Iowa Code § 709.4(1) (Supp. 1999). Herndon does not dispute a "sex act" occurred between himself and Rosa.[1] Nor does he dispute he may have physically assaulted Rosa. Herndon does, however, assert there is no link between these two occurrences and thus there is not substantial evidence to

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[1] The Iowa Code defines a "sex act" as follows:

> The term "sex act" or "sexual activity" means any sexual contact between two or more persons by: penetration of the penis into the vagina or anus; contact between the mouth and genitalia or by contact between the genitalia of one person and the genitalia or anus of another person; contact between the finger or hand of one person and the genitalia or anus of another person, except in the course of examination or treatment by a person licensed pursuant to chapter 148, 148C, 150, 150A, 151, or 152; or by use of artificial sexual organs or substitutes therefor in contact with the genitalia or anus.

Iowa Code § 702.17 (1999).

support a finding he performed a sex act by force or against Rosa's will in violation of section 709.4(1) of the Iowa Code.

When determining whether a person has performed a sex act by force or against the will of another person, "the circumstances surrounding the commission of the act may be considered in determining whether or not the act was done by force or against the will of the other." Iowa Code § 709.5 (Supp. 1999); *see also State v. Bauer*, 324 N.W.2d 320, 322 (Iowa 1982) (stating this means all the circumstances surrounding the act, subjective and objective, should be considered). The jury is also "free to accept all, part, or none of a witness's testimony." *State v. Farnum*, 554 N.W.2d 716, 718 (Iowa App. 1996) (finding there was substantial evidence to support the defendant's third-degree sexual abuse conviction where the defendant's testimony and the victim's testimony were markedly different). Finally, a victim's account of sexual abuse need not be corroborated by other witnesses or direct physical evidence. *Id.* (quoting *State v. Knox*, 536 N.W.2d 735, 742 (Iowa 1995)).

All of the circumstances in this case support a finding Herndon committed third-degree sexual abuse. Rosa testified she never consented to having sexual intercourse with Herndon and, even though she made her unwillingness clear to him, he overpowered her. Rosa's account is corroborated by physical evidence. Police investigators retrieved a pair of torn panties from Rosa's apartment. A doctor found live sperm in Rosa's vagina and a fresh abrasion on her shoulder.

Given Rosa's credible testimony and the other evidence the State offered against Herndon, a rational trier of fact could conclude beyond a reasonable

doubt Herndon performed a sex act with Rosa against her will. Such a finding is supported by substantial evidence even though Rosa and Herndon had previously engaged in consensual sex. *See State v. Plaster*, 424 N.W.2d 226, 233 (Iowa 1988).

Herndon's conviction of third-degree sexual abuse is supported by sufficient evidence. We affirm the district court.

AFFIRMED.