FILED
MAR 23 1982
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)

Plaintiff-Appellee,) Filed March 23, 1982 525

vs.)

NICHOLAS JOHN BAUER,) 1-435/66231

Defendant-Appellant.)

Appeal from Kossuth District Court - J. H. Andreasen, Judge.

Defendant appeals from his conviction of sexual abuse in the third degree in violation of section 709.4, The Code. AFFIRMED.

Chris Odell, Appellate Defender's Office, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and M. J. Blink, Assistant Attorney General, for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

Defendant, Nicholas John Bauer, appeals from his conviction of sexual abuse in the third degree. He asserts trial court erred in 1) overruling his motion for a directed verdict based on the absence of substantial evidence to support a finding that a sex act was against the complainant's will; 2) allowing the State to impeach defendant with evidence of his prior arrests; 3) excluding evidence of the complaining witness's past sexual conduct; and 4) overruling defendant's motion for mistrial based on prosecutorial misconduct during closing argument. We affirm.

On August 29, 1980, defendant was charged by county attorney's information with sexual abuse in the third degree in violation of section 709.4, The Code. On October 22, 1980, defendant filed an application for introduction of evidence of the complainant's past sexual conduct. Defendant claimed that it was necessary for him to question the complainant concerning the frequency of her sexual relations during her menstrual period. The stated purpose of this question was to neutralize the State's evidence, as shown by the minutes of testimony, inferring that the complainant did not consent to the sex act because of the stage of her menstrual cycle. Following resistance by the State in an in-camera hearing, trial court ruled on November 12, 1980, that the evidence of the complainant's prior sexual conduct was irrelevant and inadmissible at trial. The case proceeded to trial before a jury on November 18, 1980.

The relevant facts revealed at trial show that the complainant and defendant had known each other since March 15, 1980, when the complainant rented a farm house owned by defendant's family, and defendant visited the premises in conjunction with his work on the family farm. There was also evidence that the two had met at a local bar and at parties they both attended. Several weeks before the incident which gave rise to this case, defendant and complainant met at a local party and, after conversing for a few minutes, left the party and

sat in a friend's car. Defendant suggested that they go to her house for a "private party" that night. Complainant, however, declined by indicating that "some other time" might be more appropriate. On July 15, 1980, the complainant left her children with a babysitter and went out for the evening. She returned to her home around midnight, locked the doors, left a window open for ventillation in the living room where she slept, and retired for the evening. She was awakened in the early morning by a "gentle child-like kiss" on her lips and someone saying "Kathy, how are you doing?" The complainant inquired who it was but was given no identification except that the person responded "it is me." Testimony concerning what occurred immediately after this exchange is in dispute. According to defendant, the two held hands and continued to kiss and converse. The complainant denied that there was any further talking or touching. It is undisputed, however, that defendant took off his trousers, got on the couch with the complainant, and removed her underpants. At this point she said "don't, I am on the rag." Defendant responded by saying "don't worry about it." Sexual intercourse occurred twice thereafter. Subsequently, complainant went to the kitchen to get a cigarette. She testified that she did not leave the premises at this time, but returned to the living room and sat in a chair opposite the couch and smoked. She then went upstairs to the bathroom, dressed, and returned downstairs to find defendant asleep. Approaching the couch, she peered closely at him and, for the first time, determined his identity. Thereupon, she left the premises and drove to a friend's house in Algona.

On December 1, 1980, the jury returned a verdict of guilty of sexual abuse in the third degree. Defendant thereafter moved for a new trial but trial court overruled the motion and sentenced defendant to confinement for up to ten years. Defendant's appeal followed.

I. Scope of Review. Since this is an action at law, our review is for correction of errors only. Iowa R. App. P. 4; Rinehart v. State, 234 N.W.2d 649, 658 (Iowa 1975).

II. Sufficiency of the Evidence. Defendant first asserts that trial court erred in overruling his motion for directed verdict. He specifically focuses on the elements of sexual abuse which requires the sex act to be against the will of one participant.

We will first enumerate some general principles important to our review of this issue. Trial court's refusal to direct a verdict for defendant will withstand challenge if there is any substantial evidence in the record to support it. State v. Schrier, 300 N.W.2d 305 (Iowa 1981). Substantial evidence is that evidence which would convince a rational factfinder that the defendant is guilty of the crime charged beyond a reasonable doubt. State v. Robinson, 288 N.W.2d 337, 339 (Iowa 1980). We view the evidence in the light most favorable to the State, taking into consideration all evidence in the record. State v. Kern, 307 N.W.2d 22, 28 (Iowa 1981); State v. Rich, 305 N.W.2d 739, 741 (Iowa 1981); Robinson, 288 N.W.2d at 340. On factual issues, the credibility of witnesses and the weight to be given to their testimony is for the jury. State v. Cott, 283 N.W.2d 324, 329 (Iowa 1979). All legitimate inferences which may be fairly and reasonably deducted from the evidence will be accepted. Schrier, 300 N.W.2d at 306.

Applying these principles to the evidence in this case, we conclude there was sufficient evidence to submit the case to the jury and to support the jury's verdict. In this regard, complainant testified that her submission resulted from fear and not from consent. Although there was no physical resistance, there was evidence to support claimant's contention that this was due to her fear. Defendant surreptitiously entered complainant's house through an open window in the early morning hours when the complainant was asleep. Upon wakening her, he did not identify himself when asked. He made advances toward the complainant and when she made an effort to dissuade him, he ignored it and continued. Thus, notwithstanding lack of physical resistance, we conclude that this evidence engendered a jury question for determination of the issue of consent. See State v.

Gray, 216 N.W.2d 306, 308 (Iowa 1974); State v. Haloubek, 246 Iowa 109, 113, 56 N.W.2d 861, 864 (1954). A reasonable juror could conclude that defendant's conduct was sufficiently threatening to instill enough fear in his victim to accomplish his purpose. We thus will not disturb the jury's verdict on appeal.

III. Evidence of Prior Arrests. Defendant further asserts trial court erred in allowing the State to impeach defendant with evidence of his prior arrests. Upon our review of the record, we conclude defendant failed to preserve error on this issue. Defendant, on recounting the details of his arrest, testified that it was "a frightening experience." On cross-examination of defendant, the following exchange took place:

> Q. [by prosecutor] You [were] frightened because you had been arrested?
>
> A. [by defendant] Yeah.
>
> Q. Also frightened because you had known you had done something wrong the night before?
>
> A. I didn't know.
>
> Q. Well, now, this isn't the first time you have ever been arrested, is it?
>
> A. No.
>
> Q. How many times have you been arrested?
>
> MR. DOTSON: Excuse me, your Honor. If this man has a prior felony conviction that he wants to impeach this young man with, that is fine. If he wants to go into his traffic record I am going to object at this point, it is an improper question on the part of the State.
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> MR. SOLDAT: I don't care about his convictions, not going into his convictions. What I am going into is the quality of his mind upon arrest that was brought up on direct examination. I would like to show this was not a new experience for this young man and he had no reason to be frightened by such an experience.
>
> THE COURT: I believe the witness has answered the question. I trust counsel will not

pursue this in greater detail in view of the answer that he has received.

MR. SOLDAT: My pending question, I believe, was how many times he had been arrested and I didn't hear that answer.

THE COURT: The objection would be overruled. The witness may answer if he knows.

THE WITNESS: I don't know.

BY MR. SOLDAT:

Q. You don't know?

A. No.

Q. Can you give me your best estimate?

A. I am not sure.

Q. Two, three, four?

A. Two.

Defendant would have us rule that the only basis for introduction of evidence of other crimes is impeachment of the witness's credibility. We do not agree that the legal use of such evidence is so restricted. See Cott, 283 N.W.2d at 326. "Relevancy of the other offense is the sine qua non of its admissibility into evidence[.]" State v. Cuevas, 282 N.W.2d 74, 80 (Iowa 1979). If the evidence tends to prove some fact or element in issue other than defendant's criminal disposition, it can be admissible.[1] Cott, 283 N.W.2d at 326. (emphasis added). Thus, while the relevancy of the evidence of defendant's prior arrests may be questioned and its

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1 The basic standard by which other crimes evidence is tested is relevancy. However, even when such evidence has some relevancy, the trial court must exercise discretion to determine whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice.

State v. McDaniel, 265 N.W.2d 917, 921 (Iowa 1978), as quoted in Cuevas.

prejudicial effect may outweigh its probative value, defendant failed to object to the evidence on these grounds. Issues not raised in the trial court may not be raised for the first time on appeal. State v. Jump, 269 N.W.2d 417, 430 (Iowa 1979). Defendant must indicate the specific ground for exclusion of evidence so as to direct the court to the question raised. State v. Washington, 257 N.W.2d 890, 895 (Iowa 1977), cert. denied, 435 U.S. 1008 (1978). Having made no valid objection in trial court, defendant has waived error on appeal. Further, defendant does not argue the issues of relevance or prejudice on appeal. His argument is confined to his original objection that the question was improper as impeachment because it did not concern a prior felony conviction involving dishonesty. We do not consider issues which are not raised on appeal. Kent Feeds, Inc. v. Stanwood Feed and Grain Co., 186 N.W.2d 593, 597 (Iowa 1971).

IV. Evidence of Past Sexual Conduct. Defendant also argues trial court erred in excluding evidence of the complaining witness's past sexual conduct. He asserts that his proposed question as to the complainant's frequency of sexual relations during her menstrual period is relevant to the State's evidence inferring that the complainant had not consented because she was in her menstrual period. The test for the admissibility of such evidence is relevancy. Iowa R. Crim. P. 20(5). See also State v. Davis, 269 N.W.2d 434 (Iowa 1978). Relevant evidence is that evidence having a tendency to make the existence of any fact that is of consequence to the determination of the case "more probable or less probable than it would be without the evidence." State v. Hopkins, 192 N.W.2d 747, 752 (Iowa 1971), quoting McCormick on Evidence, § 152. The trial court has discretion to exclude evidence which is otherwise relevant when its value is substantially outweighed by the danger of misleading the jury or by considerations of undue delay, wasted time, or needless presentation of cumulative evidence. State v. Harmon, 238 N.W.2d 139, 144 (Iowa 1976). When evidence has a minimum of probative value, but its admission would have a wrongful effect on the jury, it

should be excluded. Id. at 145. The purposes of the rape shield law is to protect the privacies of the victim, to encourage the reporting and prosecuting of sex offenses, and to prevent time-consuming and distracting inquiry into collateral matters. State v. Ogilvie, 310 N.W.2d 192, 195 (Iowa 1981). We believe that the considerations of the rape shield law outweigh the questionable probative value of the evidence in the instant case, and that trial court thus did not abuse its discretion in excluding that evidence.

V. Prosecutorial Misconduct. Defendant's final assignment of error is trial court's failure to grant a new trial based on alleged prosecutorial misconduct. Having reviewed the record, we find it wholly inadequate to determine what was said by the prosecutor which may have constituted misconduct. No record was made; trial court had not taken notes of that part of the State's argument; and defense counsel and counsel for the prosecution disagreed on what was said. We decline to examine the question of prosecutorial misconduct on this record.

Having found no reversible error, we affirm defendant's conviction.

AFFIRMED.

All judges concur except Oxberger, C.J., who dissents.

OXBERGER, C.J., (dissenting).

I dissent. Apparently the majority concedes the evidence of defendant's prior arrest was prejudicial error, but because the defendant's objection did not cite the correct grounds to exclude the evidence, it asserts that he has waived the error on appeal.

The supreme court on a number of occasions has reversed convictions under similar circumstances. In State v. Cusick, 248 Iowa 1168, 84 N.W.2d 554 (Iowa 1957), the court reversed a conviction of fraudulent advertising, stating, "The defendant did not raise in the trial court or in this court the questions with which we shall hereafter discuss. However, under the provisions of section 793.18, 1954 Code, I.C.A., we are directed, in our consideration of an appeal in a criminal case to ". . . examine the record without regard to technical errors."

In State v. Leahy, 243 Iowa 959, 54 N.W.2d 447(Iowa 1952), the court reversed a conviction for assault with intent to commit great bodily injury. The court said at page 453, "The evidence was very nearly insufficient as a matter of law to sustain the verdict. In this situation the case calls for reversal 'for errors which otherwise might not constitute reversible error.' Chapman v. Head, Tex.. Civ. App., 279 S.W. 906, 908."

In this case the issue of sufficiency of evidence to sustain the verdict is extremely close. The defendant and the alleged victim had numerous contacts. On one occasion they engaged in smoking marijuana together , and the defendant suggested that they go to her home and have sex, and she indicated maybe some other time. On the night in question, the defendant awoke the victim with a kiss and she asked, "Who is it?" He said, "It is me." She testified that at no time did she indicate to the defendant in any manner that she did not want to engage in the sex act except to inform him that she was having her period.

Thus, the error in admitting the evidence of defendant's prior arrest record

was extremely prejudicial. I would hold that the defendant was denied a fair trial and, under our duty pursuant to section 814.20, The Code 1981, to review the record without regard to technical defects, grant a new trial.