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DEC 23 1986
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)

Plaintiff-Appellee,) Filed December 23, 1986

v.) 6-382
85-1847

ELIJIO REYNA,) 300

Defendant-Appellant.)

Appeal from the Iowa District Court for Scott County (No. 121334) - James R. Havercamp, Judge.

Defendant appeals from his conviction, after a jury trial, of third-degree sexual abuse in violation of Iowa Code section 709.4(1)(1985), asserting that the evidence was not sufficient to support his conviction. **AFFIRMED.**

Charles Harrington, Chief Appellate Defender, and B. John Burns, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General; Roxann M. Ryan, Assistant Attorney General, and Realff H. Ottesen, Assistant Scott County Attorney, for appellee.

Considered by Oxberger, C.J., Snell and Schlegel, JJ.

OXBERGER, C.J. 301

In this appeal, the defendant challenges the jury's verdict finding him guilty of third degree sexual abuse in violation of Iowa Code section 709.4(1)(1985). The defendant maintains that the evidence adduced at trial was insufficient to support his conviction. We affirm.

The principles governing our review of an attack levied against the sufficiency of evidence are undisputed and well established. We view the evidence in the light most favorable to the State. State v. Mulder, 313 N.W.2d 885, 888 (Iowa 1981). We must consider all of the evidence, and we may indulge all legitimate inferences arising reasonably and fairly therefrom in support of the jury's verdict. Id. Moreover, the verdict is binding if it is supported by substantial evidence. State v. Robinson, 288 N.W.2d 337, 339 (Iowa 1980). By "substantial evidence", we mean that which could convince a rational trier of fact that the defendant is guilty beyond a reasonable doubt. State v. Mulder, 313 N.W.2d at 888.

The defendant urges that his conviction must be reversed because the evidence was not sufficient to establish that penetration occurred. As a basis for this contention, he argues that although the victim testified at trial that penetration had occurred, this testimony was impeached by several pretrial statements in which she allegedly expressed some uncertainty.

Initially, we note that penetration is not a necessary prerequisite to a conviction under section 709.4(1) of the Iowa Code. This section provides that sexual abuse in the third degree has occurred when the victim is, by force or against will, made to engage in a "sex act". A "sex act" is defined in Iowa Code section 702.17(1985) 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, by contact between the mouth and genitalia

> or by contact between the genitalia of one person and the genitalia or anus of another person or by the use of artificial sexual organs or substitutes therefor in contact with the genitalia or anus.

Pursuant to this definition, sexual abuse in the third degree may occur without penetration; the only prerequisite is some form of prohibited contact. 4 J. Yeager & R. Carlson, Iowa Practice §§ 201, 202 (1979 & Supp. 1986); Dunahoo, The New Iowa Criminal Code, 29 Drake L. Rev. 237, 272 (1979); see also State v. Howard, 284 N.W.2d 201, 202 (Iowa 1979).

We think that the record contains substantial evidence supporting the jury's conclusion that contact proscribed by the above statute occurred between the defendant and the victim. The record reflects that the victim was a friend of the defendant's brother; she met the defendant the night of the crime. That night, both the defendant and the victim were attending a party. The victim offered the defendant a ride home because they lived within close proximity of one another. On the way home, the defendant directed the victim to stop the car in a parking lot. He then turned the car off and proceeded to make advances at her. After a struggle, he removed both her clothing and his, and pulled her to the back seat. The victim testified that sexual intercourse then occurred.

The defendant makes much of the fact that after the attack, the victim indicated to a police officer that she was not sure whether penetration had occurred. In response to the defendant's assertion, we reiterate that actual penetration is not a statutory prerequisite to the commission of the crime charged; we think that the evidence clearly establishes that prohibited contact between the victim and the defendant's genitalia occurred. See State v. Howard, 284 N.W.2d at 203 (circumstantial evidence gathered from victim's description of encounter sufficient to support a finding of contact between genitalia of victim and defendant). Nor are we persuaded by the defendant's argument

that the alleged inconsistency in the victim's testimony concerning penetration requires reversal. We have repeatedly recognized that the resolution of a witness' contradictory statements lies within the province of the jury in weighing the testimony. State v. Fields, 199 N.W.2d 144, 146 (Iowa 1972). Accordingly, the defendant's conviction is affirmed.

AFFIRMED.