

**IN THE COURT OF APPEALS OF IOWA**

No. 8-561 / 07-1624  
Filed October 29, 2008

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

**vs.**

**THEODOROS KARFIS,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Davis and Monroe Counties,  
Annette J. Scieszinski, Judge.

Theodoros Karfis appeals his conviction, following jury trial, for sexual  
abuse in the third degree. **AFFIRMED.**

Robert Breckenridge of Breckenridge & Duker, P.C., Ottumwa, for  
appellant.

Thomas J. Miller, Attorney General, Linda J. Hines and A. Patricia  
Houlihan, Assistant Attorneys General, and Rick Lynch and Steve Goodlow,  
County Attorneys, for appellant.

Heard by Vogel, P.J., and Mahan and Miller, JJ.

**MILLER, J.**

Theodoros Karfis appeals his conviction, following jury trial, for sexual abuse in the third degree. He contends the district court erred in submitting the charge of sexual abuse in the third degree to the jury, excluding certain evidence, and denying his motion in arrest of judgment. We affirm.

**I. BACKGROUND FACTS AND PROCEEDINGS.**

From the testimony presented at trial, largely through the alleged victim, the jury could find the following facts. In February 2006, seventeen-year-old A.C. had been working as a waitress for Ted's Pizza and Steakhouse (Ted's) in Bloomfield, Iowa for approximately a month. Karfis and his wife operated Ted's together for approximately thirty years and resided in the apartment above the restaurant. A.C. began to feel increasingly uncomfortable around Karfis during the time she worked there, because when business was slow Karfis would lead her to a booth to talk and refer to it as a "date." Karfis would sometimes ask her to stay past closing while he finished smoking his cigarette, and would give her money from the cash register or his wallet when he thought she had not made enough in tips.

On February 18, 2006, Karfis asked A.C. to come with him into the restaurant's back room, told her to turn around so she was facing away from him, and according to A.C.'s testimony Karfis "stuck money down the back of my pants, and then he turned me back around and he hugged me and he kissed me on the neck." She testified he told her not to tell the other waitresses he had given her the money. Because A.C. felt embarrassed and uncomfortable after

this she decided she would work until the end of the pay period, February 19, collect her pay check, and quit.

On February 19 A.C. was scheduled to work from 11:00 a.m. until 5:00 p.m. Prior to reporting for work she asked her friend Andrew to come to Ted's in the afternoon, when business was usually slow, so she would not have to be alone with Karfis. At approximately noon on the 19th A.C. found herself alone in the restaurant with Karfis. She called her aunt and Andrew hoping either could come to Ted's but neither one could do so.

Karfis asked A.C. to sit with him in a booth. He sat facing the outside doors. While at the booth he gave her a cake to eat and asked her about her tips. After A.C. told him about her tips Karfis remarked that she should have made more tips than another waitress because she was prettier. Karfis eventually asked A.C. to put her knees up on the seat of the booth. After she did so he removed her apron and stuck money down her pants. In an attempt to remove herself from the situation A.C. then told Karfis she had to use the restroom, and when she got up to go he stuck money down her shirt and into her bra. Karfis was still at the booth when A.C. returned from the restroom. As she walked past him he pulled her down onto his lap. She put her hands on the table to try to hold her weight so she did not have to sit completely on his lap. A few seconds later the phone rang and A.C. went to answer it and take a pizza order. Karfis shortly followed her to the phone and told her to tell the customer the pizza would take twenty-five minutes. A.C. testified she was aware it normally only takes fifteen minutes to complete a pizza order.

Karfis returned to the booth and told A.C. to hurry back. A.C. testified she tried to stall by washing her hands but eventually returned to the booth and sat down. Karfis again asked her to put her knees on the booth and she again did so. Karfis then unbuttoned her pants, pulled them off her hips, and pulled her underwear down as well but not as far as her pants. He then placed money in the front and back of her pants at the same time and touched her vagina with his fingers. As Karfis was doing so, A.C. said to him, "Isn't this illegal?," but he just laughed. She then told him she needed to go the bathroom again. Although A.C. initially told the police Karfis penetrated her vagina with his fingers, at trial she testified this was not true and he in fact did not penetrate her. She testified this discrepancy was because she initially did not understand the meaning of the word penetrate, believing it meant "just moved around."

Once in the restroom, A.C. called her mother and asked her to have the police come and get her. Her mother asked what was wrong and whether her father could just come and get her. A.C. responded, "No, Mom. . . . I'm just going to run out." While A.C. was in the restroom talking with her mother Karfis knocked on the door and asked what was taking her so long. She told him she was getting sick. A.C. then left the restroom, retrieved her purse and coat, and went outside to her car. Karfis called to A.C. as she left, chased after her, and grabbed her car's mirror as she backed up to leave.

When A.C. returned home she told her parents what had occurred and at approximately 5:00 p.m. she and her parents went to the police station to report the incident. At the station Officer Jason Cole of the Bloomfield Police

Department spoke with A.C. She appeared to him to be shaken up and a little teary-eyed. After she informed Cole why she was there he had her make a written statement describing the incident.

On February 20, 2006, Officer Cole interviewed Karfis. Karfis acknowledged he had given his waitresses extra money when they did not earn enough tips. However, he denied ever placing money in A.C.'s pants or down her shirt. Karfis stated to Cole that on the day in question he and A.C. had talked in the booth about her tips and her boyfriends, and then she left the restaurant around 2:30 or 3:00, telling him she was sick. Although Karfis agreed there was no one else in the restaurant at the time, he denied that anything such as what A.C. described had happened, and specifically denied touching her.

On April 13, 2006, the State charged Karfis, by trial information, with sexual abuse in the third degree, in violation of Iowa Code sections 709.1 and 709.4 (2005). The State filed a motion in limine seeking to exclude, among other things, "[a]ny evidence regarding non-pertinent character traits of the victim" and "[e]vidence of any school investigation involving the victim and an incident during the summer of 2005." Karfis resisted the State's motion and filed his own motion in limine. A hearing was held on October 4, 2006, on all pending motions, including the motions in limine.

At the hearing three specific instances of conduct by A.C. were raised by Karfis as being relevant to the issues raised by the State's motion. First, he asserted that she had made a false report of alleged sexual abuse against a teacher. Second, he claimed that while she was in the eighth grade A.C. had

taken a photograph of herself nude from the waist up and had given it to a boy in her class. Finally, he alleged that A.C. recently had exposed her bare breasts to a fellow female student while in school and subsequently received an in-school suspension for doing so. The State argued these instances were not relevant or material to the case, and were not admissible under Iowa Rule of Evidence 5.403 as their probative value was substantially outweighed by the danger of unfair prejudice to the State. The district court granted the State's motion in limine as to these three instances of conduct on the grounds urged by the State.

On October 31, 2006, all parties met for the commencement of the scheduled jury trial. The parties reached a plea agreement and Karfis entered an *Alford* plea to the crime of assault with intent to commit sexual assault. The court found a factual basis for the plea, accepted the guilty plea, and set judgment and sentencing for December 22, 2006. On December 15, 2006, Karfis filed a motion in arrest of judgment alleging the plea proceedings were inadequate and he did not fully understand the penal consequences of his plea. Following a hearing on the motion, the district court granted the motion finding Karfis was not properly informed of the effect of Iowa Code chapter 903B prior to the entry of his guilty plea. On January 19, 2007, the parties stipulated that in light of the previous guilty plea and report of such in the local newspaper, a change of venue was appropriate. Accordingly, the court granted a change of venue to Monroe County and granted Karfis's request for an extension of pretrial deadlines.

On March 1, 2007, Karfis filed an "Application for Reconsideration of Rulings and Evidentiary Hearing" seeking to have the court reconsider its

previous limine ruling and allow the three previously described specific acts by A.C. Following a hearing on the motion the court issued a written ruling concluding that its previous ruling granting the State's motion in limine should stand.

Jury trial commenced on April 25, 2007, and the jury found Karfis guilty as charged. Following trial, Karfis filed a combined motion in arrest of judgment and motion for new trial. On August 16, 2007, the district court denied these motions, entered judgment, and sentenced Karfis to a term of imprisonment of no more than ten years.

Karfis appeals, contending the district court erred in (1) submitting the charge of sexual abuse in the third degree to the jury because the State failed to sufficiently prove the alleged acts, if they occurred, were "against the will" of A.C. as required by statute and the manner in which the charge was submitted to the jury; (2) excluding evidence of A.C.'s prior acts, as they were relevant to her credibility; and (3) denying Karfis's motion in arrest of judgment, as the evidence was insufficient to support a guilty verdict. We take up these issues in a slightly different order.

## **II. MERITS.**

### **A. Exclusion of Evidence.**

Challenges to evidentiary rulings are reviewed for correction of errors at law. Iowa R. App. P. 6.4. Trial courts have wide latitude in making such rulings, and its decisions in this regard are reversed only for a demonstrated abuse of discretion. *State v. Sallis*, 574 N.W.2d 15, 16 (Iowa 1998). To show an abuse of

discretion, one must show that the court exercised its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *State v. Greene*, 592 N.W.2d 24, 27 (Iowa 1999). Even if an abuse of discretion is found, reversal is required only when the abuse is prejudicial. *Id.*

Karfis contends the district court erred in ruling that evidence of A.C.'s prior conduct and prior report of sexual abuse was inadmissible. At issue is evidence that in 2002 A.C. took a photograph of herself while topless and gave it to a boy, in 2005 she reported she was sexually abused by a teacher, and in early 2006 she received an in-school suspension for exposing her bare breasts to a female student on school premises. The district court granted the State's motion in limine and ultimately excluded this evidence for the reasons argued by the State. Those reasons included, in part, that the evidence was not relevant and its probative value was substantially outweighed by the danger of unfair prejudice.

First, Karfis contends the district court erred in ruling the evidence that A.C. had reported sexual abuse by a teacher in 2005 was inadmissible. He contends the report was false and therefore not prohibited by Iowa Rule of Evidence 5.412. Rule 5.412, otherwise referred to as the rape-shield law, "prohibits introduction of reputation or opinion evidence of a complainant's 'past sexual behavior' and substantially limits admissibility of evidence of specific instances of a complainant's past sexual behavior." *State v. Alberts*, 722 N.W.2d 402, 408 (Iowa 2006). In *State v. Baker*, 679 N.W.2d 7, 10 (Iowa 2004), our supreme court determined "that prior false claims of sexual activity do not fall

within the coverage of our rape-shield law.” It explained that because a “false allegation of sexual activity is not sexual behavior, such statements fall outside both the letter and the spirit of the rape-shield law.” *Baker*, 679 N.W.2d at 10.

However, “[i]n keeping with the policy behind” rule 5.412, “it is imperative that a claim of sexual conduct (or misconduct) by the complaining witness be shown to be false before it is admissible at trial.” *Alberts*, 722 N.W.2d at 409.

[I]n order for evidence of the victim’s prior false claim of sexual abuse to be admitted into evidence, the defendant must first make a threshold showing to the court that “(1) the complaining witness made the statements, and (2) the statements are false, based on a preponderance of the evidence.”

*Millam v. State*, 745 N.W.2d 719, 722 (Iowa 2008) (quoting *Alberts*, 722 N.W.2d at 409).

At the re-hearing on the district court’s early ruling granting the State’s motion in limine, Karfis made an offer of proof attempting to show A.C.’s 2005 allegation of sexual abuse was false and therefore not prohibited by rule 5.412.<sup>1</sup> In the district court’s written ruling on this issue, the court described the 2005 incident as follows:

The accusations presented to, and considered by, the school were that its teacher [Jason Ogden] facilitated beer consumption by several minors as they rode around with him in his pickup truck and that after everyone else in the vehicle was dropped off, he touched the alleged victim in a sexual manner over her clothes in the area of her thigh and crotch.

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<sup>1</sup> The proof offered by Karfis included statements by A.C. and her mother, an “Incident Report” prepared by the Appanoose County Sheriff’s office, an excerpt from a deposition of A.C.’s mother, and testimony from the accused teacher Jason Ogden.

Another teacher heard rumors of this incident and reported it to her superiors in school administration. The school conducted an in-house investigation and referred A.C. to the Appanoose County Sheriff's office. Throughout the investigation of the alleged incident, although Ogden admitted he had allowed A.C. into his vehicle he adamantly denied any inappropriate touching. At the conclusion of the school's investigation of the allegations Ogden received a two-week suspension that he believed was imposed due to his poor judgment in providing a ride to A.C. and underage drinkers. Appanoose County law enforcement closed the investigation file about three weeks after it was opened, and checked the boxes "inactive" and "unfounded" on the incident report.

The district court found that "nothing in this record shows that [A.C.'s] 2005 account of sexual contact by the teacher was 'demonstrably false,' false to a 'reasonable probability,' false as a 'supportable contention,' or false by a 'strong probability.'" See *Baker*, 679 N.W.2d at 9 n.1. The court concluded that

It has never been determined that the alleged victim's statements about the 2005 sexual-contact incident were, or are, "false." Without requisite proof of falsity, the alleged victim's prior statements about a sexual-contact incident unrelated to the charge pending in this case are not probative to impeach her credibility.

The record supports the court's finding and conclusion, and we conclude the district court did not abuse its discretion in excluding the evidence of A.C.'s 2005 claim of sexual contact by a teacher on the basis Karfis had not shown by a preponderance of the evidence that the accusation was false. See *Millam*, 745 N.W.2d at 722.

Next, we agree with the district court the evidence of the nude posing and exposing breasts was not relevant to any issue at trial.<sup>2</sup> Relevant evidence is any “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Iowa R. Evid. 5.403. Here, Karfis denied that the sexual acts alleged by A.C. had occurred, not that A.C. had consented to them. Nor did he present any evidence or allege that A.C. had either provided a nude picture of herself to him or exposed her breasts to him. Although A.C.’s credibility or lack of credibility was for the fact finder to determine, we conclude, as the district court apparently did, that the two incidents in question have little or no bearing on A.C.’s credibility and thus little or no relevance to any issue in this case.

However, assuming the evidence in question has some small relevance, we further agree with the district court that under Iowa Rule of Evidence 5.403 the probative value of this evidence is substantially outweighed by the danger of unfair prejudice. “Relevant evidence is inherently prejudicial in the sense of being detrimental to the opposing party's case.” *State v. Delaney*, 526 N.W.2d 170, 175 (Iowa Ct. App. 1994). However, we look beyond this type of inherent prejudice to whether the evidence has an “undue tendency to suggest a decision on an improper basis, appeals to the sympathies of the jury, or otherwise might

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<sup>2</sup> We note the State appears to acknowledge that based on the holding in *State v. Zaehring*, 280 N.W.2d 416, 420 (Iowa 1979) that “posing nude does not in and of itself infer or connote sexual activity or conduct,” rule 5.412 does not prohibit evidence of either of the two incidents in question.

cause the jury to base their decision on something other than the relevant legal propositions.” *Id.* The complaining party has the burden of establishing the trial court abused its discretion in the balancing process under rule 5.403. *State v. Cott*, 283 N.W.2d 324, 329 (Iowa 1979). Accordingly, given the nature, time frame, and circumstances of these incidents, we conclude Karfis has not met his burden to establish the district court abused its broad discretion in determining, as it did in excluding the evidence, that the probative value of this evidence was substantially outweighed by the danger of unfair prejudice.

**B. Submission of the Charge to the Jury.**

Karfis next contends the district court erred in submitting the charge of sexual abuse in the third degree to the jury because the State failed to present sufficient evidence that he committed a sex act, if any occurred, “against the will” of A.C.. He argues the court erred in denying his motions for directed verdict and in submitting Instructions No. 20 and 23 to the jury because they court did not adequately define the term “against the will” to the jury.

We review challenges to the sufficiency of the evidence supporting a guilty verdict for correction of errors at law. *State v. Webb*, 648 N.W.2d 72, 75 (Iowa 2002). In reviewing such challenges we give consideration to all the evidence, not just that supporting the verdict, and view such evidence in the light most favorable to the State. *State v. Schmidt*, 588 N.W.2d 416, 418 (Iowa 1998). We will uphold a trial court's sufficiency determination if there is substantial evidence to support the defendant's conviction. *State v. McPhillips*, 580 N.W.2d 748, 752 (Iowa 1998). If a rational trier of fact could conceivably find the defendant guilty

beyond a reasonable doubt, the evidence is substantial. *State v. Lambert*, 612 N.W.2d 810, 813 (Iowa 2000). Direct and circumstantial evidence are equally probative. Iowa R. App. P. 6.14(6)(p). We also review jury instructions for the correction of errors at law. Iowa R. App. P. 6.4; *Herbst v. State*, 616 N.W.2d 582, 585 (Iowa 2000).

Iowa Code section 709.1, defining sexual abuse, provides, in relevant part:

Any sex act between persons is sexual abuse by either of the persons when the act is performed with the other person in any of the following circumstances:

1. The act is 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.

Pursuant to section 709.4(1), sexual abuse in the third degree is committed when a person performs a sex act “by force or against the will of the other person[.]” However, it is not “necessary to establish physical resistance by a person in order to establish that an act of sexual abuse was committed by force or against the will of the person.” Iowa Code § 709.5.

The district court, after arguments on Karfis’s first motion for directed verdict, found “the evidence does generate a question for the jury . . . as would constitute a charge of a sex act being committed against the will of . . . A.C. . . . All other aspects of the charge subject to the Motion for Directed Verdict of Acquittal shall not go forward.” Thus, the only third-degree sexual abuse

alternative that was submitted to the jury was whether Karfis performed a sex act with A.C. against her will.

Karfis states that the “central issue” is whether the term of art “against the will” is limited to those two criteria set forth in section 709.1(1), namely that consent or acquiescence is obtained by threats of violence or by incapacitation. Our supreme court has previously held that the examples of “against the will” set forth in section 709.1(1) are not an exclusive list. See *State v. Bolsinger*, 709 N.W.2d 560, 563 (Iowa 2006) (finding fraud and deception may also “vitiating consent.”). Furthermore, section 709.5 specifically states that “[T]he circumstances surrounding the commission of [an act of sexual abuse] may be considered in determining whether or not the act was done . . . against the will of the other.” In fact, section 709.5

specifically directs that the question whether the sexual act was committed “by force or against the will” of the victim should be decided by considering the circumstances surrounding the act. This, we take it, means all the circumstances, subjective as well as objective.

*State v. Bauer*, 324 N.W.2d 320, 322 (Iowa 1982). We conclude a finding of “against the will” is not limited to the criteria set forth in section 709.1(1), but may include any of the circumstances surrounding the commission of the act that compromise the ability of the victim to consent or causes him or her to acquiesce; anything that, as Karfis states, causes the will of the victim to be overcome.

We conclude the jury could reasonably find that the circumstances surrounding the commission of the alleged sexual act in this case demonstrate

A.C. was incapable of protesting or resisting Karfis any more directly than she did and thus were sufficient for the court to submit the offense of sexual abuse in the third degree to the jury. A.C. testified she felt “violated” and “scared” when Karfis told her to kneel on the booth and then put the money down her pants and down her shirt into her bra. She “got more scared” and “knew something was going to happen” when Karfis took off her apron. She further testified she was crying when she went to the restroom to try to escape the situation, “praying that people would come in” the restaurant. She testified that when Karfis pulled her onto his lap she picked up a lighter and was thinking about burning him because she did not know what to do. A.C. further explained that the reason she returned to the booth was because she “was just scared. I was too scared to leave.” A.C. testified that while Karfis pulled down her pants and put money in the front and back of them and touched her vagina she “was really scared. I was in shock. I didn’t know what to do.”

“Fear has always been recognized as a substitute for resistance. . . .” *Bauer*, 324 N.W.2d at 322. A jury can find the victim’s fear “rendered her incapable of protest or resistance.” *Id.* We conclude that based on the circumstances surrounding the acts in question a reasonable jury could find A.C.’s fear prevented her from more forcefully resisting Karfis. She had just reached her seventeenth birthday, Karfis was a man in his sixties and was her employer, she had not been working at Ted’s very long at the time, and she was alone in the restaurant with Karfis. Furthermore, a rational jury could find that A.C. did directly resist Karfis by putting her hands on the table to hold herself up

and prevent herself from sitting on his lap when he attempted to pull her onto his lap, and by stating to him, "Isn't this illegal?" when he pulled her pants down around her hips, placed money in the front and back of her pants, and touched her vagina with his fingers.

We conclude there was sufficient evidence, based on the circumstances surrounding the commission of the alleged act, for a rational trier of fact to find the sex act was done against A.C.'s will. The district court did not err in denying Karfis's motions for directed verdict and submitting the charge of sexual abuse in the third degree to the jury. We further conclude the trial court's instructions on this issue were a correct statement of the law and had adequate evidentiary support.

**C. Motion in Arrest of Judgment.**

Finally, Karfis contends the district court erred in denying his motion in arrest of judgment because there was not sufficient evidence to support the jury's guilty verdict. Specifically, he argues that A.C. was not a credible witness due to certain inconsistent statements and the unlikelihood of the incident having occurred, given the physical characteristics of Ted's, the fact it was open for business and had customers at times, and its proximity to the apartment where Mrs. Karfis was present.

Our scope of review and many of the standards of review that apply in sufficiency-of-the-evidence challenges are set forth above and need not be repeated here. The following additional standards are applicable as well. Inherent in our standard of review of jury verdicts in criminal cases is the

recognition that the jury was free to reject certain evidence, and credit other evidence. *State v. Arne*, 579 N.W.2d 326, 328 (Iowa 1998). A jury is free to believe or disbelieve any testimony as it chooses and to give as much weight to the evidence as, in its judgment, such evidence should receive. *State v. Liggins*, 557 N.W.2d 263, 269 (Iowa 1996). The very function of the jury is to sort out the evidence and place credibility where it belongs. *State v. Thornton*, 498 N.W.2d 670, 673 (Iowa 1993). The credibility of witnesses, in particular, is for the jury. *Id.*

Although there were some discrepancies and inconsistencies in A.C.'s descriptions of events, her descriptions both before and at trial were very detailed, and most of her trial testimony was consistent with her February 19, 2006, written statement to the police. A reasonable jury could view any discrepancies or inconsistencies that did exist as the function of confusion or memory loss caused by the trauma surrounding the incident and the passage of over fourteen months before trial, and could conclude they did "not necessarily render [her] testimony with respect to the nature" of A.C.'s "contact with the defendant unbelievable." *State v. Laffey*, 600 N.W.2d 57, 60 (Iowa 1999). As with any witness testimony at a criminal trial, the trier of fact is at liberty to believe or disbelieve the testimony of witnesses as it chooses. See *State v. Trammell*, 458 N.W.2d 862, 863 (Iowa Ct. App. 1990). The jury, as fact finder, could believe some of A.C.'s testimony, all of the testimony, or none of it. *State v. Lopez*, 633 N.W.2d 774, 786 (Iowa 2001). Clearly the jury here, as was their prerogative, determined A.C.'s testimony was credible and believable.

We conclude the State presented sufficient evidence from which a rational jury could find Karfis guilty of third-degree sexual abuse beyond a reasonable doubt. The district court did not err in denying Karfis's motion in arrest of judgment.

#### **IV. CONCLUSION.**

For the reasons set forth above, we conclude the district court did not err in excluding evidence of A.C.'s prior acts and prior allegation of sexual abuse. The two prior acts had little or no relevance and their probative value was substantially outweighed by the danger of unfair prejudice, and Karfis did not demonstrate that the prior allegation of sexual abuse was false. We further conclude there was sufficient proof the alleged sex act was done against A.C.'s will. The court did not err in submitting the charge of sexual abuse in the third degree to the jury and it adequately instructed the jury on this issue. Finally, we conclude the court did not err in denying Karfis's motion in arrest of judgment, as there was sufficient evidence for a rational jury to find, beyond a reasonable doubt, that Karfis committed the crime of third-degree sexual abuse.

**AFFIRMED.**