

**IN THE COURT OF APPEALS OF IOWA**

No. 1-801 / 10-0766  
Filed January 19, 2012

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

**vs.**

**LUIS LOPEZ,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Polk County, Arthur E. Gamble,  
Judge.

Luis Lopez challenges his conviction for sexual abuse in the third degree.

**AFFIRMED.**

Benjamin D. Bergmann of Parrish, Kruidenier, Dunn, Boles, Gribble,  
Parrish, Gentry & Fisher, L.L.P., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney  
General, John Sarcone, County Attorney, and Nan M. Horvat, Assistant County  
Attorney, for appellee.

Considered by Danilson, P.J., and Tabor and Mullins, JJ.

**TABOR, J.**

Luis Lopez challenges his conviction for sexual abuse in the third degree. He contends the State failed to prove beyond a reasonable doubt that his sexual encounter with a Drake University student was not consensual. He also alleges his trial counsel should have asked for a new trial by claiming the jury verdict was contrary to the weight of the evidence and should have engaged in more thorough discovery.

Because the victim's testimony was sufficient to show that after drinking copious amounts of alcohol on the night in question she did not or could not consent to sexual intercourse with Lopez, we affirm the conviction. We also reject Lopez's claim of ineffective assistance of counsel based on the weight-of-the-evidence standard, but we preserve his remaining ineffective assistance allegation for postconviction relief proceedings.

***I. Background Facts and Proceedings***

On Saturday, November 14, 2009, twenty-year-old Britta attended a Drake University football game with friends, but they left the stadium early to go drinking at Peggy's, a popular bar near the Des Moines campus. Britta drank three or four beers and a few shots. Britta then accompanied some friends to their dorm room, where she ate a microwaved meal and drank two glasses of Franzia, a boxed wine, from a large plastic Solo cup. One of the friends recalled that Britta "passed out for a little while" at the dorm room.

About two hours later, the group headed back to Peggy's for more drinking. Britta estimated that she downed four or five cocktails—most likely

Bacardi Limon Rum and Diet Cokes—and six or seven more shots of alcohol. Before midnight, Britta and several of her sorority sisters left Peggy's for the Dublin, a tavern on the opposite side of the Drake campus. Britta had little memory of being at the Dublin. Her friends recalled that she repeatedly went to the restroom to vomit, but continued to consume alcohol up until "last call."

The friends who went drinking with Britta that night had never before seen her so intoxicated. They described her as loud, "a mess," "glassy-eyed," and unable to focus. She refused a ride home from the Dublin, leaving by herself on foot around closing time.

The next thing Britta remembers is waking up underneath Luis Lopez in the grimy cargo area of his maroon Chevy Astro van. Britta's dress was pulled up; her underwear, socks and shoes were stripped off; and Lopez had his penis inside of her vagina. She screamed and pushed him off of her. Lopez told her to "shut up" and put her clothes on. Britta asked Lopez: "Who are you and why are you doing this?" She demanded that he let her out of the van and he complied.

Britta ran into the street and flagged down a passing vehicle. Crying hysterically, she told the driver, Ricky Moore, that she had been raped. The driver called 911 and blocked Lopez from leaving in his van. Moore also called his fiancé to come comfort Britta until police arrived. A patrol officer responded at about 10 a.m., five to ten minutes after the 911 call. The police sent Britta to the hospital and took Lopez into custody.

Sexual assault nurse examiner (SANE) Kim Tweedy assessed Britta's condition at the hospital. Britta complained of a sore neck and difficulty

swallowing. Nurse Tweedy saw that the victim's neck was bruised and swollen, and Britta had a "sucking mark" or "hickey" on one side. A CT scan of the victim's neck did not uncover any permanent damage. The nurse conducted a vaginal examination that revealed fluid and "atypical" redness. The victim also had dirty feet, bruises on her legs, scraped knuckles, and a cut on her little finger. Britta testified that she did not sustain these injuries earlier in the evening.

Britta gave a urine sample at the hospital that showed a blood alcohol content of .157 at 12:30 p.m. on Sunday, November 15, 2009. By using retrograde extrapolation, a criminalist testified that, conservatively, her blood alcohol content would have been .322 when she left the Dublin bar. At that level of intoxication—four times the legal limit for operating a motor vehicle—the criminalist expected that one would observe a loss of motor skills, bloodshot eyes, slurred speech, balance problems when walking, and possibly blackouts.

Detective Thomas Follett read Lopez his Miranda rights. Lopez offered the detective several versions of how he encountered Britta the previous night, none of which squared with the other evidence available to the police. For instance, Lopez first told Detective Follett that Britta knocked on the door of his house on 15th Street at 10 p.m. "wanting dope and wanting to provide sex for dope" and that they had sex in the upstairs bedroom. He later said the victim tried to call drug dealers from inside his house and from his van sometime before 12:30 a.m.

Police found the victim's cellular telephone and a receipt from the Kum & Go convenience store in Lopez's bedroom. The receipt—and surveillance

footage from the store—documented that Lopez was at the 31st Street and University Avenue location at 1:13 a.m. The convenience store was just a few blocks west of the Dublin, where Britta left on foot between 1:30 and 2 a.m.

Lopez later informed the officer that the victim was never in his house, that he found her somewhere in the 2700 block of University Avenue, and that “they had sex there in the van.” Lopez accused passerby Moore and his fiancé of being the victim’s drug dealers. Lopez also told the detective that he did realize Britta was drunk.

By the time Britta met with the prosecuting attorney, she recalled that some time during the night she “came to” and could not breathe because something was pressing against her throat. Britta remembered, at the same time, someone saying: “Shut up, shut up.”

On December 17, 2009, the State filed a trial information, charging Lopez with sexual abuse in the third degree in violation of Iowa Code sections 709.1, 709.4(1), 709.4(3), and/or 709.4(4) (2009). Lopez’s trial started on March 8, 2010, and the jury returned its guilty verdict on March 11, 2010. On April 30, 2010, the court entered judgment on the defendant’s third-degree sexual abuse conviction, under Iowa Code sections 709.1 and 709.4(1) and/or 709.4(4), and sentenced the defendant to an indeterminate ten-year prison sentence. Lopez now appeals his conviction.

## ***II. Scope and Standards of Review***

We review Lopez’s sufficiency-of-the-evidence claim for legal error. See *State v. Meyers*, 799 N.W.2d 132, 138 (Iowa 2011). We are bound by the jury’s

guilty verdict unless the record lacks substantial evidence to support it. *State v. Tapia*, 751 N.W.2d 405, 406 (Iowa Ct. App. 2008). Substantial evidence is proof upon which a rational finder of fact could find a defendant guilty beyond a reasonable doubt. *Meyers*, 799 N.W.2d at 138. In reviewing the sufficiency of the evidence, “we view the evidence in the light most favorable to the State, including legitimate inferences and presumptions which may fairly and reasonably be deduced from the evidence in the record.” *State v. Leckington*, 713 N.W.2d 208, 213 (Iowa 2006).

We review his ineffective-assistance-of-counsel claims de novo. *State v. Ondayog*, 722 N.W.2d 778, 783 (Iowa 2006). “Although claims of ineffective assistance of counsel are generally preserved for postconviction relief proceedings, we will consider such claims on direct appeal where the record is adequate.” *State v. Horness*, 600 N.W.2d 294, 297 (Iowa 1999).

### **III. Analysis**

#### **A. Sufficiency of the Evidence**

At trial, the State accused Lopez of committing sexual abuse in either of two alternative ways: first, that he performed the sex act by force or against Britta’s will or second, that she was mentally incapacitated or physically helpless when he committed the sex act. See Iowa Code §§ 709.1, 709.4(1), 709.4(4).

We note at the outset that some overlap exists between the nonconsent elements of third-degree sexual abuse in sections 709.4(1) and 709.4(4). The against-the-will element in section 709.4(1) includes the situation where the victim is “under the influence of a drug-inducing sleep or is otherwise in a state of

unconsciousness.” Id. § 709.1(1); *State v. Weiss*, 528 N.W.2d 519, 521 (Iowa 1995) (concluding the legislature “obviously intended to prohibit a sex act performed upon an unconscious person—unconscious by whatever means, including a drug-induced sleep”). The physically-helpless language in section 709.4(4) addresses the situation where a victim is unable to communicate a lack of consent because he or she is “unconscious, asleep, or is otherwise physically limited.” Iowa Code § 709.1A(2). Accordingly, evidence that the victim was asleep or unconscious when Lopez was performing a sex act on her would satisfy the nonconsent element of either alternative.

The jury received the following marshalling instruction:

The State must prove both of the following elements of Sexual Abuse in the Third Degree:

1. On or about November 15, 2009, the defendant performed a sex act with Britta . . . .

2. The defendant performed the sex act under any one of the following circumstances:

a. By force or against the will of Britta . . . .

or

b. While Britta . . . was mentally incapacitated or physically helpless.

. . . .

The jury returned a general verdict of guilty to sexual abuse in the third degree.

On appeal, Lopez argues the State’s evidence fell short under both alternatives. While the defendant admits engaging in a sex act with Britta, he asserts the State offered “absolutely no evidence relating to whether or not [she] consented” to having sex with him. After reviewing the record in the light most favorable to the verdict, we conclude reasonable jurors could find substantial evidence supported either statutory option.

## 1. By Force or Against the Will

Our supreme court recently reiterated:

The overall purpose of Iowa's sexual abuse statute is to protect the freedom of choice to engage in sex acts. The sex abuse statute exists to protect a person's freedom of choice and to punish "unwanted and coerced intimacy." A person who imposes a sex act on another by force or compulsion under any circumstance violates the other's protected interest.

*Meyers*, 799 N.W.2d at 143 (citations omitted).

Jurors decide whether a sex act is committed "by force or against the will" of the victim by considering all the circumstances surrounding the act, both subjective and objective. *State v. Bauer*, 324 N.W.2d 320, 322 (Iowa 1982). In this case, the jurors were free to accept Britta's testimony that when she awoke the morning of November 15, 2009, she was in the back of a stranger's van being vaginally penetrated by a man she had never seen before. The victim's testimony that she was sleeping or passed out and when she awoke or regained consciousness Lopez was on top of her performing intercourse was sufficient evidence the sex act was against her will. See *State v. Farnum*, 554 N.W.2d 716, 718 (Iowa Ct. App. 1996).

The jurors were also free to draw a reasonable inference from the evidence that Lopez performed a sex act with Britta by force. See *id.* (holding that it was "well within the evidence for the jury to believe the victim's testimony" and noting that the intoxicated victim had bruising after the sexual assault that she did not recall having before that night). Britta testified she was able to remember briefly regaining consciousness and feeling like she could not breathe because of pressure on her neck and the perpetrator telling her to "shut up"—the



same phrase he used when she pushed him off her in the back of the van. The victim's recollection of being strangled was corroborated by the pain, difficulty swallowing, swelling and bruising of her neck found during the hospital examination. The State presented substantial evidence to support the first alternative of sexual abuse in the third degree.

## **2. Mentally Incapacitated or Physically Helpless**

The legislature defined both "mentally incapacitated" and "physically helpless" in the sexual abuse chapter. "Mentally incapacitated" means the victim is "temporarily incapable of apprising or controlling [her] own conduct due to the influence of a[n] . . . intoxicating substance." Iowa Code § 709.1A(1). As noted above, "physically helpless" means the victim is "unable to communicate an unwillingness to act because the person is unconscious, asleep, or is otherwise physically limited." Id. § 709.1A(2). The district court provided these definitions to the jury. The legislature did not separately define the catchall category of "otherwise physically limited" and no definition of that phrase was included in the jury instructions.

On appeal, Lopez highlights evidence in the record that Britta remained able to carry on conversations with friends and function at a "high level" despite her alcohol consumption. It was the task of the jury to weigh that evidence against the criminalist's expert testimony concerning Britta's level of intoxication and Britta's own testimony that she did not remember how she ended up in the back of Lopez's van and he was performing a sex act on her when she regained awareness of her surroundings. Whether Britta was "physically helpless" and

unable to consent when Lopez penetrated her vagina with his penis was a jury question. *See Tapia*, 751 N.W.2d at 407 (holding defendant's actions could not be "separated into segments when the victim was asleep, partially awake, and awake when deciding whether a jury could conclude she was physically helpless").

In addition, the record supported a jury finding that Britta was "mentally incapacitated" at the time of the rape. The term "mentally incapacitated" can be read broadly enough to encompass a victim who has passed out due to heavy alcohol consumption. *Cf. Farnum*, 554 N.W.2d at 721 (explaining that the term "incapacity" in section 709.4(2)(a) could extend to a person "rendered unconscious from intoxication").

Finally, the defendant argues on appeal that he "did not testify at trial, and was unable to clarify his versions of events to the jury." The district court made a record of the defendant's personal choice not to take the witness stand. Lopez was not unable to tell the jury his story, but chose not to do so. While neither the jurors nor an appellate court can draw an inference of guilt from the defendant's exercise of his constitutional right against self incrimination, *Griffin v. California*, 380 U.S. 609, 613–14, 85 S. Ct. 1229, 1232–33, 14 L. Ed. 2d 106, 109–10 (1965), the defendant's decision also does not support an inference that he would have provided exculpatory evidence. Lopez's statements to Detective Follett were inconsistent with other documented evidence and shifted as the officer confronted him with the inconsistencies. The jury was entitled to view the defendant's fabricated versions as guilty knowledge, or in this case, as proof

Lopez did not have the victim's consent as he claimed. See *State v. Cox*, 500 N.W.2d 23, 25 (Iowa 1993) ("A false story told by a defendant to explain or deny a material fact against him is by itself an indication of guilt and the false story is relevant to show that the defendant fabricated evidence to aid his defense.").

After viewing the evidence in the light most favorable to the verdict, we conclude the State proved the nonconsent element of sexual abuse beyond a reasonable doubt.

***B. Ineffective Assistance of Counsel***

Lopez claims his counsel's performance was subpar on two accounts. First, he claims counsel breached a material duty by not filing a motion for new trial on the ground that the jury's verdict was contrary to the evidence. Second, he alleges counsel was ineffective in declining to depose several witnesses, including the victim, law enforcement personnel, a nurse, and the passerby who called for help. He also contends counsel spent too little time deposing other witnesses.

To prove a claim of ineffective assistance of counsel, a defendant must show by a preponderance of the evidence that: (1) counsel failed to perform an essential duty and (2) prejudice resulted from that failure. *Ondayog*, 722 N.W.2d at 784. A defendant asserting an ineffective-assistance-of-counsel claim on direct appeal must establish "an adequate record to allow the appellate court to address the issue." *State v. Johnson*, 784 N.W.2d 192, 198 (Iowa 2010). "[I]t is for the court to determine whether the record is adequate and, if so, to resolve the claim." *Id.*; see also Iowa Code § 814.7 (2011).

We address each of his contentions in turn.

**A. Trial Counsel's Failure to File Motion for New Trial Based on the Weight of the Evidence was Not Ineffective Assistance.**

The district court may grant a new trial when the verdict is contrary to the law or evidence. Iowa R. Crim. P. 2.24(2)(b)(6). "Contrary to the evidence" in this rule means "contrary to the weight of the evidence." *Nguyen v. State*, 707 N.W.2d 317, 327 (Iowa 2005) (quoting *State v. Ellis*, 578 N.W.2d 655, 659 (Iowa 1998)). The "weight of the evidence" is a determination by the trier of fact that a greater amount of credible evidence weighs on one side of the question. *Id.* The weight-of-the-evidence standard differs from the substantial-evidence standard applied to motions of judgment of acquittal, where the district court has less power to undo the verdict. *Id.* But the district court must exercise its discretion to grant a new trial with caution and should only do so in "exceptional cases" where the evidence "preponderates heavily against the verdict." *Id.*

We believe the record is adequate to decide this ineffective assistance claim on direct appeal. In his appellant's brief, Lopez claims trial counsel, by not filing a motion for new trial, deprived the district court of the opportunity to take a "broader view" of the State's evidence. But he stops there, not alleging what testimony offered by the prosecution at the criminal trial lacked credibility. For its part, the State asserts on appeal that "the victim's testimony was believable, consistent, and corroborated by her physical injuries and the defendant's admission that he had sex with her." The State further points out that no version of events offered by Lopez to the police was credible. We agree with the State's

argument. This was not the kind of “exceptional case” where the district court would have found that the credible evidence preponderated heavily against the jury’s verdict. See *Nugyen*, 707 N.W.2d at 327–28. Lopez’s first claim of ineffective assistance of counsel fails.

**B. Trial Counsel’s Failure to Conduct Adequate Depositions Should Be Decided in Postconviction Proceedings.**

In his second claim of ineffective assistance, Lopez contends his trial attorney shirked his responsibility to conduct meaningful discovery, specifically that he failed to depose certain witnesses at all and the depositions he did conduct were too truncated to serve as adequate preparation for trial. The State asserts these claims should be preserved for postconviction relief proceedings. Because a more fully developed record would assist us in deciding whether counsel’s performance fell below professional norms and prejudiced the defendant, we preserve this claim for a postconviction relief action. See *Ondayog*, 722 N.W.2d at 786 (holding that an evidentiary hearing is “often necessary to discern the difference between improvident trial strategy and ineffective assistance”).

**AFFIRMED.**