

**IN THE COURT OF APPEALS OF IOWA**

No. 7-767 / 07-0605  
Filed November 29, 2007

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

**vs.**

**JAIRO ESPINOZA,**  
Defendant-Appellant.

---

Appeal from the Iowa District Court for Bremer County, James M. Drew,  
Judge.

The defendant appeals from the judgment and sentence entered upon his conviction of one count of sexual abuse in the third degree and three counts of assault with the intent to commit sexual abuse. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and David Arthur Adams,  
Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney  
General, and Kasey E. Wadding, County Attorney.

Considered by Huitink, P.J., and Miller and Eisenhauer, JJ.

**EISENHAUER, J.**

Jairo Espinoza appeals from the judgment and sentence entered upon his conviction of one count of sexual abuse in the third degree and three counts of assault with the intent to commit sexual abuse in violation of Iowa Code sections 709.1, 709.4, 709.11 (2003) following a jury trial. Espinoza contends there is insufficient evidence to support his conviction, specifically challenging the evidence supporting the requirement in all four counts that the sex act or assault was “by force or against the will.”

We review his claim for errors at law. *State v. Rohm*, 609 N.W.2d 504, 509 (Iowa 2000). We will uphold a finding of guilt if substantial evidence supports the verdict. *Id.* “Substantial evidence is evidence upon which a rational finder of fact could find a defendant guilty beyond a reasonable doubt.” *Id.*

In order to be convicted, the State was required to prove beyond a reasonable doubt that Espinoza performed the sex act or assault “by force or against the will of” C.K., his fourteen-year-old stepdaughter. The State is not required to establish physical resistance and “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.” Iowa Code § 709.5. Subjective circumstances are considered in making this determination. *State v. Bauer*, 324 N.W.2d 320, 322 (Iowa 1982). In *Bauer*, the statutory requirements were met although the defendant did not threaten the victim and used no force except the force necessary for the sex act, but the victim testified to fear which rendered her incapable of protest. “This is all our statute demands.” *Id.*

C.K. testified to specific sexual activities with her stepfather and stated she was afraid of him and did not feel she had any choice in these matters. Her attempts to remove herself from the abuse situations with excuses were never successful because he always required her to return. Further, C.K. testified Espinoza told her "he'd like to keep it a secret between him and me." After the abuse occurred, C.K. spent the summer living with her father and became hysterical when told she would have to return to live with Espinoza. We conclude there is substantial evidence for the jury to find C.K.'s participation in sexual acts with her stepfather was by force and against her will.

**AFFIRMED.**