

**IN THE COURT OF APPEALS OF IOWA**

No. 8-753 / 06-1356  
Filed October 29, 2008

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

**vs.**

**KEITH WILSON KELLEY, SR.,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Scott County, Douglas C. McDonald, District Associate Judge.

Defendant appeals his conviction for assault with intent to commit sexual abuse. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Nan Jennisch, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Linda J. Hines, Assistant Attorney General, Michael J. Walton, County Attorney, and Mark Gellerman, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Potterfield, J., and Robinson, S.J.\*

\*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2007).

**ROBINSON, S.J.****I. Background Facts & Proceedings**

Jackie, who was then sixteen years old, arranged to spend the night of February 2, 2006, at a friend's apartment because other members of her family left town overnight to attend a funeral. While at the apartment, her friend's father, the defendant, Keith Kelley, asked her how many times she had had sex, and said if she was twenty-two years old he would chase her.

Jackie testified that at about 11:15 p.m. she was trying to go to sleep in the living room, when Kelley asked her to rub his feet. She refused his request and went to sleep. Jackie stated that at around 12:15 a.m. Kelley woke her up and again asked her to rub his feet. Kelley then began rubbing Jackie's leg. Jackie told him to get off of her, but he continued, and placed his hand on her inner thigh. Jackie stated she needed to get up to charge her cell phone, and Kelley let her get up.

Jackie laid down in a bedroom, but Kelley smacked her on the butt, and she went back out to the living room. Kelley asked, "Is it okay if I jack off?" and Jackie told him, "No." Kelley asked her to get him some toilet paper, which she did, and when she came back he had his pants down past his knees. Kelley began masturbating, and asked Jackie to watch, but she refused. Kelley then said he was sorry and asked Jackie not to tell anyone. Jackie called a friend, Ashley, and tearfully stated Kelley had touched her in her private area.

Kelley was charged with assault with intent to commit sexual abuse, in violation of Iowa Code section 709.11 (2005). Kelley's daughter testified she and

Jackie went to a friend's home that evening where they drank alcohol and Jackie became intoxicated. She testified she and Jackie both went right to sleep after they got back to the apartment. Kelley testified the girls were intoxicated when they came back to the apartment that evening. He stated he was trying to convert the sofa into a bed for Jackie when she grabbed him around the neck from the back, and he grabbed her outer thigh in an effort to get her off. He also stated he accidentally touched the side of her "boob," and then she let go of him.

The district associate court found Jackie to be the more credible witness, finding there was no reason she would fabricate such a story. The court found Kelley's testimony that Jackie grabbed him around the neck was not credible in light of his daughter's testimony that Jackie went to sleep immediately when she got back to the apartment. The court concluded:

THE COURT CONCLUDES beyond a reasonable doubt that the Defendant is guilty of the crime of Assault With Intent to Commit Sexual Abuse, a violation of Iowa Code Section 709.11, by touching the victim in an inappropriate manner, asking her to engage in inappropriate physical and sexual activity, and making her believe that she was in imminent danger of having a sex act committed on her against her will. The Defendant had the apparent ability to perform such activity.

The court sentenced Kelley to a term of imprisonment not to exceed two years, suspended, and placed him on probation for a period of two years. Kelley appeals his conviction.

## **II. Merits**

Kelley contends there is not sufficient evidence in the record to support his conviction. He claims the evidence does not establish beyond a reasonable doubt that he acted with the specific intent to commit sexual abuse. He asserts

there is no evidence he intended to commit a sex act with Jackie by force, against her will, or without her consent. He claims the court's decision is not supported by substantial evidence.

We review challenges to the sufficiency of the evidence for the correction of errors at law. *State v. Schmidt*, 480 N.W.2d 886, 887 (Iowa 1992). A guilty verdict is binding on appeal, unless there is not substantial evidence in the record to support it, or the verdict is clearly against the weight of the evidence. *State v. Shortridge*, 589 N.W.2d 76, 80 (Iowa Ct. App. 1998). Substantial evidence means evidence that could convince a rational fact finder that the defendant is guilty beyond a reasonable doubt. *Id.*

Kelley was convicted under section 709.11, which provides, "Any person who commits an assault, as defined in section 708.1, with the intent to commit sexual abuse . . . is guilty of an aggravated misdemeanor if no injury results." The crime of assault with intent to commit sexual abuse requires specific intent. *State v. McNitt*, 451 N.W.2d 824, 824 (Iowa 1990). The issue of whether the facts in a specific case support a finding of intent to commit sexual abuse is for the fact-finder to decide. *State v. Polly*, 657 N.W.2d 462, 468 (Iowa 2003).

Jackie said before Kelley touched her he made statements of a sexual nature to her. She testified, "He asked me how many times I got fingered and how many times I had sex and how many times I gave head." She said he also told her that if she was twenty-two years old he would chase her. Also, she stated he masturbated in her presence, and asked her to watch. These facts

provide substantial evidence to support a finding beyond a reasonable doubt that Kelley had the specific intent to engage in a sex act with Jackie.

Furthermore, Jackie testified that Kelley's acts were committed without her consent and against her will and that she refused his request to rub his feet and then began rubbing her leg. She said she told him to go and get off of her, but he put his hand on her inner thigh. She further testified that when she tried to go into another room he struck her on the buttocks and when he asked if he could masturbate, she told him, "No," but he continued to do so anyway. Jackie's testimony provides substantial evidence to support a finding beyond a reasonable doubt that she was placed in fear he would engage in a sex act with her against her will, and he had the apparent ability to execute the act.

We conclude there is substantial evidence in the record to support the conclusion of the district associate court that Kelley was guilty of assault with intent to commit sexual abuse. We affirm Kelley's conviction.

**AFFIRMED.**