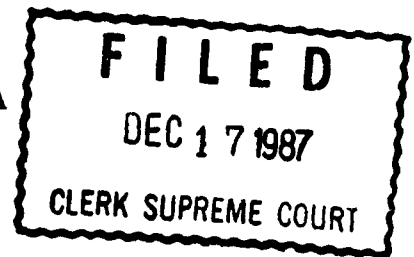


IN THE COURT OF APPEALS OF IOWA



STATE OF IOWA,)

Plaintiff-Appellee,)

vs.)

FRANK H. KLUCKMAN,)

Defendant-Appellant.)

7-264
86-797

327

Appeal from the Iowa District Court for Woodbury County (No. 41777),
Phillip S. Dandos, Judge.

The defendant appeals his conviction and sentence for the crime of committing lascivious acts in violation of Iowa Code section 709.8. **AFFIRMED.**

Richard L. McCoy of Sioux City for defendant-appellant.

Thomas J. Miller, Attorney General; Bruce Kempkes, Assistant Attorney General; and Randy S. Hisey, Assistant County Attorney, for plaintiff-appellee.

Considered by Oxberger, C.J., and Donielson and Sackett, JJ.

OXBERGER, C.J.**328**

The defendant appeals his conviction and sentence for the crime of committing lascivious acts with a thirteen-year-old child in violation of Iowa Code sections 709.1 and 709.8. The defendant asserts: (1) there is insufficient evidence to support his conviction and the trial court erred in overruling his motion for a new trial and his motion in arrest of judgment; (2) the complaining witness was so impeached that her testimony could not support the verdict; (3) the court erred in giving the jury a verdict-urging instruction; and (4) the court's sentence was excessive because it did not order probation. We affirm.

The defendant asserts there was insufficient evidence in the record to support his conviction because the testimony of the complainant was so impeached it could not support the verdict, and the court erred in overruling his motion for a new trial and motion in arrest of judgment. In reviewing these motions based upon the sufficiency of the evidence, this court views the evidence in a light most favorable to the State. State v. Schrier, 300 N.W.2d 305, 306 (Iowa 1981). It is necessary to consider all the evidence when determining evidential sufficiency. Id. A jury verdict of guilty is binding upon this court unless there is no substantial evidence in the record to support it or such finding is clearly against the weight of the evidence. Id.

The defendant argues the testimony of the child is not believable and "a pure fabrication of her mind." The question is not whether the witnesses were credible but whether the evidence, taken as a whole, was sufficient to support the conviction. Farnum, 397 N.W.2d at 747. The record is replete with evidence that the defendant committed the acts which were the basis of the charge. The victim testified that on several occasions the defendant fondled and sucked her breasts, that on at least two occasions the defendant inserted his finger into her vagina, and that the defendant took nude photographs of her. This testimony

was corroborated by the victim's sister and mother who testified they saw bruises on her breasts and vaginal area and heard her say the defendant caused them. One of the deputy sheriffs also testified that the defendant's daughter told her that she knew of one incident where her father had sexual contact with the victim. In view of this evidence, we hold the trial court did not err in denying defendant's motions and the evidence was sufficient to support the conviction.

The defendant also challenges the court's giving the jury a verdict-urging instruction or "Allen charge." The State argues the defendant failed to preserve error on this issue. We agree.

THE COURT: * * * [T]he record will show that [this] court previously submitted instruction number 26 [the Allen charge] in response to the questions propounded by the jury, which it has gone over with counsel and we agreed to the answers given. We also, to previous questions of the jury, went over the answers that were submitted to the jury in this case. At this time the court proposes to give instruction number 26 to the jury. The court has submitted a copy of instruction number 26.

Does either party have any objection to instruction number 26 as the court proposes to give it?

PROSECUTOR: None by the State, Your Honor.

DEFENSE COUNSEL: No, Your Honor.

It is clear defendant failed to preserve error and we do not reach the merits of this issue.

Finally, the defendant asserts the court's not ordering probation was excessive. The court sentenced the defendant to an indeterminate sentence not to exceed five years. This sentencing decision will not be disturbed absent a showing of an abuse of discretion. State v. Ramirez, 400 N.W.2d 586, 590 (Iowa 1987).

The defendant has not provided this court with a record which affirmatively shows any basis for any error. The appendix contains the court's sentencing order, but there is no record relating to why the trial court imposed the particular sen-

tence. We conclude, therefore, the defendant has waived any error that may have occurred.

AFFIRMED.