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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)
Plaintiff-Appellee,) Filed November 24, 1981
vs.)
RAY ANTHONY GORDON, III,) 1-367/65885
Defendant-Appellant.)

Appeal from Black Hawk District Court - Carrol Engelkes, Judge.

Defendant appeals from his conviction of the crime of lascivious acts with a child in violation of section 709.8, The Code. AFFIRMED.

Douglas Staskal and Francis C. Hoyt, Jr., State Appellate Defender's Office, Des Moines, Iowa, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Merle W. Fleming, Assistant Attorney General, for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

Defendant appeals from his conviction, after trial to the court, of the crime of lascivious acts with a child in violation of section 709.8, The Code. He argues that the evidence was insufficient to support a verdict of guilty, and, that if error was not preserved on this issue by operation of Iowa R. Crim. P. 18(10)(a), then failure to move for a directed verdict or judgment of acquittal in the court below constituted ineffective assistance of counsel. We find no support for defendant's contentions and consequently affirm the trial court.

When determining sufficiency of evidence claims, we must consider all of the evidence and review it in the light most favorable to the State. State v. Robinson, 288 N.W.2d 337, 340 (Iowa 1980). If there is substantial support for the verdict on the record, then that verdict is conclusive. State v. Jones, 271 N.W.2d 761, 763 (Iowa 1978). The evidence adduced at trial, reviewed in the light most favorable to the State, shows the following: On February 25, 1980, six-year-old Kayleen Tomkins came home from school around 3:45 p.m. and received permission from her mother to go over to her friend Amy's to play. Upon finding Amy not at home, she continued on to Tia's apartment, an apartment located in her own complex and one where she had played before. A man answered the door and said that Tia was sleeping, but that Kayleen should come in and wait for her. He told her to sit on the couch beside him, then told her to stand up, whereupon he pulled down her slacks and panties and put one of his fingers into her vagina. Kayleen cried, the man told her not to tell, and then he gave her a dime "for her tooth" and let her go. She was reluctant at first to tell her mother what had happened because it was "something bad." Finally, she related the incidents, and her mother and a friend went back to Tia's apartment. Tia answered the door and said that Ray Gordon, her mother's boyfriend and the defendant herein, had just left. Kayleen's mother discovered blood on her daughter's panties, the police were called, and Kayleen was examined by a doctor.

At trial, defendant denied Kayleen's story, saying he had left the apartment around 4:00 p.m. to help his mother with her car. The court found him guilty of committing lascivious acts with a child on October 3, 1980.

I. Defendant first argues that there was insufficient evidence to support a decision of guilty beyond a reasonable doubt. Besides the facts already set out, evidence was presented that Kayleen identified defendant from a photo array at the police station and again at trial. Her mother's and a neighbor's testimony corroborated

her story further as did medical testimony concerning examination of Kayleen and the bloodstains. In opposition to this evidence was testimony by defendant and his mother and brother. Ordinarily, a decision as to credibility of witnesses is a matter for the factfinder. State v. Orozco, 290 N.W.2d 6, 11 (Iowa 1980). Looking at all of the evidence as a whole, we find ample support in the record to uphold the trial court's verdict of guilty.

II. Defendant also contends that either error as to a sufficiency of the evidence claim was preserved by operation of Iowa R. Crim. P. 18(10)(a) or he was denied effective assistance of counsel. Because we have chosen to deal with the sufficiency of evidence claim on the merits, we do not decide whether rule 18(a)(10) was intended to preserve error in this fashion. However, in passing, we note that the court, when faced with a similar argument based on Iowa R. Crim. P. 6(3) regarding jury instructions, found that such a rule, while clarifying the responsibilities of a trial judge, did not relieve trial counsel of their responsibility to make proper objections within the adversary system. See State v. Rouse, 290 N.W.2d 911, 914 (Iowa 1980).

In the present case, defendant's only contention in regard to ineffective assistance of counsel is counsel's failure to make a motion for a directed verdict or judgment of acquittal in the court below. Failure to preserve error may be so egregious that it denies a defendant the constitutional right to effective assistance of counsel. State v. Steltzer, 288 N.W.2d 557, 560 (Iowa 1980). But because we have reviewed the issue of sufficiency of the evidence on the merits and find it to be both legally and factually wanting, such failure of counsel, if any, cannot be made the basis for relief on appeal. See State v. Rand, 268 N.W.2d 642, 649 (Iowa 1979) (defendant must demonstrate substantial prejudice to sustain claim of relief based upon ineffective assitance of counsel). We have considered all issues presented and find no basis for reversal.

AFFIRMED.