

FILED**OCT 25 1983**

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA**STATE OF IOWA,**

)

Plaintiff-Appellee,

)

Filed October 25, 1983

vs.

)

HOWARD ALVIN BENNETT,

)

3-21969258

Defendant-Appellant.

)

Appeal from Black Hawk District Court - C. W. Antes, Judge.

Defendant appeals from his conviction of sexual abuse in the second degree.

AFFIRMED.

Thomas M. McIntee of Schwieger, Parish, McIntee & McIntee, Waterloo, for
defendant-appellant.

Thomas J. Miller, Attorney General, and Michael K. Jordan, Assistant Attor-
ney General, for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Schlegel, Hayden, and
Sackett, JJ.

SACKETT, J.

Defendant, Howard Bennett, appeals from his conviction of sexual abuse in the second degree. On appeal, defendant asserts that: (1) there was not substantial evidence to support the trial court's finding that defendant was guilty of sexual abuse; and (2) the court should have excluded from evidence certain statements made by defendant that were the fruit of his allegedly illegal arrest. We affirm.

Bennett was accused of sexually abusing his nine-year-old niece and eleven-year-old nephew. The case against Bennett consisted chiefly of testimony by the minor victims. The testimony of the niece was corroborated by a fourteen-year-old half-sibling who had been babysitting at the house and who testified that she had witnessed one of the incidents of abuse. The testimony of the victims was at times inconsistent with their earlier testimony in depositions, and sometimes internally inconsistent. The case was tried to the court, which found Bennett guilty of sexual abuse in the second degree with respect to the niece, but not guilty with respect to the nephew.

I. Sufficiency of the evidence. Defendant challenges the sufficiency of the evidence to support his conviction for sexual abuse in the second degree with respect to his niece. The State asserts that error was not preserved on the sufficiency of the evidence issue since defendant did not challenge the sufficiency of evidence at the close of the State's case or after defense counsel presented his witnesses. The State relies upon State v. Dickerson, 313 N.W.2d 526, 529 (Iowa 1981), for the proposition that a party cannot effectively challenge the sufficiency of the evidence for the first time on appeal. While Dickerson correctly states the general rule, that rule is subject to exceptions. Iowa Rule of Civil Procedure 179(b) provides that in a civil case tried to the court a party, on appeal, may challenge the sufficiency of the evidence to sustain any finding without having

preserved the error below. That rule has recently been applied to juvenile court termination proceedings. In re Interest of A.R., 316 N.W.2d 887 (Iowa 1982). It is arguable that the same rule should apply in criminal cases tried to the court. See State v. Rifkin, 140 Vt. 472, 438 A.2d 1122 (1981) (in nonjury trial defendant need not move for judgment of acquittal in order to preserve right to question sufficiency of evidence on appeal). We need not decide, however, whether a criminal defendant in Iowa must preserve error on the sufficiency of the evidence when the case is tried to the court because we find that there was substantial evidence to support defendant's conviction.

In reviewing questions relating to the sufficiency of evidence, we examine the whole record in the light most favorable to the State, accept all legitimate inferences tending to support the conviction, and uphold the trial court's finding when there is substantial evidence to support it. State v. Newman, 326 N.W.2d 788, 790-91 (Iowa 1982). We must determine whether, viewed in its entirety, there was such evidence as would convince a rational trier of fact that the defendant is guilty beyond a reasonable doubt. State v. Mulder, 313 N.W.2d 885, 888 (Iowa 1981).

The evidence supporting Bennett's conviction rested upon the testimony of three juvenile witnesses. Bennett now argues that such testimony was "insufficient, inconsistent, and totally noncredible" and was therefore insufficient to support his conviction. The credibility of the testimony was clearly an issue for the factfinder. State v. Robinson, 288 N.W.2d 337, 341 (Iowa 1980). The court was free to accept or reject any portion of the witness's testimony. State v. Metcalf, 260 N.W.2d 857, 860 (Iowa 1977). The fact that there were minor inconsistencies in the niece's testimony does not preclude a finding that she was sexually abused, particularly since her testimony was corroborated by another witness's testimony. Likewise, the court's finding that defendant was not guilty of sexually abusing his

nephew is not determinative. We find that there was substantial evidence upon which a rational trier of fact could find beyond a reasonable doubt that defendant was guilty of sexual abuse in the second degree with respect to his niece.

II. Warrantless arrest. Defendant argues that the trial court erred in admitting statements made by himself following a warrantless arrest at his home in the absence of exigent circumstances. The defendant moved before trial to suppress a statement that he made to the police about an earlier incident of child abuse on the grounds that his warrantless arrest was improper. The court denied the motion. While the defense did not make a proper objection to the testimony at trial, the adverse ruling on the pretrial motion to suppress sufficiently preserved the error for appellate review on the record then made. See State v. Hilpipre, 242 N.W. 2d 306, 309 (Iowa 1976). Because a constitutional issue is involved, we view the relevant evidence from the suppression hearing de novo. State v. Dickerson, 313 N.W.2d at 530.

Officer Nemmers testified at the suppression hearing that he went to the address where the defendant resided with his brother and his brother's family. He spoke with the defendant's brother outside the residence, and the brother invited Officer Nemmers and his partner inside, where they spoke with the defendant. The defendant was advised of the allegations made against him and was asked to accompany the officers to the police station. The defendant was not arrested at that time and voluntarily accompanied the officers to the police station. On the way to the station, the defendant was advised of his rights but was not questioned until his arrival at the police station. At that time he was again given his Miranda rights and signed a standard waiver form. He was again told of the allegations against him. He denied the allegations, stating that he had not had that type of sexual problem for three years. He then indicated that he wished to speak with his lawyer, at which time the interview ended. The defendant was placed under arrest at the police station. The defendant did not deny that he was not arrested

at the home of his brother and admitted that he knew that he was not obligated to accompany the officers to the police station. The defendant decided to accompany the officers so that he could get the matter cleared up. The defendant further admitted at the suppression hearing that his brother gave the police officers permission to enter the home.

The defendant relies upon Payton v. New York, 445 U.S. 573, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980), in support of his argument that his arrest was per se unconstitutional in violation of the Fourth Amendment to the United States Constitution and that any statements made by himself following his arrest should have been excluded. The state does not argue with defendant's position that, absent valid consent or exigent circumstances, the officers could not enter into defendant's home to effect a warrantless arrest. State v. Luloff, 325 N.W.2d 103, 105 (Iowa 1982). We agree that while the defendant's argument is legally correct, it has no factual support in the record. The police officers had valid consent to enter the premises. Defendant was not arrested at his residence, but left voluntarily with the officers. The statement in question was made after defendant had been informed of his Miranda rights, before his arrest, and before he requested legal counsel. Because defendant's arrest did not violate the Fourth Amendment, the trial court was correct in overruling the defendant's motion to suppress.

Since we find no reversible error, we affirm the judgment and sentence of the trial court.

AFFIRMED.