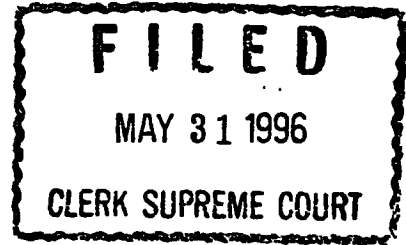


IN THE COURT OF APPEALS OF IOWA

No. 6-224 / 95-0076



STATE OF IOWA,

Appellee,

vs.

MARK DANIEL WILSON,

Appellant.

Appeal from the Iowa District Court for Woodbury County, James D. Scott,
Judge.

Appeal from conviction of second-degree sexual abuse. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Ahmet S. Gonlubol, Assistant
State Appellate Defender, for appellant

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney
General, Thomas S. Mullin, County Attorney, and James J. Katcher, Assistant County
Attorney, for appellee

Heard by Habhab, P.J., and Cady and Streit, JJ. Vogel, J., takes no part.

STREIT, J.

The defendant, Mark Wilson, appeals his conviction of second-degree sexual abuse. He argues: 1) there was insufficient evidence from which the State could prove him guilty beyond a reasonable doubt; 2) the trial court erred in refusing a request for a jury instruction on the issue of jurisdiction; and 3) his trial counsel was ineffective. We affirm and preserve defendant's claim of ineffective assistance for postconviction proceedings.

I. Sufficiency of the Evidence. The defendant argues the State failed to prove his guilt beyond a reasonable doubt. When reviewing criminal convictions for sufficiency of the evidence, we review the evidence in a light most favorable to the State. *State v. McGrew*, 515 N.W.2d 36, 37 (Iowa 1994). A conviction is reversed only if there is no substantial evidence in the record supporting the verdict or the verdict is clearly against the weight of the evidence. *Id.* at 37-38.

Substantial evidence is evidence which could convince a rational trier of fact the defendant is guilty of the crime charged beyond a reasonable doubt. *Id.* at 38. A fair inference of guilt with respect to each element of the crime charged is sufficient to uphold a verdict. *Id.* We consider all of the evidence, not merely that supportive of the conviction, in determining the sufficiency of the evidence to support a guilty verdict. *State v. Robinson*, 288 N.W.2d 337, 340 (Iowa 1980).

The defendant was the uncle of the five-year-old victim. The victim's father was the defendant's brother. The defendant was visiting his brother's home when the sexual abuse occurred. The victim's father and twelve-year-old stepsister testified the victim was asleep on the living room floor and was wearing a pajama top and underwear. The defendant was asked to watch the victim while the father and stepsister left to return another child to her home. Before they left, the stepsister took the victim to the bathroom and heard her urinate.

When the father and stepsister returned approximately fifteen minutes later, the victim was lying on the floor next to the chair in which the defendant sat. The victim was in a state of undress and her clothes were next to the defendant's chair. Her father testified she was naked and her stepsister's testimony indicated her shirt had been pulled up and she was not wearing underwear.

The father testified the defendant was upset when he asked what happened and told him the victim had wet her pants or had just gone to the bathroom. Both the father and stepsister touched the victim's underwear and observed it was not wet or damp. The father asked the victim what happened, but she would not respond and looked away. Several months later the victim told her stepsister the defendant had put his "pee pee" in her "pee pee."

The victim testified about the abuse and claimed the defendant told her to take her clothes off and he pulled down his shorts. The victim then testified, “He stick his pee pee on my pee pee.”

This is not a case in which the only incriminating evidence is so inconsistent or self-contradictory as to be insufficient to sustain a conviction. *See, e.g., State v. Smith*, 508 N.W.2d 101 (Iowa App. 1993). The testimony of the victim was corroborated by the testimony of the father and stepsister who observed the victim’s state of undress immediately after the abuse occurred. There was substantial evidence from which a rational trier of fact could find the defendant guilty of the crime charged beyond a reasonable doubt.

II. Jury Instruction – Jurisdiction. The defendant interpreted the victim’s deposition testimony as suggesting the abuse occurred in the family’s home in South Dakota, but her trial testimony indicated it occurred in the family’s prior residence in Iowa. Before jury instructions were drafted, defense counsel requested an instruction or special interrogatory on the issue of jurisdiction. *See State v. Liggins*, 524 N.W.2d 181 (Iowa 1994). Although the trial court acknowledged jurisdiction seemed to be a fact issue for the jury to consider, it denied the request for a special interrogatory at that time.

After the final instructions were drafted, trial counsel voiced no objection to the omission of an instruction on jurisdiction. To preserve error counsel must make a

specific objection to the instructions in their final form. *State v. Welch*, 507 N.W.2d 580, 584 (Iowa 1993). In the absence of such an objection, any alleged error is waived. *Id.* Given the failure to preserve error with respect to this issue, we decline to address it on appellate review.

III. Ineffective Assistance of Counsel. The defendant contends his trial counsel was ineffective in failing to preserve the jurisdiction/jury instruction issue for appellate review and in not objecting to the court's statement regarding the victim's competency to testify. Generally, claims of ineffective assistance of counsel are preserved for postconviction proceedings. *See State v. Mulder*, 313 N.W.2d 885, 890 (Iowa 1981), *cert. denied* 459 U.S. 841 (1982); *State v. Nebinger*, 412 N.W.2d 180, 191-92 (Iowa App. 1987). Preserving the matter for postconviction relief allows the facts to be developed and gives the allegedly ineffective attorney an opportunity to explain his or her conduct, strategies, and tactical decisions. *See State v. Coil*, 264 N.W.2d 293, 296 (Iowa 1978)

Trial counsel may have had strategic reasons for not further pursuing a jury instruction on the jurisdiction issue or in not wanting to object to the court's statement made in lieu of taking the victim's oath. Improvident trial strategy, miscalculated tactics, or mistakes in judgment do not necessarily amount to ineffective assistance. *Fryer v. State*, 325 N.W.2d 400, 413 (Iowa 1982). We conclude the record is not sufficient to address this claim and preserve it for postconviction proceedings.

AFFIRMED.