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JAN 2 8 1987
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed January 28, 1987
vs.	)	
ALONZO CHARLES SAPP,	)	6-430 86-65
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Mills County (2126) - J.C. Irvin, Judge.

Defendant appeals from his conviction, following a jury trial, of two counts of sexual abuse in the third degree. **AFFIRMED.**

Charles Harrington, Chief Appellate Defender, and Deborah A. Goins, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Lona Hansen, Assistant Attorney General, for plaintiff-appellee.

Considered by Oxberger, C.J., Snell, and Hayden, JJ.

HAYDEN, J.

Defendant was charged with two counts of sexual abuse of a child in violation of Iowa Code section 709.4(3) (1985). The charges were based upon allegations that defendant sexually abused Desiree Evans and Chris Rayland. The trial information filed on September 11, 1985, alleged defendant on or about August 2, 1985, committed sexual abuse by having contact between himself and two children, both thirteen at the time of the incident.

The matter came to trial with a jury at the courthouse in Mills County on November 19 and 20, 1985. The court overruled the defendant's motions for judgment of acquittal at the end of the State's evidence and at the close of all evidence. Defendant's motion for new trial was also overruled. The jury found the defendant guilty on both counts, and the court sentenced him to two concurrent prison terms, not to exceed ten years.

Defendant contends the trial court erred in overruling his motions for judgment of acquittal since the State failed to produce sufficient evidence as to whether Desiree Evans was a "child" as defined by Iowa Code section 702.5 (1985). Section 702.5 provides "a 'child' is any person under the age of fourteen years." At trial the following direct examination took place between the assistant county attorney and Desiree Evans:

> Q. How old are you, Desiree?
>
> A. Fourteen.
>
> Q. Okay. When is your birthday?
>
> A. October 11th, 1969.
>
> Q. Okay. How old were you then on August—in August of this year?
>
> A. Thirteen.

From the testimony that her birthday was October 11, 1969, it can be surmised that on August 2, 1985, the date of the incident, Desiree was fifteen. Defendant argues the conflict in evidence demonstrates the State's failure to produce substantial evidence from which a reasonable jury could have concluded that Desiree Evans was a "child." Since the State allegedly failed to produce sufficient evidence as to the victim's age, defendant requests his conviction under count one be reversed and dismissed.

Our scope of review is at law for correction of errors only. Iowa R. App. P. 4.

I.

The State contends defendant should not be allowed to raise the issue of sufficiency of the evidence as to Desiree Evans' age because he did not correctly preserve error at trial level by objecting with sufficient specificity. Moreover, the State argues even if the age issue is reviewable, sufficient evidence was presented to allow the jury to find Desiree Evans a "child" as a matter of fact.

Defendant moved for a judgment of acquittal at the close of State's evidence and at the conclusion of his own case. Defendant also filed a motion for new trial. In each of these pleadings defendant alleged the State failed to carry the burden of proving defendant's guilt beyond a reasonable doubt. Rule 18(8) of the Iowa Rules of Criminal Procedure states:

> The court on motion of a defendant or on its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the prosecuting attorney is not granted, the defendant may offer evidence without having waived his or her right to rely on such motion.

"Under this rule, when the defendant moves for a directed verdict at the end of the State's evidence, the court must grant the motion if the evidence is insufficient to sustain a conviction." State v. Holderness, 293 N.W.2d 226, 229 (Iowa 1980). We find that defendant properly preserved error on the challenge to the sufficiency of the evidence through his motions for a judgment of acquittal. Since the court, when considering such a motion, must consider all of the evidence in the record, we conclude that defendant's failure to draw the court's attention to the proof regarding the victim's age was not fatal to the preservation of said issue on appeal.

On appeal, defendant's sole issue is whether sufficient evidence was produced by the State regarding the victim's age. The elements of the crime which defendant was charged are: (1) defendant performed a sex act with; (2) the victim, a child, and (3) the defendant was not living with the victim as husband and wife. Iowa Code § 709.4 (1985); State v. Tague, 310 N.W.2d 209, 212 (Iowa 1981). At trial, jury instruction numbers 11 and 12 provided in pertinent part as follows:

INSTRUCTION NO. 11

> The law provides that if any person performs a sex act with a child under the age of 14 years, the person commits sexual abuse in the Third Degree.
>
> Lack of knowledge on the part of the person as to the actual age of the child would not be a defense to the crime charged. Likewise, it would be immaterial whether the person, at the time of such sex act, if any, may have believed the child was 14 years of age or older.

* * *

INSTRUCTION NO. 12

> You must find the Defendant not guilty of Sexual Abuse in the Third Degree under Count I of the Information unless the State proves by evidence beyond a reasonable doubt each of the following elements:

> 1. That on or about the 2nd day of August, 1985, the Defendant was not living with Desiree Evans as husband and wife.
>
> 2. That on said date the Defendant performed a sex act as that term is explained in Instruction No. 10 with Desiree Evans.
>
> 3. That on said date Desiree Evans was under the age of 14 years.
>
> If you find the State has proved beyond a reasonable doubt each and all of the foregoing elements then you will find the Defendant guilty of the crime of Sexual Abuse in the Third Degree; but, if you find the State failed to prove beyond a reasonable doubt one or more of such elements, then you shall find the Defendant not guilty.

The State had the burden of proving the age of the victim as one of the essential elements of the crime. The age of the victim was a factual matter for the jury to determine.

When reviewing a challenge to the sufficiency of the evidence, we must view evidence in the light most favorable to the State. State v. Robinson, 288 N.W.2d 337, 338 (Iowa 1980). We will uphold a criminal verdict unless the record lacks substantial evidence to support it. State v. Mitchell, 371 N.W.2d 432 (Iowa Ct. App. 1985). "In the criminal law context, substantial evidence means such evidence as could convince a rational trier of fact that an element of a crime has been proved beyond a reasonable doubt." State v. Knupp, 310 N.W.2d 179, 182 (Iowa 1981) (emphasis added).

From the evidence presented to the jury at trial, they could have been convinced Desiree Evans was thirteen at the time of the incident. She answered, upon direct examination, that in August of 1985 she was thirteen years old. She did say her birthday was October 11, 1969, thereby making her fifteen at the time of the abuse. When confronted with a direct factual conflict, we defer to the discretion of the jury; as long as the verdict is supported by substantial

evidence, we will affirm. Desiree Evans' testimony that she was thirteen at the time of the occurrence could convince the jury of such fact beyond a reasonable doubt.

AFFIRMED.