



IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
	)	
Plaintiff-Appellee,	)	Filed March 26, 1985
	)	
vs.	)	
	)	
TERRANCE DEWAYNE HILL,	)	5-02
	)	<u>83-889</u>
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Black Hawk County - Carroll E. Engelkes, Judge.

Defendant appeals from his conviction of second-degree sexual abuse in violation of Iowa Code section 701.3. On appeal, he asserts that his conviction was not supported by substantial evidence. **AFFIRMED.**

Charles L. Harrington, Appellate Defender, and John P. Messina, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General, and Mickey W. Greene, Assistant Attorney General, for plaintiff-appellee.

Heard by Donielson, P.J., and Snell and Schlegel, JJ.

SNELL, J.

Defendant was charged by trial information with second-degree sexual abuse in violation of Iowa Code section 701.3. At trial before the court, the mother of the victim testified that the defendant was her live-in boyfriend, and that on the morning after he babysat for her children, she noticed what she believed to be semen on the inside of her daughter's leg. The mother stated that after she confronted the defendant about this observation, he admitted he performed a sex act on the child. She further testified that she had learned from her daughter that defendant had additional sexual contact with the child at a later point in time.

The five-year-old victim was permitted to testify following a court determination that she understood the nature of an oath to tell the truth. She demonstrated, through the use of anatomically correct dolls, that the defendant performed a sex act on her. She responded affirmatively when asked whether defendant made certain contact that would constitute an oral sex act. On cross-examination, she responded affirmatively when asked whether her mother and the prosecutors told her what to say in court. She also shrugged her shoulders in response to a question as to whether she had told the truth.

The defendant denied performing any sex act on the victim. He further testified that he believed the mother of the victim concocted the allegations because of the emotional problems of her youth and the circumstances of the breaking of their relationship.

Defense counsel made no motion for judgment of acquittal during trial. The trial court in its findings of fact and conclusions of law concluded that on at least one occasion the defendant committed an oral sex act on the victim. The court found that defendant was guilty of the charged crime.

On appeal, defendant asserts that the conviction was not supported by substantial evidence. We find, however, that error was not preserved on this issue because of defense counsel's failure to make a motion for judgment of acquittal.

A party cannot challenge the sufficiency of the evidence for the first time on appeal. State v. Leonard, 243 N.W.2d 887, 893 (Iowa 1976). "Our adversary system imposes the burden upon counsel to make a proper record to preserve error" State v. Sallis, 262 N.W.2d 240, 248 (Iowa 1978). We reject the defendant's argument that the fact that this case was tried to the bench negates the requirement that a motion for judgment of acquittal be made to preserve error. The existence of a right or duty on the part of the court does not necessarily relieve counsel of the responsibility of urging the proper objection or exception. See, State v. Dickerson, 313 N.W.2d 526, 529 (Iowa 1981) (Trial court's right to order acquittal on its own motion under Iowa R. Crim. P. 18(10) does not relieve counsel of the obligation to object to the sufficiency of the evidence at the trial court level.) See, also, State v. Rouse, 290 N.W.2d 911, 914 (Iowa 1980) (Rule requiring trial court to instruct the jury on all lesser-included offenses does not relieve counsel of the obligation to submit the requested instruction nor to object to the failure to include the instruction.)

On appeal, defendant also argues that counsel's failure to make this objection constituted ineffective assistance of counsel. In order to prevail in his claims of ineffective assistance of counsel, defendant must prove by a preponderance of the evidence that the counsel's performance was deficient, and prejudice resulted from the inadequate performance of counsel's duties. State v. Miles, 344 N.W.2d 231, 234 (Iowa 1984).

We conclude that even if error had been preserved, there was substantial evidence to support the trial court's guilty verdict. Therefore, the defendant was not prejudiced by counsel's failure to make a motion for judgment of acquittal.

The judgment and sentence are affirmed.

AFFIRMED.