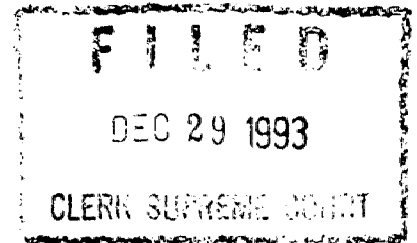


IN THE COURT OF APPEALS OF IOWA

No. 3-342 / 92-451



STATE OF IOWA,
Appellee,

vs.

KENNETH G. BOYD,
Appellant.

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Appeal from the Iowa District Court for Warren County,
Darrell Goodhue, Judge.

Kenneth G. Boyd appeals from his conviction, following
a jury trial, of robbery in the second degree in violation
of Iowa Code sections 711.1(2) and 711.3 (1991).

AFFIRMED.

Linda Del Gallo, State Appellate Defender, and Patricia
J. Cone-Fisher, Assistant State Appellate Defender, for
appellant.

Bonnie J. Campbell, Attorney General, Bridget A.
Chambers, Assistant Attorney General, and Kevin Parker,
County Attorney, for appellee.

Considered by Oxberger, C.J., and Schlegel and Habhab,
JJ.

OXBERGER, C.J.

Michael Steele attempted to rob, at gun point, certain drugs from the Phar-Med pharmacy in Indianola. The pharmacist managed to wrestle the gun away from Steele who ran from the store without obtaining the drugs. Steele was observed getting into a blue Celica driven by Kenneth G. Boyd, the defendant. Following a chase outside the city limits, the car came to a rest in a ditch and Steele was arrested on the scene. Boyd was arrested a few hours later and charged with robbery in the first degree.

At trial, Boyd did not dispute he led the police on a chase. However, he denied knowledge of, or participation in, the robbery. Sergeant Moore testified when he told Boyd he was under arrest for first-degree robbery, Boyd replied it "was the first time he was aware of that." Moore testified he then asked, "Did it ever occur to you to think to pull over to ask why we were chasing you?", to which Boyd "just kind of grinned and didn't say nothing." Boyd moved for a mistrial contending this testimony infringed upon his right against self-incrimination and his right to due process. Boyd stated his objection was made a short time after the issue because Moore's testimony surprised him. The district court overruled the motion.

Lieutenant Richard Berry testified when Steele was arrested he did not want to make any comments without an attorney. Boyd again moved for a mistrial because of the "spill-over" of prejudice to him. The motion was denied.

Following a recess, Boyd told the court he saw and heard at least two witnesses talking near some jurors about the case in the hallway. He testified that one of the witnesses pointed out Steele and said, "That is him there in the brown." Boyd received an admonition to the jury on this issue.

Boyd was found guilty of robbery in the second degree. His motion for new trial was overruled and he was sentenced to a period not to exceed ten years.

Boyd appeals.

I. Denial of Mistrial Motion Due to Testimony Regarding Boyd's Silence

Boyd contends the district court erred in failing to grant his motion for mistrial after Sergeant Moore commented on Boyd's silence after his arrest.

In order to preserve error, even error of constitutional dimension, the defendant must object at the earliest possible opportunity. State v. Yaw, 398 N.W.2d 803, 805 (Iowa 1987). Failure to object to a comment on the defendant's silence operates as a waiver of any improprieties in the testimony. State v. Johnson, 272 N.W.2d 480, 483 (Iowa 1978). "When an objection is late and follows the answer, a motion to strike and an application to have the objection precede the answer, or an excuse for the tardy objection, must be made in order for the objection to preserve error." State v. Sharkey, 311 N.W.2d 68, 71 (Iowa 1981). We find the recently decided

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case State v. Jirak, factually similar to the case at hand. 491 N.W.2d 794, 797 (Iowa App. 1992). In Jirak, the jury heard extensive evidence concerning the defendant's silence before the motion for mistrial was made. Id. The court found the motion untimely and thus, ruled the defendant failed to preserve error. Id.

At trial, the following encounter took place:

Q. What was his response to that?

A. He didn't respond back. He just kind of grinned and didn't say anything.

The prosecution then asked another question, unrelated to Boyd's silence. Sergeant Moore answered the question. Boyd then requested the opportunity to make a record in chambers, at the court's convenience. In chambers, defense counsel argued he was surprised by Sergeant Moore's testimony, thus failing to make a timely objection. He requested a mistrial, but did not request a motion to strike nor make application to have his objection appear before the question was answered. He also did not request a curative instruction. We find this insufficient to remedy the failure to timely object, and accordingly, find Boyd failed to preserve error on this issue.

II. Denial of Mistrial Due to Misconduct Toward the Jury

Boyd next contends the district court erred in denying his motion for mistrial when he alleged jurors overheard witnesses discussing the case.

"The trial court is given substantial discretion in determining the significance to the outcome of a case of misconduct by officers of the court, parties to the case, or members of the jury." State v. Lampman, 342 N.W.2d 77, 79 (Iowa App. 1982).

To impeach a verdict on the basis of jury misconduct, three conditions must be met:

(1) evidence from the jurors must consist only of objective facts as to what actually occurred in or out of the jury room bearing on misconduct;

(2) the acts or statements complained of must exceed tolerable bounds of jury deliberation; and

(3) it must appear the misconduct was calculated to, and with reasonable probability did, influence the verdict. State v. Cullen, 357 N.W.2d 24, 27 (Iowa 1984).

In this case, there was contradictory and unsatisfactory evidence as to whether any witness actually discussed the case. No evidence was presented to indicate any juror overheard any remark, if one was made. The trial court admonished the jurors to come forward if they overheard a remark being made. No juror came forward. Finally, since there was no direct evidence to indicate that a remark had been made and no juror indicated overhearing such a remark, we cannot say there was evidence that the verdict had been influenced. We affirm the trial court's denial of Boyd's motion for mistrial.

AFFIRMED.