

FILED

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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Appellee,	)	Filed May 20, 1977
vs.	)	
GLEN ROEST,	)	67
Appellant.	)	----- No. 59196

Appeal from Webster District Court - Edward J. Flattery,
Judge.

An appeal of a conviction of assault with intent to
commit rape, §698.4, The Code, with numerous issues including
submitting the issue of a lesser included offense. -

AFFIRMED.

Ulstad, Guinan and Cornell, of Fort Dodge, Terry W.
Guinan, counsel for appellant.

Richard C. Turner, Attorney General of Iowa, Jim P.
Robbins, Assistant Attorney General, William J. Thatcher,
counsel for appellee.

Heard by Allbee, C. J., Donielson, Snell, Oxberger and
Carter, JJ.

DONIELSON, J.

This is an appeal by the defendant from a conviction of assault with intent to commit rape, §698.4, The Code 1973. The defendant was charged with rape and pleaded not guilty, §698.1, The Code 1973.

The facts of the case are in controversy. The alleged rape occurred November 18 or in the early morning hours of November 19, 1975. The defendant and several male companions had met earlier in the evening of November 18 at an amusement center in Fort Dodge. They left sometime after 8:00 p.m. in one, Steve Hedeem's car. Thereafter they purchased some beer (one or two cases) and drove around drinking it.

The first contact with the prosecutrix, Susan Hendrickson, was between 12:00 and 1:00 a.m. Hendrickson was driving around when the defendant and his friends began to follow her. The two cars stopped beside each other at a stop sign. At this point there is conflicting testimony, Hendrickson testifying that the defendant just got in the car without her saying anything, the defendant testifying that she invited him to come in her car. Hendrickson and the defendant then drove down Central Avenue and back to the square and parked next to the Hedeem car. At this point, the defendant testified that at the request of Hendrickson, he got some beer from the Hedeem car, and they drove off again, parked and each drank beer and then went back to the square where he says, at the implied invitation of Hendrickson, had intercourse. Hendrickson testified that she did not ask the defendant to get the beer, and, while parked at the square, the defendant pushed her between the front bucket seats of her car and got on top of her.

While parked at the square, two of the defendant's

companions, Patton and Andrs, got into Hendrickson's car and drove to a local park. Again there is conflicting testimony, Hendrickson testifying that the defendant raped her first in the car and then pulled her out, threw her on the gravel and he and Andrs both raped her again. The defendant testified that he first had intercourse at the square with Hendrickson's consent. Thereafter the four drove to the park and, according to the defendant's testimony, Patton became angry that he had not had his chance and, after Hendrickson had stepped outside the car, pushed her to the gravel and got on top of her. According to the defendant, he and Andrs pulled Patton off of Hendrickson and the four then left the park.

The issues to be resolved in this case are: 1. Was it error for the court to allow the conviction of assault with intent to commit rape to stand in light of the admission by the defendant and prosecutrix that there was intercourse? 2. Was the prosecutor's conduct in eliciting testimony that the defendant refused to cooperate with the police grounds for a mistrial? 3. Was the prosecutor's statement which implied that the defendant should have taken a polygraph test grounds for a mistrial? Was this error preserved by the defendant? 4. Did the court error in not granting a mistrial after the outburst in the court room?

I

Lesser Included Offense

The standard of appellate review in a criminal appeal challenging the sufficiency of evidence to sustain a guilty verdict is to view the evidence in the light most favorable to the state and accept as established all reasonable inferences tending to support the jury's action. State v. Overstreet, 243 N.W.2d 880, 883 (Iowa 1976).

The defendant contends on appeal that because of his admission of having intercourse with the prosecutrix, he could not be found guilty of assault with intent to commit rape. He contends he is guilty of rape or nothing. The State apparently contends that an assault with intent to commit rape occurred at the city square. In so doing, the State relies on the prosecutrix's testimony denying the act of intercourse at the city square. The defendant testified that he did have intercourse with the prosecutrix at the city square but not at any other time.

The fact that Ms. Hendrickson testified intercourse actually occurred does not preclude the jury's finding of assault with intent to commit rape. State v. Banks, 213 N.W.2d 483, 486 (Iowa 1973); State v. Anderson, 222 N.W.2d 494, 497 (Iowa 1974). Does the added fact that the defendant admitted intercourse preclude a finding of assault with intent to commit rape? In this regard, the defendant relies on State v. Holoubek, 246 Iowa 109, 66 N.W.2d 861 (1954). In that case, the defendant admitted intercourse at the time and place in question, but claimed there was consent. The court stated: *"If he is guilty of the crime charged, it is because it was without her consent. He was either guilty of the crime charged or not guilty. Such a situation does not require the submission of offenses often included in a charge of rape."* (emphasis added)

The defendant interprets this to mean that where he admits to intercourse, as he did, he is guilty of rape or nothing at all. However, there are two inconsistencies between the Holoubek case and the case at bar. First, there is a factual distinction in that the defendant in Holoubek admitted

intercourse at the time and place in question. There was only one time and one place involved. In the case at bar, the defendant admitted intercourse at one place and time, i.e., the city square, while Ms. Hendrickson denied that intercourse occurred there. Later in the same evening, defendant denied intercourse at the park while Ms. Hendrickson contended there was intercourse with the defendant. It is at this point in the sequence of events that the jury could have found that an assault with intent to commit rape occurred. There was evidence as to each element of that offense and while there was evidence of a completed rape, there was also evidence to the contrary. Thus the jury could have found that while the defendant attempted to rape Ms. Hendrickson at the park, he was not successful. The jury is free to believe or disbelieve any or all of the State's case. See State v. Banks, 213 N.W.2d 483, 486 (Iowa 1973) where the court cites State v. Kramer, 252 Iowa 916, 920-921, 109 N.W.2d 18 (1961):

"[T]he defendant says if there was anything to submit it should have been rape only, without included offenses. His argument here is that the state's evidence showed, if it showed anything, a completed rape. At this point he cites authorities to the effect that when the evidence shows the defendant to be guilty either of the highest offense or none at all, included offenses need not be submitted; and he asserts it was error for the trial court to submit the included offense of which he was found guilty. It is necessary only to point out that the jury was the sole trier of the facts; it might believe all of the state's case, or none of it, or only part of it. If it chose not to believe the prosecuting witness and the police officer on the question of penetration, it had the right to do so. Equally, it had the right to believe the prosecutrix and Mrs. Redenbaugh as to the assault; and so believing, to bring in the verdict which it did."

The defendant's contention also goes to whether it was

proper to give the lesser included offense of assault with intent to commit rape in the instruction. The prevailing rule in Iowa is that a lesser offense would be necessarily included in the main offense if: 1. The legal elements of the lesser offense were entirely included in the legal element of the main offense; and 2. The facts of the case represented a situation where the main offense could not have been committed without commission of the lesser offense. See *State v. Habhab*, 209 N.W.2d 73, 75 (Iowa 1973); see also *State v. Willis*, 250 N.W.2d 428, 430 (Iowa 1977). While the defendant is silent as to the legal elements, he contends on appeal, that there is no factual basis for the lesser included offense. However, he did not make this objection when the trial judge submitted the instructions prior to reading them to the jury. After making several other objections, the record shows that defendant's counsel stated, *"Other than that, that is all I have."* This was a waiver of the defendant's right to object further to the instructions. Where there has been an express waiver of the right to object to instructions, counsel may not raise the new objection on a motion for new trial or on appeal. See *State v. Rosewall*, 239 N.W.2d 171, 175 (Iowa 1976); *State v. Willis*, *supra*.

Often submission of a lesser included offense is sought by a criminal defendant for reasons of trial strategy. 59 *Iowa L. Rev.* 684 (1974). *"Criminal defendants cannot be allowed to encourage or participate in submission of lesser included offenses as a trial tactic with the knowledge that, if they are convicted of the lesser included offense, it will be set aside."* *State v. Rosewall*, *supra* at 175.

II

Mistrial Motion

The appellant's citation of error has to do with the prosecutor's examination of a witness relative to the defendant's statement.

The error was not preserved as indicated by the two objections set forth:

A. "MR. GUINAN: We object to this as improper, Your Honor, and further we move that counsel knows it's improper."

B. "MR. GUINAN: Yes, and we'd ask for a mistrial. He knows it's improper."

Objections must be sufficiently specific to inform the courts of the grounds upon which the evidence is sought inadmissible. If the court is not so informed by objection, there is no reversal of errors unless the grounds are obvious. *State v. Hendren*, 216 N.W.2d 302, 304 (Iowa 1974); *State v. Buckner*, 214 N.W.2d 164, 167-168 (Iowa 1974).

Indeed this division in the appellant's brief refers to prosecutor's misconduct, relevancy, probative value and mentions that it is improper to show that the defendant was refusing to confess and to cooperate. However, both the record and the brief fail to disclose specifically what objection appellant's counsel was proposing when he said "*It is improper*".

When we review the record, we find that the series of questions objected to did in fact show that the defendant cooperated in answering the officer's questions.

The objection was simply not specific enough to alert the trial court nor indeed this appellate court as to the basis of the objections.

III

Mistrial Motion for Closing Arguments

Defendant's third contention alleges the trial court erred in refusing to grant a motion for mistrial which was based on alleged improper comments made by the prosecutor in closing argument. While the prosecutor admitted making some statements, they were not preserved in the record and defendant did not file a bill of exceptions pursuant to §§785.5, 786.1-786.9, The Code. We are unable to tell from the briefs and record exactly what was involved.

The contention then is not reviewable on appeal. The Supreme Court has consistently held that where the statements are not preserved and a bill of exceptions is not filed, it will not be reviewed on appeal. See *State v. Guess*, 223 N.W.2d 214, 217 (Iowa 1974); *State v. McKee*, 223 N.W.2d 204, 206 (Iowa 1974); *State v. Kendrick*, 173 N.W.2d 560, 563 (Iowa 1970); *State v. LaMar*, 260 Iowa 957, 151 N.W.2d 496, 502 (1967). The record was not sufficiently reconstructed as in *State v. Swallow*, 244 N.W.2d 321 (Iowa 1976).

IV

Mistrial for Courtroom Outburst

The defendant's last contention alleges the trial court erred in not granting his motion for mistrial because of a courtroom outburst by a member of Ms. Hendrickson's family in the presence of the jury.

A motion for mistrial is within the discretion of the trial court and only when abused will the appellate interfere. *State v. Conner*, 241 N.W.2d 447, 455 (Iowa 1976); *State v. Staker*, 220 N.W.2d 613, 617 (Iowa 1974). Because they are present and in a better position to gauge the effect on the jury of the matter in question, trial courts are given wide

latitude. State v. Garren, 220 N.W.2d 898, 901 (Iowa 1974); State v. Blackwell, 238 N.W.2d 131, 138 (Iowa 1976).

An examination of the record does little to reveal what actually transpired. There is no evidence that the jury understood the outburst. The record does indicate that the spectator was promptly ushered out of the court room and advised not to repeat the incident. Further, the trial judge instructed the jury not to consider any of the statements made by the spectator. With these facts in mind, we cannot find any abuse of the trial court's broad discretion in overruling the defendant's motion for mistrial.

We have considered every contention urged by the defendant and have found none with merit.

AFFIRMED - all judges concur.