FILED
MAR 31 1980
CLERK, SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)

Plaintiff-Appellee,) Filed March 31, 1980

vs.)

BERT BURKETT,) 0-68
63673

Defendant-Appellant.)

Appeal from Polk District Court - Luther T. Glanton, Judge.

Defendant appeals conviction of burglary in the second degree, a violation of sections 713.1 and 713.3, The Code 1979. Affirmed.

Alfredo G. Parrish and Linda Del Gallo of Parrish & Del Gallo, Des Moines, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Richard Cleland, Assistant Attorney General, for plaintiff-appellee.

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

DONIELSON, J.

Defendant, Bert Burkett, appeals conviction of burglary in the second degree, a violation of sections 713.1 and 713.3, The Code 1979. For reversal, defendant contends prosecutor impermissibly used his post-arrest silence to impeach him. We affirm the trial court's judgment.

I.

On January 25, 1979, defendant was charged with second degree burglary, in connection with the theft on January 8, 1979, of a television set from a motel room. Trial commenced April 16, 1979, and the jury returned a verdict of guilty as charged on April 17, 1979. Defendant was sentenced on May 25, 1979, to serve a period not to exceed ten years.

During cross-examination of defendant, the following exchange occurred:

Q. Mr. Burkett, didn't you tell Detective Martin that you both went to the Holiday Inn, used the tire iron to pry open the front door?

A. I said we both went. We did both go. I was there with him.

Q. Mr. Burkett —

A. When he pulled up —

Q. Let me phrase it this way, Mr. Burkett. I don't want to confuse you. You never told Detective Martin that you didn't know what Mr. Douglas was doing at the Holiday Inn South, did you?

A. Detective Martin didn't ask me.

Q. That wasn't my question. I don't care if it was asked or not. You didn't tell him you didn't know what was going on until the TV was removed from the Holiday Inn South, did you?

A. He never asked me.

Q. Did you? You didn't tell him that, did you?

MR. RIGG [defense counsel]: Your Honor, I have an objection. Somehow I just — I would object on the grounds I think it's unconstitutional to use the Defendant's silence to impeach the Defendant.

THE COURT: Overruled.

MR. RIGG: Your Honor, may I make one further record, and I would cite to the Court Doyle v. Ohio. It's a 1972 United States Supreme Court case. That is my record.

THE COURT: This Defendant's on the witness stand.

He has the right to cross-examine him.

Defendant asserts the prosecutor's questions constituted an unconstitutional comment on his right to remain silent and an attempt to impeach defendant by use of his post-arrest silence.

II.

The rule is well established that failure to object to evidence or move to strike the same when the record is made and the grounds for objection or motion to strike become apparent precludes the party from asserting on appeal admission of evidence was error. State v. Reese, 259 N.W.2d 771, 775 (Iowa 1977); State v. Ivory, 247 N.W.2d 198, 203 (Iowa 1976); State v. Hill, 243 N.W.2d 567, 569 (Iowa 1976); State v. Hinkle, 229 N.W.2d 744, 748 (Iowa 1975); State v. King, 225 N.W.2d 337, 341 (Iowa 1975); State v. Jewett, 219 N.W.2d 559, 560 (Iowa 1974); State v. Hendren, 216 N.W.2d 302, 305 (Iowa 1974); State v. Canada, 212 N.W.2d 430, 432 (Iowa 1973); see State v. Johnson, 272 N.W.2d 480, 483 (Iowa 1978); State v. Wellington, 264 N.W.2d 739, 741 (Iowa 1978). Our statutory duty to review the record in a criminal case without regard to technical errors or defects does not confer on us the duty or authority to treat an unexcused failure to make an otherwise mandatory record regarding the admissibility of evidence as a mere technical error or defect. State v. Smith, 228 N.W.2d 111, 112 (Iowa 1975), quoted in Wellington, 264 N.W.2d at 741.

From the portion of the record set out above, it is clear trial counsel failed to object to prosecutor's two challenged questions prior to defendant's answers. Defense counsel also did not move to strike the answer or request his objection precede the answer. Further, defense counsel did not give any reason for failing to object sooner. Defendant is represented by different counsel on this appeal. This failure to raise proper objection operates as a waiver of any improprieties in the testimony. Johnson, 272 N.W.2d at 483; see State v. Holmes, 276 N.W.2d 823, 827 (Iowa 1979); State v. Jump, 269 N.W.2d 417, 430 (Iowa 1978); State v. Harmon, 238 N.W.2d 139, 143 (Iowa 1976); State v. Hall, 235 N.W.2d 702, 727 (Iowa 1975). Absent proper objection, the issue is not before us.

Defendant's motion to strike made at the close of all the evidence is without effect. A motion to strike must be made at the earliest opportunity — when the error becomes apparent. See Canada, 212 N.W.2d at 432. Defense counsel was aware of the nature of the alleged error at the time he entered his untimely objection; defendant's motion to strike was thus untimely. Id.

Likewise, defendant's motion for a mistrial made at the close of all the evidence was untimely. See State v. Cuevas, No. 62598, slip op. at 11 (Iowa, filed February 20, 1980); State v. Ware, 205 N.W.2d 700, 702 (Iowa 1973). A mistrial motion must be made when the grounds relied on first become apparent. Id; State v. Boose, 202 N.W.2d 368, 369 (Iowa 1972); see State v. Gilmore, 259 N.W.2d 846, 852 (Iowa 1977). Here, the motion for mistrial made at the close of all the evidence was untimely.

The judgment and order of the trial court is affirmed.

AFFIRMED.