FILED
JUN 4 1986
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,
Plaintiff-Appellee,

vs.

KEVIN J. MARSHALL,
Defendant-Appellant.

FILED JUNE 4, 1986

6-85
85-971

373

Appeal from the Iowa District Court for Dubuque County (No. 15847), L. John Degnan, Judge.

Defendant appeals his conviction of second degree robbery and second degree burglary. **AFFIRMED.**

Larry R. Kurt, Dubuque, Iowa, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa; Ralph R. Potter, Assistant County Attorney, Dubuque, Iowa; and Roxann M. Ryan, Assistant Attorney General, Des Moines, Iowa, for plaintiff-appellee.

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

SCHLEGEL, J. 374

Defendant appeals his conviction of second degree robbery and second degree burglary. He contends the trial court unduly prejudiced his case by improper comments, and that his motion for acquittal should have been granted due to the lack of evidence in the record as a whole to sustain a conviction.

Defendant Kevin Marshall was convicted of the robbery and burglary of a residence in Dubuque, Iowa. Most of the evidence used by the State to convict defendant came from the testimony of one of the victims of the robbery and an alleged accomplice.

The case was submitted to the jury and defendant was found guilty on both counts. Defendant appeals that verdict.

I. Prejudice. Defendant argues the trial court improperly commented on the testimony of his alleged accomplice and that he was therefore prejudiced by the judicial remarks. During defense counsel's cross examination of the alleged accomplice, the following exchange occurred:

> Q. (by defense counsel) Mr. Sharkey, have you ever lied to the members of the Dubuque Police Department?
>
> MR. POTTER: I'm going to object, your Honor. That is not proper impeachment. If he wants to ask him about felony convictions, that's one thing. But to ask him if he lied, is improper.
>
> THE COURT: I do not think that is a fair question, Mr. Kurt. It is quite broad, "Did you ever lie to the Police Department?".
>
> I think there might have been an occasion when I lied to a police department in my lifetime.
>
> MR. KURT: I believe it is a proper method of impeachment. What Mr. Potter is referring to, is when a defendant takes the stand, there are limited areas.

> But Mr. Sharkey is the State's witness.
>
> THE COURT: I do not think it is very damaging, and if Mr. Sharkey wants to tell you, I think I will let him answer the question. Did you ever lie to the police department?
>
> THE WITNESS: Hasn't everybody?

Defense counsel did not move for mistrial at this time and waited until the close of the State's evidence to object to the trial court's comments. Because of this delay, the state argues on appeal that error was not preserved. In the alternative, the State argues that whatever prejudicial effect the judicial comments had upon defendant were cured by a subsequent instruction to the jury to disregard such remarks. Should we find that error was not preserved, we need not address the issue of prejudicial effect and the subsequent instruction.

Trial irregularities, even important constitutional rights, may be waived by defendant's failure to raise an objection as soon as possible. See State v. Larmond, 244 N.W.2d 233, 237 (Iowa 1976)

> At least two reasons exist for requiring a timely objection to alleged judicial bias. One is that it gives the judge an opportunity to correct or explain his conduct before the defendant has been denied a fair trial. See State v. Smith, 242 N.W.2d 320, 323-24 (Iowa 1976). Another reason is that it precludes a defendant from delaying an objection in order to gamble on a favorable verdict.

State v. Windsor, 316 N.W. 2d 684, 687 (Iowa 1982).

We certainly do not condone the trial court's comments in this case. We need not reiterate the well-established rules that prohibit any conduct by the trial court that may influence the jury concerning any evidence or information pertaining to defendant's guilt or innocence. But even judicial impropriety must be sufficiently preserved by counsel.

It is true the supreme court in Larmond considered a prejudice issue despite the trial counsel's delay in objecting to judicial conduct until he moved for a

new trial. But that court, as the Windsor opinion points out, excused the delay on the basis that the "oppressiveness of the trial judge deterred the inexperienced defense attorney from making a proper record and that the judge's conduct had irretrievably demolished defendant's chance for a fair trial before defense counsel could have been expected to object." Windsor, at 687. However, like the Windsor court, we find no circumstances like those in Larmond exist in this case and no excuse appears in the record for failing to object to the alleged improper comments earlier. Therefore, we hold defendant failed to preserve error on the misconduct issue and we are thus barred from considering the issue.

II. Sufficiency of the Evidence. At the close of the State's evidence, defense counsel submitted a motion for acquittal. The motion was renewed at the end of all the evidence, but the trial court denied the motion both times. Defendant alleges the trial court erred in its denial because there was insufficient evidence to sustain a conviction.

> When reviewing the sufficiency of evidence, we view the evidence in the light most favorable to the State, including all legitimate inferences and presumptions which may fairly and reasonably be deduced from the evidence in the record. It is necessary to consider all of the evidence and not just the evidence supporting the verdict. A jury verdict is binding upon this court and will be upheld unless the record lacks substantial evidence to support the charge. Substantial evidence means evidence which would convince a rational trier of fact that the defendants are guilty of the crime charge beyond a reasonable doubt.

State v. Blair, 347 N.W.2d 416, 418-19 (Iowa 1984).

The state's evidence comprised basically of (1) the victim's identification of defendant from a photo display, (2) the alleged accomplice testimony that defendant participated in the robbery and burglary, and (3) the identification

of defendant's brother's car as the get-away car. In each instance the effectiveness of the evidence depended upon the credibility of the particular witness. The credibility of witnesses is the province of the jury. State v. Orozco, 290 N.W.2d 6,11 (Iowa 1980); State v. Dahlstrom, 224 N.W.2d 443, 448 (Iowa 1974). The testimony of the State's witnesses, if believed by the jury, is clearly sufficient to support the verdict. The jury apparently found the witnesses credible and we cannot conclude it was wrong as a matter of law.

We find no reversible error under any of the issues assigned.

AFFIRMED.