FILED
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IN THE COURT OF APPEALS OF IOWA

No. 3-357 / 92-1174

STATE OF IOWA,

Appellee,

vs.

DAVID TROY McDANIEL and PAMELA LOUISE McDANIEL,

Appellants.

Appeal from the Iowa District Court for Poweshiek County, Richard J. Vogel and Robert Bates, Judges.

The defendants appeal the judgment and sentence entered upon their convictions for possession of a schedule I controlled substance (marijuana) with intent to deliver. **AFFIRMED IN PART; REVERSED IN PART AND REMANDED FOR A NEW TRIAL.**

Linda Del Gallo, State Appellate Defender, and Ahmet S. Gonlubol, Assistant State Appellate Defender, for appellants.

Bonnie J. Campbell, Attorney General, Martha E. Boesen, Assistant Attorney General, and Michael W. Mahaffey, County Attorney, for appellee.

Considered by Donielson, P.J., and Hayden and Sackett, JJ.

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HAYDEN, J.

Defendants, David and Pamela McDaniel, appeal their convictions, following a jury trial, for possession of a schedule I controlled substance (marijuana) with intent to deliver.

Dottie Sheets, a witness for the State, gave the following account at trial of a drug transaction between defendants and her. Dottie stated she went to McDaniels' residence on October 7, 1991, to purchase one-quarter ounce of marijuana. Sheets asked Pamela for one-quarter ounce of marijuana. Pamela went upstairs, came back down, and told Dottie to wait a minute. Pamela left the room for a few minutes to speak with her husband and then came back with two bags. One bag contained one-quarter ounce of marijuana. The other bag contained one ounce of marijuana, which Pamela asked Dottie if she could sell. Dottie took both bags and put them in her purse. Pamela told her to either give her the money she received for the sale of the bag, or return the bag to her within a few days.

Dottie left McDaniels' home and drove around the block where she was stopped by Officer Kriegel for a traffic violation. While Kriegel was talking with Dottie, Officer Oster approached her car. When Dottie opened the glove compartment to obtain her car registration, Oster saw a bag of marijuana. Oster removed the bag and showed it to Officer Kriegel. Dottie was subsequently arrested for possession of marijuana. Dottie's purse and vehicle were

seized and inspected. The police found two bags of marijuana in her purse. Police also found a hip pouch containing a small amount of marijuana in a plastic bag and a pipe. The four bags of marijuana had a net weight of 32.8 grams. The trial information against Dottie was amended, charging Dottie with possession with intent to deliver.

At the police station Officer Oster interviewed Dottie. She told Oster she had gone to McDaniels' house to purchase one-quarter ounce of marijuana. In this initial interview, however, Dottie claimed David McDaniel gave her the marijuana and asked if she would be willing to sell some for him.

Following this interview the police executed a search warrant for McDaniels' residence. Officer Oster testified at trial upon entry into McDaniels' home he could smell burning marijuana. Oster and another officer found three small bags of marijuana, a marijuana pipe, a hand scale, rolling papers, and approximately $300. David and Pamela were subsequently arrested and charged with possession of a schedule I controlled substance (marijuana) with intent to deliver. On January 21, 1992, McDaniels filed motions to suppress the evidence obtained from the search of their home. The district court denied the motions.

A trial commenced on April 7, 1992. Dottie testified she gave the police a false report on the day she was arrested. Dottie maintained she had actually received the

marijuana from Pamela, not David. Dottie stated Pamela had gone out to the garage to speak with David before giving her the marijuana. Dottie claimed when she gave her first statement, she was scared and worried she might lose her job and children because of her arrest. Dottie admitted in exchange for the information she provided, the charges against her were reduced to simple possession and she received a deferred judgment.

Don Doyle, a neighbor of McDaniels, testified on behalf of defendants. He testified he was at McDaniels' home on the day in question. He claimed he was helping David lay gas pipe in the garage. Doyle testified Pamela never came out to the garage that day.

The jury found McDaniels guilty as charged. The district court sentenced David and Pamela each to a term of imprisonment not to exceed ten years, and suspended the sentence. McDaniels were placed on probation. McDaniels have appealed.

McDaniels raise several issues on appeal, contending the district court erred (1) in refusing to submit an accomplice instruction to the jury, (2) in overruling their motions for acquittal based on their claim of insufficient evidence, (3) in admitting evidence of a prior drug sale between McDaniels and Dottie, and (4) in denying their motion to suppress.

Our scope of review is for the correction of errors of law. Iowa R. App. P. 4.

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I. Jury Instruction.

At the conference on the proposed jury instructions McDaniels' counsel requested the court to submit Iowa Uniform Jury Instruction Number 200.4, which would require the jury to determine (1) whether Dottie was an accomplice and, if so, (2) whether her testimony was sufficiently corroborated to sustain a conviction. The court refused to submit the instruction to the jury. McDaniels maintain the district court erred in refusing to submit to the jury the question of whether Dottie was an accomplice and to instruct the jury regarding corroboration of accomplice testimony.

On appeal, McDaniels point to Iowa Rule of Criminal Procedure 20(3), which provides a conviction cannot be based upon the testimony of an accomplice or a solicited person, unless the testimony is corroborated by other evidence. Iowa Rule of Criminal Procedure 20(3) states:

> A conviction cannot be had upon the testimony of an accomplice or a solicited person, unless corroborated by other evidence which shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof.

Iowa R. Crim. P. 20(3). When a defendant seeks to invoke this rule, the burden is on defendant to prove by a preponderance of the evidence the individual was an accomplice. State v. Berney, 378 N.W.2d 915, 917 (Iowa 1985); State v. Houston, 206 N.W.2d 687, 689 (Iowa 1973).

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It is McDaniels' position Dottie is an accomplice and therefore her testimony should have been corroborated. The Iowa Supreme Court has defined an accomplice as follows:

> An accomplice is a person who willfully unites in, or in some way concerned in the commission of a crime. The general rule for determining whether a witness is an accomplice is if [she] could be charged with and convicted of the specific offense for which an accused is on trial.
>
> But something more than mere knowledge that a crime is contemplated, or mere personal presence at the time and place where committed, must be shown in order to make one an accomplice. And it must be established by a preponderance of the evidence that a witness was in fact an accomplice.

Berney, 378 N.W.2d at 917 (quoting State v. Johnson, 318 N.W.2d 417, 440 (Iowa), cert. denied, 459 U.S. 848 (1982)). The question of whether a particular witness is an accomplice is a question of law where the facts as to the witness's culpability are neither disputed nor susceptible to different inferences; however, where the facts are susceptible to different inferences the question is one of fact for the jury. Id. (citations omitted); State v. Sallis, 238 N.W.2d 799, 802 (Iowa 1976). McDaniels argue the issue of whether Dottie was an accomplice was a question for the jury.

There are two alleged transactions which occurred on October 7, 1991, between defendants and Dottie. One alleged transaction involved one-quarter ounce of marijuana, and the other involved one ounce of marijuana. Dottie was a customer with regard to the transaction of the one-quarter ounce of marijuana. A purchaser of drugs is

not an accomplice of the seller in the offense of delivery. See State v. Lott, 255 N.W.2d 105, 107 (Iowa 1977). In a taped interview with Officer Oster, which was admitted into evidence at trial and played for the jury, Dottie stated she paid forty-five dollars for the one-quarter ounce. The trial court's refusal to submit the accomplice issue and instruction to the jury with regard to the one-quarter ounce transaction was proper.

We are concerned, however, with the facts surrounding the alleged transaction of the one ounce of marijuana. Dottie paid for the one-quarter ounce of marijuana. However, Dottie stated in the taped interview with Officer Oster she did not pay for the one ounce of marijuana. In the interview Dottie claimed defendants asked her if she could "get rid of it." Dottie took both bags of marijuana with her when she left McDaniels' residence. When she was stopped by Officer Steve Kriegel, she had $279 with her. Officer Oster testified, based on his experience as a member of the Jasper-Poweshiek County Drug Task Force, a person could purchase one and one-half ounces of marijuana for $279.

After a careful review of the record we find the facts as to Dottie's culpability are susceptible to different inferences. The trial court erred in refusing to submit to the jury the question of whether Dottie was an accomplice with regard to the one ounce of marijuana transaction. We reverse on this issue and remand for a new trial.

II. Insufficient Evidence.

McDaniels argue there was insufficient evidence to support a conviction for possession of a schedule I controlled substance with intent to deliver. Specifically they contend Dottie's testimony, as an accomplice, was not sufficiently corroborated. This sufficiency argument relates to McDaniels' claim the trial court erred in refusing to submit a jury instruction requiring corroboration of an accomplice's testimony.

McDaniels contend Sheets is an accomplice therefore the sufficiency of the corroboration evidence was a question for the jury. See State v. Larue, 478 N.W.2d 880 (Iowa App. 1991). The existence of corroborative evidence is a question of law, while the sufficiency of that evidence ordinarily is a question of fact for the jury. Id. at 883 (citing State v. Doss, 355 N.W.2d 874, 879 (Iowa 1984); State v. Ware, 338 N.W.2d 707, 710 (Iowa 1983)). It is prejudicial error to fail to instruct even without request on the requirement of corroboration where the jury could find the only witness against defendants was an accomplice. Larue, 478 N.W.2d at 883 (citing State v. Anderson, 240 Iowa 1090, 1096, 38 N.W.2d 662, 665 (1949)).

Based upon our reversal of the district court's decision for failure to give an accomplice instruction, we similarly reverse the part of the district court's decision in which it refused to submit the requested jury instruction requiring corroboration of accomplice testimony.

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McDaniels raise the following two issues on appeal. The issues concern the admission of evidence of prior drug sales and the validity of a motion to suppress. There is a strong possibility the State will seek to admit the evidence involved in these two issues on remand so we address them now.

III. Admission of Evidence of Prior Drug Sale.

McDaniels allege the district court abused its discretion in overruling their objection to the introduction of evidence of a prior drug sale between Dottie and defendants. McDaniels maintain such information was used only to show conduct in conformity, and therefore inadmissible under Iowa Rule of Evidence 404(b).

> Generally, evidence which shows commission of crimes other than the one with which a defendant is charged is inadmissible. When the evidence tends to prove (1) motive, (2) intent, (3) absence of mistake or accident, (4) a common scheme or system of criminal activity embracing the commission of two or more crimes so related that proof of one tends to prove the other, and (5) the identity of the person charged with commission of the crime, an exception to the general rule permits admission of the evidence.

State v. Serr, 322 N.W.2d 96, 99-100 (Iowa App. 1982). Evidence of a separate crime is inadmissible as bearing on a defendant's guilt unless it falls within the established exceptions. State v. Powell, 256 N.W.2d 235, 237 (Iowa 1977).

The district court overruled McDaniels' objection to the admission of evidence of a prior drug sale to Dottie. At trial Dottie testified she purchased one-quarter ounce

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of marijuana from defendants in September 1991 for sixty dollars.

The general rule is evidence showing the commission of a crime other than the one with which a defendant is charged is inadmissible. State v. Grosvenor, 402 N.W.2d 402, 405 (Iowa 1987) (citing State v. Howell, 290 N.W.2d 355, 360 (Iowa 1980)). Exclusion of evidence of other crimes is based on the view it is ordinarily not relevant. State v. Mendiola, 360 N.W.2d 780, 782 (Iowa 1985) (citing State v. Conner, 314 N.W.2d 427, 429 (Iowa 1982)).

In State v. Howell, the Iowa Supreme Court addressed whether testimony concerning defendant's prior drug sales was admissible. Howell, 290 N.W.2d at 360. The court stated:

> [T]he only exception which could possibly permit the introduction of the disputed evidence -- the existence of a common scheme, plan, or system. It is not enough that the defendant committed other crimes of the same nature unless in some way each has a bearing on the other.

Howell, 290 N.W.2d at 360 (quoting State v. Wright, 191 N.W.2d 638, 641 (Iowa 1971)). The court determined the trial court abused its discretion in admitting the evidence of prior drug sales. Id. The court reversed and remanded the case for a new trial. Id. at 361. In State v. Klauer, the court similarly concluded evidence of prior narcotics sales was error. State v. Klauer, 226 N.W.2d 803, 804 (Iowa 1975) (citation omitted); see also State v. Deanda, 218 N.W.2d 649, 651 (Iowa 1974) (admission of evidence of subsequent sales of marijuana constituted error).

We determine the trial court abused its discretion in admitting testimony of alleged prior drug sales. The admission of evidence constitutes reversible error. We reverse the trial court on this issue and remand for a new trial.

IV. Motion to Suppress.

McDaniels contend the district court should have suppressed evidence obtained from their residence pursuant to a search warrant. McDaniels contend the search warrant was not predicated on prior surveillance of McDaniels' home by the police but was predicated on the information Dottie, an accomplice, gave to the police. McDaniels claim Dottie's information was unreliable because she was involved in the criminal activity.

Search warrants are preferred; therefore, our courts resolve all doubts in favor of their validity. State v. Bishop, 387 N.W.2d 554, 558 (Iowa 1986) (citations omitted). We do not make an independent determination of probable cause; rather, we give great deference to the prior determination of probable cause by the judge. Id. (citing Christenson v. Ramaeker, 366 N.W.2d 905, 908 (Iowa 1985)). Our inquiry is whether the judge had a "'substantial basis for . . . conclud[ing] that probable cause existed.'" Bishop, 387 N.W.2d at 558 (quoting Illinois v. Gates, 462 U.S. 213, 238-39, 103 S. Ct. 2317, 2332, 76 L. Ed. 2d 527, 548 (1983)).

The application for a search warrant included a statement by affiant, Officer Oster, that confidential sources had revealed to Officer Hanssen marijuana was being sold out of McDaniels' residence. Subsequent surveillance revealed vehicle traffic stopping at the residence for short periods of time. The application also contained a statement from a named informant, Dottie Sheets, in which she stated she had purchased marijuana from David McDaniels. Officers discovered marijuana in Dottie's possession. Officer Oster stated he had observed Dottie's vehicle at McDaniels' residence prior to the traffic stop, which revealed the marijuana in her possession.

We hold the district court judge had a substantial basis for concluding probable cause existed to support the issuance of the search warrant for McDaniels' residence. We affirm on this issue.

AFFIRMED IN PART; REVERSED IN PART AND REMANDED FOR A NEW TRIAL.