

FILED

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CLERK SUPREME COURT

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IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA)

Plaintiff-Appellee,)

Filed April 29, 1980

vs.)

DANNY J. WRIGHT,)

Defendant-Appellant.)

0-80
62658

Appeal from Scott District Court - C. H. Pelton, Judge.

Defendant appeals conviction on four counts of delivery of a controlled substance for profit, in violation of section 204.401(1), supplement to The Code, 1977. - Reversed and remanded for new trial.

Doren Shifley, Davenport, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, Douglas F. Staskal, Assistant Attorney General, and William E. Davis, Scott County Attorney, for plaintiff-appellee.

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

PER CURIAM

Defendant, Danny J. Wright, appeals conviction on four counts of delivery of a controlled substance for profit, in violation of section 204.401(1), supplement to The Code, 1977. We reverse and remand for new trial.

Wright was convicted by a Scott County jury for delivering a controlled substance for profit. He raises five issues on appeal and our review is on errors assigned. Iowa R. App. P. 4. We find his challenge to the trial court's overruling his motion for mistrial meritorious and reverse on that ground.

I. Wright moved for a mistrial when a police officer, in rebuttal testimony, stated the State's confidential undercover agent and Wright "had evidently served time together before." Wright contended this reference to a past conviction was so prejudicial it denied him a fair trial. The trial court agreed the statement was unduly prejudicial and stated it likely could not be cured by an admonition to the jury. However, it denied Wright's mistrial motion stating the issue was one for appeal.

Wright's motion for mistrial was predicated on prejudice denying him fair trial. The State claims Wright waived error on the matter because he did not make specific objection to the reference to past criminality except to say it was prejudicial; he did not move for his objection to precede the answer and did not ask that the testimony be stricken; and he did not ask that the jury be admonished to disregard the testimony.

We find, however, Wright's motion for mistrial was sufficient to bring the matter to the court's attention. The parties had reached an agreement with the court that no evidence on Wright's prior conviction would be presented. The trial judge said "I thought we had a ruling heretofore that we weren't going to let in the defendant's prior record..." When the State presented such evidence, Wright's counsel objected on prejudice grounds. Wright's counsel also had objected to the general line of questioning on Wright's friendship with the confidential undercover agent as irrelevant. We find Wright's objection preserved the question whether the danger of prejudice created by the evidence outweighed its probative value.

The determination whether the probative value of evidence outweighs its prejudicial effect is within the trial court's discretion, State v. McDaniel, 265 N.W.2d 917, 921 (Iowa 1978). To establish an abuse of discretion, Wright must show the trial

court's action was unreasonable in light of the attendant circumstances. State v. Cott, 283 N.W.2d 324, 329 (Iowa 1979), (citing State v. Gartin, 271 N.W.2d 902, 910 (Iowa 1978)). The State claims it intentionally sought the testimony on the prior offense to show lack of motive by the confidential undercover agent to "frame-up" Wright. The confidential undercover agent did not testify nor was he identified. Thus, no basis to show lack of motive on his part was presented. The better reason for the testimony was expressed by State's counsel when he said: "I believe the defendant, by his answers to my cross-examination, has at least, put his general character into question here and possibly his prior conviction might be relevant." The trial judge replied: "I think it's a delicate question. I don't know that answer at this point either."

Wright admitted during cross-examination that the confidential undercover agent introduced him to police officer Warnstadt for the purpose of drug purchases. Wright denied he sold drugs to the officer. On cross-examination State's counsel and Wright had this exchange:

Q. That's not the kind of thing you do, right? (referring to sale of drugs). A. No, I don't.

Q. You're not that kind of person. A. No, I am not.

The State's effort to show Wright's bad character due to his previous conviction is exactly the prejudicial conduct rejected in Cott, 283 N.W.2d at 329. We find the probative value of the evidence of the prior conviction was outweighed by the prejudice it created. Further, the attendant circumstances of the case, most notably that the State intentionally elicited the evidence despite its agreement with Wright and the court not to do so, show the trial court's denial of the motion for mistrial was unreasonable and constituted an abuse of discretion. The State contends Wright cannot complain of any error since he did not seek to have the evidence stricken and the jury admonished to disregard it. However, the trial court specifically stated it did not think such a procedure would be effective and we refuse to hold Wright waived error by not seeking an action the trial court had stated would be ineffective. The trial court abused its discretion by denying Wright's motion for mistrial and accordingly, we reverse and remand for new trial.

II. Wright also contests various rulings on the scope of redirect examination and the allowance of rebuttal testimony. Such rulings are within the discretion of the trial

court and, given the disposition of the case, we do not review them here. Additionally, Wright contends the evidence was insufficient to prove the profit element of the crime charged and he claims the State should have been required to introduce into evidence the drugs he is alleged to have sold. We think the trial court correctly ruled a jury question was engendered on the profit element and the jury could find Wright guilty notwithstanding the fact the drugs were not introduced as evidence. See Iowa R. App. P. 16.

For the reasons stated in Division I, the trial court judgment is reversed and the matter remanded for new trial.

REVERSED AND REMANDED.

Danielson and Carter, JJ., dissent.

DONIELSON, J. (dissenting)

I do not believe the trial court abused its discretion in denying defendant's motion for mistrial. Defendant had the burden to prove the trial court's action was unreasonable in the light of the attendant circumstances. State v. Cott, 283 N.W.2d 324, 329 (Iowa 1979) (citing State v. Gartin, 271 N.W.2d 902, 910 (Iowa 1978)). We affirm unless the trial court has abused the discretion granted it because of its superior position to make a determination in accordance with the demands of justice. Gartin, 271 N.W.2d at 910. Here, the trial court determined correctly the probative value of the challenged testimony outweighed any prejudicial effect.

Evidence of other crimes is admissible if it is relevant to the issue of motive to commit a crime. Cott 283 N.W.2d at 326 (quoting State v. Folkens, 281 N.W.2d 1, 5 (Iowa 1979)). Defendant's motive to commit the charged crimes was put in issue by his own testimony and the cross-examination of officer Warnstadt. Defendant testified he did not think Warnstadt was "on the level" and "kept putting him off." On cross-examination, defendant testified he had been framed and the confidential informant had a motive to frame him.

State sought to rebut the inference arising from this testimony that the informant had entrapped defendant into selling drugs to Warnstadt and defendant did not have a criminal motive to sell the drugs. To do this, State tried to show the defendant knew the informant and they were friends by inquiring about the conversation between defendant and the informant at the time of the first transaction. The probative value of this evidence is clear. The prejudicial effect, if any, was minimal. The testimony did not explain where or why defendant "served time." Under these facts, I cannot conclude the trial court abused its discretion in determining any danger of unfair prejudice created by the evidence did not substantially outweigh its probative value. Cott, 283 N.W.2d at 329-30. See also State v. Cuevas, 288 N.W.2d 525, 535-36 (Iowa 1980).

Nor does defendant's claim that the admission of this evidence violated an agreement among the prosecutor, the defendant, and the court support the majority's result. There is no record concerning this agreement. We should not presume it

excluded evidence otherwise material. The result might be otherwise had the trial court granted the motion for mistrial on the strength of this agreement. But its failure to do so leaves us with no basis for enforcing some understanding the limits of which do not appear in the record.

I would affirm the trial court on this issue.

Carter, J., joins in this dissent.