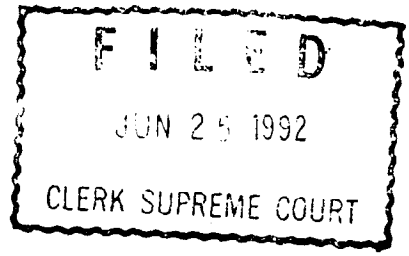
IN THE COURT OF APPEALS OF IOWA

No. 2-145 / 90-1554



1238

STATE OF IOWA,

Appellee,

vs.

WILLIAM FRANK SCHOENECK,

Appellant.

Appeal from the Iowa District Court for Fayette County, John Bauercamper, Judge.

Schoeneck appeals a jury verdict finding him guilty of possession of cocaine with intent to deliver. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Andi S. Lipman, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General; Martha E. Boesen, Assistant Attorney General; W. Wayne Saur, County Attorney; and J. G. Johnson, Assistant County Attorney, for appellee.

Heard by Oxberger, C.J., and Schlegel and Habhab, JJ.

HABHAB, J.

FACTS

On the evening of January 31, 1990, law enforcement officers executed a search warrant at the residence of Kathy Schoeneck, the defendant William Schoeneck's estranged wife. William Schoeneck (hereinafter Schoeneck) was present at the time of the search. During the search, officers found a plate on the living room table containing a white powdery substance. Under the table, officers discovered a straw and razor blade.

Officers searched a blue denim jacket which was near the table. In the pocket of the jacket, officers discovered the following items: a "coke spoon";[1] a folding knife; two prescription bottles labeled with Schoeneck's name containing medication prescribed for Schoeneck; a third prescription bottle containing thirteen pharmaceutical folds with a white powdery substance which tested positive for cocaine; and five plastic bags containing a white powder substance. One of the five bags tested positive for cocaine and another tested positive for Mannitol, a substance used to "cut" cocaine. At a later date, a vehicle registration form was also found in the denim jacket. The vehicle was registered to Schoeneck.

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1. A "coke spoon" is used by drug users and drug dealers. Drug users use a "coke spoon" to ingest cocaine through the nose. Drug dealers use "coke spoons" as a measuring device.

During the search, Schoeneck requested to use the restroom. The deputy had Schoeneck empty his pockets in an effort to make certain no evidence would be flushed down the toilet. Officers seized two sums of cash from Schoeneck's pockets. One sum, $2500 cash in an envelope, belonged to Schoeneck. The other sum, $2610, was believed to have been stolen during a burglary committed by Daniel Hon. Schoeneck was allegedly holding the $2610 for Hon.

The State charged Schoeneck with one count of possession with intent to deliver cocaine. Following a jury trial, Schoeneck was found guilty of possession of cocaine with the intent to deliver and he was sentenced accordingly. Schoeneck filed this appeal. We affirm.

SCOPE OF REVIEW

Our standard of review is well settled. A verdict will be upheld where there is substantial evidence to support the charge. State v. LeGear, 346 N.W.2d 21, 23 (Iowa 1984). Substantial evidence means such evidence as could convince a rational trier of fact the defendant is guilty of the crime charged beyond a reasonable doubt. Id. The evidence is viewed in the light most favorable to the State, including legitimate inferences and presumptions which may fairly and reasonably be deduced from the record. State v. Bass, 349 N.W.2d 498, 500 (Iowa 1984). We consider all the evidence at trial, not just the

evidence that supports the verdict. State v. Robinson, 288 N.W.2d 337, 340 (Iowa 1980).

ISSUES PRESENTED

There are three main issues on appeal. First, whether the trial court erred in failing to grant Schoeneck's motion for a directed verdict of acquittal based on insufficiency of the evidence. Second, whether Schoeneck was denied effective assistance of counsel based upon counsel's failure to object to testimony of Detective Hepke. Third, whether the trial court abused its discretion in failing to preclude the admission of evidence Schoeneck contends was irrelevant and prejudicial. We will address the issues in the order presented.

I. Motion for Directed Verdict.

Schoeneck argues the trial court erred in failing to grant his motion for a directed verdict of acquittal based on the insufficiency of the evidence. We disagree.

A directed verdict is appropriate in cases where each element of the claim is not supported by substantial evidence. Oberreuter v. Orion Industries, Inc., 398 N.W.2d 206, 209 (Iowa App. 1986) (citation omitted). A court ruling on a motion for directed verdict must view the evidence in the light most favorable to the nonmoving party. Beitz v. Horak, 271 N.W.2d 755, 757 (Iowa 1978) (citation omitted); Iowa R. App. P. 14(f)(2). The movant

is considered to have admitted the truth of all evidence offered by nonmovant and every favorable inference that may be deduced from it. B & B Asphalt Co. v. T. S. McShane Co., 242 N.W.2d 279, 284 (Iowa 1976). To overrule the motion the court must find substantial evidence in support of each element of nonmovant's claim. Beitz, 271 N.W.2d at 757 (citation omitted). If reasonable minds could differ, an issue is for the jury. Harvey v. Palmer College of Chiropractic, 363 N.W.2d 443, 444 (Iowa App. 1984) (citation omitted). The trial court is vested with considerable discretion in determining whether evidence is sufficient. Hoover's Hatchery, Inc. v. Utgaard, 447 N.W.2d 684, 687 (Iowa App. 1989) (citation omitted).

Schoeneck contends that while there was evidence of personal use of cocaine at the residence, the only evidence which was consistent with the sale of cocaine was found in the denim jacket. Schoeneck claims the evidence failed to establish the denim jacket belonged to him.

Though Schoeneck claims the denim jacket containing the incriminating evidence belonged to Dan Hon, there is substantial evidence to support the conclusion the jacket actually belonged to Schoeneck. Schoeneck bought the jacket. The prescription medication in the pockets of the jacket was prescribed for Schoeneck. Furthermore, a vehicle registration form in the jacket was listed in Schoeneck's name. We find there was substantial evidence to establish the denim jacket belonged to Schoeneck.

There was also substantial evidence to establish Schoeneck knew the white substance was cocaine and that he possessed it with the intent to deliver. In a conversation with the police chief, Schoeneck said he knew the drugs were cocaine. The denim jacket contained thirteen individual packets of cocaine pre-cut in quantities consistent with street sale of cocaine. A larger container of cocaine and Mannitol was found in the denim jacket. A "coke spoon" consistent with the sale of drugs was also found in the denim jacket. Finally, Schoeneck, who had not held steady employment in the year prior to the search, was in possession of an envelope containing $2500 in cash.

There was substantial evidence to establish Schoeneck knowingly possessed cocaine with the intent to deliver. Although there is testimony in the record to support Schoeneck's contentions, there is also substantial evidence to the contrary. Reasonable minds can differ as to whether Schoeneck knowingly possessed cocaine with intent to deliver. It is for the jury to assess the credibility of the witnesses and determine the facts. The jury's guilty verdict has spoken on this issue. We find the trial court did not err in overruling Schoeneck's motion for directed verdict. We affirm on this issue.

II. Ineffective Assistance of Counsel.

Schoeneck argues he was denied effective assistance of counsel based upon counsel's failure to object to testimony

of Detective Hepke. Detective Hepke testified that there was no doubt in his mind the cocaine was held with the intent to deliver and the cocaine was not for personal use due to the large quantity. Schoeneck contends Detective Hepke's testimony invaded the province of the jury.

Where the record on direct appeal is not adequate to permit us to resolve the issue, we preserve the defendant's claim for postconviction proceedings so the facts may be so developed. State v. Koenighain, 356 N.W.2d 237, 238 (Iowa App. 1984). This also gives the allegedly ineffective attorney the opportunity to explain his or her conduct. State v. Coil, 264 N.W.2d 293, 296 (Iowa 1978).

We conclude there is an inadequate record for us to adjudicate the defense claim without counsel's explanation for his conduct. We note the theory underlying defense counsel's defense was that Schoeneck neither owned nor exercised control over the denim jacket which contained all of the incriminating evidence. The failure to object to Detective Hepke's testimony may be in keeping with the defense strategy which only defense counsel can explain. We therefore preserve defendant's ineffective assistance of counsel claim for a later proceeding.

III. Evidentiary Rulings.

Schoeneck argues the trial court abused its discretion in failing to preclude the admission of evidence he contends was irrelevant and prejudicial. We disagree.

Our scope of review is for the correction of errors of law. Iowa R. App. P. 4. On this evidentiary issue, we review for an abuse of discretion. State v. Halstead, 362 N.W.2d 504, 506 (Iowa 1985). In order to show an abuse of discretion, one generally must show that the court exercised its discretion "on grounds or for reasons clearly untenable or to an extent clearly unreasonable." State v. Blackwell, 238 N.W.2d 131, 138 (Iowa 1976) (quoting State v. Burnor, 132 Vt. 603, 326 A.2d 138, 140 (1974)).

At trial, Schoeneck made a standing objection to the admission of testimony concerning his statements to officers during the search of the residence regarding his knowledge of the burglary committed by Hon. In addition, Schoeneck objected to the introduction of evidence seized during the search which was believed to have been taken during the burglary by Hon. Schoeneck contends the admission of such evidence was both irrelevant and extremely prejudicial. The State responds that Schoeneck's standing objection failed to preserve error.

Determinations of relevance of evidence rests within the sound discretion of the trial court and will be reversed only upon a showing that such discretion has been abused. State v. Gordon, 354 N.W.2d 783, 784 (Iowa 1984). Iowa Rule of Evidence 401 provides in pertinent part:

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Iowa R. Evid. 401. Under this definition of relevant evidence, we are unable to conclude the trial court abused its discretion in admitting the evidence pertaining to the burglary by Hon. Relevant evidence is admissible unless, under Iowa Rule of Evidence 403, its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. State v. Wilson, 406 N.W.2d 442, 447 (Iowa 1987); Iowa R. Evid. 403. We are unable to conclude the trial court abused its discretion in ruling the probative value of the evidence pertaining to the burglary outweighed any prejudice alleged by Schoeneck. We affirm the trial court on this issue.

CONCLUSION

After considering all issues presented, we affirm the trial court with the exception of the issue of ineffectiveness of counsel which we preserve for a later action.

Costs of this appeal are taxed to the appellant.

AFFIRMED.