FILED
SEP 21 1982
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)
Plaintiff-Appellee,) Filed September 21, 1982 141
vs.)
TOREN BRETT LULOFF,) 2-212/67008
Defendant-Appellant.)

Appeal from Black Hawk District Court - Roger F. Peterson, Judge.

Defendant appeals from his conviction, after trial to the court, of delivery of a controlled substance (cocaine) in violation of Iowa Code § 204.401(1)(a) (1979). On appeal, defendant asserts (1) that there was not sufficient evidence that he was not entrapped; (2) that an undercover agent's testimony about rumors that defendant was selling drugs was hearsay and should have been excluded; (3) that a proper chain of custody was not shown for the bag of cocaine, and thus it should have been excluded; (4) that there was not sufficient evidence that the delivery of the cocaine was for profit; and (5) that the photocopies of the currency used in the transaction were not originally made for use as evidence and should have been excluded. AFFIRMED.

Larry J. O'Connor, Waterloo, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Michael K. Jordan, Assistant Attorney General, for plaintiff-appellee.

Considered en banc.

DONIELSON, J.

Defendant, Toren Brett Luloff, appeals from his conviction, after trial to the court, of delivery of a controlled substance (cocaine) in violation of Iowa Code § 204.401(1)(a) (1979). On appeal, defendant asserts (1) that there was not sufficient evidence that he was not entrapped; (2) that an undercover agent's testimony about rumors that defendant was selling drugs was hearsay and should have been excluded; (3) that a proper chain of custody was not shown for the bag of cocaine, and thus it should have been excluded; (4) that there was not sufficient evidence that the delivery of the cocaine was for profit; and (5) that the photocopies of the currency used in the transaction were not originally made for use as evidence and should have been excluded. We affirm.

Our scope of review is on assigned errors at law. Iowa R. App. P. 4.

I.

In the spring of 1979 the Waterloo Police Department hired and trained Steve Bartell as an officer and undercover agent. As part of his indoctrination Bartell was made aware of various individuals, including defendant, who were suspected of dealing narcotics in the Waterloo area. To investigate these suspicions, Officer Bartell secured a job bartending at the Thunderbird Lounge.

The defendant was a customer at the lounge when he and Officer Bartell met. The second time defendant entered the lounge Bartell told defendant that he was interested in buying some cocaine and understood that he could buy some drugs from defendant. No sale took place at that time. Nevertheless, on several subsequent occasions defendant and Bartell discussed the possibility of defendant selling drugs to Bartell.

On October 17, 1979, defendant called Bartell at home and offered to sell him a half of an ounce of cocaine. When Bartell said he only wanted one gram of the drug, defendant replied that he would not break a quarter ounce package.

They agreed to meet at a cemetery where Bartell was to pay defendant $490 for the quarter ounce package. When defendant did not show, Bartell called him at home. Defendant told Bartell that he had gone to the cemetery but because of construction work going on there he did not want to complete the sale at that location. Defendant then invited Bartell to his home where he sold Bartell a bag containing a white powdery substance. Bartell placed the bag into another bag before leaving defendant's home. He then went to a prearranged location where he gave the substance to Officers Gunderson and Dwyer.

Sergeant Gunderson took the bag and placed it in a locked evidence locker until January 20, 1980, when it was turned over to Detective Link who prepared it for mailing to the Iowa Department of Public Safety, Criminalistics Laboratory for analyzation. The substance was analyzed to weigh 6.5 grams and contain 13.9 percent cocaine, a Schedule II controlled substance. Defendant was subsequently charged with delivery of a controlled substance in violation of Iowa Code § 204.401(1)(a) (1979).

At defendant's trial to the court, Bartell testified for the state that he had begun the initial conversation with defendant by saying that he had "heard rumors about town that the defendant would supply me with illicit narcotics if I wanted to purchase them." Defendant's hearsay objection to this testimony was overruled. The court also overruled defendant's objection to the admission of the plastic bag of cocaine. Defendant asserted that the proper chain of custody had not been shown.

Defendant was found guilty and this appeal followed.

II.

Defendant's first contention is that the court erred by finding that the officers' conduct did not amount to entrapment. During trial he asserted that he was a victim of entrapment and now contends the state failed to prove the

absence of entrapment beyond a reasonable doubt. See State v. Levson, 261 N.W.2d 471, 473 (Iowa 1978). When reviewing this type of challenge, we view the evidence in the light most favorable to the state, assisted by all reasonable inferences. State v. Schrier, 300 N.W.2d 305, 306 (Iowa 1981). When there is "substantial evidence" such that a reasonable mind would accept it as adequate to reach the conclusion that defendant was not the victim of entrapment, the finding is conclusive. See State v. Robinson, 288 N.W.2d 337, 338 (Iowa 1980).

Iowa applies an objective standard that defines entrapment as follows:

> Entrapment occurs when a law enforcement agent induces the commission of an offense, using persuasion or other means likely to cause normal law-abiding persons to commit the offense. Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment.

State v. Williams, 315 N.W.2d 45, 53 (Iowa 1982) (quoting State v. Mullen, 216 N.W.2d 375, 382 (Iowa 1974)).

Our review of the record reveals that the evidence supports the finding that the officers' activities were not sufficiently provocative to induce a normally law-abiding person to commit the crime of delivery of a controlled substance. While it is true that Bartell initiated the transaction by asking defendant if he had any drugs to sell, this merely afforded defendant an opportunity to commit the offense. Standing alone, this fact is insufficient to support a finding of entrapment. State v. Leonard, 243 N.W.2d 75, 80 (Iowa 1976). Indeed, it is well recognized that officers may employ " 'artifice and strategem' to apprehend those engaged in criminal activity." Id. Narcotics agents have often employed such practices to afford the defendant an opportunity to sell or deliver illicit drugs. See State v. McGranahan, 206 N.W.2d 88, 90 (Iowa 1973).

In the instant case, there is additional evidence that, while Bartell persistently urged defendant to sell him some cocaine, the actual sale occurred

only after defendant contacted Bartell to arrange the transaction. It is also significant that defendant refused to sell Bartell the requested amount and insisted that he buy a larger quantity at a specific price. We find this is substantial evidence from which a rational factfinder could conclude beyond a reasonable doubt that there was no entrapment.

III.

Defendant also contends that Bartell's testimony as to rumors that illicit drugs could be purchased from defendant was hearsay and should have been excluded. Under our definition of hearsay "an out of court utterance is not hearsay unless it contains an assertion of fact and is offered to prove the truth of that assertion." Leonard, 243 N.W.2d at 890. Here, Bartell told defendant that he had heard rumors that defendant would be able to supply him with illicit narcotics. This statement was not offered to prove that defendant could, in fact, supply Bartell illicit drugs, but only to show that defendant and Bartell had engaged in discussions concerning the sale of drugs. The Iowa Supreme Court has indicated that, where the hearsay rule can be found inapplicable under any theory, the court's ruling will be upheld. State v. Hilleshiem, 305 N.W.2d 710, 712 (Iowa 1981). Accordingly, we find no error in the trial court's denial of defendant's hearsay objection.

IV.

Defendant next challenges the state's introduction into evidence of the bag of cocaine on the grounds that the proper chain of custody had not been shown. For evidence to be admissible it must be shown that it is reasonably probable that "tampering, substitution or alteration did not occur." State v. Gibb, 303 N.W.2d 673, 681 (Iowa 1981). The thrust of defendant's argument is that, since the officers could not account for the outer bag into which Bartell placed the bag of cocaine, and since Bartell's testimony was somewhat discredited, the trier of fact could

believe that the bag of cocaine admitted into evidence was not the same as that purchased from defendant.

Initially, we note that whether evidence should be received over a chain of custody challenge is a matter within the trial court's discretion. State v. Gibb, 303 N.W.2d 673, 681 (Iowa 1981). We will reverse the ruling on this issue only upon a clear showing of an abuse of discretion. Id. In making its determination, the trial court may presume that state agents would not tamper with the evidence. State v. Orozco, 290 N.W.2d 6, 10 (Iowa 1980). Additionally, we note that the credibility of witnesses remains the judgment of the factfinder. Robinson, 288 N.W.2d at 341.

Applying these principles, we find that there was no abuse of discretion in admitting the bag of cocaine into evidence. The record shows the officers had continuous possession of the bag of cocaine. Their failure to account for the outer bag does not dictate the conclusion that the bag of cocaine itself was tampered with, though clearly it is one the court could have reached. We believe the court's failure to do so was a proper exercise of its discretion.

V.

Finally, defendant contends (1) that there was insufficient evidence that the delivery of cocaine was for profit; and (2) that the photocopies of the currency used in the transaction were not made for use as evidence and thus should have been excluded. In his brief, defendant offers no authority in support of either contention. Iowa Rule of Appellate Procedure 14(a)(3) states, in part, that "[f]ailure in the brief to state, to argue, or to cite authority of an issue may be deemed waiver of that issue." Accordingly, we find defendant has waived these issues on appeal and, therefore, refuse to address them further.

Having found no reversible error, we affirm the conviction.

AFFIRMED.