IN THE COURT OF APPEALS OF IOWA

No. 6-288 / 95-0133

STATE OF IOWA,

Plaintiff-Appellee,

vs.

GEORGE SMITH, JR.,

Defendant-Appellant.

FILED
JUN 27 1996
CLERK SUPREME COURT

Appeal from the Iowa District Court for Black Hawk County, L.D. Lybbert, Judge.

George Smith challenges his convictions, following a jury trial, of three counts of delivery of a controlled substance and two counts of failure to affix drug tax stamps. **AFFIRMED.**

Brad Driscoll, Cedar Rapids, until withdrawal, and then Linda Del Gallo, State Appellate Defender, and John F. Fatino and Ahmet S. Gonlubol, Assistant State Appellate Defenders, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Kim Griffith and D. Raymond Walton, Assistant County Attorneys, for appellee.

Heard by Sackett, C.J., and Habhab and Streit, JJ.

SACKETT, C.J.

Defendant-appellant George Smith challenges his convictions, following a jury trial, of three counts of delivery of a controlled substance and two counts of failure to affix drug tax stamps. The court entered judgment on the jury's verdict and sentenced defendant to up to fifteen years on each of the convictions, to be served concurrently. We affirm.

Defendant claims the district court erred in: (1) admitting audio tapes of what the State claims were sales of controlled substances; (2) permitting the State to elicit in cross-examination testimony showing defendant had been in jail; and (3) allowing the cumulative testimony of an officer regarding seized cocaine after a lab technician already testified about the weight and identification of the cocaine. Defendant further claims, if his trial counsel failed to preserve error on one of these issues, his trial counsel was not effective. He raises an additional claim that his trial attorney was not effective and asks, if the conviction is affirmed, that these issues be preserved so he can raise them in an action for postconviction relief. The State argues defendant failed to preserve error on issue two, claims defendant received effective assistance regarding issue one, and agrees the remaining ineffective assistance of counsel claims should be preserved for a possible postconviction relief action.

Defendant's conviction was supported in large part by the testimony of Charles Young. Young was convicted of selling crack cocaine and received a suspended

sentence and probation in exchange for assisting the State in locating other drug dealers. Young was to buy cocaine and was equipped with a microphone set to record conversations. The equipment was of marginal quality. Young sought to buy crack cocaine from defendant. Young obtained several what are termed "twenty dollar rocks" of crack cocaine.

The State charged defendant with three counts of delivery of cocaine and two counts of failure to affix a drug tax stamp. Prior to trial, defendant filed a motion seeking to exclude the tape recordings made by Young and Officers Meyer and Hammitt who were at the other end of Young's transmitting device. The district court overruled the motion.

Defendant contends the trial court abused its discretion in admitting the tapes. We review for an abuse of discretion. *State v. Jones*, 490 N.W.2d 787, 789 (Iowa 1992).

There were three separate transactions where Young was wired and he allegedly was engaged in transactions for the purchase of drugs. The tapes of the alleged transactions are of poor quality and are only audible in places. Defendant contends the tapes should not have been admitted because they were not sufficiently trustworthy. He further contends the tapes were not probative and were unduly prejudicial.

Defendant contends not only were the tapes of poor quality and unintelligible in large part, but they also did not establish who was speaking or how the spoken words related to defendant. Defendant contends, therefore, the tape recordings were more likely to confuse or mislead the jury than to help it reach a decision.

A tape recording is admissible if evidence clearly establishes it is accurate and trustworthy. *State v. Klindt*, 389 N.W.2d 670, 674 (Iowa 1986); *State v. Russell*, 261 N.W.2d 490, 495 (Iowa 1978); *State v. Weatherly*, 519 N.W.2d 824, 826 (Iowa App. 1994). There was testimony from the police officers who monitored the tape and recorded telephone calls that the tapes represented what they monitored within the limits of the equipment used. Young testified there were gaps in the tapes, but the officers testified the recording device had not been shut off and there were no gaps, contrary to Young's testimony.

Young described the transactions as the tapes were played for the jury. It is indeed unfortunate that better recording devices are not available to our state law enforcement officers and local police. It has been found a tape recording is admissible even though it is incomplete, partially unintelligible, or partially inaudible, so long as its flaws are not so substantial that the recording as a whole is rendered untrustworthy. *See United States v. Wilkinson*, 53 F.3d 757, 760-61 (6th Cir. 1995). The trial court, present in the courtroom while the tape was played and Young

testified to what was happening, was in a superior position to assess this issue than are we. We do not find the trial court abused its discretion in admitting this evidence.

Defendant further contends the trial court abused its discretion in admitting the tapes because they were more prejudicial than probative. He supports this contention with Iowa Rule of Evidence 403. When the admissibility of evidence is challenged under this rule, the court must exercise its discretion in balancing the probative value of the evidence against the danger of unfair prejudice which it may present. *State v. Plaster*, 424 N.W.2d 226, 229 (Iowa 1988).

The tapes were the only real support for Young's testimony. Young's credibility as a witness was understandably suspect considering the fact he had been convicted of being a drug dealer and was cooperating for the purpose of protecting himself from a more severe sentence. Young and one of the officers identified defendant's voice on the tapes.

We do not find the prejudice outweighed the probative value of the tapes. We affirm on this issue.

Defendant next contends the trial court erred in allowing the State to cross-examine defendant's witness Watkins concerning conversations he had with defendant when both were incarcerated in the Black Hawk County jail. Defendant had called Watkins to testify he had seen Young selling drugs. On cross-examination, the State brought out that defendant and Young had been incarcerated at the same time. The

State contends error was not preserved on this issue. Without addressing the issue of preservation or the probative value of the evidence, we find there is no reasonable probability defendant's substantial rights were affected by the admission of the testimony.

Defendant's next claim is that the trial court abused its discretion in admitting cumulative testimony describing the crack cocaine sold by defendant. We review for an abuse of discretion. *State v. Harmon*, 238 N.W.2d 139, 145 (Iowa 1976).

Even if the evidence is cumulative, this alone is not a sufficient reason to require its exclusion; its admissibility still turns on the trial court's discretion. *State v. Munz*, 355 N.W.2d 576, 580 (Iowa 1984); *State v. Maxwell*, 222 N.W.2d 432, 435 (Iowa 1974).

Debra Davis, an Iowa Division of Criminal Investigation criminologist, testified for the State. She opined three of the State's exhibits contained a cocaine base and gave her opinion as to the weight of each. Over defendant's objections to the cumulative nature of the testimony, the State later elicited testimony from Officer Meyer regarding the weight and tagging of the cocaine. The challenged testimony further bolstered Young's identification of the seized cocaine as that which he had on three occasions purchased from defendant. We affirm on this issue.

Defendant's last claim is that his trial attorney was not effective in that: (1) there was no motion for the appointment of a private investigator; (2) there was no

motion for disclosure of the Waterloo Police Department internal affairs document; (3) there was no effort to make a record on the untruthfulness of Officer Meyer; (4) counsel failed to strike testimony after objections made after the testimony came in were sustained; and (5) counsel failed to move to exclude evidence of defendant's gang affiliation. The State concedes these claims cannot be decided on the record before us. We reserve to defendant the right to raise these claims in a postconviction proceedings.

AFFIRMED.