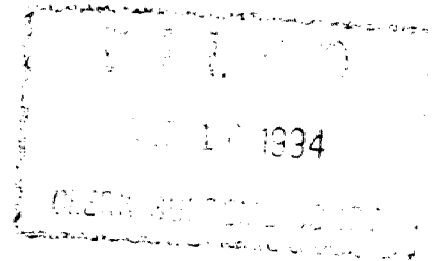


IN THE COURT OF APPEALS OF IOWA

No. 4-333 / 93-239



STATE OF IOWA,

Appellee,

vs.

JERRY L. MILES,

Appellant.

Appeal from the Iowa District Court for Scott County,
Edward B. deSilva, Judge.

Defendant appeals judgment and sentence, following jury trial, entered upon his conviction of delivery of cocaine.
AFFIRMED.

Jerry L. Miles, pro se, Mt. Pleasant, and David R. Treimer as standby appellate counsel, Davenport, for appellant.

Bonnie J. Campbell, Attorney General, Richard J. Bennett, Assistant Attorney General, and William E. Davis, County Attorney, for appellee.

Considered by Donielson, C.J., and Hayden and Huitink,
JJ.

Following jury selection, Miles moved for a mistrial, alleging all minority members of the jury panel were directed to other courtrooms. The court noted the panel did not contain minority members and overruled the motion.

At trial, the officers involved in the arrest of Miles, Fellner, and Campbell testified. Fellner and Campbell testified the cocaine in their possession at the time of arrest had not been obtained from Miles. Miles testified he was in the area the police were watching because he was attempting to locate his daughter's step-father. He denied receiving cocaine from the man on the bicycle or transferring cocaine to Fellner and Campbell. He also denied having cocaine in his mouth at the time of arrest. He testified he told officers to pump his stomach and "[t]hey have done that previously before." Miles' motions for judgment of acquittal were overruled.

Following closing arguments, Miles moved for a mistrial on the ground the prosecution had misstated evidence in arguing police had pumped Miles' stomach before. The prosecutor admitted misquoting Miles' testimony. The court overruled the motion for mistrial.

The jury returned verdicts finding Miles guilty of delivery of cocaine and possession of cocaine. The court informed the jury they had rendered inconsistent verdicts, instructed the jury to reread instruction No. 21 (sign only one paragraph of verdict form), and ordered them to resume deliberations. Miles' motion for mistrial was denied.

evidence in the record, and not just the evidence supporting the verdict, to determine whether there is substantial evidence to support the charge. Bass, 349 N.W.2d at 500; Hall, 371 N.W.2d at 188. Substantial evidence means evidence which would convince a rational fact finder the defendant is guilty beyond a reasonable doubt. State v. LeGear, 346 N.W.2d 21, 23 (Iowa 1984); Hall, 371 N.W.2d at 188.

In the case at bar, the evidence demonstrates an officer observed Jerry Miles hand something to a man on a bicycle and receive something from that man. Miles then returned to a car driven by Fellner in which Campbell was a back seat passenger. Believing he had witnessed a drug transaction, the officer radioed for backup assistance and then followed Miles' vehicle.

Miles' vehicle was pulled over, and the occupants were removed. An officer saw Fellner discard what was later determined to be crack cocaine out the driver-side window. Small pieces of cocaine were found in Campbell's shirt pocket, and a crack pipe was found at his feet.

The above evidence supports the jury verdict the defendant delivered cocaine which he had purchased from the man on a bicycle and then in turn transferred to a person or persons in the automobile.

The defendant points out Campbell's and Fellner's testimony defendant was not the source of drugs found by the police. However, Campbell and Fellner plead guilty to

reasons which were clearly untenable or was exercised to an extent which was clearly unreasonable. Id. (quotation omitted).

Defendant first asserts the prosecutor committed misconduct by presenting evidence regarding drugs found on Campbell's person. The defendant claims such evidence is irrelevant because the defendant was not charged with delivery of drugs to Campbell, but only with delivery to the driver, Fellner. The defendant did not object to this evidence and so his claim is waived. We have repeatedly held that ordinarily matters not raised in the trial court cannot be effectively asserted for the first time on appeal. State v. Lyon, 223 N.W.2d 193, 194 (Iowa 1974)

Regardless, the delivery charge only required the jury find the defendant delivered cocaine and did not specify a particular person to whom the cocaine was delivered. Thus, the case was not limited to delivery to a particular person, regardless of whether the evidence was stronger regarding delivery to one person as opposed to another person. Consequently, this evidence was relevant, and the prosecutor acted properly in presenting it.

The defendant also argues the prosecutor improperly injected an issue of defendant's race into this case. Defendant bases this claim on the following question which the prosecutor asked the police: "Do you see white people in the area making purchases?" The driver of the car is white, while defendant and the backseat passenger are

officer who testified about the typical amount of crack which is sold on the streets. Defendant did not object to this evidence, and so his claim is waived. We have repeatedly held that ordinarily matters not raised in the trial court cannot be effectively asserted for the first time on appeal. State v. Lyon, 223 N.W.2d 193, 194 (Iowa 1974)

Regardless, the testimony of these officers was relevant because it explained the complete circumstances of the instant crime. Circumstantial evidence may establish a defendant's guilt. State v. Hamilton, 309 N.W.2d 471, 479 (Iowa 1981). It is of no importance these officers could not positively identify the object in question as crack cocaine at the time of the alleged delivery.

Defendant also asserts a hypothetical question the prosecutor posed to a police officer was improper. Defendant's objection to this hypothetical question was sustained. No answer was given. Once again, there is a lack of prejudice. We conclude there was no abuse of discretion by the trial court in its denial of the defendant's motion for mistrial.

Finally, in closing argument the prosecutor discussed evidence defendant swallowed the cocaine when police stopped his vehicle. In doing so, the prosecutor stated he did not know why the police failed to have defendant's stomach pumped, but noted defendant's earlier testimony the police had done so in the past. The prosecutor further

who testified. Consequently, the prosecutor's statement did not constitute misconduct, but was a fair reply to the defense. See State v. Lass, 228 N.W.2d 758, 770 (Iowa 1975).

III. Jury Panel Selection.

Defendant claims the jury panel was improperly selected. We disagree.

The applicable standard of review for a claim a distinctive group has been excluded from the jury panel or pool, thus violating the fair cross-section requirement of the Sixth Amendment, is de novo because a constitutional right is implicated. When a defendant is alleging error involving a constitutional right, we make an independent evaluation of the totality of the relevant circumstances to determine if such an error was made. Rinehart v. State, 234 N.W.2d 649, 658 (Iowa 1975); State v. Jeffries, 417 N.W.2d 237, 239 (Iowa App. 1987).

Defendant claims the jury panel was improperly selected because it contained no jurors who were minorities. Our supreme court has previously held the procedures followed in Scott County for jury selection meet both constitutional and statutory requirements. See State v. Jones, 490 N.W.2d 787, 793-94 (Iowa 1992). "There is no requirement that the distinctive group or class be represented in exact proportions to the general population." Id. at 793 (citing Hoyt v. Florida, 368 U.S. 57, 69 (1961)).

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 defendant's claim without counsel's explanation for his/her conduct. We therefore preserve defendant's ineffective assistance of counsel claim for a later proceeding.

We considered additional arguments by defendant and find them meritless. For reasons stated above, we affirm defendant's conviction.

AFFIRMED.