IN THE COURT OF APPEALS OF IOWA

No. 8-456 / 97-1068

STATE OF IOWA,

Appellee,

vs.

DENNIS SCOTT STEWART
a\k\a DENNIS SCOTT YOUNG,

Appellant.

FILED
OCT 29 1998
CLERK SUPREME COURT

Appeal from the Iowa District Court for Lee County, John C. Miller and Harlan W. Bainter, Judges.

Appellant appeals from judgment and sentence entered for furnishing a controlled substance to an inmate. **AFFIRMED.**

Ronald D. Ellerhoff, Burlington, for appellant.

Thomas J. Miller, Attorney General, Mary Tabor and Douglas Hamerand, Assistant Attorneys General and Michael Short, County Attorney, for appellee.

Considered by Streit, P.J., and Vogel and Mahan, JJ.

PER CURIAM.

Defendant appeals from judgment and sentence entered for furnishing a controlled substance to an inmate. He argues the trial court erred in denying his motion for appointment of an expert, his motion to dismiss, and his request for judgment of acquittal. We affirm.

Defendant, an inmate, allegedly sold marijuana to another inmate, Craig Gardner. Gardner was working with prison officials to set up drug buys. Defendant was charged with two counts of furnishing a controlled substance to an inmate in violation of Iowa Code section 719.8 (1995).

Defendant filed a pretrial motion for the appointment of an expert to evaluate Gardner's competency because Gardner suffers from a mental illness. The court denied the request stating, "[T]here is no statutory authority empowering the Court in a criminal case to order a witness to undergo psychiatric examinations designed to evaluate the victim's credibility." *See State v. Gabrielson*, 464 N.W.2d 434 (Iowa 1990).[1] At trial, Gardner testified about the drug buys and his mental illness. Defendant sought to impeach Gardner based on his mental illness.

Defendant made motions for dismissal of the charges and for judgment of acquittal based on the claim Gardner was an accomplice or co-conspirator. The court denied defendant's motions for dismissal and judgment of acquittal, determining there

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[1] The trial court also noted the three tests of a witness's testimonial qualifications do not require expert testimony from a psychologist or psychiatrist. *State v. Harvey*, 242 N.W.2d 330, 335 (Iowa 1976).

was a *prima facie* case for submission to the jury. The jury returned guilty verdicts on both charges. The court sentenced defendant to an indeterminate fifteen-year prison term.

We review a trial court's decision whether or not to appoint an expert for an abuse of discretion. *State v. Barker*, 564 N.W.2d 447 (Iowa App. 1997). Iowa Rule of Criminal Procedure 19(4) provides, in pertinent part:

> Counsel for a defendant who because of indigency is financially unable to obtain experts or other witnesses *necessary to an adequate defense* of the case may request in a written application that the necessary witnesses be secured at public expense. Upon finding, after appropriate inquiry, that the services are *necessary* and that the defendant is financially unable to provide compensation, the court shall authorize counsel to obtain the witnesses on behalf of the defendant.

Id. (emphasis added). The burden is on the defendant to demonstrate the need. *State v. Coker*, 412 N.W.2d 589, 593 (Iowa 1987).

Defendant argues *Gabrielson* should be limited to its facts and the court should have appointed an expert witness to evaluate Gardner's competency. We determine the trial court did not abuse its discretion in denying defendant's request for a court-appointed expert. Every person is competent to be a witness unless a statute or rule provides otherwise. Iowa R. Evid. 601. An expert is not necessary to determine whether a witness meets the testimonial qualifications set forth in *Harvey*.[2] Although

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[2] (1) The witness has observed the incident and has received some impressions to relate in court; (2) the witness has a recollection of those impressions resulting from his observation which fairly corresponds with or reproduces the original knowledge or observation; and (3) the witness is able to communicate this recollection. *Harvey*, 242 N.W.2d at 335.

Gardner's mental illness might go to his credibility, defendant had ample opportunity at trial to challenge Gardner's credibility. We affirm the trial court on this issue.

Defendant also contends the trial court erred in denying his motion for dismissal and judgment of acquittal because the State did not present evidence corroborating Gardner's testimony. He believes such corroboration is necessary because Gardner was an accomplice. We disagree. In determining a drug buyer was not an accomplice of the seller, the supreme court stated:

> The general rule for determining whether a witness is an accomplice is if the witness could be charged with and convicted of the specific offense for which the accused is on trial. *State v. Johnson*, 237 N.W.2d 819, 822 (Iowa 1976). The question of whether a particular witness is an accomplice is a question of law when the facts are not disputed or susceptible to different inferences. *State v. Berney*, 378 N.W.2d 915, 917 (Iowa 1985). When the facts are susceptible to different inferences, the question becomes one of fact for the jury. *Id.*

State v. McDaniel, 512 N.W.2d 305, 308 (Iowa 1994). Gardner was acting as an agent of the State in buying the drugs from defendant. His mere possession of the drugs until he turned them over to prison officials does not make him susceptible to a charge of furnishing a controlled substance to an inmate. Because Gardner was not an accomplice, his testimony needed no corroboration. The trial court correctly denied defendant's motion for dismissal and judgment of acquittal and submitted the evidence to the jury.

AFFIRMED.