FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 9-549 / 89-366

STATE OF IOWA,

Appellee,

vs.

RODNEY LOUIS EPPS,

Appellant.

360

Appeal from the Iowa District Court for Black Hawk County, James D. Coil, Judge.

The defendant appeals the judgment and sentence of the district court finding him guilty of possession of a controlled substance, cocaine, in violation of Iowa Code section 204.401(3). **AFFIRMED.**

John W. Ackerman of Ackerman Law Office, Waterloo, for appellant.

Thomas J. Miller, Attorney General; Bruce Kempkes, Assistant Attorney General; James Metcalf, Black Hawk County Attorney; and D. Raymond Walton, Assistant Black Hawk County Attorney; for appellee.

Heard by Schlegel, P.J., and Hayden and Habhab, JJ.

SCHLEGEL, P.J.

The defendant appeals the judgment and sentence of the district court finding him guilty of possession of a controlled substance, cocaine, in violation of Iowa Code section 204.401(3).

On October 7, 1988, various officers of the Waterloo Police Department executed a search warrant at an apartment in Waterloo. The search warrant was issued in the names of Jimmy Lee Cook, Bobby Gany, and Larry Wilson, who were believed to have stored illegal drugs and paraphernalia at the apartment for later sale. Prior to the execution of the warrant, the police knocked on the door and announced their presence. When no one answered, the police kicked the door in.

Upon entry, the police observed a haze of smoke, which was identified as smoke from a cocaine substance known as "crack." In the kitchen area the police found the defendant, Rodney Louis Epps, and several others. Epps and the other occupants were then lined up in the kitchen and searched for weapons and narcotics. Numerous items of controlled substances and paraphernalia were found during the course of the police search.

The police found a broken glass air freshener bottle in Epps' left front pocket. The bottle was sent to the DCI laboratory where it was discovered that traces of cocaine were in the glass. Based on this evidence, Epps was

charged by trial information with possession of cocaine, a schedule II controlled substance.

Epps pleaded not guilty, and waived his right to a jury trial. At trial, Epps testified that he and his brother had been walking in the park near the apartment shortly before his arrest when he spotted the glass jar and absent-mindedly placed it in his pocket. Epps further testified that his brother needed to use a restroom, and decided to go to Wilson's apartment. Epps maintained that they had been in the apartment no more than three minutes before the police arrived. Epps asserted that he had no knowledge of the crack cocaine operations being run from the apartment.

The case was submitted to the trial court which returned a verdict of guilty. The court sentenced Epps to 120 days in jail, suspending 61 days for time spent, and 12 months' probation. Epps has appealed.

Epps argues that the search warrant under which he was arrested was invalid. Epps maintains that the magistrate who issued the warrant relied on gross misrepresentations of fact and relied on information from a police informant without checking out the informant's trustworthiness; thereby not complying with Iowa Code section 808.3 and not showing there was probable cause. Epps asserts that since his name was not on the search warrant and, therefore, did not contain probable cause to search him, the search

warrant lacked the specificity requirement to include him in the search of the apartment.

Epps also believes that since he was not specified in the warrant as a person to be searched, all evidence obtained in the search of his person and effects was tainted and therefore inadmissible. Finally, Epps contends that the trial court's admission of testimony concerning the drugs and paraphernalia found on other persons and in the apartment was prejudicial error.

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).

The scope of review for whether the evidence was properly excluded would normally be under the totality of the circumstances. Unfortunately, we cannot address the issues regarding the failure of the trial court to exclude

the evidence because those issues were not properly preserved for appeal. As a general rule, issues not presented in the trial court may not be raised for the first time on appeal. Conner v. State, 362 N.W.2d 449, 457 (Iowa 1985). Iowa Rules of Criminal Procedure 10(2)(c) and 11(1) state that an accused challenging the admission of evidence obtained through the improper execution of a search warrant should file a suppression motion before trial. Rule 10(4) provides that failure to file such a motion constitutes a waiver of such challenge. There was no such motion filed by the defendant and the only objection raised at trial was for improper chain of custody. The issues regarding the failure to exclude the evidence were not properly preserved and therefore we may not address them on appeal.

The only issue that was preserved by defendant was whether the trial court properly admitted the testimony of other crimes not committed by the defendant. Defendant made a motion for mistrial based on the admission of this statement, which was denied by the trial court. Trial courts have considerable discretion in passing on mistrial motions, State v. Ware, 205 N.W.2d 700, 702 (Iowa 1973), and we reverse only upon a showing that that discretion was abused. There was no abuse of discretion in this instance. The three bases upon which the defendant objected to the testimony were: relevancy, hearsay, and

unfair prejudice. The admissibility of the evidence at issue rests largely in the trial court's discretion. State v. Ripperger, 409 N.W.2d 693, 693 (Iowa 1987). We will not reverse if the trial court's ruling can be sustained on any ground. Id. The testimony was clearly relevant. And the testimony also falls under the excited utterance exception to the hearsay rule. In any event the admission of the evidence did not unfairly prejudice the defendant. The admission of the testimony was within the discretion of the trial judge and we find no abuse of that discretion.

AFFIRMED.