

IN THE COURT OF APPEALS OF IOWA

No. 8-457 / 97-1078

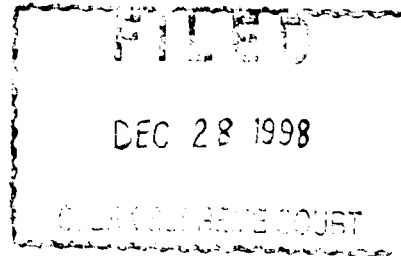
STATE OF IOWA,

Plaintiff-Appellee,

vs.

ANTHONY LAMBERTI,

Defendant-Appellant.



Appeal from the Iowa District Court for Polk County, Richard G. Blane, II,
Judge.

Defendant appeals the judgment and sentence entered upon his convictions of distribution of a controlled substance to a person under eighteen and contributing to the delinquency of a minor in violation of Iowa Code sections 124.406, 709A.1(3), and 123.47 (1995). **AFFIRMED.**

Mark E. Weinhardt of Belin Lamson Zumbach Flynn, P.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Richard J. Bennett, Assistant Attorney General, John P. Sarcone, County Attorney, and Jamie Bowers, Assistant County Attorney, for appellee.

Heard by Streit, P.J., and Mahan and McCartney,* JJ.

* Senior judge assigned by order pursuant to Iowa Code § 602.9206 (1997).

MAHAN, J.

Anthony Lamberti appeals from his convictions for the offenses of distribution of a controlled substance to a person under eighteen and contributing to the delinquency of a minor. Lamberti contends the evidence presented was insufficient to show the substance involved was marijuana. Lamberti maintains he was denied a fair trial because the prosecutor, in his opening statement, told the jury Lamberti has a sexual interest in young girls. Finally, Lamberti argues there was insufficient evidence to support submission of a single marshalling instruction. We affirm.

The criminal charges against Lamberti stem from events which occurred during and following a birthday party Lamberti hosted for his teenage daughter. At some point during the evening, five girls went up to Lamberti's bedroom to drink wine coolers and beer Lamberti provided. Lamberti was present and also drinking beer. After someone knocked on the door, Lamberti asked the girls to go into the closet so no one would notice they were in the bedroom and would not disturb them; Lamberti explained he did not want to provide alcohol for all of the kids at the party.

While the girls were drinking in the closet, one or two of them looked through Lamberti's belongings. One of the girls found a clear, sandwich-size plastic storage bag containing what one or more of the girls identified as marijuana. One of the girls asked Lamberti if they could smoke it. He said, "Not here," and took the bag. This is referred to as the "closet incident."

The girls then asked Lamberti to take them to McDonald's so they could get something to eat. The five girls got into the car and Lamberti drove them to a gravel

road. He stopped, got out, and opened the trunk. Lamberti took out a larger clear plastic bag containing a substance identified by the girls as marijuana and proceeded to fill a pipe with the substance. He then smoked the substance and passed the pipe around to some of the girls. This is referred to as the "gravel road incident."

Lamberti later drove the girls back to his house. He began to yell and accused the girls of taking his "weed."

During opening argument, the prosecutor stated:

You might be asking yourself, why would a guy like this defendant, why would a dad of a 14-year-old girl be giving girls booze and marijuana? Well, the evidence in this case is going to tell you why. You're going to know why. You're going to hear that this guy likes 14-year-old girls. He really likes them. Sexually.

The five girls testified at trial the substance they found in the closet and that Lamberti shared with them on the gravel road was marijuana. One of the girls testified on cross examination as follows:

Q. Now in the closet you're saying that Tony said to the girls, "Do you want to smoke this pot," is that correct? A. Yes.

Q. You heard him say that? A. Yes.

Q. In the presence of all the other girls? A. Yes.

The girls' testimony was the only evidence presented to prove the substance was marijuana; the identity of the substance was not verified by chemical testing.

The jury was instructed on the elements of Distribution of a Controlled Substance to Persons Under Age Eighteen as follows:

- 1a. On or about the 10th day of July, 1996, the Defendant knowingly distributed marijuana to [one or more of the five girls]; or

- 1b. On or about the 10th day of July, 1996, the Defendant knowingly possessed with intent to distribute marijuana to [one or more of the five girls].
2. On July 10, 1996, the Defendant was 18 years or older.
3. On July 10, 1996, the person to whom the Defendant knowingly distributed or intended to distribute marijuana was under 18 years old.

The jury found Lamberti guilty of distribution of a controlled substance to persons under age eighteen. He was sentenced to a prison term not to exceed twenty-five years.

I. THE MARIJUANA. Lamberti contends the evidence presented was insufficient to show the substance involved was marijuana. Specifically, Lamberti argues the girls' testimony is insufficient evidence to prove the substance was marijuana beyond a reasonable doubt because the girls had little or no experience with marijuana, nor had they been trained to identify marijuana. The evidence, however, showed that some of the girls had seen marijuana before that night, some had been present when others smoked it, at least one of the girls had smoked marijuana before, and two of the girls stated it "burned" their throats when they smoked it that night. In addition, Lamberti made at least four admissions himself about the nature of the substance. In two of those incidents, he referred to the substance as either "pot" or "weed."

Lamberti failed to object when the girls testified the substance was marijuana. Therefore, Lamberti's objection to the girls' testimony was waived and the jury could properly use their testimony to determine whether or not the State proved beyond a reasonable doubt the substance was marijuana. *In re C.T.*, 521 N.W.2d 754, 757

(Iowa 1994) (the identity of controlled substances may be proved by circumstantial evidence; chemical testing is not required).

II. THE PROSECUTORIAL STATEMENT. Lamberti maintains he was denied a fair trial because the prosecutor told the jury Lamberti has a sexual interest in young girls. Lamberti argues his trial counsel's failure to object and move for a mistrial when the prosecutor made the statement constitutes ineffective assistance of counsel. He also contends it was an abuse of discretion for the district court to deny his motion for a mistrial based on prosecutorial misconduct.

A. Ineffective Assistance of Counsel. We review claims of ineffective assistance of counsel de novo. *State v. Brooks*, 555 N.W.2d 446, 448 (Iowa 1996).

The defendant bears the burden of demonstrating ineffective assistance of counsel. *State v. Morgan*, 559 N.W.2d 603, 612 (Iowa 1997); *Dunbar v. State*, 515 N.W.2d 12, 15 (Iowa 1994); *State v. Kone*, 557 N.W.2d 97, 102 (Iowa App. 1996). "A defendant receives ineffective assistance of counsel when (1) the defense attorney fails in an essential duty and (2) prejudice results." *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984); *State v. Bugely*, 562 N.W.2d 173, 178 (Iowa 1997). An ineffective-assistance-of-counsel claim may be disposed of if the defendant fails to prove either prong. *State v. Cook*, 565 N.W.2d 611, 614 (Iowa 1997). Therefore, we may affirm Lamberti's conviction based on his failure to prove prejudice without deciding whether his counsel failed to perform an essential duty. See *State v. Hoeck*, 547 N.W.2d 852, 863 (Iowa App. 1996).

The defendant establishes prejudice by showing "there is a reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different." *State v. Hopkins*, 576 N.W.2d 374, 378 (Iowa 1998) (quoting *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698). A "reasonable probability is a probability sufficient to undermine confidence in the outcome" of the defendant's trial. *Bugely*, 562 N.W.2d at 178 (quoting *State v. Kraus*, 397 N.W.2d 671, 673 (Iowa 1986)).

In the case at bar, the prosecutor presented ample evidence of Lamberti's guilt; five girls testified, without objection, Lamberti possessed marijuana and shared it with some of the girls. Even without the prosecutor's statement, the evidence presented would have reasonably permitted the jury to reach the conclusion it did. *See State v. Bayles*, 551 N.W.2d 600, 610 (Iowa 1996).

B. Denial of Lamberti's Motion for a Mistrial. Prosecutorial misconduct warrants a new trial when it is "so prejudicial as to deprive the defendant of a fair trial." *State v. Escobedo*, 573 N.W.2d 271, 277 (Iowa App. 1997) (quoting *State v. Lyons*, 210 N.W.2d 543, 549 (Iowa 1973)). To establish the claim, a defendant must show both misconduct and prejudice. *State v. Farmer*, 492 N.W.2d 239, 242 (Iowa App. 1992). Trial courts have broad discretion to determine whether prejudice resulted from misconduct. *State v. Anderson*, 448 N.W.2d 32, 33 (Iowa 1989). As a first-hand observer to both the claimed misconduct and any reaction by the jury, the trial court is better equipped than an appellate court to determine the presence of prejudice. *Id.* at 34. Consequently, we will reverse a trial court ruling only upon

finding an abuse of discretion. *Id.* This occurs when discretion is "exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable." *Id.*

The grant of a new trial based on prosecutorial misconduct does not hinge on the misconduct, but the resulting prejudice which prevents the trial from being fair. *Escobedo*, 573 N.W.2d at 278. In the case at bar, the district court determined there was sufficient evidence for the jury to decide Lamberti's sexual interest in one of the girls partially motivated Lamberti to distribute alcohol or marijuana, at least to that particular girl. The district court then prohibited the prosecutor from arguing Lamberti had a sexual interest in young girls generally, since that argument would not be sufficiently supported by the evidence. Furthermore, Lamberti points to only one comment made by the prosecutor during opening argument; it does not appear the prosecutor repeatedly stated Lamberti has a sexual interest in young girls generally. *Id.* at 277 (prejudice ordinarily results from persistent efforts to inject prejudicial matter before the jury). Finally, the evidence regarding Lamberti's guilt was strong; five girls testified, without objection, Lamberti possessed marijuana and shared it with some of the girls. Therefore, we find the prosecutor's comment did not contribute to Lamberti's conviction and the district court's denial of Lamberti's motion for a mistrial was not an abuse of discretion. *See id.*

III. THE MARSHALLING INSTRUCTION. Finally, Lamberti argues there was insufficient evidence to support submission of a single marshalling instruction. We review these claims under the substantial evidence test. *State v. Hogrefe*, 557 N.W.2d 871, 876 (Iowa 1996).

Evidence is substantial to support submission of an instruction to the jury when a reasonable mind would accept the evidence as adequate to reach a conclusion. *Id.* In determining whether there is substantial evidence to support submission of an instruction to the jury, we view the evidence in the light most favorable to the party requesting the instruction. *Id.*

Lamberti argues parts 1a and 1b of the jury instruction are alternative bases for a guilty verdict which correspond to the "closet incident" and the "gravel road incident."¹ Lamberti asserts the evidence is insufficient to support a conviction based on the "closet incident" alone. Lamberti contends the district court erred in giving the single marshalling instruction because some jurors may have based their verdict entirely on the "closet incident" which created the possibility of a non-unanimous jury verdict. We disagree.

The rule in Iowa is that while the jury must be unanimous on whether a defendant committed a crime, when alternative modes or theories of commission of a particular crime are presented, the jury need not be unanimous on a particular means of commission of the crime if substantial evidence supports each alternative and those alternative modes are not repugnant or inconsistent with others. *Gavin v. State*, 425 N.W.2d 673, 678 (Iowa App. 1988) (citing *State v. Bratthauer*, 354 N.W.2d 774, 776 (Iowa 1984); *State v. Duncan*, 312 N.W.2d 519, 523 (Iowa 1981); and *White v. State*,

¹ Lamberti reads instruction 1a on distribution to correspond to the alleged distribution of marijuana during the "gravel road incident." He reads instruction 1b on possession with intent to distribute to correspond to the incident in the closet, where he allegedly possessed marijuana with the express intent to smoke it with the girls later.

380 N.W.2d 1, 4 (Iowa App. 1985)). As we read it, the State's theory is that the events in the closet were not a separate incident, but were part of the sequence of events which culminated on the gravel road. 1a and 1b of the jury instructions are alternative bases for a guilty verdict which would correspond to the entire sequence of events which took place that evening. A dichotomy based upon the "closet incident" and the "gravel road incident" was never presented to the jury by either the State or the district court. Therefore, we find the district court did not err in submitting the alternative theories to the jury in a single marshalling instruction.

For these reasons, we affirm the judgment and sentence entered upon Lamberti's convictions of distribution of a controlled substance to a person under eighteen and contributing to the delinquency of a minor.

AFFIRMED.