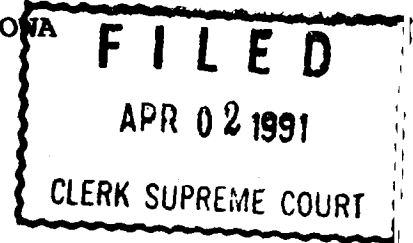


IN THE COURT OF APPEALS OF IOWA

No. 0-627 / 90-67



STATE OF IOWA,

Appellee,

vs.

STEVEN R. YOUNG,

Appellant.

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Appeal from the Iowa District Court for Muscatine County, David J. Sohr, Judge.

Young appeals his convictions, following bench trials, for two counts of delivery of cocaine. **AFFIRMED.**

Linda del Gallo, State Appellate Defender, and Andi S. Lipman, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General; Bruce Kempkes, Assistant Attorney General, and Stephen J. Petersen, County Attorney, for appellee.

Considered by Oxberger, C.J., and Hayden and Sackett, JJ.

OXBERGER, C.J.

Steven Young was accused of selling cocaine to an undercover officer and a confidential informant on two separate occasions, April 22, 1989 and May 4, 1989. Young was charged with two counts of delivery of cocaine. After separate bench trials, he was convicted of both counts. He has appealed. The appeals have been consolidated.

Young challenges the sufficiency of the evidence supporting both convictions. With respect to the April 22 transaction, Young contends the evidence failed to prove he participated in the transaction either as a principal or as an aider and abetter. With respect to the May 4 transaction, Young contends the State's evidence failed to overcome his defense of entrapment.

Young also contends the trial court erred by allowing the undercover officer and the confidential informant to give hearsay testimony about a statement made by another person.

Finally, Young contends the trial court should have required the State to disclose the identity of a confidential informant who had previously tried but failed to persuade Young to sell cocaine.

Our scope of review is on assigned error only. Iowa R. App. P. 4. Because the defendant waived his right to a jury, the trial court's findings of fact have the effect of a special verdict. Id.

The standard of review in challenging the sufficiency of the evidence is well established. State v. Lampman, 342 N.W.2d 77, 81 (Iowa App. 1982). We will uphold a verdict where there is substantial evidence in the record tending to support the charge. State v. Aldape, 307 N.W.2d 32, 39 (Iowa 1981).

When reviewing a challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the State, including legitimate inferences and presumptions that fairly and reasonably may be deduced from the evidence in the record. State v. Hall, 371 N.W.2d 187, 188 (Iowa App. 1985); State v. Bass, 349 N.W.2d 498, 500 (Iowa 1984). Direct and circumstantial evidence are equally probative so long as the evidence raises "a fair inference of guilt and [does] more than create speculation, suspicion, or conjecture." State v. Hamilton, 309 N.W.2d 471, 479 (Iowa 1981). It is necessary to consider all the evidence in the record, and not just the evidence supporting the verdict, to determine whether there is substantial evidence to support the charge. Hall, 371 N.W.2d at 188; Bass, 349 N.W.2d at 500. Substantial evidence means evidence which would convince a rational fact finder that the defendant is guilty beyond a reasonable doubt. Hall, 371 N.W.2d at 188; State v. LeGear, 346 N.W.2d 21, 23 (Iowa 1984).

THE APRIL 22, 1989, SALE. Young argues the State failed to prove he participated in the sale of cocaine which occurred on April 22, 1989, in his home. Young claims he was merely present in the room where the sale occurred. He contends the only person who participated in the sale or profited from it was Arnoldo Perez who handed the cocaine to the undercover police officer involved in the controlled buy.

The sale occurred in the kitchen of the downstairs unit of a duplex. Young owned the duplex, but resided only in the downstairs portion of it. Perez was the upstairs tenant of the duplex.

In State v. Lott, 255 N.W.2d 105, 107 (Iowa 1977), the supreme court stated:

One cannot be convicted of a crime upon a theory of aiding and abetting unless there is substantial evidence to show he assented to or lent countenance and approval to the criminal act either by active participation in it or by some manner encouraging it prior to or at the time of its commission. Guilt may be established by circumstantial evidence. Knowledge is essential, but neither knowledge nor presence at the scene of the crime is sufficient to prove aiding and abetting. (citing to State v. Barnes, 204 N.W.2d 827, 828 (Iowa 1972)).

The trial court found the defendant actively and knowingly participated in the delivery of cocaine which occurred in his kitchen on the night in question. The court determined the evidence showed the defendant set up the delivery, furnished the place for the delivery, and introduced the parties involved to one another.

The informant testified she contacted Young and originally negotiated the terms of the sale with him. Both the informant and the undercover officer testified they were told to await Young's return when they first went to Young's house on April 22. Further, the informant and the undercover officer testified that when the officer thanked him for agreeing to sell to him, Young responded "No problem." We find substantial evidence exists in the record to support the trial court's determinations and Young's conviction for aiding and abetting the delivery of a controlled substance.

THE MAY 4, 1989, SALE. Young admits selling cocaine to an undercover officer on May 4, 1989. However, Young claims he did so only because the State's confidential informant who arranged the sale begged him to sell her drugs and promised him a sexual encounter in exchange for agreeing to sell drugs to her. Once a defendant generates a fact question on a defense of entrapment, the burden shifts to the State to disprove the entrapment beyond a reasonable doubt. State v. Tomlinson, 243 N.W.2d 551, 553 (Iowa 1976). Young asserts the State failed to disprove he was entrapped.

In State v. Mullen, 216 N.W.2d 375, 382 (Iowa 1974), the supreme court quoted with approval the National Commissions Study Draft of a New Federal Criminal Code section 702 (1970):

Entrapment occurs when a law enforcement agent induces the commission of an offense, using persuasion or other means likely to cause normally law-abiding persons to commit the offense. Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment.

The trial court as trier of fact found:

Credibility of the witnesses is an issue here. The Court does not believe Defendant's version of the events. [The informant] was instructed beforehand along the lines of entrapment and was cautioned not to make any promises and to be circumspect in her approach. Her testimony was forth-right. She denied Defendant's accusations. None of the conduct ascribed to her by Defendant is capable of verification. . . . Defendant's reference to a sexual encounter is based solely on his own interpretation of what he claims was said. Furthermore, [the informant's] testimony was corroborated by Agent Sandy.

We find the record supports the trial court's determinations and we defer to its judgment with respect to the credibility of the witnesses. The trial court was in a better position to judge the credibility of the witnesses.

THE HEARSAY OBJECTION. During the trial on the April 22, 1989, sale, the State sought to introduce evidence that Young was not home when the undercover agent and the informant first went to his house. The undercover agent testified that when he and the informant first went to Young's home, the individual who answered the door told them Young was not home and "told us Steve had gone to get the stuff." Young's attorney objected to the testimony as inadmissible hearsay. The State responded the evidence was not offered for the truth of the matters asserted, but

simply to explain the sequence of contacts at Young's residence. Young's attorney then countered that even so, the statement was more prejudicial than probative. The trial court overruled the objection. The informant subsequently testified to the same statement and the defendant again raised the same objection.

On appeal, Young submits the part of the testimony, "[he] told us Steve had gone to get the stuff," was inadmissible hearsay and prejudiced his defense. "Statements that otherwise would be considered hearsay, offered not for the purpose of proving the truth of the statements but rather offered to help explain relevant conduct taken in response to them, are not hearsay and are not excludable as such." State v. Hollins, 397 N.W.2d 701, 705 (Iowa 1986)(citing State v. Coburn, 315 N.W.2d 742, 746 (Iowa 1982)).

When reviewing a statement the State asserts was offered for the purpose of explaining certain responsive conduct, we review the relevant record to determine if the purpose offered by the State can reasonably be found to be the real purpose for the challenged testimony. Id. If upon objective review, the record supports the offered purpose for admission of the evidence, we accept that purpose. Id. at 706.

Our review of the record leads us to accept that the testimony was offered to explain why the undercover officer and informant returned to Young's residence in a relatively short period of time. Further, we fail to find the testimony unduly prejudiced Young's defense because the trial court did not rely on the statement in any of its findings of fact supporting its determination Young actively participated in the transfer of the cocaine.

DISCLOSURE OF OTHER INFORMANT'S IDENTITY. Young contends the trial court's failure to require the State to disclose the identity of another informant who unsuccessfully attempted to buy drugs from him denied him his right to compulsory process. Young argues he sought the informant's identity to show the State specifically used a female informant to entrap him. Young asserts this evidence would bolster his claims of entrapment by the female informant.

Discovery rulings rest within the trial court's discretion and we review them only for abuse of discretion. State v. Wagner, 410 N.W.2d 207, 213 (Iowa 1987) (citation omitted). Reversible error in the administration of discovery rules only occurs upon a showing that substantial rights of the defendant were prejudiced. Id. (citations omitted). "To trigger the right of compulsory process, a defendant must make a plausible showing the testimony of the individual otherwise

unavailable to the defendant was both material and favorable to his defense." Id. (citing United States v. Valenzuela-Bernal, 458 U.S. 858, 867, 102 S. Ct. 3440, 3446, 73 L. Ed. 2d 1193, 1202 (1982)).

The undercover officer involved in the successful controlled buy admitted at trial a male confidential informant had unsuccessfully attempted to purchase cocaine from Young sometime before April 22, 1989. The officer also testified about the identities of the police officers involved in the other attempted controlled buys. Young did not seek to present testimony of the officers involved in the prior buy attempts. We cannot find the defendant's right to compulsory process was prejudiced where he failed to offer the testimony of other individuals whose identities were known and who worked with the unidentified confidential informant.

Additionally, Young's claims of entrapment involved the alleged pleas and enticements specifically made by the female informant who testified at his trial. The number of prior attempts made by other informants to get Young to sell cocaine was irrelevant with respect to whether the known female informant entrapped him with improper coercion and promises. The trial court did not abuse its discretion by refusing to require the State to disclose the identity of the confidential informant who unsuccessfully attempted to purchase cocaine from Young.

CONCLUSION. We affirm Young's convictions with respect to all issues raised on appeal.

AFFIRMED.