

IN THE COURT OF APPEALS OF IOWA

FILED

AUG 23 1989

CLERK SUPREME COURT

STATE OF IOWA,)

Plaintiff-Appellee,)

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vs.)

ROBERT LEWIS LONG a/k/a)

WILLIS LOUIS ADAMS,)

9-124
88-1014

Defendant-Appellant.

Appeal from the Iowa District Court for Polk County
(No. Cr 31174), Harry Perkins, Judge.

Defendant appeals from his conviction, following a jury
trial, for possession of a schedule II controlled substance
(cocaine) with intent to deliver. **AFFIRMED.**

Alfredo Parrish and Max Exline of Parrish & Kruidenier,
Des Moines, for defendant-appellant.

Thomas J. Miller, Attorney General; Sarah J. Coats,
Assistant Attorney General; and Odell McGhee and Steve
Foritano, Assistant County Attorneys, for
plaintiff-appellee.

Heard by Oxberger, C.J., and Sackett and Habhab, JJ.

HABHAB, J.

Defendant Robert Lewis Long appeals his conviction, following a jury trial, for possession of a schedule II controlled substance (cocaine) with intent to deliver in violation of Iowa Code section 204.401(1)(a). Defendant contends the following prejudicial errors were made during his trial.

I.

Amended Information. After defendant presented his case-in-chief, the State was allowed to amend the trial information to correctly charge defendant with possession of a schedule II controlled substance rather than the initial charge of possessing a schedule I substance.

Iowa Rule of Criminal Procedure 4(8)(a) allows a trial information to be amended before or during a trial if (1) substantial rights of the defendant are not prejudiced and (2) a wholly new or different offense is not charged. State v. Williams, 328 N.W.2d 504, 505 (Iowa 1983) (citing State v. Williams, 305 N.W.2d 428, 430-32 (Iowa 1981), and State v. Sharpe, 304 N.W.2d 220, 223 (Iowa 1981)).

We conclude this test has been met and the amendment was proper. The amendment did not result in a wholly new or different charge being brought against defendant. The original trial information charged defendant with the crime of possession of a controlled substance, cocaine, with intent to deliver in violation of Iowa Code section 204.401(1) on February 27, 1986.

This code section states that "any person who violates this subsection with respect to: A substance classified in schedule I or II which is a narcotic drug or cocaine, is guilty of a class "C" felony." Iowa Code § 204.401(1)(2) (1985). The change made to defendant's trial information did not change the class of the crime nor the elements the State had to prove.

Defendant was not denied a fair trial nor were any of his substantial rights prejudiced by the amendment. Defendant knew he was being charged with possession and intent to deliver cocaine, and regardless of the classification of the drug as schedule I or II, it was a class "C" felony. Defendant was sufficiently apprised of what charges he must be prepared to meet. State v. Williams, 328 N.W.2d at 506.

Substantial rights of the defendant are prejudiced if the amendment creates such surprise that the defendant would have to change his trial strategy to meet the charge in the amended information. State v. Gray, 429 N.W.2d 571, 572 (Iowa App. 1988) (citing State v. Fuhrmann, 257 N.W.2d 619, 624 (Iowa 1977)). While claiming such prejudice has occurred, defendant points to no change in how or what evidence he would have presented or different strategy he would have used if initially presented with the correct classification of the drug.

II.

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Defendant next claims reversible error in the trial court's admission of the seized cocaine into evidence due to a break in the chain of its custody when the drugs were left unattended in the courtroom during a recess. Testimony from the court reporter, the prosecutor, and defendant's attorney indicates the cocaine was left under some photographic exhibits defendant's attorney wanted to examine during the noon lunch break. There was no evidence presented, such as a broken seal or a weight differential, indicating the cocaine exhibit was tampered with during this period. Aside from the noon hour, the State proved a continuous chain of custody from the time of seizure through analysis of the substance, and up to the date of the trial.

Admission of evidence of a chain-of-custody objection is a matter within the trial court's discretion and reversal is warranted only when a clear showing is made that the discretion was abused. State v. Gibb, 303 N.W.2d 673, 681 (Iowa 1981). In order to justify admission of physical evidence, it is not required that the chain of custody be shown with perfect precision. State v. Mayes, 286 N.W.2d 387 (Iowa 1979). The trial court may admit the evidence when satisfied it is reasonably probable that tampering, substitution, or alteration did not occur. Id. See also State v. Bakker, 262 N.W.2d 538, 542-43 (Iowa 1978).

We recognize that drugs such as cocaine are more easily tampered with than certain other physical evidence. Id. Other cases involving drug chain-of-custody issues indicate the most important period of custody, when dealing with a drug, is from the point of seizure to analysis of the substance. State v. Gibb, 303 N.W.2d at 681; State v. Kantaris, 280 N.W.2d 389, 392 (1979); Grady, 201 N.W.2d 493, 495 (Iowa 1972). The trial court is entitled to assume that an official would not tamper with an exhibit or its contents. State v. Branch, 222 N.W.2d 423 (Iowa 1974). We certainly do not condone leaving exhibits, especially illegal drugs, unattended in an open courtroom for any length of time. However, the trial court did not abuse its discretion in admitting the cocaine exhibit into evidence under the facts presented here. This is particularly true here for there was not a break in the chain of custody at the time the analysis was made nor was there a break at the time the State moved that it be admitted into evidence.

III.

Defendant argues he was denied a fair trial because several jurors could no longer be impartial after reading a newspaper article which contained facts of a drug raid similar but unconnected, to the one in defendant's case. The trial court questioned the jurors about their exposure to news regarding the raid after the guilty verdict was

returned and discovered three jurors had read an article and four jurors had heard news reports about the raid.

Defendant's motion for new trial based in part on such jury misconduct grounds was denied. The trial court has broad discretion to make such a ruling and its decision is not reversed unless the trial court's ruling is clearly unreasonable under the circumstances. State v. Cullen, 357 N.W.2d 24, 27 (Iowa 1984). To impeach a verdict based on jury misconduct, three conditions must be met: (1) evidence from the jurors must consist only of objective facts as to what actually occurred in or out of the jury room bearing on misconduct; (2) the acts or statements complained of must exceed tolerable bounds of jury deliberation; and (3) it must appear the misconduct was calculated to, and with reasonable probability did, influence the verdict. Id. at 27.

Defendant has failed to show the news reports read or heard by certain jurors were even discussed during deliberations. Defendant only called two of the jurors to testify at the motion hearing. Both jurors said the news reports did not affect their voting and as far as they knew there were no discussions about the reports until after deliberations. Instructions to jurors to not read or listen to such reports are generally directed to news pertaining to the specific case on which the juror is serving. The two jurors who testified at defendant's

motion for new trial indicated their knowledge of the article in no way affected their votes because very little of the article was read or no connection between the two raids was made. The trial court did not abuse its discretion when overruling the motion based on grounds of misconduct.

IV.

Defendant contends the trial court committed reversible error by allowing: (1) demonstrative evidence of packages of white powder to go to the jury when the cocaine seized in his room was not packaged in that manner and (2) into evidence defendant's use of an alias and testimony regarding the weapons seized when defendant was arrested.

The trial court has discretion in admitting demonstrative evidence, and it is usually received if it affords a basis for a reasonable inference on a point in issue. State v. Henderson, 268 N.W.2d 173, 179 (Iowa 1978). A point in issue in this case was whether defendant had the intent to sell the drugs. An officer demonstrated how certain items seized in defendant's room such as the plastic baggies, aluminum foil, and a scale were commonly used by drug dealers to package cocaine into different amounts salable to individual users. The trial court also gave a cautionary instruction that the packages were admitted only to show how cocaine might be packaged for sale and it was up to the jury to determine the weight to

be given such evidence. The trial court properly allowed such evidence to go to the jury as it was relevant on the issue of intent. See State v. Sykes, 412 N.W.2d 578, 584-85 (Iowa 1987); State v. Luter, 346 N.W.2d 802, 808-09 (Iowa 1984).

Two guns were admitted into evidence through the testimony of the officer who found them during the search of defendant's room. The guns were identified, without objections, as weapons found in the defendant's hotel room and testimony was received, again without objection, as to where they were found and the fact that when found they were loaded. The trial court admitted the weapons based on the officer's testimony loaded handguns of this type were commonly found during drug raids. The trial court did not abuse its discretion by admitting the evidence regarding the weapons.

During the trial, an officer testified that when defendant was arrested he identified himself as Robert Long. The officer said he later learned defendant's real name was Willis Louis Adams. Defendant claims such evidence was irrelevant because his identity was not an issue. The State argues defendant failed to object to the evidence as it was eventually introduced and its admission was relevant to establish a consciousness of guilt. We agree with the State defendant did not preserve error on this issue by properly objecting to the testimony regarding

defendant's real name.¹ Furthermore, the testimony was properly admitted as evidence of defendant's consciousness of guilt. See Wigmore on Evidence section 276, Vol. II, p. 122 (1979); State v. Wimbush, 260 Iowa 1262, 1268, 150 N.W.2d 653, 656 (1967). In either event the alias evidence was clearly relevant for defendant's hotel room was registered to a Robert Long and a number of documents found in defendant's room were issued to Long. We find no error.

Based on these rulings, defendant's conviction and sentence is affirmed.

AFFIRMED.

1. Further, we note from the record made in chambers that defense counsel stated that he had no objections to this single question.