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IN THE COURT OF APPEALS

STATE OF IOWA,	)	
Appellee,	)	Filed September 9, 1977
vs.	)	
STEPHEN WESLEY O'BRIEN,	)	<u>169</u>
Appellant.	)	59278

Appeal from Linn District Court - Ansel J. Chapman, Judge.

Appeal from conviction of delivery of a controlled substance claiming mistrial should have been declared because of voluntary statements by two witnesses and alleging prejudice from two jury instructions. - Judgment affirmed.

Jerald W. Kinnamon, Jon M. Kinnamon and J. Eric Heintz, of Cedar Rapids, for Appellant.

Richard C. Turner, Attorney General of Iowa, Mark S. Beckman, Assistant Attorney General, and Eugene J. Kopecky, Linn County Attorney, for Appellee.

Submitted to Allbee, C.J., and Donielson, Snell, Oxberger and Carter, JJ.

PER CURIAM

Defendant, Stephen Wesley O'Brien, appeals his conviction by jury of the crime of delivery of a controlled substance in violation of § 204.401(1), The Code. He was subsequently found guilty by the same jury of delivery with the intent to profit and not as an accommodation. On appeal, defendant contends the trial court erred in: 1) overruling his motion for mistrial based upon the prejudicial effect two separate volunteered statements had on the jury and 2) in sending two instructions to the jury which unnecessarily called attention to defendant's interest in the trial and undue prominence to the facts as put forth by the State.

Defendant's initial contention is that the trial court erred in overruling his timely motion for mistrial because of the volunteered statement by Detective Hansel which was so prejudicial as to deny him a fair trial. He argues that the trial court's admonition to disregard the statement was not sufficient to withdraw the prejudice. Hansel testified as follows:

"A. He had already sold me drugs

"Q. I thought you told me they weren't—I thought you told me they were not a controlled substance under the Iowa Code. A. But they are under the Federal Code."

Defendant's objection immediately ensued.

The trial court is vested with considerable discretion in deciding whether or not to grant a mistrial. *State v. Mattingly*, 220 N.W.2d 865, 870 (Iowa 1974); *State v. Ware*, 205 N.W.2d 700, 702 (Iowa 1973). And the decision to deny a motion for mistrial should be set aside only where there is an abuse of discretion. See *State v. Swallow*, 244 N.W.2d 321, 325 (Iowa 1976). Abuse of discretion will be found only where there is no support for the decision in the evidence. See *State v. Warner*, 229 N.W.2d 776, 783 (Iowa 1975).

Generally, the prejudicial effect of improper testimony may be avoided by striking it from the record and giving a cautionary instruction to the jury. It is only in the exceptional cases, where the prejudicial effect of the testimony cannot be eliminated, that such an instruction will be insufficient. *Mattingly*, supra. From a review of the entire record, we are unable to find any evidence that the defendant was prejudiced by Hansel's statement. The statement referred to an entirely

separate transaction from which defendant was accused. The jury was properly admonished and we find no error.

The second volunteered statement of which the defendant complains was made by an informant, Gary Bell, while testifying on behalf of the defendant. In response to a question asked by defense counsel, Bell stated: "Maybe I should state something else. I had had dealings with him before." Counsel again immediately objected, the court struck both the question and the answer and admonished the jury to disregard both. However, no motion for mistrial was made. Defendant now argues that the cumulative effect of both responses was so prejudicial as to deny defendant a fair trial.

The rule is that a mistrial motion must be made when the grounds first become apparent. *State v. Ware*, 205 N.W.2d 700, 702 (Iowa 1973). The record discloses that defense counsel did not timely object; therefore, the error is not preserved for appeal. However, the trial court, in ruling on defendant's motion for mistrial prior to submission, stated that even if timely made, he would overrule such motion because he did not think the statement was prejudicial to the extent a mistrial was warranted. We agree. Had the trial court refused to grant a mistrial upon a timely objection, we would be unable to say that it had abused its discretion.

The final errors asserted by defendant concern two instructions, one given at the principle trial, the other at the accommodation hearing. Instruction No. 16 was identical to Iowa Uniform Jury Instruction No. 501.5, Credibility of Witnesses. Defendant claims that instruction impermissibly called attention to his interest in the outcome and allowed the jury to find him less credible because he was the defendant. In *State v. Bester*, 167 N.W.2d 705, 710 (Iowa 1969), the Supreme Court condemned an instruction which singles out and comments upon defendant's interest in the case and weight to be given his testimony as distinguished from the testimony of other witnesses as reversible error. "The proper practice is to give a general credibility instruction, as the court did here, applicable to all witnesses alike." *State v. Feddersen*, 230 N.W.2d 510, 515 (Iowa 1975); *State v. Milliken*, 204 N.W.2d 594, 596-97 (Iowa 1973). The credibility instruction given was general and applicable to all witnesses alike. We find no merit in defendant's argument.

The other instruction attacked by defendant concerns the issue of profit in the accommodation hearing. Defendant attacks the instruction because in his view it directed the attention of the jury to the price and quantity of the amphetamines and gives undue emphasis to the testimony on behalf of the state without allowing the jury to infer that an intent other than profit existed.

It is true that the rule is that instructions to the jury should not argue the case for either side or call special attention to matters of evidence thought to be favorable to one party, at least without mention of related matters favorable to his adversary. *State v. Gillespie*, 163 N.W.2d 922, 927 (Iowa 1969). Further, an instruction which gives undue prominence to evidentiary facts to be determined by the jury is erroneous. *State v. Milliken*, 204 N.W.2d 594, 596 (Iowa 1973); *State v. Proost*, 225 Iowa 628, 635-36, 281 N.W. 167, 170 (1938). However, we do not believe supplemental instruction No. 2 called special attention to or unduly emphasized the state's evidence. The trial court simply attempted to define "intent to profit" and instruct the jury as to what they could consider in deciding whether the defendant had an intent to profit. The jury was told it "may" consider sales price, quantity delivered, the arrangement and circumstances surrounding the delivery, and all other facts and circumstances as shown by the evidence. The trial court did not err in giving supplemental instruction No. 2, which is consistent with and only elaborates upon the meaning of "intent to profit" set forth in *State v. McNabb*, 241 N.W.2d 32 (Iowa 1976).

Affirmed.