IN THE COURT OF APPEALS OF IOWA

No. 1-93 / 90-434

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CLERK SUPREME COURT

466

STATE OF IOWA,

Plaintiff-Appellee,

vs.

ELDON R. WITTERN,

Defendant-Appellant.

Appeal from the Iowa District Court for Woodbury County, Dewie J. Gaul, Judge.

Wittern appeals his convictions, following a jury trial, for three counts of delivery of cocaine. He contends the district court abused its discretion by overruling his two motions for mistrial. He also challenges an instruction concerning his entrapment defense. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Brian K. Sissel, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Bruce Kempkes, Assistant Attorney General, Thomas Mullin, County Attorney, and Mark Campbell, Assistant County Attorney, for appellee.

Heard by Donielson, P.J., and Schlegel and Sackett, JJ.

SACKETT, J.

Defendant Eldon R. Wittern was convicted of three counts of delivery of cocaine. The State's evidence showed defendant made three drug sales to a special agent Shannon. The sales were all arranged by Rudy DeLeon. DeLeon went with defendant when he made the three drug sales.

Defendant testified DeLeon had the drugs and he wanted defendant to sell them to Shannon for him. Defendant said DeLeon wanted to do this so Shannon would not chisel DeLeon down on price. Defendant said the drugs were in DeLeon's car and he merely handed them to Shannon.

I.

Defendant's first contention is the trial court should have declared a mistrial because of evidence elicited by the State during direct examination of DeLeon. During the State's case, the following colloquy took place:

> Q. Now, you testified that on July 4, 1986, you were a cocaine dealer.
> THE WITNESS: Yes.
> Q. And that you agree to work for law enforcement in apprehending drug dealers? A. Yes.
> Q. When law enforcement agents met with you to discuss who you could purchase drugs from, did you tell them? A. Yes, I did.
> Q. One of the names you gave the police officers, was that Eldon Wittern? A. Yes, it was.
> Q. Prior to July 4, 1986, had you purchased cocaine from Eldon Wittern? A. Yes, I had.

At this point, defendant objected to the exchange and moved for mistrial on the basis of Iowa R. Evid. 404(b) and

prosecutorial misconduct. The court sustained the objection, admonished the jury to disregard the testimony, but denied the defendant's motion for mistrial. Defendant contends the limiting instruction did not cure the prejudice and he should have a new trial. Defendant contends the trial court abused its discretion. The State says the trial court did not. Additionally, the State contends error was not preserved and the objection should not have been sustained.

The trial court has broad discretion when ruling on a motion for mistrial. See State v. Wade, No. 89-1765, slip op. at 5 (Iowa Mar. 20, 1991); State v. Brown, 397 N.W.2d 689, 699 (Iowa 1986). Generally, trial court's quick action in striking the improper response and cautioning the jury to disregard it, coupled, when necessary, with some type of general cautionary instruction, will prevent any prejudice. Brown at 699. A defendant who asserts these actions were insufficient bears the heavy burden of demonstrating a clear abuse of discretion on the part of trial court. Id. If evidence is improperly admitted but is later withdrawn with a cautionary statement to the jury to disregard it, there is no error except in extreme instances where the prejudicial effect would probably remain to influence the verdict despite its exclusion. State v. Coffee, 182 N.W.2d 390, 392 (Iowa 1970).

Finding there was no abuse of discretion, we find it unnecessary to discuss the State's other argument for affirmance.

II.

Defendant next contends the trial court abused its discretion in refusing to grant a mistrial because of what the defendant contends was prosecutorial misconduct. During defendant's cross-examination, the State inquired about testimony given at a previous forfeiture hearing where defendant testified. The county attorney asked defendant the following question:

> Q. Well, you didn't have any problem on July 19th telling me that you were guilty of this, did you?

Defendant's attorney objected to the question and the court sustained the objection. The county attorney then asked:

> Q. Mr. Wittern, on July 19th, 1989, did you tell me under oath--

Once again defendant's attorney objected. The trial court again sustained the objection. The State asked for a hearing in chambers and explained to the trial court why it thought the question was proper. The trial court sustained defendant's objection. Defendant then moved for a mistrial.

The State argues the trial court did not abuse its discretion, and the evidence was admissible and defendant did not preserve error. We find the trial court did not abuse its discretion. See State v. Peterson, 189 N.W.2d

891, 896 (Iowa 1971). We need not address the State's other arguments for affirmance.

III.

Defendant's last contention is the trial court erred in instructing the jury on the entrapment defense. The trial court gave the following instruction:

> The defendant claims he was "entrapped." The State must prove by evidence beyond a reasonable doubt the defendant was not entrapped.
>
> "Entrapment" occurs when a law enforcement agent causes the commission of a crime by using persuasion or other means likely to cause a normally law-abiding person to commit the crime. Conduct merely providing an opportunity to commit a crime does not amount to entrapment.
>
> You should consider the conduct of the agent, the informant and the defendant. This includes dealings leading up to the crime, the interaction between the agent and the defendant, and the defendant's response to conduct of the agent. These shall be considered in deciding what the effect of the agent's conduct would be on a normally law-abiding person. The defendant asserts the drugs were supplied to him by the confidential informant. The burden is on the State to prove that the drugs delivered were not supplied to the defendant by the State's informant.

(Emphasis added.)

Defendant contends the emphasized portion of the instruction is erroneous because it focuses on a subjective test and makes the defendant's action a focus of the inquiry when only the action of the police should be considered.

The current Iowa law on entrapment was formulated in State v. Mullen, 216 N.W.2d 375 (Iowa 1974); See State v. Agent, 443 N.W.2d 701, 703 (Iowa 1989). In Mullen, the

court adopted an objective test and sought to remove the focus of inquiry from the defendant's propensity to crime emanating from a criminal nature to whether the judicial process was perverted by the conduct of government officers. Id. This puts the real concern on police actions. Id. A determination of the defendant's predisposition to commit the crime or a determination of whether the crime design originated with defendant is no longer a critical factor in an entrapment case. Id.

However, while professing a commitment to the objective test, the court in Agent, 443 N.W.2d at 703, quoted State v. Sparks, 238 N.W.2d 777 (Iowa 1976), when they said:

> [t]his does not render the circumstances Surrounding the defendant's participation in the drug transaction irrelevant. . . . The conduct of the government official or agent must be evaluated in its context, not in a vacuum. Under this principle the state had a right to test defendant's claim of unfamiliarity and uncertainty concerning the transaction by cross-examination of the kind involved here.

(Emphasis supplied.)

Sparks and Agent pave the way for the admission of evidence of the defendant's conduct as it relates to the transaction if the trial court does so while striking a balance that protects the rights of the defendant without creating an artificial scenario for the State to present as to how the crime occurred. See Agent, 443 N.W.2d at 703-04. The instruction given protects this balance. There was no error.

AFFIRMED.