FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 0-01 / 88-599

STATE OF IOWA,

Appellee,

vs.

RANDY FREDERICK,

Appellant.

Appeal from the Iowa District Court for Woodbury County, Michael S. Walsh, Judge.

Defendant appeals from his convictions, following a jury trial, for three counts of delivery of methamphetamines. **AFFIRMED.**

Randy S. Hisey of Uhlir, Baker & Hisey, South Sioux City, Nebraska, for appellant.

Thomas J. Miller, Attorney General; Bruce Kempkes, Assistant Attorney General; Thomas S. Mullin, County Attorney; and J. Keith Rigg, Assistant County Attorney, for appellee.

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

HABHAB, J.

The defendant, Randy Frederick, was arrested and charged with three counts of delivery of methamphetamine, arising from a Sioux City police undercover operation. Four codefendants were charged with similar offenses arising from the same series of transactions. The arrests were triggered by an undercover operation headed by the Sioux City police. Elias Zappas, a convicted felon turned police informant, arranged a drug buy between Tommy Whinery and Officer Mark Skaff, who posed as a South Dakota car salesman. The two men agreed to future business dealings.

On June 5, 1987, Whinery arranged another sale of "crank" with Officer Skaff, together with the defendant, Randy Frederick. Upon purchasing fourteen grams of "crank" at $300, the officer was informed by Frederick that he would be willing to supply him with more. On June 16, 1987, another meeting took place near the Traxx Bar. At the meeting, Frederick bragged that he had been part of a "boss lady's" assembly line earlier that day cutting "crank" with Inositol, a food supplement. Another purchase was made.

On June 17-18, 1987, Zappas arranged for Officer Skaff to purchase a large quantity of "crank" from Whinery and Frederick. Frederick informed Officer Skaff that he would have to call his sources to check on availability. Another officer followed Frederick to a pay phone and subsequently to a house at 3110 Euclid Avenue. Frederick exited his car

and entered the home. Zappas received a call several minutes later from Whinery stating the drug sale would be scheduled the next day.

On June 19, 1987, Officer Skaff met with Whinery and Frederick. While waiting for Frederick to return with the "crank," Whinery told Skaff that Frederick's people were a big operation but were scared that a major bust was close at hand. Frederick returned and accepted $2,400 from Skaff. Frederick and Whinery were then arrested.

At the time of Frederick's arrest, the police had confiscated his pager from his car. During booking procedures, a message came over the pager to call Schery at home. The police obtained a search warrant and subsequently arrested seven people at 3110 Euclid, where the police seized a large volume of drugs and drug paraphernalia.

Frederick and four codefendants were tried jointly on all counts. Following trial, a jury found Frederick guilty of three counts of delivery of methamphetamine. Frederick has appealed from the resulting convictions. We affirm.

I. **Chain of Custody.** Frederick contends the trial court erred in admitting into evidence the "crank" exhibits because the State had failed to adequately lay the proper foundation regarding chain of custody. At trial, Sandi Peterson, the evidence clerk for the Sioux City Police Department, testified that on June 4, 1987, Officer Klay checked out the "crank" from the sale on June 16th for

laboratory analysis and that it was returned on July 10th. She also testified that Officer Klay on June 8th checked out the "crank" from the sale on June 19th for lab analysis and that it was returned on July 10th. On cross-examination, however, Peterson stated that the first time she received an exhibit would have been on June 20th.

Officer Klay testified that he had only checked out the "crank" from the June 5th sale, but not those of June 16th or June 19th. Officer Skaff testified the "crank" from the June 16th sale was sent by him on June 17th by registered mail to the laboratory. He also testified that he sent the "crank" from the June 19th sale to be analyzed on June 24th. Frederick objected to the introduction of the crank exhibits on grounds of relevancy and improper foundation. The trial court overruled the objection, but stated that trial counsel could nonetheless argue that the chain of custody was insufficient.

We do not believe the trial court erred in admitting the "crank" exhibits into evidence. Under Iowa law, the admissibility of physical evidence is a matter within the sound discretion of the trial court. State v. Hutchison, 341 N.W.2d 33, 37 (Iowa 1985). Reversal is warranted only where there has been a clear abuse of discretion. Id. The party introducing the evidence must show that taking all the circumstances into account, it is reasonably certain that there was no material alterations. State v. Ubben, 186 N.W.2d 625, 627-28 (Iowa 1971).

In the present case, there was some confusion on the part of the evidence clerk as to who had taken the exhibits and when they were taken for analysis. However, Officer Skaff, who was the one directly responsible for the "crank" exhibits, identified the bags with his markings on them. Officer Skaff provided his own explanation as to the chain of custody. It is presumed that the officer, as an agent of the State, would not tamper with the crank. State v. Lamp, 322 N.W.2d 48, 59 (Iowa 1982). The trial court in its discretion overruled Frederick's objection, but noted that trial counsel could certainly point out the inconsistencies in the chain of custody.

II. **Motions for Severance.** Frederick next argues the trial court erred in overruling his motion for severance of multiple defendants, denying his right to compulsory process. In particular, Frederick maintains that Sherry Draper, one of the codefendants, would have testified on his behalf if her trial had been separated from his. Frederick alleges Draper's testimony would have provided exculpatory evidence. We disagree.

Iowa Code section 204.408 (1987) provides that a trial information may "join one or more persons as defendants who it is alleged violated the same provisions in the same transaction or series of transactions and which involve common questions of law and fact." Section 204.408 further provides that "[t]he court may grant a severance and separate trial to an accused person jointly

charged . . . if it appears that substantial injury would result to such accused person unless a separate trial was granted." Thus the decision of a motion to sever is vested in the discretion of the trial court. Iowa R. Crim. P. 6(4)(b).

A district court's denial of a severance motion will generally not be disturbed in the absence of a showing that the court abused its discretion, causing clear prejudice to a defendant's right to a fair trial. United States v. O'Meara, 895 F.2d 1216, 1219 (8th Cir. 1990). The denial of a severance motion results in clear prejudice when the defendant is deprived of an appreciable chance that he or she would not have been convicted in a separate trial and not merely that there was a better chance of acquittal. Id. The fact there is some disparity in the evidence which incriminated a codefendant resulting in a spillover prejudicial effect against other codefendants is an insufficient ground for severance unless in its discretion the district court determines that the jury was unable to compartmentalize the evidence against the separate defendants. Id. Where, as here, the defendant bases his motion for severance upon a claim that he needs a codefendant's testimony, a number of factors are relevant: (1) the likelihood that the codefendant would in fact testify at the movant's severed trial and waive his fifth-amendment privilege; (2) the significance of the testimony in relation to the defendant's theory of defense;

(3) the exculpatory nature and effect of such testimony; (4) the likelihood that the codefendant's testimony would be impeached; (5) the extent of prejudice caused by the absence of the testimony; (6) the effect of a severance on judicial administration and economy; and (7) the timeliness of the motion. United States v. McConnell, 749 F.2d 1441, 1445 (10th Cir. 1984); United States v. Butler, 611 F.2d 1066, 1071 (5th Cir. 1980), cert. denied, 449 U.S. 83, 101 S. Ct. 97, 66 L. Ed. 2d 35 (1980).

Applying the foregoing analysis to the present case, we do not believe Frederick has met his burden. Frederick offered no specifics about what Draper was expected to testify. The most the district court heard was that Draper would testify that Frederick did not sell drugs for her on the nights in question, but that he did work in her legitimate activities. Such testimony can hardly be deemed exculpatory, and given the cumulative evidence in the present case, such testimony would likely be readily impeached. Draper's testimony would have added little to explain Frederick's statements to Officer Skaff and Zappas captured on tape, nor would it support Frederick's claim that he only sold the drugs to help his friend Whinery because of a perceived threat. Based on these facts, the trial court did not abuse its discretion in overruling the motion for severance.

We likewise reject Frederick's claim that he was compelled to testify about matters relating to his

entrapment as a result of the trial court's refusal to sever the count against him for the June 5th sale of "crank" to Officer Skaff. Frederick in part argued in his motion that he desired "to exercise his right to not testify as to either "the sales on June 16th and June 19th. Following the rejoinder of Whinery's case, which had been temporarily severed, the trial court restarted pretrial motion proceedings, ordering that all pretrial motions must be filed by December 19, 1987, otherwise such motions would be considered untimely. Frederick renewed his motion to sever his codefendants' trials, but failed to renew his motion to sever the count underlying his and Whinery's sale on June 5th.

Pursuant to Iowa Rule of Criminal Procedure 10(3), "[f]ailure of the defendant to timely raise defenses or objects or to make requests which must be made prior to trial . . . shall constitute waiver thereof . . .," but the court may upon a showing for good cause grant relief. Frederick has not presented us with any reason why he failed to refile his motion to sever the counts. Frederick thus has not preserved error on this issue.

III. **Actions of Trial Counsel.** Frederick next argues that the trial court abused its discretion in failing to grant a mistrial due to the other codefendant's counsel's conduct at trial. Frederick maintains that the other counsel's numerous objections, sidebar conferences, protracted hearings in chambers, caustic comments and

interruptions toward other codefendants, and the general hostility pervading the courtroom greatly prejudiced the jury.

Pursuant to State v. Belieu, 288 N.W.2d 895, 899 (Iowa 1980), when a defendant makes a pretrial motion to sever which is overruled with leave to renew it when prejudice threatens, "the defendant has a duty to alert the court in sufficient time to permit consideration of steps to avoid prejudice," though the trial court does have a duty to grant severance if prejudice appears. In the present case, Frederick voiced no concerns about codefendants' counsels' actions in the courtroom. Though Frederick did renew his motion to sever late in the trial, nowhere did Frederick allege that cocounsels' antics so permeated the atmosphere of the trial and so poisoned the jury with prejudice that he could not receive a fair trial. In his motion for new trial and arrest of judgment, Frederick failed to raise the issue of cocounsels' tactics. Frederick thus never alerted the court that he believed such tactics were prejudicing his case, unlike the defendant in Belieu. In Belieu, the defendant had persistently renewed his motion to sever throughout the trial, and the court was found to have had every opportunity to guard against prejudice. 288 N.W.2d at 899.

Moreover, an examination of the record reveals that most of the heated colloquies took place outside the presence of the jury. The district court repeatedly

emphasized to the jury to guard against prejudice and be fair and impartial. The district court fully instructed the jury to reach a decision only by applying the facts as presented at trial. There has been no evidence brought to our attention which reflects an unwillingness on the part of the jury to follow those instructions. We thus find no merit to the issue.

IV. Introduction of Whinery's Video Statement. Frederick next argues that the trial court erred in failing to order into evidence a videotaped statement made by Whinery during his pretrial negotiations with the police to reach a plea bargain. The district court, upon reviewing the videotape in camera, refused to require its production on the grounds that it contained no exculpatory evidence and also revealed the names of confidential informants. The court did, however, rule that Whinery could share an edited, transcribed statement of the videotape. Frederick asserts that the videotape contained exculpatory information essential to his entrapment defense and that the tape would show that the prosecution withheld information about the alleged threat to Whinery.

We believe the district court was correct in refusing to order the production of the videotape. First, we do not believe the videotape contained exculpatory evidence which could have aided Frederick's claim of entrapment. Any entrapment occurred, if at all, when Zappas allegedly told Whinery he would put a bullet through his head if Whinery

didn't sell some "crank." Though Frederick makes much of the alleged prosecution's unwillingness to reveal whether such threats had been made, the fact remains that any such threats were made against Whinery alone, and not Frederick. Frederick testified that he only helped Whinery, whom he had only met several weeks before, because Whinery told him about the threat. Additionally, an entrapment defense does not extend to inducement by a private citizen. United States v. Leroux, 738 F.2d 943, 947 (8th Cir. 1984). In the present case, it was Whinery who was contacted by Zappas and Officer Skaff. It was Whinery who induced Frederick into selling the drugs, not the government agents. Furthermore, the edited transcript of the videotape was ultimately made available for use by the codefendants at trial. Thus, we do not believe the videotape would have aided Frederick in his entrapment defense.

V. **Entrapment Instructions to the Jury.** Frederick also argues that the trial court erred in instructing the jury on entrapment. Frederick argues that the instructions emphasize his alleged propensity or predisposition to commit the crime. Upon a review of the record and applicable case law, we find no merit to Frederick's argument. Instruction No. 67 is in substantial compliance with Iowa Uniform Jury Instruction No. 213 regarding entrapment. Viewing the instruction in its entirety, we believe Instruction No. 67 sufficiently states the

applicable law such that the jury could comprehend its meaning. See State v. Morrison, 368 N.W.2d 173, 175 (Iowa 1985).

We have considered all remaining arguments propounded by Frederick, and upon an examination of the record, we find that all remaining issues have no merit.

AFFIRMED.