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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 1-203 / 90-760

STATE OF IOWA,

Plaintiff-Appellee,

523

vs.

DWIGHT CHARLES REED,

Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, George Stigler, Judge.

Defendant appeals his conviction, following a jury trial, for possession of cocaine with intent to deliver. He contends he should have been granted a mistrial because the judge committed prejudicial misconduct during voir dire. **REVERSED AND REMANDED.**

Linda Del Gallo, State Appellate Defender, and Shari Barron, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General; Bruce Kempkes, Assistant Attorney General; Thomas J. Ferguson, County Attorney; and D. Raymond Walton, Assistant County Attorney, for appellee.

Heard by Hayden, P.J., and Sackett and Habhab, JJ.

SACKETT, J.

Defendant-appellant Dwight Charles Reed appeals from a conviction, following a jury trial, of possession of cocaine with the intent to deliver. Defendant contends on appeal he should have a new trial because the trial court questioned the jury about pending criminal charges against his chief defense witness. He also contends his trial counsel was not effective. We agree with the defendant he should have a new trial, because of the question the trial court put to the jury on voir dire. We reverse his conviction and remand for a new trial. We therefore need not address his claim of ineffectiveness of trial counsel.

The defendant contends he did not receive a fair trial because the trial judge prejudiced his cause in voir dire when the judge asked all the jurors if they would be influenced by the fact there were unrelated pending criminal charges against the defendant's principal witness, Eddie Denton.

Defendant claimed he possessed crack cocaine only in the capacity of a confidential informant with the Waterloo Police Department. In defense of the charge, the defendant testified Denton, then a police officer, asked him to gather information on a person the police suspected of being a drug dealer. Defendant said he agreed to gather the information and met the suspect in a bar. The defendant related the suspect offered him $200 worth of cocaine; defendant was to sell the cocaine and return $140

to the suspect. The defendant testified he agreed to take the cocaine only to gather evidence for Denton. He claimed he was on the way to deliver the cocaine to Denton when he was arrested.

Denton testified as a witness for the defense. Denton related he asked defendant to gather information on the suspect. He testified defendant had served as a reliable informant in the past. Other police officers also testified the defendant had served as a reliable informant in the past. The defendant and Denton both testified Denton had not asked the defendant to buy the cocaine.

The trial court asked the jury panel if they were aware of pending criminal charges against a defense witness. The defendant contends the trial judge's decision to question prospective jurors in the manner he employed was prejudicial to his defense. Defendant argues the trial court's questions were prejudicial to his defense because they tended to discredit his witness. Defendant further argues the fact there were pending criminal charges against the witness was not admissible and only the trial judge's questions put this fact before the jury.

The State contends error on this issue was not preserved for review. We disagree. After preliminary instructions to the jury panel, and prior to voir dire, the defendant's attorney made a record which the county attorney accepted as accurate. From the record made, we find the judge read to the jury a list of potential

witnesses and told the jury there were criminal charges pending against the defendant's witness, Denton. The pending criminal charges were not defined. The judge asked the jurors if any information or impression they had about Denton would make it difficult for them to be fair. The record made clearly defines for us what transpired, and the context in which the questions were asked. This distinguishes this case from State v. Misner, 410 N.W.2d 216, 220 (Iowa 1987), where the appellate court found there was no way to determine the context in which the statements were made.

The defendant's attorney then asked the jury panel be disqualified because the panel had been given an impression that a defense witness's testimony was tainted. The trial judge denied the defendant's request to disqualify the panel. The trial court recited there had been a grand jury investigation pending for about four months, and there had been extensive media coverage of the investigation. The judge stated he did not believe anyone could live in Black Hawk County and not be aware of the charges pending against Denton. The judge said it had been his intent to identify any prospective juror with strong feelings against Denton and remove him or her from the panel. After the panel was chosen, the defendant renewed his motion. The trial court again denied the motion indicating, among other things, the charges against Denton might be admissible for impeachment. Error was preserved. See generally State v.

Bishop, 387 N.W.2d 554, 562 (Iowa 1986); State v. Larmond, 244 N.W.2d 233, 237 (Iowa 1976); State v. Oshinbanjo, 361 N.W.2d 318, 321 (Iowa App. 1984).

Our review on this issue is de novo. See State v. Davis, 446 N.W.2d 785, 787 (Iowa 1989); State v. Aldape, 307 N.W.2d 32, 36 (Iowa 1981).

The trial court justified its action as helping the defendant obtain a fair trial. The defendant did not want the kind of help the trial court attempted to give him. It is a dangerous practice for a trial court to override a defense attorney's strategy, even to attempt to right what the judge perceives as an injustice at trial. See State v. Cuevas, 288 N.W.2d 525, 531 (Iowa 1980); State v. Droste, 232 N.W.2d 483, 491 (Iowa 1975); State v. Glanton, 231 N.W.2d 31, 35-36 (Iowa 1975); State v. Matlock, 387 N.W.2d 781, 784 (Iowa App. 1986). Judges are not advocates for either side. See Mills v. State, 383 N.W.2d 574, 576 (Iowa 1986). A trial judge should not assume the role of an advocate. See United States v. Gunther, 631 F.2d 583, 587 (8th Cir. 1980); Cuevas, 288 N.W.2d at 531. The trial court should be cautious when intervening in the trial. See generally State v. Pinckney, 306 N.W.2d 726, 730 (Iowa 1981); State v. Johnson, 243 N.W.2d 598, 603 (Iowa 1976); Glanton, 231 N.W.2d at 35-36. There may be a greater rash of prejudice from overintervention than from underintervention. Matlock, 387 N.W.2d at 784.

The trial judge's questions introduced evidence of pending criminal charges against defendant's witness. The evidence was not otherwise admissible. The mere fact a person has been charged with an offense is not available for impeachment. State v. Spears, 312 N.W.2d 79, 82 (Iowa App. 1981). We find it was error for the trial court to question the jury in the manner it did.

The State advances, even if it were error, the defendant has not shown he was prejudiced. We remind the State it is its burden to show the error was harmless beyond a reasonable doubt. See State v. Freeman, 297 N.W.2d 363, 367 (Iowa 1980); State v. Ware, 205 N.W.2d 700, 704 (Iowa 1973). The State has not met this burden. We reverse and remand for a new trial.

REVERSED AND REMANDED.

Hayden, P.J., concurs; Habhab, J., dissents

HABHAB, J. (dissenting)

I respectfully dissent. I would affirm the conviction. The facts leading up to this offense are: After his car was stopped for an unrelated matter, Dwight Reed was found to be in possession of about 1.15 grams of crack cocaine. The cocaine was packaged in envelopes and baggies and was valued at about $200. There was evidence the amount and packaging of the cocaine was consistent with the practices of drug dealers.

Reed was charged with possession of cocaine with intent to deliver. In his defense, he alleged that police officer Eddie Denton, the former husband of his aunt, had approached him and asked him to gather information on a suspected drug dealer known as Stickman. Reed further alleged that he agreed to gather information, that he located Stickman in a bar and engaged in a pool game with Stickman, that Stickman solicited him to sell $200 worth of cocaine on the street, that he accepted Stickman's proposal with the sole intent to turn the cocaine over to Officer Denton as evidence, and that he was on his way to Officer Denton when he was arrested. He acknowledged that Officer Denton had not asked him to make an actual drug purchase from Stickman; nonetheless, he asserted that he obtained the cocaine from Stickman solely in furtherance of Officer Denton's request for information. Officer Denton testified on Reed's behalf; he confirmed that he had asked Reed to gather information on Stickman. Denton and other officers

also testified that Reed had served as an informant in the past and had provided reliable information.

A jury found Reed guilty of possession of cocaine with the intent to deliver. Reed has appealed from the resulting conviction.

Reed contends he should have been granted a new trial because the trial judge committed prejudicial misconduct during voir dire. The judge allegedly asked the jurors if they would be influenced by the fact that there were unrelated criminal charges pending against Officer Denton, Reed's primary defense witness. Reed argues that by relaying to the jurors prejudicial information about his primary witness, the judge improperly interfered with the impartiality of the jurors. The majority agrees with this argument. I disagree.

Reed also contends his trial attorney rendered ineffective assistance by failing to request an instruction on his theory of defense based on Iowa Code section 704.11.

I.

I first address the issue of whether the trial court's questioning was prejudicial, thus requiring that the defendant receive a new trial.

The defendant contends the trial court's question to the jury regarding their ability to be impartial in considering testimony by defense witness Officer Denton was prejudicial. The trial court specifically stated during a discussion in chambers the reasons he found it necessary to

question the potential jurors on this subject. It appears the judge was seriously concerned with the impact of the media with regard to the criminal charges pending against Officer Denton. The district court's question to the jury must be viewed against the background of the entire trial. In chambers, the trial court pointed out the fact that a grand jury investigation pending against Officer Denton had been in progress for four to five months. The judge also explained the situation had received a great deal of media coverage, both on television and in the newspaper. The trial court felt strongly that it would be difficult to live in Black Hawk County and not be aware of the charges pending against Officer Denton. The judge contended he asked the question of the jurors specifically to exclude any individual who might have strong feelings against Officer Denton. A district court's questions to the members of a jury panel

> reaches the level of a constitutional deprivation only when the guise of impartiality incumbent upon his function is destroyed, thereby demolishing the defendant's credibility, his presumption of innocence, and any chance whether guilty or innocent, that he had of a successful defense . .

State v. Johnson, 243 N.W.2d 598, 603 (Iowa 1976).

The trial court's question did not show any obvious hostility toward the defendant. Additionally, he did not indicate anything with regard to the defendant himself. With regard to the witness, the judge did not discuss the specific charges against the defendant, nor did he indicate

the witness had committed any sordid or heinous act. Further, the judge did not make any comments regarding his opinion on the forthcoming evidence.

The judge clearly asked the question on voir dire out of concern with the fact the witness was in the Black Hawk county limelight due to the criminal charges pending against him. His actions were intended to insure a fair trial for the defendant. While the defendant contends otherwise, he has failed to demonstrate any prejudice. The only evidence the defendant provided with regard to prejudice is the statement that "the jury certainly took the court's questions as an indication that Officer Denton was disreputable and not credible." Defendant makes this bald assertion without providing any evidence to support the statement. The defendant could have gotten affidavits or produced juror testimony to show extraneous evidence caused prejudice. See Iowa R. Evid. 606(b). However, the defendant presented no evidence at all which would tend to demonstrate prejudice. Additionally, we note the record indicates the evidence against the defendant was overwhelming. I would find the questions submitted by the trial judge were not prejudicial; and thus would affirm the conviction.

II.

The defendant also contends his attorney rendered ineffective assistance of counsel by failing to request a jury instruction premised on Iowa Code section 704.11.

This section provides:

> A peace officer or person acting as an agent of or directed by any police agency who participates in the commission of a crime by another person solely for the purpose of gathering evidence leading to the prosecution of such other person shall not be guilty of that crime or of the crime of solicitation as set forth in section 705.1, provided that all of the following are true:
>
> 1. The officer or person is not an instigator of the criminal activity.
>
> 2. The officer or person does not intentionally injure a nonparticipant in the crime.
>
> 3. The officer or person acts with the consent of superiors, or the necessity of immediate action precludes obtaining such consent.
>
> 4. The officer's or person's actions are reasonable under the circumstances.
>
> This section is not intended to preclude the use of undercover or surveillance persons by law enforcement agencies in appropriate circumstances and manner. It is intended to discourage such activity to tempt, urge or persuade the commission of offenses by persons not already disposed to commit offenses of that kind.

Generally, ineffective assistance of counsel claims are preserved for postconviction to allow trial counsel an opportunity to defend the charge. State v. Mulder, 313 N.W.2d 885 (Iowa 1981); State v. Nebinger, 412 N.W.2d 180 (Iowa App. 1987). It does not appear the record is so completely devoid of supporting evidence so as to justify summarily dismissing the claim. Nor can we substantiate the claim based on this record.

The jury instruction, which the allegedly ineffective counsel did not request, formed the foundation of the

defendant's defense. There appears to be at least some evidence in the record to support it. I would allow an opportunity for the trial counsel to explain why he did not request the proposed instruction. I therefore would preserve this issue for postconviction proceedings.