IN THE COURT OF APPEALS OF IOWA

No. 3-226 / 92-565

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CLERK SUPREME COURT
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STATE OF IOWA,

Appellee,

vs.

DEWITT N. BABERS,

Appellant.

Appeal from the Iowa District Court for Scott County, James R. Havercamp, Judge.

The defendant appeals his conviction, following a jury trial, of delivery of a schedule II counterfeit controlled substance in violation of Iowa Code section 204.401(1)(c) (1991). **REVERSED AND REMANDED FOR A NEW TRIAL.**

Linda Del Gallo, State Appellate Defender, and B. John Burns, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Sheryl A. Soich, Assistant Attorney General, William E. Davis, County Attorney, and Hugh J. Pries, Assistant County Attorney, for appellee.

Heard by Oxberger, C.J., and Schlegel and Hayden, JJ. Donielson, J., takes no part.

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SCHLEGEL, J.

The defendant, Dewitt N. Babers, appeals his conviction, following a jury trial, of delivery of a schedule II counterfeit controlled substance in violation of Iowa Code section 204.401(1)(c) (1991). Babers contends the district court erred in excluding the testimony of a witness and in failing to instruct on the defense of entrapment.

Christine Stalker worked as a confidential informant for the Davenport Police Department during the summer of 1991. Stalker approached Babers and asked if he would sell her some rocks (a common term for crack cocaine). Babers sold Stalker a handful of rocks for thirty dollars. The rocks were rocks, not crack cocaine.

The State charged Babers with delivery of a counterfeit controlled substance and failure to affix a drug tax stamp. Babers filed notices of intoxication and entrapment defenses, and the district court dismissed the tax-stamp count. At trial Stalker denied she acted as a confidential informant to obtain a benefit on the police officer test and further denied that the police excused a traffic ticket in consideration of her work.

After the State had rested its case, Babers sought to call Max Ray to testify on Babers' behalf. Ray's identity had not previously been disclosed to the State, although Babers' counsel became aware of the nature of Ray's testimony several days earlier. Defense counsel indicated

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Ray's testimony would contradict Stalker's testimony concerning the police examination and the traffic tickets.

The district court excluded the witness, stating:

> Well, it's on a rather minor matter of impeachment as well. It's a contrary statement on a very minor part of her testimony it seems to me. Certainly went into the motivation that the witness had for testifying and established I think a motivation along the lines that you are now attempting to re-enforce, that is, that she did have an expectation of cooperation and a better position in her school as well as with the law enforcement officers. I think it's probably not strictly cumulative but it's along that line. I'm going to rule that without notice the witness cannot testify.

The court refused to instruct the jury on Babers' entrapment or intoxication defenses, indicating Babers failed to meet his burden of generating a fact question. The jury found Babers guilty as charged. The district court entered judgment and sentenced Babers to a prison term not to exceed ten years. Babers appeals. We reverse and remand for a new trial. We review for correction of errors at law. Iowa R. App. P. 4.

Babers' first contends the district court erred in refusing to permit Babers to offer the testimony of Max Ray, an acquaintance of Stalker. Ray's testimony would have tended to impeach the credibility of Stalker's testimony. Specifically, Ray would have testified to the following facts, all of which Stalker denied on cross-examination: (1) the police department was intending to give Stalker, the confidential informant, preferential consideration when she applied for a position with the department; (2) the police

department had "fixed" a traffic ticket for Stalker in exchange for her cooperation; (3) Stalker had called the defendant a "dickhead." The district court declared that Ray's testimony would be excluded.

Iowa Rule of Criminal Procedure 12(4), provides:

> If the defendant has taken depositions under subsection 1 of this rule and does not disclose to the prosecuting attorney all of the defense witnesses (except the defendant and surrebuttal witnesses) at least nine days before trial, the court may order the defendant to permit the discovery of such witnesses, grant a continuance, or enter such other order as it deems just under the circumstances. It may, if it finds that no less severe remedy is adequate to protect the state from undue prejudice, order the exclusion of the testimony of any such witnesses.

(Emphasis added.) Rule 12(4) thereby grants to the court limited discretion to exclude witness testimony in cases where "no less severe remedy is adequate to protect the state from undue prejudice." The record in the current case contains no inquiry by the district court of undue prejudice nor any findings concerning the availability of less severe remedies. However, it is clear that adequate protection of the State could have been provided by simply permitting a deposition of the prospective witness. The short time consumed by such a procedure would have been warranted in the interest of justice.

The Iowa Supreme Court has held that where the discretion of the district court to admit evidence is limited by a responsibility to make certain findings, abdication of that responsibility constitutes reversible

error. State v. Hackney, 397 N.W.2d 723, 728 (Iowa 1986); Sullivan v. Chicago & Northwestern Transport. Co., 326 N.W.2d 320, 328 (Iowa 1982). Here, the language of rule 12(4) reveals that the district court's discretion to order the exclusion of witness testimony is limited by a responsibility to "find that no less severe remedy is adequate to protect the state from undue prejudice." (Emphasis added.) The district court failed to make this requisite finding prior to excluding Ray's testimony. We hold this constitutes an abuse of discretion. The district court prevented Babers from calling the only witness Babers felt was important to his defense. Stalker was the primary witness against Babers, and the weight and credibility afforded Stalker's testimony was therefore a key issue.

Next, Babers contends the district court erred in failing to instruct the jury on the entrapment defense. The district court rejected Babers' request for an entrapment instruction on the ground that Babers failed to achieve his burden of generating a fact question on the defense of entrapment. Since our resolution of the first issue on appeal is dispositive of this case, we decline to address the entrapment issue.

In accordance with the preceding discussion, we reverse the defendant's conviction and remand this case for a new trial.

REVERSED AND REMANDED FOR A NEW TRIAL.

Hayden, J., concurs; Oxberger, C.J., dissents.

OXBERGER, C.J., (dissenting)

I respectfully dissent.

The trial court properly exercised its discretion in refusing to allow Ray to testify. The defense learned of the witness on a Friday, during the trial, but did not inform the prosecution until the following Tuesday. The State had rested its case in chief and the defense had begun to present witnesses. At that point in the trial, requiring discovery of the witness or grant of a continuance could have been unduly prejudicial to the State. Thus, I find it within the discretion of the trial court to refuse to allow Ray's testimony.

In addition, I do not read Iowa Rule of Criminal Procedure 12(4) to require a specific finding in the record that no less severe remedy is available. In those instances where such a finding is specifically required to be articulated, the rule clearly states such a mandate. See, e.g., Iowa R. Crim. P. 16(1) (requiring a defendant to waive a jury trial "on the record").

Babers further maintains the court erred in refusing to instruct the jury on his entrapment defense because (1) the transaction, as described by Stalker, was wholly legal and would appear to be advantageous to the average citizen, and (2) Stalker approached him, initiated the transaction and

denied wearing a wire or being a police officer. Although the majority does not address this issue, I believe it is germane to disposition of the case.

Entrapment occurs "when a law enforcement agent induces the commission of the offense, using persuasion or other means likely to cause a normally law-abiding person to commit it." State v. Petersen, 490 N.W.2d 53, 55 (Iowa 1992). Conduct merely affording a person an opportunity to commit an offense is not entrapment. Id. The trial court has a duty to instruct the jury on the issues it is charged with deciding, but should not instruct on claims not substantially supported by the evidence. State v. Lucas, 368 N.W.2d 124, 127-28 (Iowa 1985).

I agree with the trial court's finding that Babers did not generate a fact question on the defense of entrapment. See State v. Cooper, 248 N.W.2d 908, 910 (Iowa 1976). The undisputed testimony established that the confidential informant approached Babers and asked if he had any "rocks," the common street name for crack cocaine. No other evidence presented indicated she did anything further to induce Babers to enter into the transaction. I would affirm the decision of the trial court.