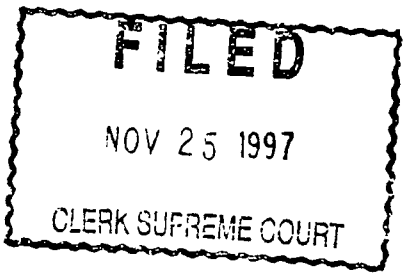
IN THE COURT OF APPEALS OF IOWA

No. 7-410 / 96-1239

000357



STATE OF IOWA,
Appellee,

vs.

DELON A. HORNE,
Appellant.

Appeal from the Iowa District Court for Dubuque County, Robert J. Curnan, Judge.

Defendant appeals the judgment and sentence entered upon his conviction of delivery of a controlled substance, cocaine, in violation of Iowa Code sections 124.401(1)(c) and 124.401A (1995). **AFFIRMED.**

Monica L. Ackley, Dubuque, for appellant.

Thomas J. Miller, Attorney General, Susan M. Crawford, and Martha Boesen Assistant Attorney Generals, Fred H. McCaw, County Attorney, and Timothy Gallagher, Assistant County Attorney, for appellee.

Heard by Cady, C.J., and Huitink and Streit, JJ.

CADY, C.J.

Delon Horne raises three points in his appeal from the judgment and sentence following his conviction of delivery of a controlled substance. He claims there was insufficient evidence to support the conviction, he received ineffective assistance of counsel, and the trial court abused its discretion in finding the drug transaction took place within 1000 feet of a school. We affirm.

Horne was arrested for delivery of cocaine after a drug task force undercover agent purchased drugs from him at a motel room in Dubuque. The undercover operation began when an informant called Horne and told him his "girlfriend" would be coming to his motel room to pick up drugs. After obtaining $275 in serialized cash, the task force officer arrived at Horne's motel room. The officer testified at trial Horne let her in the room and gave her cocaine in exchange for $225. Horne testified he did not sell cocaine to the officer, but merely offered her the drug without an exchange of cash. After leaving the motel, the officer took a circuitous route back to her office because she feared she was being followed. Although the officer was equipped with a devise to audibly record the transaction, it did not function properly.

At trial, a Dubuque police officer testified the distance from Horne's motel room to a local high school building was 825 feet. He calculated this distance by determining the two points on a plat map he obtained from the city engineer's office and using a ruler to transform the map distance into feet using the key of the map. Horne's fiancé testified she recorded a distance of 1321 feet when she walked from

the motel to the school with a measuring wheel. School was not in session during the transaction.

The trial judge found Horne guilty of delivery of a schedule II controlled substance following a bench trial. The court sentenced him to an indeterminate term of fifteen years based on a statute which provides an enhanced penalty for drug transactions which occur within 1000 feet of a school. On appeal Horne argues insufficient evidence existed to support his conviction, he received ineffective assistance of counsel, and the district court abused its discretion in finding the drug transaction took place within 1000 feet of a school building.

I. Sufficiency of Evidence

Horne asserts the State failed to present sufficient evidence to prove him guilty beyond a reasonable doubt. This contention was not raised by way of motion for judgment of acquittal in the trial court and cannot be urged for the first time here. Iowa R. Crim. P. 18(8); *State v. Grosvenor*, 402 N.W.2d 402, 406 (Iowa 1987); *State v. Dickerson*, 313 N.W.2d 526, 529 (Iowa 1981). We therefore decline to address this issue. Even if we were to consider the issue, we conclude sufficient evidence exists to support the conviction.

II. Ineffective Assistance of Counsel

Horne's ineffective assistance of counsel claim involves a constitutional challenge. Therefore, our scope of review is de novo. *State v. Ray*, 516 N.W.2d 863, 865 (Iowa 1994).

Ordinarily, ineffective assistance of counsel proceedings are preserved for postconviction proceedings. *Id.*; *see also State v. Buck*, 510 N.W.2d 850, 853 (Iowa 1994). These claims may be resolved on direct appeal, however, when the record adequately addresses the issues. *Ray*, 516 N.W.2d at 865. Moreover, a claim of ineffectiveness of counsel is an exception to the general rule that an issue must be raised timely and adequately in order to preserve error for appeal. *Earnest v. State*, 508 N.W.2d 630, 632 (Iowa 1993).

To prevail on an ineffective assistance of counsel claim, Horne must prove by a preponderance of the evidence that: (1) counsel failed to perform an essential duty; and (2) prejudice resulted. *Ray*, 516 N.W.2d at 865; *State v. Bayles*, 551 N.W.2d 600, 610 (Iowa 1996). Horne must therefore overcome the strong presumption of counsel's competence and that counsel's error worked to his actual and substantial disadvantage, creating a probability that, but for the error, the trial's result would have been different. *Ray*, 516 N.W.2d at 865 (citing *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 2069, 80 L. Ed.2d 674, 699 (1984)). We often most efficiently dispose of the ineffective assistance of counsel claim by looking first to the question of prejudice. *State v. Hildebrant*, 405 N.W.2d 839, 841 (Iowa 1987).

Horne asserts his trial counsel should have objected to the testimony by the police officer concerning the distance from his motel room to the school. Specifically, he alleges the officer relied on a plat map which was subject to a hearsay objection.

Counsel need not make every possible objection to satisfy the standard of normal competency. *State v. Carberry*, 501 N.W.2d 473, 477 (Iowa 1993). Additionally, a miscalculated trial strategy or mistake in judgment does not necessarily amount to ineffective assistance of counsel. *State v. Wissing*, 528 N.W.2d 561, 564 (Iowa 1995). Trial counsel is entitled to a presumption of competence and we will not second guess reasonable trial strategy. *Id.*

In this case, it could have been reasonable trial strategy for counsel to not raise a hearsay objection based on the plat map. Counsel put on its own witness regarding the distance from the motel room to the school. By raising such a hearsay objection, counsel would have forced the State to call in a custodian of records to establish the foundation for the plat map. *See* Iowa R. Evid. 803(6). Such an action could highlight the validity of the map in comparison to Horne's measurement. In any case, because the plat map could have been admitted into evidence as an exception to the rule against hearsay, no prejudice resulted to Horne. Moreover, our review of the record reveals the officer provided additional evidence concerning the distance between the motel and the school without the aid of the plat map.

Horne next claims counsel should have called additional witnesses. He claims these witnesses could have further explained the events of the evening. Additionally, Horne maintains a surveillance officer who placed the transaction at a different time than the other witnesses should have been called.

Complaints about a failure to call witnesses should be accompanied by a showing that the absent testimony would have been beneficial. *Nims v. State*, 401 N.W.2d 231, 235 (Iowa App. 1986). Horne has failed to show how additional testimony would have been beneficial to his case or how the lack of such testimony prejudiced him. Even if other people were in the room, Horne admitted he offered drugs to the undercover agent. Additionally, the undercover officer testified she heard the call when Horne and the informant arranged for her visit. Moreover, evidence of the surveillance officer's deposition testimony was introduced at trial through another witness. Considering the overwhelming trial evidence of guilt, we conclude Horne suffered no prejudice when counsel failed to call additional witnesses.

Horne also claims counsel should have raised an intoxication defense against the delivery charge. Although voluntary intoxication cannot constitute a complete defense to a crime, it has long been the general rule in Iowa that it may negate specific intent when it is an element of the crime charged. *State v. Caldwell*, 385 N.W.2d 553, 557 (Iowa 1986); Iowa Code § 701.5 (1995). Voluntary intoxication, however, is not a defense when the crime does not require a specific intent. *Caldwell*, 385 N.W.2d at 557.

Delivery of a controlled substance is a general intent crime. Iowa Code § 124.401; *see State v. Buchanan*, 549 N.W.2d 291, 294 (Iowa 1996) (general intent crimes occur when defendant intends deliberate or knowing action, as opposed to

causing the prohibited result through an accident or carelessness). Because the crime of delivery contains no specific intent element, intoxication would not excuse Horne's conduct. Horne thus experienced no prejudice by counsel's failure to raise this defense.

III. Sentencing

We review Horne's sentencing claims for errors at law. Iowa R. App. P. (4). Trial court sentencing decisions are cloaked with a strong presumption in their favor, and an abuse of discretion will not be found unless the defendant shows such discretion was exercised on clearly unreasonable grounds. *State v. Loyd*, 530 N.W.2d 708, 713 (Iowa 1995).

Horne claims the trial court abused its discretion by determining Horne's motel room was within 1000 feet of a school.[1] He first questions the competency of the police officer's testimony regarding the plat map and reiterates his hearsay objections concerning the plat map. In this case, Horne never raised a hearsay objection to the plat map or challenged officer Parker's competency to testify. We will not consider this issue for the first time on appeal. *See State v. Hollins*, 397 N.W.2d 701, 707

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[1] Iowa Code section 124.401A authorizes an enhanced penalty for drug transactions occurring within 1000 feet of a school. The statute provides: "In addition to other penalties provided in this chapter, a person...who unlawfully distributes...a substance...to another person...within one thousand feet of the real property comprising a public or private school...may, at the judges discretion, be sentenced to up to an additional term of confinement of five years." Iowa Code § 124.401A. This provision was amended in minor respects in 1996. Horne was sentenced before the effective date of the amendment.

(Iowa 1986) (supreme court would not consider general hearsay objections on appeal when the trial court was given no opportunity to consider confrontation clause implications at trial).

Horne next claims the proper measure between the school and the motel was a pedestrian route rather than a straight line. This claim requires us to determine the legislative intent behind Iowa Code section 124.401A, which allows for an enhanced penalty for drug transactions within 1000 feet of a school. We have previously observed the similarity of section 124.401A to federal statute 21 U.S.C.S. § 860 (Law. Co-op Supp. 1997). *See State v. Peterson*, 490 N.W.2d 53, 55 (Iowa 1992). Federal courts have determined the "within 1000 feet" language refers to a distance measured by a straight line rather than by a pedestrian route. *See United States v. Watson*, 887 F.2d 980, 981 (9th Cir. 1989); *United States v. Ofarril*, 779 F.2d 791, 792 (2d Cir. 1985). We agree with the court in *Watson* that "[r]equiring speculation about pedestrian routes would create uncertainty in a statute which was clearly meant to establish clear lines of demarcation. . . ." We conclude the phrase "within one thousand feet" in section 124.401A refers to a distance measured by a straight line.

Horne also asserts the enhanced sentence should not be imposed unless school was in session or children were present, and he must have had knowledge the school was nearby. School does not need to be in session or children do not need to be present to trigger the enhanced sentence. *See Peterson*, 490 N.W.2d at 55 (to obtain an enhanced sentence, State did not need to show students were actually congregated

within 1000 feet of an area where offense occurred). Additionally, the language of the statute does not require the defendant's knowledge of the presence of a school near the cite of the drug transaction. *See* Iowa Code § 124.401A. We will not read requirements into a statute not created by the legislature. *See State v. Burns*, 541 N.W.2d 875, 876 (Iowa 1995).

The record indicates the sentencing court considered school was not in session and Horne was operating at a fixed location rather than a one time meeting place before imposing the enhanced penalty. We find no abuse of discretion occurred.

AFFIRMED.