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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

302

STATE OF IOWA,)

Plaintiff-Appellee,) Filed September 6, 1984

vs.)

RICHARD ALONZO GONZALES,) 4-291
83-1410

Defendant-Appellant.)

Appeal from the Iowa District Court for Bremer County - Ralph McCartney, Judge.

Defendant appeals from his conviction for delivery of a controlled substance (marijuana) in violation of Iowa Code section 204.401(1)(a). AFFIRMED.

Charles Harrington, Appellate Defender, and Patrick R. Grady, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General, and Valencia Voyd McCown, Assistant Attorney General, for plaintiff-appellee.

Considered by Oxberger, C.J., Snell, and Hayden, JJ.

HAYDEN, J.

Defendant appeals from his conviction for delivery of a controlled substance (marjuana) in violation of Iowa Code section 204.401(1)(a). On appeal defendant asserts: (1) that the trial court erred in allowing rebuttal testimony of prior drug sales by the defendant; (2) the trial court's instructions on entrapment did not adequately distinguish between the "objective" and "subjective" tests; and (3) his trial counsel was ineffective for failing to object to evidence suggesting that the defendant had expressed an interest in future drug sales.

Our review of criminal cases is ordinarily on assigned error. State v. Cullison, 227 N.W.2d 121, 126-27 (Iowa 1975). However, we make an independent evaluation of the totality of the circumstances on issues involving violation of basic constitutional safeguards. Id.

I. Prior Drug Sales. A State's witness, David Pietro, testified on cross-examination that he had tried and failed to purchase marijuana from the defendant while serving as a police informant:

> Q. . . . And during that time from October of 1982 to the present, have you had occasion to be in the defendant's home on a number of times? A. Yes.
>
> Q. How many times? A. I don't know.
>
> Q. I mean 10, 20, 50? A. I don't know. 30, 40 times maybe.
>
> Q. So you've been in the defendant's residence approximately 30 or 40 times during which time you've been working for the Waverly Police Department? A. Yes.
>
> Q. And had you been instructed by the police department to attempt to purchase marijuana from Mr. Gonzales? A. Yes.
>
> Q. And was your purpose for being there on many of those 30 or 40 occasions to try to do just that? A. Yes.
>
> Q. You didn't do it, did you; you didn't purchase— A. No, not at that time, no.

Pietro was then permitted to testify on rebuttal that he had purchased marijuana from the defendant before becoming a police informant:

Q. Now, on those 30, 40, 50 times you might have been at the defendant's apartment, was that including the period before October when you had previously known the defendant? A. No.

Q. How were you acquainted with the defendant prior to October of '82, if you were? A. Just go over there, sit and talk to him.

Q. So you were over there how many times before October? A. Probably about the same, 30 or 40 times.

Q. On any of those occasions did you purchase any drugs from the defendant?

MR. CARNEY: We will object to this. It's outside of the scope of proper examination. It seems like I've brought up the motion that was ruled upon by this court prior to trial too many times.

THE COURT: Overruled.

THE WITNESS: A. Yes.

MR. RIFFEL: Q. What did you purchase?

THE WITNESS: A. Marijuana.

Defendant argues that the trial court erred in admitting evidence of prior drug sales to Pietro. He claims that this error was especially prejudicial since his defense was one of entrapment.

Ordinarily evidence of prior crimes, admissible for certain limited purposes, is inadmissible for the purpose of showing that the defendant has a predisposition to criminal behavior. State v. Howell, 290 N.W.2d 355, 360 (Iowa 1980); Iowa Rule of Evidence 404(b). The trial court in this case ruled prior to trial that the State could not introduce evidence of drug sales made by the defendant other than the one with which he was charged. At trial the court sustained defense counsel's objections to evidence of prior sales several times before Pietro testified.

The record clearly shows that defendant "opened the door" on the subject of prior drug sales in his cross-examination of Pietro. Defendant attempted to bolster his entrapment defense by showing that on prior occasions he had resisted the temptation to make illegal sales. We believe that once defendant elicited

from Pietro that he had not been able to buy drugs from defendant since October of 1982, the trial court did not err in allowing the State to question Pietro about purchases made from defendant prior to that date. The trial court has discretion to admit otherwise inadmissible evidence when it is fairly responsive to inadmissible evidence introduced by the other side. State v. Padgett, 300 N.W.2d 145, 147 (Iowa 1981); State v. Pepples, 250 N.W.2d 390, 394 (Iowa 1977). When the defendant tried to show by the absence of prior drug sales that he had no predisposition to criminal activity, the State could fairly rebut this inference as it did.

II. Jury Instruction on Entrapment. In State v. Mullen, 216 N.W.2d 375, 382 (Iowa 1974), the Iowa Supreme Court adopted the objective test of entrapment which focuses on the actions of law enforcement officials rather than on the predisposition of the accused to commit the crime. The court cited approvingly some proposed federal legislation which defines entrapment in terms of police conduct likely to cause normally law-abiding persons to commit an offense. Id. However, the court stated that transactions between law enforcement officials and the defendant, including the defendant's response to the inducements, are still relevant under the objective test. Id. at 382-83.

Defendant argues that the trial court's instructions in this case confused the objective and subjective tests for entrapment. Specifically, defendant alleges that the trial court erred in denying his request that the instruction include the following sentence: "You should not consider whether they (law enforcement agents) did in fact induce this defendant to commit this crime nor should you consider whether the defendant may have been predisposed to commit a crime without this inducement."

The entrapment instruction given by the trial court in this case reads as follows:

Instruction No. 9

The defendant asserts that he was the victim of entrapment as to the crime charged. The State has the burden of disproving entrapment by the evidence beyond a reasonable doubt and if it fails to sustain its burden, the defendant must be acquitted.

"Entrapment" occurs when law enforcement agents and their informant induce the commission of an offense using persuasion or other means likely to cause normally law-abiding persons to commit the offense.

The law permits law enforcement officers to afford opportunities to persons to commit crimes, and they may employ strategems to apprehend persons engaged in criminal activity, but they cannot plant in the mind of normally law-abiding persons the idea to commit a crime and induce its commission in order to prosecute them. The question is whether the claimed inducement would have been likely to have caused a normally law-abiding person to commit the crime in question under the circumstances of this case.

In applying this instruction you should consider the course of conduct between the law-enforcement officers or the person who served as their agent and informer, and the defendant. The transactions leading up to the offense, the interaction between the officer or informer and the defendant and the response of the defendant to such conduct are all to be considered by you in judging what the effect of the officer's or informer's conduct would be on a normally law-abiding person.

It is your duty to acquit the defendant if you find that officers of the City of Waverly Police Department or the person serving as their agent and informant conducted themselves in a manner such as would constitute entrapment as above defined.

However, if you find from the evidence beyond a reasonable doubt that such conduct did not constitute entrapment as above defined, then the State has sustained the burden imposed upon it and has disproved the defense of entrapment.

This instruction, based largely on Iowa Uniform Jury Instruction 213, correctly states the law of entrapment in Iowa. The second paragraph repeats almost verbatim the definition of entrapment approved by the supreme court in Mullen. The third paragraph discusses the definition and clearly focuses the jury's attention on the actions of law enforcement officials and their effect on normally

law-abiding persons rather than on the particular defendant. Finally, the fourth paragraph restates the Mullen court's holding that transactions between the defendant and law enforcement officials are relevant to the objective test.

As long as the instructions correctly state the law, the trial court is free to reject any specific language urged by the parties. State v. Savage, 288 N.W.2d 502, 508 (Iowa 1980). The trial court did not abuse its discretion in rejecting the amendment to instruction 9 proposed by the defendant.

III. Ineffective Assistance of Counsel. At trial a tape recording of the sale of marijuana by the defendant to the police informant, Scott Wilson, was played for the jury. Additionally, both Wilson and a police officer monitoring the tape during the sale testified. This evidence revealed that during the conversation defendant stated that if Wilson found some "good stuff" and sent it to him, defendant would send him money. Defendant also asked the name of the fictitious friend for whom Wilson was allegedly purchasing the marijuana in case this friend needed more while Wilson was out of town. Defendant argues that his trial counsel was ineffective for failing to object to these references to possible future drug transactions involving the defendant.

The test of whether a defendant has been denied his constitutional right to the effective assistance of counsel is whether "under the entire record and totality of the circumstances counsel's performance was within the range of normal competency." Snethen v. State, 308 N.W.2d 11, 14 (Iowa 1981). When a claim of ineffective assistance is based upon a specific act or omission of counsel at trial, it must be shown that "(1) counsel failed to perform an essential duty, and (2) prejudice resulted therefrom." Id. "Prejudice cannot be found unless the error constitutes a denial of the accused's due process right to a fair trial, a fundamental miscarriage of justice, or an equivalent constitutional deprivation." State v. Miles, 344 N.W.2d 231, 234 (Iowa 1984).

Although defense counsel might have objected to the evidence of defendant's willingness to participate in future drug sales, we do not believe that his failure to do so rises to the level of ineffective assistance of counsel. In Karasek v. State, 310 N.W.2d 190, 192 (Iowa 1981), the supreme court held that counsel for a defendant charged with arson was not ineffective for failing to object to the State's introduction of evidence that defendant was present at one previous fire and for belatedly objecting to evidence that defendant was present at another previous fire. The court noted that a lawyer's overall performance should not be judged by a single mistake made during the course of a trial. Id.

After reviewing the entire record in this case, we conclude that counsel's overall performance was within the range of normal competency. Counsel was very diligent in objecting to any evidence of prior sales made by the defendant. He could have decided that further objections to these remarks made by the defendant would have prejudicially directed the jury's attention to them and would have been more detrimental than allowing the statements into evidence.

AFFIRMED.