FILED
APR 02 1991
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 1-09 / 90-218

471

STATE OF IOWA,

Appellee,

vs.

LEAVY DON HEYWARD,

Appellant.

Appeal from the Iowa District Court for Black Hawk County, L. D. Lybbert, Judge.

The defendant appeals his conviction, following a jury trial, for possession of cocaine with intent to deliver. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Andi S. Lipman, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Roxanne Ryan, Assistant Attorney General, Sarah J. Coats, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and D. Raymond Walton, Assistant County Attorney, for appellee.

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

HAYDEN, J.

Leavy Don Heyward was arrested along with another co-defendant, Ivy Nelson Fountain. Waterloo police officers had set up a controlled buy of cocaine. Following the resulting arrests, the police found a handgun underneath Heyward's seat on the passenger side of the vehicle he and Fountain were driving. A bag of drug paraphernalia was also found under the seat.

There was testimony the day of their arrest the two had been pimping for two girls, trying to raise some money. Apparently they would take the two girls, drop them off on a street, and then proceed to a parking lot to wait for the girls. As they were leaving one of these parking lot waiting areas they were stopped by the police.

A jury found Heyward guilty of possession of cocaine with intent to deliver. The district court later sentenced Heyward to a term of imprisonment not to exceed ten years. Heyward has appealed his conviction and sentence.

Heyward contends he should have been granted a mistrial because a police officer testified there was "more than sufficient evidence to support the defendant was dealing" in drugs.

Heyward challenges the sufficiency of the evidence to corroborate the testimony of an accomplice, as required by Iowa Rule of Criminal Procedure 20(3).

In addition, Heyward contends the prosecutor committed prejudicial misconduct during closing argument by

commenting on Heyward's failure to call witnesses or present evidence. Heyward asserts these comments violated his constitutional right to avoid self-incrimination and entitled him to a mistrial. He argues his trial attorney rendered ineffective assistance by waiving the mistrial remedy.

Finally, Heyward contends the sentencing court abused its discretion by allegedly relying on a fixed policy of never giving a suspended sentence to a person who has previously received a suspended sentence.

Our scope of review is on assigned errors of law. Iowa R. App. P. 4. We deal with Heyward's arguments in the order presented.

I. Witness's Opinion on the Evidence

Heyward's first assignment of error concerns an opinion given by a police officer as to the state of the evidence against him. We set out the pertinent portion of the transcript:

> Q. I'll ask you, officer, what's that opinion?
> A. Well, my opinion is that if you look at all the evidence, there is more than sufficient evidence to support that the defendant was dealing--
> MR. BRINER: I object, Your Honor, and I ask to be heard right now out of the jury's presence.
> THE COURT: Well, the objection is sustained. Any part of the answer that has been received is stricken from the record and the jury is instructed to disregard it.

The State claims the jury most likely did not even hear the officer's full answer as defense counsel interrupted the answer and objected loudly. One alternate juror testified he did not hear the objectionable testimony due to the immediate and loud reaction of defense counsel. However, that alternate was eighty years old and wore a hearing aid. The court reporter heard the full testimony and transcribed it. We therefore assume the jurors heard this testimony.

As the trial court recognized, the police officer's testimony is inadmissible. No expert opinion testimony is allowed on the issue of the guilt or innocence of a defendant. State v. Myers, 382 N.W.2d 91, 94 (Iowa 1986).

> Trial court has broad discretion in ruling on motions for mistrial. Generally, trial court's quick action in striking the improper response and cautioning the jury to disregard it, coupled, when necessary, with some type of general cautionary instruction, will prevent any prejudice. A defendant who asserts these actions were insufficient bears the heavy burden of demonstrating a clear abuse of discretion on the part of trial court.

State v. Brown, 397 N.W.2d 689, 699 (Iowa 1987) (citations omitted).

In the present case, the trial court moved immediately on its own motion and struck the objectionable answer. The trial court further admonished the jury to disregard the answer. Finally, the trial court gave a general cautionary instruction concerning stricken testimony the jury may have heard.

We determine the defendant has not carried his "heavy burden of demonstrating a clear abuse of discretion." The trial court's prompt action, combined with the cautionary jury instructions, provided the requisite protection from otherwise inadmissible testimony.

We affirm the trial court on this issue.

II. Prosecutor's Comments on Defendant's Failure to Testify

During rebuttal arguments, the prosecutor commented on the defendant's failure to present witnesses. Final arguments were not recorded. However, at an in-chambers hearing after the jury retired to deliberate, the parties agreed to the essence of the comments.

> THE COURT: My memory of what was said immediately prior to that objection was that Mr. Walton had argued that the State was required to inform the defendant of all of its evidence in advance of the trial and had done so and I believe his next comment was that the defendant had the right to call witnesses and could produce witnesses if it saw fit to do so. Is--
>
> THE STATE: As I recall, that's essentially correct. I do recall saying that although the State has the burden of proving the charges, the defendant has an opportunity to call witnesses if he so desires and then after the objection I got up there and I said he could help him.
>
> THE COURT: Is that substantially what took place or do you have some other view as to what comments or argument was being made?
>
> MR. BRINER: I agree that that's substantially what took place.

Heyward's trial counsel waived moving for a mistrial. His reason for doing so was a tactical decision on his

part, to avoid giving the State an opportunity for a dress rehearsal of Heyward's trial. Heyward now argues this trial attorney's failure to move for a mistrial was ineffective assistance of counsel.

As a general rule, issues not presented in the trial court may not be raised for the first time on appeal. Conner v. State, 362 N.W.2d 449, 457 (Iowa 1985). However, in State v. Schoelerman, 315 N.W.2d 67, 71-72 (Iowa 1982), the supreme court recognized that review of an appellate issue is not precluded when failure to preserve error results from a due process denial of effective representation.

Established principles govern our review of Heyward's sixth amendment claim his counsel was ineffective. When considering this claim, our ultimate concern is with "the fundamental fairness of the proceeding whose result is being challenged." Strickland v. Washington, 466 U.S. 668, 696, 104 S. Ct. 2052, 2069, 80 L. Ed. 2d 674, 699 (1984). In deciding this we must consider whether "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Id. at 686, 104 S. Ct. at 2064, 80 L. Ed. 2d at 692-93. "In examining counsel's conduct we review de novo the totality of relevant circumstances." State v. Risdal, 404 N.W.2d 130, 131 (Iowa 1987) (citations omitted). "Defendant bears the burden of proving by a preponderance of the evidence that (1) counsel

failed to perform an essential duty and (2) prejudice resulted." Id. at 131-32.

In proving the first prong of this test, Heyward must overcome the strong presumption counsel's actions were reasonable under the circumstances and fell within the normal range of professional competency. State v. Hildebrant, 405 N.W.2d 839, 841 (Iowa 1987). To prove the second prong of this test Heyward must show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698.

Having reviewed the record, we conclude Heyward has failed to carry his burden on either of the two prongs. Heyward's trial counsel showed himself to be a competent advocate throughout the trial. His decision not to seek a mistrial on the basis of the prosecutor's comments was due to two well-thought-out considerations: (1) the comments were not unduly prejudicial, and (2) a tactical decision not to give the State a "dress rehearsal" and a second chance to convict his client. These are the type of tactical decisions skillful counsel must make during the course of trial. We determine defense counsel's decision not to seek a new trial was within the "normal range of professional competency." Hildebrant, 405 N.W.2d at 841.

Heyward has failed to carry his burden on the second prong as well. We determine the police officer's testimony did not give rise to a "probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698.

We affirm the trial court on this issue.

III. Evidence to Corroborate Accomplice's Testimony

Heyward next argues there is insufficient evidence to corroborate his accomplice Fountain's testimony against him. Iowa R. Crim. P. 20 provides:

> A conviction cannot be had upon the testimony of an accomplice or a solicited person, unless corroborated by other evidence which shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof.

The state is not required to establish corroborative evidence beyond a reasonable doubt. State v. King, 256 N.W.2d 1, 10 (Iowa 1977).

> No general rule can be stated with respect to the quantum of evidence corroborating an accomplice necessary to warrant a conviction. Each case must be governed by its own circumstances, Evidence which merely raises a suspicion the accused is the guilty party of course is not sufficiently corroborative of the testimony of an accomplice to warrant a conviction. However, "the corroboration of an accomplice's testimony need not be strong, nor must it confirm every material fact testified to by the accomplice." All that is required is that the accomplice's testimony be supported in some material fact that tends to connect the defendant with the crime charged and, therefore, supports the credibility of the accomplice's testimony.

State v. Aldape, 307 N.W.2d 32, 41 (Iowa 1981) (citations omitted).

Heyward was arrested clutching $907 in his hand. A loaded .22 caliber pistol was found under his seat. Drug paraphernalia was also found under his seat, as well as drug dealing equipment, rock cocaine, and cocaine residue. A few grams of cocaine were found in the car as well. When searched at the police station, Heyward was found to have cocaine on his person, as well as Schedule III controlled substances in the form of prescription pills. Also found on his person was a small notebook entitled "Don's Money Getter." This notebook contained names and telephone numbers, as well as beeper numbers. Beepers are often used by persons in the drug business. Records such as Heyward's notebook are commonly used to provide drug dealers with a list of possible contacts for drug transactions.

We determine the evidence meets the requisite level to corroborate an accomplice's testimony. We affirm the trial court on this issue.

IV. Refusal to Exercise Discretion in Sentencing

Heyward's final complaint is the trial court improperly refused to exercise its discretion in sentencing. He claims the trial court refused to consider the possibility of suspending his sentence and granting probation.

"When a sentence is not mandatory under the Iowa Criminal Code, a trial court must exercise discretion in

imposing a sentence." State v. Washington, 356 N.W.2d 192, 197 (Iowa 1984). However, a sentence within the statutory maximum will not be overturned absent an abuse of discretion. State v. Sumpter, 438 N.W.2d 6, 10 (Iowa 1989).

Heyward bases his objection of this isolated portion of the trial court's sentencing statement:

> Frankly, I am always reluctant to suspend a sentence to a person that has received a prior suspended sentence regardless of what the offense may have been, so in this case, even if this would have been another burglary as distinguished from possession of cocaine with intent to deliver, I would have been reluctant to deliver, I would have been reluctant to suspend the sentence because defendant has received a prior suspended sentence in Colorado.

We have reviewed the rest of the trial court's statements at the sentencing hearing. Our review demonstrates the trial court, in a lengthy and well-reasoned statement, took all pertinent information into consideration in making its sentencing decision. The sentence was within the statutory maximum. We determine the trial court did not abuse its discretion in its sentencing of Heyward.

We affirm the trial court on this issue.

AFFIRMED.