IN THE COURT OF APPEALS OF IOWA

No. 9-656 / 89-322

STATE OF IOWA,

Appellee,

vs.

RICHARD LAVERN LOMAS,

Appellant.

FILED
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CLERK SUPREME COURT
343

Appeal from the Iowa District Court for Scott County, Edward B. deSilva, Judge.

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

Kent A. Simmons, Davenport, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, and William E. Davis, Scott County Attorney, for appellee.

Heard by Oxberger, C.J., and Donielson and Habhab, JJ.

HABHAB, J.

Defendant Richard Lavern Lomas appeals from his conviction, following a jury trial, for possession of cocaine with intent to deliver. Defendant raises three issues: (1) whether the trial court erred in admitting into evidence certain testimony which had been excluded under a motion in limine; (2) whether the prosecutor committed prosecutorial misconduct by certain remarks made during closing argument; and (3) whether the district court erred in overruling defendant's motion for judgment of acquittal premised upon insufficient evidence. As a subsidiary issue, defendant asserts that any failure to preserve error as to issues one and two above constituted ineffective assistance of counsel. We affirm.

Our review is on assigned errors of law. Iowa R. App. P. 4.

I.

The defendant first asserts as error that Detective Thomas gave certain testimony during the course of the trial that violated an agreement concerning defendant's motion in limine and further claims error because defense counsel failed to properly object to that testimony. The State responds by arguing that because defense counsel failed to object to the admission of that testimony during the course of the trial that defendant has failed to demonstrate any reversible error and further that defendant has failed to prove ineffective assistance of counsel. We

will assume for the purposes of this opinion that an agreement between the State and defense counsel was reached as to certain provisions of defendant's motion in limine. We, however, need not decide whether the testimony complained of violates that agreement for the defendant failed to lodge a proper objection as to the now objected-to testimony. Failure to lodge an objection to testimony which allegedly violates a motion in limine constitutes a waiver of any error. See State v. Latham, 366 N.W.2d 181, 183 (Iowa 1985); State v. Davis, 240 N.W.2d 662, 664 (Iowa 1976). Our supreme court in the Latham case stated as follows:

> In State v. Davis, 240 N.W.2d 662 (Iowa 1976), we addressed the question of whether testimony that violates a ruling on a motion in limine requires reversal of a conviction in the absence of any objection or motion made by the defendant during the trial to deal with the violation. In Davis, a prosecution witness gave an answer during cross-examination which, we assumed arguendo, violated the trial court's ruling on a prior motion in limine. The defendant, however, did not take any action at trial regarding the violation. He made no objection, requested no jury instruction or admonition, nor offered any motion for mistrial. We held that no error was preserved. "To hold otherwise would permit a defendant to take a chance with the jury, holding a claimed error in reserve in case of conviction." Id. at 664.
>
> We find the rationale of Davis to be equally convincing here. Defendant's failure to take any action at trial regarding the prosecutor's question constituted a waiver of any error.

Latham, 366 N.W.2d at 183.

We find defendant has failed to preserve error as to this issue.

Similarly, defendant failed to preserve error on the issue of prosecutorial misconduct during closing argument. As the Iowa Supreme Court recently noted:

> A failure to request a mistrial for alleged misconduct by opposing counsel must be asserted before the issues are submitted to the jury. In permitting the case to be submitted to the jury without asserting the denial of a fair trial by reason of the alleged misconduct, defendant's counsel indicates a willingness to take a chance on a favorable verdict and waives the claim of misconduct.

State v. Radeke, 444 N.W.2d 476, 479 (Iowa 1989) (citation omitted). Here, since no such motion was made of record, defendant waived error as to any alleged prosecutorial misconduct. We also note that the court seemed to agree with the defendant's objection and further stated on the record that the prosecutor should not proceed along the objected-to line in her arguments.

The next issue we take up is whether the district court erred in not granting defendant's motion for judgment of acquittal. The standard of review for such a motion was set out by our supreme court in State v. Aldape, 307 N.W.2d 32, 39 (Iowa 1981):

> In reviewing a motion for a directed verdict based upon insufficiency of the evidence in a criminal case, we view the evidence in a light most favorable to the State. All of the evidence must be considered, State v. Robinson, 288 N.W.2d 337, 340 (Iowa 1980), and all legitimate inferences that may be deducted [sic] therefrom will be accepted. State v. Schrier, 300 N.W.2d 305, 306 (Iowa 1981). A trial court's refusal to direct a verdict for a defendant will withstand challenge if there is any substantial evidence in the record tending to support the charge. State v. York, 256 N.W.2d 922, 927 (Iowa 1977). Substantial evidence means such evidence as could convince a rational

> trier of fact that the defendant is guilty of the crime charged beyond a reasonable doubt. State v. Robinson, 288 N.W.2d at 339.

Defendant's motion for judgment of acquittal was based upon insufficient evidence of intent to deliver. We find there was substantial evidence by which a rational jury could have been convinced beyond a reasonable doubt that defendant was guilty of possession of a controlled substance with intent to deliver.

Officer Greg Collins, a plain clothes Davenport police officer, testified that he observed defendant exit a bar and meet another man, who too had just left the same bar, at defendant's automobile. The man then walked away. A second man repeated this scenario. Officer Collins, who could not see what transpired during these brief meetings because of darkness, testified without objection based upon his experience in law enforcement that these encounters had the characteristics of drug transactions.

Officer Howard testified that he pulled his marked police car behind defendant's vehicle and turned on his flashing lights. Defendant exited his vehicle as Officer Howard approached. Officer Howard observed that defendant had his arm in an unnatural position at his side, with his hand placed close to his right pocket. Officer Howard then told defendant to place his hands on the top of the car. After Howard patted defendant down, he observed three tin foil packets laying where defendant had been standing when he exited his vehicle. These packets contained cocaine.

Officer Welke testified, without objection, that drug users, as opposed to drug traffickers, do not normally have more than one or two such packets in their possession. Rather, such individuals purchase only that amount of drugs necessary for immediate usage. Subsequently, defendant was arrested and his car searched. Officer Thomas testified, without objection, to finding a bag of rice and a bottle of Mannitol. Both of these substances are used in the drug trade. Rice is used in packaging drugs in order to keep moisture from damaging the drugs. Mannitol is used to "cut," or dilute cocaine in order to increase the amount of the drug. Both of the substances found in defendant's car are used by drug dealers, as distinguished from drug users.

The totality of the evidence presented by the State clearly was sufficient for a rational jury to find beyond a reasonable doubt that defendant possessed a controlled substance with intent to deliver. As such, the trial court correctly denied defendant's motion.

II.

At this juncture we turn to defendant's subsidiary issue of ineffective assistance of counsel. Since this issue concerns constitutional safeguards, our review as to this issue is de novo. See State v. Jackson, 380 N.W.2d 420, 421 (Iowa 1986). Ineffective assistance claims are generally reserved for postconviction hearings, but may be determined on direct appeal when the record adequately presents them. See State v. Hildebrandt, 405 N.W.2d 839,

841 (Iowa 1987); State v. Risdahl, 404 N.W.2d 130, 131 (Iowa 1987); State v. Nebinger, 412 N.W.2d 180, 192 (Iowa App. 1987).

We find the record in this case to be insufficient for this court to determine defendant's claim. Defense counsel may well have had good reasons for each inaction which defendant now asserts was error. At a postconviction hearing, defendant's trial counsel will be given the opportunity to explain his inactions.

AFFIRMED.