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IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Appellee,	)	Filed February 22, 1979
vs.	)	
JACK LYNN DAVIS,	)	<u>749</u>
Appellant.	)	62015

Appeal from Cerro Gordo District Court - B. C. Sullivan, Judge.

Defendant appeals his conviction of the crime of delivery of marijuana with intent to profit, alleging error in the court's refusal to declare a mistrial when some jurors saw a photograph not admitted into evidence. - Affirmed.

B. Michael Dunn, Mason City, for Appellant.

Thomas J. Miller, Attorney General of Iowa, Lona Hanson, Assistant Attorney General, and Clayton L. Wornson, Cerro Gordo County Attorney, for Appellee.

Heard by Oxberger, C. J., and Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

Defendant Jack Lynn Davis appeals his conviction by jury of the crime of possession of a Schedule I controlled substance, to wit: marijuana, with intent to deliver for profit in violation of § 204.401(1)(b), The Code (1977). On appeal, the defendant alleges the trial court erred in allowing a posed photograph bearing on the issue of profit, to be viewed by the jury without being admitted into evidence by the State, and without admonition of the jury by the Court as to its prejudicial effect.

Defendant's first assignment of error is that the State's display of a staged photograph depicting bags of marijuana upon a scale, neither the scale nor the photograph being admitted or even offered into evidence, was prejudicial error. Defendant argues that the display of marijuana in a commercial environment upon a scale, prejudicially infers possession with intent to deliver for profit in a commercial sense. He states that the photograph would have been inadmissible and that by its tactics, the State was given the luxury of displaying a prejudicial, inadmissible, unoffered photograph without being subject to any evidentiary rules.

During the examination of Special Agent Ramaeker, the State showed the witness the photograph in question. Thereafter questioning by defendant's counsel revealed the marijuana had been placed on the scale for the purposes of the picture. The witness admitted the marijuana was not found on the scale as the photo depicted, but that the photo had been "staged". Counsel then moved for a mistrial on the basis that the photograph in and of itself would not be admissible, because what the photograph purported to show was not what was found in the condition depicted, and that the photograph was highly prejudicial to defendant's rights.

In overruling defendant's motion, the trial court stated that in its opinion very few of the jurors saw the photograph, stating that not more than four or six of the jurors could have seen it. The court stated the mere picture of the scale with some substance in plastic bags on the same was not harmful error and that it could be cured by admonishment by the court that they, the jury, were to disregard that piece of evidence until it had been received into evidence. Further, the court

stated that if defendant's counsel prepared his own version of an admonishment to the jury, the court would give the same.

A trial court has broad discretion in ruling on motions for mistrial. In reversing the trial court "this court would have to find the trial judge's ruling was . . . so palpably and grossly violative of fact and logic that it evidences not the exercise of will but defiance thereof, not the exercise of reason but rather of passion or bias." Ordinarily abuse of discretion will only be found where there is no support in the record for the trial court's determination. *State v. Brewer*, 247 N.W.2d 205, 211 (Iowa 1976).

Our review of the evidence convinces us that the trial court properly overruled defendant's motion. The challenged evidence, while allegedly seen by several jurors, had not yet been offered in evidence. We find the challenged photograph is not so prejudicial as to require a mistrial. The photograph depicts only a large quantity of a plant-like substance, allegedly marijuana, in plastic bags on top of a produce scale. The State could have accomplished the same thing by bringing the bags of marijuana into the courtroom and dumping them in front of the jury. There was no abuse of discretion.

Defendant's second contention is that the trial court's failure to admonish the jury regarding the staged photograph was prejudicial. The general rule is that improper testimony is not unduly prejudicial if the court admonished the jury. *State v. Burrell*, 255 N.W.2d 119, 122 (Iowa 1977); *State v. Mattingly*, 220 N.W.2d 865, 870 (Iowa 1974). In the instant case, the trial court told defense counsel that it thought an admonishment to the jury to disregard the evidence would be sufficient. The court then stated: "and if Mr. Dunn prepares his own version of an admonishment to the jury, I will give the same. That concludes the record." Defense counsel never prepared the admonishment and the trial court did not issue one on its own.

At the close of all of the evidence, defense counsel again moved for mistrial on the grounds previously urged as well as the failure of the court to issue the admonishment. The court stated that it offered to admonish the jury if Mr. Dunn related to the court the language he wished to use, however he has remained silent,

and failed to do so. A defendant cannot sit by and fail to avail himself of legal procedures to secure a fair trial and later raise lack of the same procedures as grounds for a new trial. State v. Johnson, 243 N.W.2d 598, 606 (Iowa 1976). See also State v. Trost, 244 N.W.2d 556, 558-9 (Iowa 1976) (failure to give cautionary instruction).

In the instant case defendant neither prepared the admonition himself nor requested the trial court to do so. He also did not request a cautionary instruction. Finally, Instruction 14 told the jury it was permitted to consider only that evidence which was formally introduced and received. It was to disregard all evidence which was stricken and excluded and to consider no other. There was no error.

AFFIRMED.