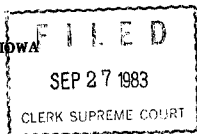


IN THE COURT OF APPEALS OF IOWA



STATE OF IOWA,

)

Plaintiff-Appellee,

)

Filed September 27, 1983

vs.

)

3-139

68749

MICHAEL BEENBLOSSOM,

)

Defendant-Appellant.

)

Appeal from Washington District Court, Dick R. Schlegel, Judge.

Defendant appeals from his conviction of delivery of a Schedule I controlled substance. Iowa Code § 204.401(1)(b)(1981). Defendant challenges the following aspects of the trial: (1) prosecutorial conduct; (2) trial court's jury instructions regarding entrapment; and (3) trial court's consideration during sentencing of other criminal charges pending against defendant. AFFIRMED.

Clemens Erdahl, Iowa City, for defendant-appellant.

Gerald Partridge, Washington County Attorney, for plaintiff-appellee.

Considered by Oxberger, C.J., and Donielson, Snell, Hayden, JJ. Schlegel and Sackett, JJ., take no part.

PER CURIAM

Defendant, Michael Beenblossom, sold hashish to an undercover police agent. He was charged with delivery of a Schedule I controlled substance, a felony. See Iowa Code §§ 204.204, 204.401(1)(b)(1981). Defendant appeals his conviction, challenging three aspects of the trial. Our review is on assigned error. State v. Cullison, 227 N.W.2d 121, 126-27 (Iowa 1975).

I. Prosecutorial Conduct

At voir dire, the prosecutor had a discussion with a prospective juror about a relative of the juror who had been prosecuted for a drug charge. After an objection by defense counsel to questions about that conviction, the prosecutor walked away from the juror and apparently commented, "But he didn't go to jail?" The defendant moved for a mistrial, asserting that the statement was made by the prosecutor to suggest to the jurors that it was likely the defendant might go unpunished for his crime. The court, after consideration, found that the prosecutor's comments were improper, but noted that the juror had answered that his relative did go to jail. The court did not view the prosecutor's comments as error sufficiently prejudicial to warrant mistrial, therefore he denied defendant's motion. However, at defendant's request, the court admonished the jury that the penalty which would be imposed on defendant would be a matter for the court, not for the jury.

The Iowa Supreme Court has stated:

In passing on a mistrial motion predicated on alleged prosecutorial misconduct trial courts are vested with considerable, though not unlimited, discretion. . . . So our primary concern is whether there was an abuse of discretion by trial court in overruling defendant's motion for mistrial.

State v. Morris, 227 N.W.2d 150, 153 (Iowa 1975). See also State v. Wright, 309 N.W.2d 891, 893 (Iowa 1981). The prosecutor's comment in the instant case was

very similar to the question posed by the prosecutor in Morris. The Iowa Supreme Court condemned the conduct, but did not find it mandated reversal and found no error in the trial court's denial of mistrial. Misconduct of a prosecutor is ground for reversal only if it deprives the accused of a fair trial. Wright at 893. In turn, "[t]o prevail on a claim that a defendant has been denied a fair trial by prosecutorial misconduct, defendant must show the misconduct and that defendant was prejudiced by it." State v. Gilroy, 313 N.W.2d 513, 519 (Iowa 1981); State v. Love, 302 N.W.2d 115, 119 (Iowa 1981).

We agree with the trial court that the prosecutor's conduct was improper. However, we cannot say that the comment was made in bad faith, that the trial court abused its discretion, or that defendant was prejudiced by the comment. See Gilroy at 519-20.

However, defendant claims the prosecutor engaged in various other improprieties during the course of the trial. Defendant contends that these other incidents, when combined with the voir dire comment, cumulatively amount to reversible prosecutorial misconduct. The State argues that at trial defendant objected only to the voir dire incident, therefore the other instances of alleged misconduct cannot be challenged on appeal. We agree. Defendant did not argue prosecutorial misconduct after the other alleged incidents occurred in the trial court. We cannot review errors which were not preserved at trial. Love at 121; State v. DeBerg, 288 N.W.2d 348, 351 (Iowa 1980). Defendant's request for reversal on the ground of prosecutorial misconduct fails.

II. Jury Instructions Regarding Entrapment

At trial defendant admitted to possession of hashish, but claimed the undercover police officer had entrapped him to sell it. The court gave the uniform jury instruction on entrapment. The instruction, in part, explained:

"Entrapment" occurs when a law enforcement agent induces the commission of an offense using persuasion or other means likely to cause normally law abiding persons to commit the offense. Conduct merely affording an opportunity to commit an offense does not constitute entrapment.

Defendant asked that the instruction be modified so that the wording of the first sentence, above, would read:

"'Entrapment', as a defense to the delivery of marijuana or hashish, occurs when a law enforcement agent induces the commission of an offense using persuasion or other means likely to cause persons who normally would not sell hashish or marijuana to commit the offense."

The trial court denied the request. Defendant claims the instruction as given does not adequately inform the jury that a defendant who admits to possession and selling hashish might be found to have been entrapped by the agent to sell the hashish.

The trial court gave the objective entrapment instruction endorsed by the Iowa Supreme Court in State v. Mullen, 216 N.W.2d 375, 381 (Iowa 1974). See also Farley v. Glanton, 380 N.W.2d 411, 415 (Iowa 1979); State v. Pooler, 255 N.W.2d 328, 330 (Iowa 1977). The State contends that the supreme court has reversed cases because of error in the given entrapment instruction only when the trial court altered the objective instruction endorsed in Mullen.

In State v. Levson, 261 N.W.2d 471, 475 (Iowa 1978), cited by the State, the trial court instructed the jury to consider evidence of any unreasonable appeals to close personal friendship. The Iowa Supreme Court held the addition of the word "unreasonable" to the court's suggestion in Mullen, at 383, that prohibited governmental activity might include appeals based primarily on close personal friendship, constituted reversible error because it affected the burden of persuasion imposed upon the State. The court said it was "substantially easier for the State to prove absence of unreasonable appeals than it is to prove absence of appeals."

The State also cites State v. Powell, 256 N.W.2d 235 (Iowa 1977), in which the trial court's jury instruction defined entrapment as when police induce a crime by means "likely to cause a normally law-abiding person to commit a crime, and which do in fact cause the defendant to commit a crime." Id. at 238. The Iowa Supreme Court found that the emphasized portion of the instruction quoted above made the jury apply the preceding objective test subjectively. It concluded that the instruction called for a subjective application of the objective test for entrapment, and the instruction therefore was erroneous. Id. at 239.

Neither Levson nor Powell provide a reason for not making the change defendant requested in the instant case. It would not have increased defendant's burden of proof, as in Levson; if anything, it would clarify the burden of the State. Moreover, the requested instruction did not call for a subjective application of the objective instruction, as in Powell.

Although Levson and Powell do not provide any reason for not including defendant's requested instruction, neither do they mandate the use of it. The instruction given by the trial court was correct. Defendant asserts, however, that the instruction given did not explain to the jury the distinction between being a normally law-abiding person for the purposes of possession and being a normally law-abiding person for the purposes of selling a controlled substance. The question is whether this warrants reversal.

The Iowa Supreme Court summarized the analysis to be followed when challenges are made to jury instructions as follows:

It is necessary to read the court's instructions as a whole when determining whether there has been error. State v. Jones, 193 N.W.2d 509, 513 (Iowa 1972); State v. Morelock, 164 N.W.2d 819 (Iowa 1969). "The object of requesting an instruction is to see that the subject is covered. . . ." Jones, 193 N.W.2d at 514-15. "A trial court is

not required to instruct in the language of requested instructions if the subject is covered in the court's own instructions." Id. at 514; See State v. Everett, 214 N.W.2d 214, 219 (Iowa 1974) (citing Jones with approval). "A party cannot complain if instructions fail to emphasize circumstances favorable to him. This is precisely what instructions should avoid." State v. Robinette, 216 N.W.2d 317, 318 (Iowa 1974); See State v. Seehan, 258 N.W.2d 374, 379 (Iowa 1977).

State v. Horn, 282 N.W.2d 717, 730 (Iowa 1979). However, it is the duty of the trial court, even when no request has been made, "to fairly present the issues and the law of the case to the jury in order that they may have an intelligent conception of the questions for decision." State v. Gilroy at 520, quoting State v. Baker, 246 Iowa 215, 230, 66 N.W.2d 303, 311 (1954).

Cases in which it has been stated that a trial court is not bound by any model or form in wording instructions, see, e.g., State v. Lindsey, 302 N.W.2d 98, 101 (Iowa 1981) and State v. Wright, 274 N.W.2d 307, 313 (Iowa 1979), are cases wherein the trial court instructions varied from the model form. We cannot hold the trial court abused its discretion in not veering from the model course. Neither can we conclude that defendant was prejudiced by the exclusion of his proposed amendment to the jury instruction. The concept of the entrapment defense was adequately covered in the instructions.

Defendant also asked that the instruction have the word "agent" (referring to the State's undercover agent) changed to "agents" (plural), apparently to include a confidential informant who was involved in the case. The court declined to do so on the grounds that the confidential informant apparently took no part in the actual sale itself. We agree. There was no evidence indicating participation in the sale by another agent, therefore denial of the request was not error.

III. Sentencing

Shortly before the date of sentencing the county attorney filed two additional drug charges against defendant, one a refileing of a charge which had earlier been dismissed, apparently to protect the name of a confidential informant, and another alleging delivery of hashish about a month after the charge for which defendant was tried. The court stated at sentencing that it had considered defendant's "past criminal history." Defendant claims the trial court considered pending charges in determining the severity of defendant's sentence. He argues that this violates due process because he had not been deemed guilty of those crimes.

However, the court's reasons for sentencing appeared to center much more upon the seriousness of the crime and the need to provide defendant with a structured environment for effective rehabilitation. It is within the sound discretion of the trial court to determine sentences. See State v. Randall, 259 N.W.2d 543, 544 (Iowa 1977). Defendant's contention is without merit.

AFFIRMED.