IN THE COURT OF APPEALS OF IOWA

No. 3-018 / 12-0172
Filed February 27, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

EMMANUEL GERARD DAVIS,
Defendant-Appellant.

Appeal from the Iowa District Court for Des Moines County, Mary Ann Brown, Judge.

Defendant appeals his convictions on three counts of delivery of a controlled substance. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Stephan J. Japuntich, Assistant Appellate Defender, for appellant.

Emmanuel G. Davis, Mt. Pleasant, appellant pro se.

Thomas J. Miller, Attorney General, Darrel Mullins, Assistant Attorney General, Patrick C. Jackson, County Attorney, and Tyron Roger, Assistant County Attorney, for appellee.

Considered by Eisenhauer, C.J., and Danilson and Bower, JJ.

DANILSON, J.

Defendant Emmanuel Davis appeals his convictions on three counts of delivery of a controlled substance (cocaine base), in violation of Iowa Code section 124.401(1)(c) (2011). He claims the district court should have granted his motion for judgment of acquittal because the State did not adequately disprove his defense of entrapment. We conclude the evidence is sufficient to uphold the verdict. In a supplemental pro se brief, Davis claims he received ineffective assistance because his defense counsel did not investigate jury misconduct, or call the witnesses Davis wanted to have testify at his trial. We affirm Davis's convictions.

I. Background Facts & Proceedings

Through mutual acquaintances, Davis first met Patrick Loper in June 2011 at Steamboat Days in Burlington, Iowa. Loper had a long criminal history and a history of using illegal substances.[1] In the summer of 2011, Loper was also a paid confidential informant for the Southeast Iowa Narcotics Task Force. For each purchase of illegal substances Loper made for the Task Force, he was paid fifty dollars.

On August 31, 2011, Loper was given forty dollars by the Task Force, and he purchased crack cocaine from Davis. On September 1, 2011, Loper purchased forty dollars worth of crack cocaine from Davis. He made another purchase of fifty dollars worth of crack cocaine from Davis about forty minutes

[1] Loper stated he had two pending charges of fifth-degree theft and a charge of driving while suspended that were pending in Des Moines County at the time he testified. He stated the prosecutor had offered to recommend minimum fines in those cases if Loper testified for the State against Davis.

later on that same day. All of these transactions were monitored by the Task Force. Loper was searched before and after the transactions, and he wore a microphone that permitted officers to listen to his conversations.

Davis was charged with three counts of delivery of a controlled substance (cocaine base). He did not deny that the purchases by Loper had occurred, but he raised a defense of entrapment. Entrapment occurs "when a law enforcement agent induces the commission of the offense, using persuasion or other means likely to cause law-abiding persons to commit it." *State v. Babers*, 514 N.W.2d 79, 83 (Iowa 1994).

At Davis's criminal trial, Loper testified that when he first met Davis at Steamboat Days, Loper told him he was interested in getting some crack, and Davis gave him his telephone number. Loper stated he called Davis less than twenty times between then and September 1, 2011. He stated he saw Davis at the Sweet Corn Festival in West Point in August, and may have seen him at Wal-Mart, but denied running into him more than that. Loper testified he had possibly talked to Davis about helping him find work. At the close of the State's case Davis made a motion for judgment of acquittal, and this was denied by the district court.

Davis testified and gave a very different account of his interactions with Loper between when they met at Steamboat Days and when the delivery of crack cocaine was made. Davis testified Loper called him three or four times a day asking for help to find crack cocaine. He also testified, "it seems like I was running into him everywhere," like the Sweet Corn Festival, Wal-Mart, and the

gas station. Davis stated that Loper told him that if Davis helped him get some crack cocaine he would help Davis get a job. Davis testified that he believed Loper was "aggressive, as in being persistent," about the sale of drugs. He stated he made twenty dollars in profit from each of the sales. After Davis's testimony the court denied his renewed motion for judgment of acquittal.

The district court instructed the jury on entrapment in an instruction that basically followed the language of Iowa Criminal Jury Instruction 200.17. The jury returned verdicts finding Davis guilty of three counts of delivery of a controlled substance. Davis was sentenced to a term of imprisonment not to exceed ten years on each count, to be served concurrently. He appeals his convictions.

II. Entrapment

Davis contends the district court should have granted his motion for judgment of acquittal. He points out that because he raised a defense of entrapment, the State had the burden to disprove this affirmative defense. He claims the State did not adequately show that his delivery of crack cocaine to Loper was not the result of entrapment. He claims Loper was relentlessly manipulative and used Davis's desperate need for money against him.

As noted above, a defendant is entrapped into committing a crime "when a law enforcement agent induces the commission of the offense, using persuasion or other means likely to cause law-abiding persons to commit it." *Babers*, 514 N.W.2d at 83. "[E]ntrapment must involve the use of excessive incitement, urging, persuasion, or temptation by law enforcement agents." *Id*. If a person's

conduct merely affords a defendant the opportunity to commit an offense, there is no entrapment. *Jim O. Inc. v. City of Cedar Rapids*, 587 N.W.2d 476, 499 (Iowa 1998).

A defendant has the burden to generate a fact question on the issue of entrapment. *State v. Cooper*, 248 N.W.2d 908, 910 (Iowa 1976). In considering whether there is sufficient evidence of entrapment to generate a jury question, the court views the evidence in the light most favorable to the defendant. *Id.* "Once evidence of entrapment is introduced the State has the burden of persuading the trier of fact beyond a reasonable doubt entrapment did not occur." *State v. Levsen*, 261 N.W.2d 471, 473 (Iowa 1978). We use an objective test to determine if there has been entrapment. *State v. Gallup*, 500 N.W.2d 437, 440 (Iowa 1993). The parties agree Davis generated a fact issue as to whether there was entrapment, and the State had the burden to disprove his defense.

The issue of whether the State has proven beyond a reasonable doubt that the defendant was entrapped is for the jury to decide. *Levsen*, 261 N.W.2d at 475. The jury's verdict will be upheld if there was sufficient evidence for a rational factfinder to find an absence of entrapment beyond a reasonable doubt. *State v. Williams*, 315 N.W.2d 45, 54 (Iowa 1982). In order to reverse Davis's conviction, the evidence would need to establish as a matter of law that the activities of Loper were "sufficiently provocative" to induce Davis to commit these offenses. *See id.*

We conclude there is sufficient evidence in the record to support the jury's verdict that the State had adequately shown Davis's delivery of crack cocaine to Loper was not the result of entrapment. Davis testified:

> Q. Tell us, how did he force you into selling drugs? A. I didn't say he forced me. I said he was aggressive, as in being persistent, . . . and he was just—he was out irate with it and—
>
> Q. I mean, did you feel like you had no choice but to sell him drugs? A. No, but at the time when it did happen, the $20 he was offering me, I mean, I needed it, so, I mean, it was dumb, but I needed it.
>
> . . . .
>
> Q. Okay. So you're telling us that this $20 profit he was offering you is what persuaded you to go ahead and sell him cocaine those three times. A. Plus the job he offered me from the demolition he said was coming up.
>
> Q. Okay. So a job offer and $20 is what persuaded you? A. Yeah. After all those months, yes, that's what it was.

Davis stated he delivered crack cocaine to Loper for financial reasons, which is the same incentive for most people delivering drugs. There is also the evidence of Loper's testimony that he telephoned Davis less than twenty times and ran into him one or two times before Davis agreed to deliver crack cocaine to him. The telephone records also did not support Davis's claims of all the calls allegedly made by Loper. "The government may use 'artice and stratagem" to apprehend those engaged in criminal activity." *State v. Leonard*, 243 N.W.2d 75, 80 (Iowa 1976). Because the evidence was conflicting, we are unable to conclude that as a matter of law the activities of the law enforcement agent, Loper, "were sufficiently provocative to induce the normally law-abiding person to commit the crime." *Id.* (citing *State v. Mullins*, 216 N.W.2d 375, 382 (Iowa 1974) (concluding,"the trial court shall determine the question as a matter of law where there is no dispute as to the facts or the inferences to be drawn from them")).

Moreover, the jury had the opportunity to weigh the evidence and determine the credibility of the witnesses. Viewing the evidence on an objective basis, we conclude the evidence was sufficient to support the jury's verdict.

We conclude the district court did not err in denying Davis's motion for judgment of acquittal.

III. Ineffective Assistance

In a supplemental pro se brief Davis raises claims of ineffective assistance of counsel. We review claims of ineffective assistance of counsel de novo. *Ennenga v. State*, 812 N.W.2d 696, 701 (Iowa 2012). To establish a claim of ineffective assistance of counsel, an applicant must show (1) the attorney failed to perform an essential duty, and (2) prejudice resulted to the extent it denied applicant a fair trial. *State v. Carroll*, 767 N.W.2d 638, 641 (Iowa 2008). "In determining whether an attorney failed in performance of an essential duty, we avoid second-guessing reasonable trial strategy." *Everett v. State*, 789 N.W.2d 151, 158 (Iowa 2010). In order to show prejudice, an applicant must show that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *State v. Madsen*, 813 N.W.2d 714, 727 (Iowa 2012).

Davis claims that during jury selection he felt uncomfortable about a juror who was a high-school classmate of one of the police officers in this case, and his defense attorney did not inquire further into the matter. He also claimed that during the trial one the jurors fell asleep, and defense counsel did not mention it to the judge. Davis claims that during a break in the trial his girlfriend saw one of the jurors talking to a member of the Task Force, and defense counsel did not

discuss this with the girlfriend. Finally, Davis claims defense counsel did not contact any of the people on a list of witnesses provided by Davis, or call any of them to testify at the trial.

If we determine the record is adequate, we may resolve a claim of ineffective assistance of counsel on direct appeal. *State v. Adams*, 810 N.W.2d 365, 372 (Iowa 2012). However, "[o]nly in rare cases will the trial record alone be sufficient to resolve the claim on direct appeal." *State v. Straw*, 709 N.W.2d 128, 133 (Iowa 2006). "Even a lawyer is entitled to his day in court, especially when his professional reputation is impugned." *State v. Bentley*, 757 N.W.2d 257, 264 (Iowa 2008).

We conclude the present record is not adequate to address Davis's claims of ineffective assistance of counsel. We conclude the issues may be addressed in possible postconviction relief proceedings.

We affirm Davis's convictions.

AFFIRMED.