IN THE COURT OF APPEALS OF IOWA

No. 8-056 / 06-1869
Filed February 27, 2008

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ORLANDO THOMAS PROCTOR,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Kellyann Lekar, Judge.

Defendant appeals his convictions for possession of a controlled substance with intent to deliver and failure to affix a drug tax stamp. **AFFIRMED.**

Chad R. Frese of Kaplan & Frese, L.L.P., Marshalltown, for appellant.

Orlando T. Proctor, Anamosa, pro se.

Thomas J. Miller, Attorney General, Bridget A. Chambers, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Bradley Walz, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Vaitheswaran, J., and Beeghly, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2007).

BEEGHLY, S.J.

I. Background Facts & Proceedings

On February 8, 2005, police officer Albert Bovy noticed a car with a broken taillight. Officer Bovy followed the car into a gas station, and parked behind it. Before he could get out of the car, the driver of the other car, Orlando Proctor, got out of his car and started walking back towards the police car. Officer Bovy quickly got out of his car and informed Proctor of the broken taillight. In talking to Proctor, officer Bovy noticed a Blistex container on the ground near Proctor's vehicle. Proctor stated the Blistex was his, and it had fallen out of the car when he had gotten out. Proctor appeared to be very nervous. His pants pockets were pulled inside out.

Officer Bovy discovered Proctor's license had been suspended, and he arrested him for driving while suspended. Officer Bovy performed a search incident to arrest. He found a box of sandwich bags in the front pocket of Proctor's sweatshirt. Proctor also had $140 in cash and a cell phone in his pockets. In the vehicle, officer Bovy saw a razor blade on the center console. About one and one-half feet under the vehicle was a sandwich bag containing a substance later determined to be 21.24 grams of cocaine base. The bag was sitting almost upright and did not look like it had been out in the elements. The bag was of the same type as those found in Proctor's pocket.

Proctor was charged with possession of a controlled substance with intent to deliver, in violation of Iowa Code section 124.401(1)(b)(3) (2005), and failure to affix a drug tax stamp, in violation of section 453B.12. During the trial the

State presented cell phone records showing Proctor received an average of seventy-six calls a day. Adam Galbraith, a member of the Tri-County Drug Enforcement Task Force, testified this level of calls was consistent with drug dealing. Galbraith testified the amount of crack cocaine found in this case was inconsistent with personal use. He stated generally a dealer would cut small amounts off a larger piece with a razor blade and place them in plastic baggies. Galbraith testified the crack cocaine found in this case contained more than ten dosage units.

Proctor's cell phone showed that just prior to his arrest he received several calls from a person identified as "Terri." Police officers traced the number to the home of Gail Griffin, where Terri Buckallew was living. Buckallew testified she thought she received Proctor's telephone number from his girlfriend. She stated she had no memory of calling his telephone number and did not recognize him. She admitted, however, that she had been a crack cocaine addict, and there would have been no reason for her to call him except to buy crack cocaine. She stated other people had access to the telephone in Griffin's house, but did not know of anyone else named Terri.

The jury found Proctor guilty of possession of a controlled substance with intent to deliver and failure to affix a drug tax stamp. Proctor admitted to being a habitual offender. The district court denied Proctor's post-trial motions. He was sentenced to a term of imprisonment not to exceed twenty-five years on the delivery charge, and fifteen years on the tax stamp charge, to be served concurrently. Proctor appeals his convictions.

II. Motion for Mistrial

During the trial the following exchange occurred while the prosecutor was questioning officer Bovy:

> Q. Did you ask the defendant whether he knew anything about the crack cocaine that was found? A. Yes, I did.
> Q. What was the defendant's response? A. He advised me that he smokes marijuana, that he was suspended . . . .

Defense counsel then objected. Outside the presence of the jury, defense counsel asked for a mistrial due to the fact officer Bovy stated Proctor used marijuana. The parties agreed the statement was inadvertent. The district court denied the motion for a mistrial, finding the statement was not so overly prejudicial that it could not be dealt with by giving the jury an admonition. The jury returned and the court admonished the jury to disregard the last question and answer that were given before the break.

On appeal, Proctor claims the district court abused its discretion by denying his motion for a mistrial. We review a district court's denial of a motion for mistrial for an abuse of discretion. *State v. Delaney*, 526 N.W.2d 170, 177 (Iowa Ct. App. 1994). An abuse of discretion occurs when the district court's discretion was exercised on grounds clearly untenable or clearly unreasonable. *State v. Piper*, 663 N.W.2d 894, 901 (Iowa 2003).

Generally, when improper evidence has been promptly stricken and the jury admonished to disregard the evidence, a motion for mistrial is properly denied. *State v. Jackson*, 587 N.W.2d 764, 766 (Iowa 1998). "Only in extreme instances where it is manifest that the prejudicial effect of the evidence on the jury remained, despite its exclusion, and influenced the jury is the defendant

denied a fair trial and entitled to a [mistrial]." *State v. Peterson*, 189 N.W.2d 891, 896 (Iowa 1971).

We conclude Proctor has failed to show that this case presents one of the "extreme instances" where an admonishment failed to cure the prejudicial effect of the evidence. There was only a brief mention that defendant smoked marijuana. We do not believe this brief statement denied defendant a fair trial. The district court carefully informed the jury that it should disregard the statement, and that the jury should consider only the relevant evidence presented in the case. We determine the district court did not abuse its discretion by denying the motion for mistrial.

III. Admission of Evidence

Proctor contends the district court abused its discretion by permitting the State to present his cell phone records because they were not relevant, and the prejudicial effect of the records outweighed its probative value. He also claims the court should not have permitted Buckallew to testify, because her testimony was also unduly prejudicial. We review the district court's evidentiary rulings for an abuse of discretion. *State v. Buenaventura*, 660 N.W.2d 38, 50 (Iowa 2003).

A. Generally, relevant evidence is admissible, while evidence that is not relevant is inadmissible. Iowa R. Evid. 5.402. Evidence is considered relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Iowa R. Evid. 5.401.

Over Proctor's objection, his cell phone records for the period from November 1, 2004, through February 9, 2005, were admitted into evidence. During this period Proctor received over 7600 calls, or an average of about seventy-six calls each day. Galbraith testified, "[i]n regards to the quantity alone it raises my suspicions from past experience with phone records, that indicates that somebody is involved in an illegal activity such as drug trafficking." Galbraith also stated Proctor received a greater number of calls on Thursdays and Fridays, when people who used drugs would often be seeking to purchase some. Furthermore, Proctor received more incoming calls than he called out. Galbraith stated this was also consistent with drug-dealing because people seeking to purchase drugs were desperate to contact their dealer and would call several times, and Proctor received "a lot of repeat calls."

We determine Proctor's cell phone records were relevant to the issue of whether he possessed a controlled substance with intent to deliver. We also conclude the evidence of his cell phone usage was not unduly prejudicial. Proctor has not shown the cell phone records had "an undue tendency to suggest decisions on an improper basis commonly, though not necessarily, an emotional one." *See State v. Newell*, 710 N.W.2d 6, 20 (Iowa 2006) (citations omitted). The evidence related in the crimes charged and would not cause the jury to base its decision on something other than the established propositions in the case. *See State v. Henderson*, 696 N.W.2d 5, 11 (Iowa 2005). We conclude the district court did not abuse its discretion in permitting this evidence.

B. The district court also permitted, over Proctor's objections, Buckallew to testify. Buckallew testified that the telephone number found in Proctor's cell phone identified as "Terri" was the number she used while living with Griffin. She could not remember ever calling Proctor, but stated that if she had called him it would have been to purchase crack cocaine. We find Buckallew's testimony is relevant to the issues in this case. The weight to be given that evidence was for the jury to determine. *See State v. Thornton*, 498 N.W.2d 670, 673 (Iowa 1993).

Again, the evidence related to the crimes charged in this case, and we determine the evidence would not have caused the jury to base its decision on something other than the established propositions in the case. *See Henderson*, 696 N.W.2d at 11. We conclude the evidence was not unduly prejudicial, and the district court did not abuse its discretion by permitting Buckallew to testify.

IV. Pro Se Claims

Proctor claims the district court erred by: (1) failing to grant a mistrial; (2) failing to grant motions for directed verdict, arrest of judgment, or new trial; (3) permitting Buckallew to testify; and (4) improperly applying section 453B.12. We have already addressed the issues regarding the motion for mistrial and Buckallew's testimony.

Proctor's motion for new trial and motion in arrest of judgment were discussed during the sentencing hearing. The district court denied the motions on the record made at that hearing. We find no error in the district court's ruling on the motions presented. As to the issue regarding section 453B.12, on our

review of the record, we determine Proctor's claim has not been preserved for our review. *See State v. Jefferson*, 574 N.W.2d 268, 278 (Iowa 1997) (noting we do not address claims on appeal that have not been presented to the district court).

Proctor also claims he received ineffective assistance due to counsel's failure to: (1) challenge the weight of the evidence in a motion for new trial; (2) request a spoliation instruction because police officers either destroyed a video of the initial stop or failed to produce it; (3) investigate the area of the stop; and (4) object to statements about the Blistex tube and razor blade because they were not seized as evidence or produced at trial.

We review claims of ineffective assistance of counsel de novo. *State v. Bergmann*, 600 N.W.2d 311, 313 (Iowa 1999). To establish a claim of ineffective assistance of counsel, a defendant must show (1) the attorney failed to perform an essential duty, and (2) prejudice resulted to the extent it denied defendant a fair trial. *State v. Shanahan*, 712 N.W.2d 121, 136 (Iowa 2006). Absent evidence to the contrary, we assume that the attorney's conduct falls within the wide range of reasonable professional assistance. *State v. Hepperle*, 530 N.W.2d 735, 739 (Iowa 1995).

A. Proctor asserts his defense counsel should have requested a new trial because the verdict was not supported by the weight of the evidence. *See State v. Ellis*, 578 N.W.2d 655, 658-59 (Iowa 1998). A verdict is contrary to the weight of the evidence where a greater amount of credible evidence supports one side of an issue or cause than the other. *Id.* at 659.

We determine that even if the weight of the evidence had been challenged, the district court would have denied the motion for new trial. The weight of the evidence in this case supports defendant's convictions. Proctor was found with a large piece of cocaine base under his car, and with the baggies and razor blade needed to distribute the illegal drug. He also had the cell phone and cash needed to conduct the business of delivering an illegal substance to purchasers. Proctor has failed to show he received ineffective assistance due to counsel's failure to challenge the weight of the evidence.

B. Proctor claims police officers intentionally destroyed the videotape of the stop, and he received ineffective assistance due to counsel's failure to request a spoliation instruction. A spoliation instruction should be given when there is an intentional destruction of relevant evidence. *Lynch v. Saddler*, 656 N.W.2d 104, 111 (Iowa 2003). The instruction creates an inference that the destroyed evidence was unfavorable to the party responsible for its destruction. *State v. Hartsfield*, 681 N.W.2d 626, 630 (Iowa 2004).

Officer Bovy testified that the videotape showed only part of the parking lot, and nothing about his interaction with defendant. He stated that because Proctor got out of his vehicle so quickly, he did not have time to properly position the camera. Officer Bovy also stated that his audio recording equipment was not turned on. Proctor has not shown there was any relevant evidence which could have been produced. In order to justify a spoliation inference, the evidence in question must have been in existence. *See State v. Langlet*, 283 N.W.2d 330, 335 (Iowa 1979).

We determine Proctor has failed to show counsel breached an essential duty by failing to request a spoliation instruction. Furthermore, even if such an instruction had been requested, it would not have changed the result of the trial given the evidence against him. *See State v. Maxwell*, 743 N.W.2d 185, 196 (Iowa 2008) (finding a defendant must show that but for counsel's unprofessional errors, the result of the proceeding would have been different).

C. Proctor asserts defense counsel should have investigated the area where the stop took place. He also claims defense counsel should have objected to references to the Blistex container and razor blade because they were not produced into evidence. He cites no authority in support of these issues. "Failure in the brief to state, to argue or to cite authority in support of an issue may be deemed waiver of that issue." Iowa R. App. P. 6.14(1)(*c*). We conclude Proctor has waived these issues on appeal.

We conclude Proctor has failed to show he received ineffective assistance of counsel.

We affirm Proctor's convictions.

AFFIRMED.