IN THE COURT OF APPEALS OF IOWA

No. 7-685 / 06-0723
Filed October 24, 2007

STATE OF IOWA,
Plaintiff-Appellee,

vs.

LUNDELL EARLEST BUCHANAN,
Defendant-Appellant.

Appeal from the Iowa District Court for Linn County, Thomas M. Horan, Judge.

Buchanan appeals from the judgment and sentence entered on his conviction of possession of cocaine (penalty enhanced). **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Robert P. Ranschau, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Robert Ewald, Assistant Attorney General, Harold Denton, County Attorney, and Jerry Vander Sanden, Assistant County Attorney, for appellee.

Considered by Mahan, P.J., and Miller and Vaitheswaran, JJ.

VAITHESWARAN, J.

The State originally charged Lundell Earlest Buchanan with possession of cocaine with intent to deliver (penalty enhanced) and possession of marijuana (penalty enhanced). The State subsequently filed an amended trial information reducing the first charge to possession of cocaine (penalty enhanced). Iowa Code § 124.401(5) (2003).

A jury found Buchanan guilty on the amended cocaine charge. The court then considered the penalty enhancement question in connection with the cocaine count and concluded that Buchanan admitted to two prior convictions.

On the marijuana charge, Buchanan waived his right to a jury trial and stipulated to a trial on the minutes of testimony. The district court found Buchanan guilty of that charge and found that Buchanan "had previously been convicted of Possession With Intent to Deliver a Controlled Substance-Marijuana in Linn County, Iowa, on November 17, 1995, in FECR 8386 and on July 25, 1996, in case number FECR 12057."

Buchanan raises two issues on appeal. He first asserts that he "did not stipulate to the allegations of prior offense as they relate to [the cocaine count] and [he] did not waive his right to a jury trial regarding the penalty enhancement on that count." He argues trial counsel was ineffective in failing to object to the procedure used by the district court in the penalty enhancement phase of the cocaine trial. We preserve this issue for postconviction relief to allow full development of the facts surrounding counsel's conduct. *Berryhill v. State*, 603 N.W.2d 243, 245 (Iowa 1999).

Buchanan also contends the district court should not have denied a motion for mistrial he made following the testimony of two law enforcement officers. One officer made reference to the fact that Buchanan was originally arrested on a charge of possession with intent to deliver cocaine. The other referred to an electronic scale in Buchanan's possession. He testified the scale was evidence of drug dealing.

After this testimony came into the record, the district court expressed a willingness to "admonish the jury to disregard [the officer's] mention of the fact that the Defendant was originally charged with Possession with Intent to Deliver because now he's charged with Possession of Cocaine and not Possession with Intent to Deliver." The court also expressed a willingness to "admonish the jury not to consider the testimony of the officer in regard to the scales." Defense counsel declined the court's offer on the ground that the "admonishment would not be sufficient to remove the taint of the designated testimony." At this juncture, the court summarily denied the mistrial motion.

Our court has "long recognized the general sufficiency of cautionary instructions except in extreme cases." *State v. Choudry*, 569 N.W.2d 618, 621 (Iowa Ct. App. 1997). The State urges us to find that, by declining the instruction, Buchanan waived error. We need not address this point, as Buchanan also argues that we should examine this issue under an ineffective-assistance-of-counsel rubric. Having preserved Buchanan's first claim for postconviction relief proceedings, we preserve this claim as well.

AFFIRMED.