IN THE COURT OF APPEALS OF IOWA

No. 2-364 / 11-1079
Filed June 13, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ANDREW STEVEN HEIEN,
Defendant-Appellant.

Appeal from the Iowa District Court for Woodbury County, Patrick McCormick, District Associate Judge.

Andrew Heien appeals from the judgment and sentence entered on his conviction for possession of marijuana. **AFFIRMED.**

Martha M. McMinn, Sioux City, for appellant.

Thomas J. Miller, Attorney General, Benjamin M. Parrott, Assistant Attorney General, Patrick Jennings, County Attorney, and Athena Ladeas, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Tabor and Bower, JJ.

BOWER, J.

Andrew Heien appeals from the judgment and sentence entered on his conviction for possession of marijuana, in violation of Iowa Code section 124.401(5) (2011). He contends the State engaged in prosecutorial misconduct, the district court erred in failing to include a jury instruction requiring corroboration of accomplice testimony, and he is entitled to relief from cumulative error. Upon our review, we conclude Heien failed to show prejudice sufficient to require a new trial on his claims of misconduct by the prosecutor, and we find no error in the district court's refusal to instruct the jury regarding corroboration of accomplice testimony. Because we find no individual errors in this case, there is no finding of cumulative error. We affirm.

I. Background Facts and Proceedings.

Shortly after midnight on December 29, 2010, Sioux City Police Officer Michael Koehler was on routine patrol when he observed a van with a malfunctioning license plate lamp. Officer Koehler was also aware that a dark colored van was suspected to have been involved in a burglary in the area earlier that evening. He activated his emergency lights, and the van pulled over.

Officer Koehler identified the driver as Shawn Keithley-Hedges and confirmed he had a valid license. The vehicle was registered to Hedges's mother. Officer Koehler asked for permission to search the vehicle, and Hedges consented. Hedges and his passenger, Andrew Heien, exited the van. By that time Officer Keith Burns had responded to the scene; he conducted a pat down

on Hedges and Heien and waited with them on the sidewalk while Officer Koehler conducted a search of the vehicle.

Officer Koehler observed marijuana "scattered" throughout the vehicle, including two clumps of marijuana on the floor behind the front seats. He noticed the clumps were slightly more behind the driver's seat, in a location that would be "awkward" for the driver to reach. Next to the clumps he found a small bag containing a hollowed out wrapper for a fruit-flavored cigar or "blunt." Officer Koehler observed a trail of marijuana residue from the floor of the front passenger side, "a great deal" of residue on the floor by the passenger seat, and three marijuana seeds on the passenger seat. Officer Burns discovered an empty tube for a flavored cigar in Heien's pocket.

The officers questioned Hedges and Heien about the marijuana. They blamed each other. Hedges said it belonged to Heien and stated Heien had tried to eat the marijuana to conceal it from the police. Officer Koehler shined his flashlight in Heien's mouth and observed marijuana residue on his tongue and in the cracks of his teeth. He also observed "small crumbles" of marijuana down the front of Heien's clothing. Heien was "upset" and blamed Hedges for having the marijuana. Parts of the encounter were recorded on police audio and video equipment. Sioux City Police Identification Technician Carissa Roach tested the residue Officer Koehler discovered in the van and identified it to be marijuana.[1]

The State charged Heien with possession of marijuana. A jury trial began on May 10, 2011. Officer Koehler, Officer Burns, Identification Technician

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[1] The residue observed on Heien's clothing and in his mouth was not tested.

Roach, and Hedges testified for the State. According to Hedges, he had picked Heien up "just minutes before getting pulled over." Hedges testified that Heien saw the marked police car and told him to "hurry up and take a left." Hedges further stated, when the police car's emergency lights turned on, Heien pulled a bag of marijuana out of his pocket and tried to eat it "to get rid of it." When Hedges refused to help him dispose of it, Heien "threw it in the back."

Heien testified on his behalf and stated the marijuana belonged to Hedges. Heien stated Hedges had picked him up about "two, three hours" before they were pulled over. According to Heien, Hedges "started getting really nervous" when they saw the police car, and then when they saw the lights, Hedges threw a bag at Heien, covering Heien's shirt in marijuana. Heien testified he was "really upset" and threw the bag back at Hedges. Heien further stated that he had not eaten any marijuana; if the officers would have told him they observed marijuana in his mouth, he would have told them that he had just finished eating a sandwich with lettuce on it.

At the close of the evidence, Heien filed a motion for mistrial on the ground of prosecutorial misconduct, which the court denied. The court also denied Heien's motion for judgment of acquittal. Heien requested the jury be given Iowa Criminal Jury Instruction 200.4, dealing with accomplice testimony. The court declined to give the instruction. The jury returned a verdict of guilty. Heien filed a motion for new trial, which was denied. The court sentenced Heien to ten days in jail, with credit for time served, plus a fine of $315. Heien now appeals.

II. Prosecutorial Misconduct.

Heien contends the State engaged in prosecutorial misconduct by posing three "predictable" questions that "could only have been expected to draw improper, highly prejudicial responses from the witnesses." Specifically, Heien argues it was misconduct for the prosecutor to: (1) question Officer Koehler why he charged Heien, rather than Hedges, for possession of marijuana where the prosecutor knew Officer Koehler's response would constitute a credibility assessment between Hedges and Heien; (2) question Hedges how he knew the substance in the vehicle was marijuana where the prosecutor knew Hedges would testify that he knew Heien had smoked marijuana on prior occasions; and (3) question Heien whether he had smoked marijuana where the prosecutor knew it would elicit evidence from Heien of uncharged prior bad acts.

In order to prove prosecutorial misconduct, Heien must prove there was misconduct and the misconduct resulted in prejudice to such an extent to deny him a fair trial. *State v. Graves*, 668 N.W.2d 860, 869 (Iowa 2003). "Thus, it is the prejudice resulting from misconduct, not the misconduct itself, that entitles a defendant to a new trial." *Id.*; *State v. Piper*, 663 N.W.2d 894, 913 (Iowa 2003). Several factors are considered when determining whether prejudice resulted from the misconduct, including: (1) the severity and pervasiveness of the misconduct, (2) the significance of the misconduct to the central issues in the case, (3) the strength of the State's evidence, (4) the use of cautionary instructions or other curative measures, and (5) the extent to which the defense invited the misconduct. *Graves*, 668 N.W.2d at 869 (internal citations omitted).

We review claims of prosecutorial misconduct for abuse of discretion. *State v. Krogmann*, 804 N.W.2d 518, 523 (Iowa 2011). An abuse of discretion is found when the district court "acts on grounds clearly untenable or to an extent clearly unreasonable." *Id*.; *State v. Leckington*, 713 N.W.2d 208, 216 (Iowa 2006).

In support of his claims, Heien cites several portions of the transcript, including the following colloquy during direct examination of Officer Koehler:

> PROSECUTOR: Officer Koehler, why did you decide to charge the defendant, Andrew Heien, for possession?
> OFFICER KOEHLER: I believed that the driver's statements were more believable based—

At that point, defense counsel objected, asserting Officer Koehler's answer was a "credibility assessment." The district court sustained the objection, but did not strike, nor was asked to strike, the testimony already in the record. Heien contends the prosecutor's question to Officer Koehler was improper because it enlisted a credibility assessment, and essentially "got Officer Koehler to vouch for the driver of the van's credibility." The State maintains the prosecutor's question was proper, and contends "[i]n an open-ended way, the question invited the officer to recount the evidence demonstrating Heien's guilt at the time of the arrest." Indeed, Officer Koehler's subsequent testimony explained the evidence inculpating Heien at the time of his arrest:

> PROSECUTOR: Officer Koehler, let's start over and get over this thing. Without going into issues of credibility, why did you feel that the defendant was the one that was culpable in this case?
> OFFICER KOEHLER: He had residue in his mouth, he had residue on his clothing, there were three marijuana seeds on his chair. And the baggy that we found and the clumps of marijuana

> matched the story that someone could have tried to pitch it in the backseat.

"It is well-settled law in Iowa that a bright-line rule prohibits the questioning of a witness on whether another witness is telling the truth." *Bowman v. State*, 710 N.W.2d 200, 204 (Iowa 2006); *see Graves*, 668 N.W.2d at 873. Upon our review, we do not find the question in this case to be the type of prosecutorial tactics prohibited by this rule. Here, the prosecutor asked Officer Koehler to explain the reasons he charged Heien for possession rather than Hedges.

> The factfinder must resolve such factual differences in reaching a verdict, and it can be helpful to the factfinder to have the factual differences identified or highlighted, whether in questioning or closing argument. Fact-based reasons that might account for disparate testimony by witnesses to the same event are also a proper area of inquiry.

Nguyen v. State, 707 N.W.2d 317, 325 (Iowa 2005). The prosecutor's question was a proper method to attempt to resolve conflicts in the witnesses' versions of events.

> Again, the identification of facts to explain the differences may be helpful to the factfinder in resolving the disputes. However, it is not proper to take the further step of asking one witness if another witness is untruthful, mistaken, or to otherwise ask the witness to comment on the credibility of another witness. This type of examination asks for an improper conclusory opinion.

Id. Here, the prosecutor did not call Heien a liar, insinuate Heien was not credible, or ask Officer Koehler to recall whether he thought Heien was telling the truth.

Significantly, this claimed incident of misconduct could hardly be classified severe or pervasive. *Graves*, 668 N.W.2d at 869-70; *see also Nguyen*, 707 N.W.2d at 325-26. Although the issue of Heien's credibility and truthfulness was

a central issue in this case because the two sole occupants of the vehicle where marijuana was found blamed each other, the evidence against Heien was strong. *See, e.g.*, *State v. Carey*, 709 N.W.2d 547, 559 (Iowa 2006) ("The most important factor under the test for prejudice is the strength of the State's case."). Considering the state of the vehicle and its occupants as described at trial by the two responding officers, Heien's version of the circumstances preceding his arrest was unlikely and cannot be reconciled with any of the other witnesses' testimony. We do not believe that the alleged misconduct infected the whole trial or prejudiced Heien's defense. *Compare Bowman*, 710 N.W.2d at 207-08 (finding prejudice where the State's case was not strong, the prosecutor knew "the verdict would turn on the credibility of the witnesses," and the prosecutor "initiated an all-out, name-calling attack" on the defendant) *and Graves*, 668 N.W.2d at 883 (finding prejudice where the claimed misconduct "related to a critical issue in the case and was the centerpiece of the prosecution's trial strategy," and the evidence of the defendant's guilt was not strong) *with Carey*, 709 N.W.2d at 558 (finding no prejudice in asking a witness to comment on the credibility of another witness on a collateral issue when the State's case was strong) *and Nguyen*, 707 N.W.2d at 326-27 (finding no prejudice in asking a witness to comment on the credibility of another witness, which did not become a theme in the case and did not amount to name-calling when the State's case was strong).

Heien further contends the prosecutor engaged in misconduct during direct examination of Hedges and cross-examination of Heien, by "elicit[ing]

evidence of uncharged prior bad acts" committed by Heien. During examination of Hedges, the following colloquy occurred:

> PROSECUTOR: And how did you know it was marijuana in the bag?
> HEDGES: Because I've known that he had smoked. He smokes.
> PROSECUTOR: Okay. Do—do you smoke marijuana?

At that point, defense counsel objected, asserting Hedges's answer went to "character evidence." After an off-the-record discussion, the district court sustained the objection, and admonished the jury to disregard Hedges's answer. The prosecutor subsequently inquired whether Hedges could recognize marijuana:

> PROSECUTOR: Okay. Can you recognize it [marijuana]?
> HEDGES: Yes, I can.
> PROSECUTOR: Okay. And what was in the baggy, did it appear to you to be marijuana?
> HEDGES: Yes, it did.

And during examination of Heien, the following colloquy occurred:

> PROSECUTOR: And you know what marijuana is?
> HEIEN: Yes, I do.
> PROSECUTOR: You've used it?
> HEIEN: I have.
> DEFENSE COUNSEL: Objection, Your Honor. Improper questioning.
> COURT: Well, he answered it so I'm going to let it stand. And that's the extent of my ruling.
> PROSECUTOR: Thank you, Your Honor. So you can recognize it?
> HEIEN: Yes, I can.
> PROSECUTOR: And that is what was in the baggy that evening?
> HEIEN: Yes.

Heien argues the prosecutor's questions to Hedges and Heien were improper because they solicited character evidence, or evidence of prior bad

acts.[2] He asserts this evidence was so prejudicial that, despite curative instructions, the jury could not ignore it. Upon our review, we find Heien has failed to show any such prejudice resulted from the claimed misconduct.

The claimed instances of misconduct were not severe or pervasive. Although the questions did relate to an essential element of the State's case (Heien's knowledge of the substance as marijuana), the evidence against Heien was strong. There was convincing evidence of Heien's guilt, as set forth by several witnesses. Further, the court used a curative measure in sustaining defense counsel's objection following the prosecutor's question to Hedges, "And how did you know it was marijuana in the bag?" The court admonished the jury to disregard Hedges's answer, "Because I've known that he had smoked. He smokes." Jurors are presumed to have followed the court's instructions absent evidence to the contrary. *See State v. McMullin*, 421 N.W.2d 517, 520 (Iowa 1988). Heien has presented no evidence to the contrary.

In light of these facts, we conclude Heien failed to show prejudice sufficient to require a new trial on these claims of misconduct by the prosecutor. We accordingly affirm the judgment of the district court as to this issue.

III. Jury Instruction.

Heien argues the district court erred in declining to include a jury instruction requiring corroboration of accomplice testimony. Our review of challenges to jury instructions is for the corrections of errors at law. *State v. Marin*, 788 N.W.2d 833, 836 (Iowa 2010). "We review the related claim that the

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[2] Heien cites Iowa Rule of Evidence 5.404(a) (character evidence) and (b) (evidence of other crimes) in support of his contention.

trial court should have given the defendant's requested instructions for an abuse of discretion." *Id.* Error in giving or refusing to give a particular instruction does not require reversal unless prejudice is shown. *Id.* When the error is not of constitutional magnitude, the test of prejudice is whether it sufficiently appears that the rights of the complaining party have been injuriously affected or that the party has suffered a miscarriage of justice. *Id.*

Specifically, Heien contends the court erred in failing to instruct the jury according to Iowa Criminal Jury Instruction 200.4, which provides:

> **200.4 Corroboration Of Accomplice.** An "accomplice" is a person who knowingly and voluntarily cooperates or aids in the commission of a crime.
>
> A person cannot be convicted *only* by the testimony of an accomplice. The testimony of an accomplice must be corroborated by other evidence tending to connect the defendant with the crime.
>
> If you find (name of witness) is an accomplice, the defendant cannot be convicted *only* by that testimony. There must be other evidence tending to connect the defendant with the commission of the crime. Such other evidence, if any, is not enough if it just shows a crime was committed. It must be evidence tending to single out the defendant as one of the persons who committed it.

(Emphasis added.)

Where the only witness against the defendant is an accomplice, the accomplice's testimony must be corroborated in order to support a conviction. *See* Iowa R. Crim. P. 2.21(3). It is prejudicial error to fail to instruct even without request on the requirement of corroboration where the jury could find the only witness against the defendant was an accomplice. *State v. Anderson*, 38 N.W.2d 662, 665 (Iowa 1949); *see also State v. Larue*, 478 N.W.2d 880, 883 (Iowa Ct. App. 1991) ("The existence of corroborative evidence is a question of

law while the sufficiency of that evidence ordinarily is a question of fact for the jury." (emphasis omitted)).

First, in light of the evidence in this record as set forth at trial, we find it highly unlikely that a jury would find Hedges to be an accomplice. *See State v. Berney*, 378 N.W.2d 915, 917 (Iowa 1985) (noting an accomplice is a person who "could be charged with and convicted of the specific offense for which an accused is on trial"). The marijuana was discovered behind the front seats in a position slightly more behind the driver's seat where it would be "awkward" for the driver to reach. Officer Burns found the wrapper for the hollowed out cigar in Heien's pocket. Three marijuana seeds were on the passenger seat where Heien had been sitting, and residue was on the passenger floor. Marijuana was in Heien's mouth and on his clothing. Considering the evidence discovered in the vehicle and on his person, Heien's rendition of the facts seems unlikely. However, it is clear Heien and Hedges did not aid each other in possessing the marijuana. Indeed, they blamed each other; the only common thread in their respective stories was that the other refused to cooperate in hiding the marijuana.

Even if we were to conclude Hedges was an accomplice, we further conclude Hedges was not the *only* witness to testify against Heien at trial; therefore, the accomplice testimony instruction was not required. Officer Koehler and Officer Burns testified as to the evidence found in the car and on Heien's person, as well as their observations and conversations with Hedges and Heien following the stop.

Moreover, even if an accomplice instruction was required, Heien was not prejudiced by the failure to give the instruction. There is no reason to believe the jury would have acquitted Heien had this instruction been given. While the testimony of the officers did not corroborate all of Hedges's testimony, it did corroborate critical portions of it. *See State v. Bugely*, 562 N.W.2d 173, 176 (Iowa 1997) (noting the corroborating evidence need only furnish some material factor connecting the defendant to the crime). We affirm as to this issue.

IV. Cumulative Error.

Heien's final contention is the cumulative effect of errors in this case denied him a fair trial, even though only one error might not have done so. To the extent these alleged errors implicate Heien's constitutional rights, our review is de novo. *State v. Bumpus*, 459 N.W.2d 619, 622 (Iowa 1990). Because we find no individual errors in this case, there may be no finding of cumulative error. *State v. Atwood*, 602 N.W.2d 775, 785 (Iowa 1999); *State v. Burkett*, 357 N.W.2d 632, 638 (Iowa 1984).

V. Conclusion.

Having reviewed all the issues raised on appeal, we affirm the judgment and sentence entered by the district court.

AFFIRMED.