

Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2001-354

JUNE TERM, 2002

State of Vermont

v.

Andrew Leo Aulis

}	APPEALED FROM:
}	
}	District Court of Vermont, Unit No. 3,
}	Caledonia Circuit
}	
}	DOCKET NO. 979-10-00 Cacr
}	
}	Trial Judge: Mark J. Keller
}	

In the above-entitled cause, the Clerk will enter:

Defendant appeals his conviction for one count of selling heroin, claiming the court erroneously denied his motions for a mistrial and judgment of acquittal. We affirm.

The State's case against defendant rested primarily on the testimony of an informant who had purchased heroin from defendant in accordance with an agreement between the informant and the State Police. The informant had a long criminal history and was a heroin user. Sargent Devenger of the Vermont State Police testified that he contacted the informant on June 7, 2000 to make a so-called controlled buy of heroin from defendant. The officer intended to use the information gained through the sale to support a warrant for electronic monitoring of a future heroin purchase. The informant met Sargent Devenger at the State Police barracks in St. Johnsbury at the appointed time, and the officer strip searched the informant. They discussed the day's objectives prior to driving to a location near defendant's apartment in Sargent Devenger's personal vehicle.

Sargent Devenger parked his car so that he could see the front of defendant's building. Also observing the front of the building from a window in the St. Johnsbury Police Department was Sargent Devenger's brother, Captain Paul Devenger, a member of the St. Johnsbury Police Department. With \$140 Sargent Devenger gave the informant to buy heroin, the informant went to defendant's apartment. Defendant told the informant that he did not have any heroin, but asked him to come by later in the afternoon. The informant returned to Sargent Devenger's vehicle, and they drove to the informant's residence where the informant was strip searched again, and the purchase money was retrieved.

Sometime before 2:30 pm that day, Sargent Devenger picked up the informant, strip searched him a third time, and gave him the purchase money. While Captain Devenger watched from the police station window, the informant entered defendant's building. The defendant was not at home, so the informant began to leave. On his way out, he encountered defendant. The two men went back to defendant's apartment where defendant produced four bags from his pocket and sold them to the informant. The informant returned to Sargent Devenger's vehicle and gave the officer the four bags he had just purchased. The officer and the informant returned to the State Police barracks where Sargent Devenger strip searched the informant again, and secured the four bags of evidence. The single bag the State tested was positive for heroin. Defendant was thereafter charged, tried, and convicted of selling heroin. This appeal followed.

Defendant first argues that the trial court should have granted him a mistrial after Sargent Devenger made reference during his testimony to defendant's incarceration at the correctional facility in Newport in response to the prosecutor's

inquiry about whether the officer intended to use the sale as probable cause for an electronic monitoring warrant. Ruling on motions for mistrial is committed to the trial court's discretion, and the moving party has the burden to establish prejudice from the objectionable testimony. State v. Mears, 170 Vt. 336, 345 (2000). Absent a showing that the court totally withheld or exercised its discretion on unreasonable or untenable grounds, we will uphold the court's ruling. Id. "In determining whether a defendant has suffered prejudice, we examine the totality of the circumstances, considering the testimony within the context of the entire proceedings." Id.

The record shows that immediately after Sargent Devenger's statement, the court called counsel to the bench, where defendant moved for mistrial claiming undue prejudice. The parties agreed that the statement was not intentionally elicited, and the court observed that it came in "quietly." Looking at the totality of the circumstances, the court determined that the jury could logically conclude that the defendant was incarcerated for the crime being tried rather than some prior offense, thus the risk of prejudice was reduced. The court offered to cure the objectionable answer by appropriately instructing the jury. Concerned that a curative instruction would draw more attention to the issue, the defendant declined the court's offer and trial continued. No further mention of defendant's incarceration was made during the proceeding. Considered within the context of the entire trial, and in light of the totality of circumstances, we conclude that the trial court did not abuse its discretion in denying defendant's motion for mistrial. No prejudice is apparent from the record, and whatever prejudice may have resulted from the statement could have been cured through a proper jury instruction, see id. at 346, which defendant declined. In sum, there was no error denying a mistrial in this case.

Defendant next argues that the court should have granted his motion for judgment of acquittal or entered such a judgment on its own motion. "In reviewing a denial of a motion for acquittal, we look at the evidence presented by the State, viewing it in the light most favorable to the prosecution and excluding any modifying evidence, and determine whether that evidence sufficiently and fairly supports a finding of guilt beyond a reasonable doubt." State v. Grega, 168 Vt. 363, 380 (1998). Defendant asserts that the State had no evidence to corroborate what he believes was incredible testimony by the informant, and therefore the evidence was insufficient to establish guilt beyond a reasonable doubt. Defendant does not direct us to any authority, however, which allows us to reverse a jury verdict where the State's case turns on the credibility of the only eye witness to the crime. The informant's credibility was an issue for the jury's determination. State v. Couture, 169 Vt. 222, 227 (1999). The jury obviously found the informant credible despite his prior criminal history and his heroin use. His testimony, combined with that of the investigating officers, was sufficient for the jury to conclude beyond that defendant was guilty of selling heroin.

Affirmed.

BY THE COURT:

John A. Dooley, Associate Justice

James L. Morse, Associate Justice

Marilyn S. Skoglund, Associate Justice