IN THE COURT OF APPEALS OF IOWA

No. 0-108 / 99-0885
Filed April 28, 2000

FILED
APR 2 8 2000
CLERK SUPREME COURT

STATE OF IOWA,
Plaintiff-Appellee,

vs.

RONALD RUSSELL SCARBERRY,
Defendant-Appellant.

Appeal from the Iowa District Court for Warren County, Gary G. Kimes, Judge.

Defendant appeals from the judgment and sentence entered upon a jury verdict finding him guilty of conspiracy to manufacture methamphetamine, possession of pseudoephedrine with the intent to use it as a precursor to any illegal substance or an intermediary to any controlled substance, and possession of methamphetamine, in violation of Iowa Code sections 124.401(1)(b)(7), 124.401(4), and 124.401(5) (1997). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and James G. Tomka, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney General, Kevin Parker, County Attorney, and Gary W. Kendell, Assistant County Attorney, for appellee.

Considered by Streit, P.J., and Zimmer and Hecht, JJ.

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HECHT, J.

Ronald Scarberry appeals from the judgment and sentence entered upon a jury verdict finding him guilty of conspiracy to manufacture methamphetamine, possession of pseudoephedrine with the intent to use it as a precursor to any illegal substance or an intermediary to any controlled substance, and possession of methamphetamine. He contends the court (1) erred in failing to grant his motion for judgment of acquittal based on insufficient evidence supporting his convictions, and (2) abused its discretion in admitting in evidence his statements made during a police interview involving a subsequent illegal act. We affirm.

I. **Factual Background and Proceedings.** On June 22, 1998, State Trooper Jerad Dreeszen pulled over a 1972 Chevrolet Monte Carlo going eighty-three miles per hour in a sixty-five mile per hour zone in Warren County. Ronald Scarberry ("Scarberry") was the driver of the car and Randy Fry ("Fry") was the passenger and owner of the vehicle. After the trooper issued a speeding ticket to Scarberry, both Scarberry and Fry consented to a search of the vehicle. The search of the interior of the vehicle produced a box of razor blades, a cellular phone, a scanner, a portable scanner, a walkie-talkie, and a large quantity of pseudoephedrine. The search of the trunk revealed four bottles of pseudoephedrine, twenty lithium batteries, a bottle of muriatic acid, two five gallon plastic fuel tanks, plastic tubing, a brass ball valve, vice grip pliers, rubber gloves, and one welder's glove. The search of Scarberry revealed he had $1690 in cash and .9 grams of methamphetamine on his person. When Trooper

Dreeszen searched Fry, he found $399 in cash, a digital scale, 100 baggies, and .89 grams of methamphetamine.

On November 20, 1998, Des Moines police officer Patrick Hickey interviewed Scarberry regarding unrelated charges in Polk County. During the interview, Scarberry explained to Officer Hickey the process he used to manufacture methamphetamine, including the length of time the process took and the fact the necessary materials were readily available. He also admitted to manufacturing the drug for his personal use.

Upon Fry's motion, the district court severed Fry's trial from Scarberry's. Scarberry's trial commenced on March 16, 1999. Officer Hickey testified at trial as to Scarberry's statements during the interview. He testified Scarberry indicated he could make four to five "8-balls" of methamphetamine at one time. Scarberry further stated that to make methamphetamine he cut up approximately 2000 ephedrine tablets and ten lithium batteries, mixed them with anhydrous ammonia, and then added two cans of ether. He would then drain the mixture and "bomb it," which consists of filtering the mixture to produce a residue. The residue is methamphetamine. He stated the entire process takes approximately two and a half hours to complete. Officer Hickey stated Scarberry told him he could get anhydrous ammonia from various locations "around town" and the chemical is easily accessible. Scarberry also disclosed he usually completed the manufacturing process "outside of town." Officer Hickey further testified Scarberry told him he manufactured methamphetamine using this process for his own personal use. On March 17, 1999, the jury returned verdicts of guilty

against Scarberry for (1) conspiracy to manufacture methamphetamine in violation of Iowa Code section 124.401(1)(b)(7); (2) possession of pseudoephedrine with intent to use as a precursor in violation of Iowa Code section 124.401(4); and (3) possession of methamphetamine in violation of Iowa Code section 124.401(5).

On May 17, 1999, the district court sentenced Scarberry to concurrent terms of imprisonment of twenty-five years on the conspiracy charge, five years on the possession of a precursor charge, and one year on the possession of methamphetamine charge. Scarberry appeals.

II. Standard of Review. The district court's ruling on admissibility of evidence will not be disturbed on appeal unless an abuse of discretion is found. *State v. Zeliadt*, 541 N.W.2d 558, 560 (Iowa App. 1995). To show an abuse of discretion, Scarberry must show the district court exercised its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *See id.* We review challenges to the sufficiency of the evidence for errors at law. Iowa R. App. P. 4; *State v. Thomas*, 561 N.W.2d 37, 39 (Iowa 1997).

III. Admissibility of Statement. Scarberry argues the district court abused its discretion by admitting evidence of a statement he made to a Des Moines police officer after his arrest but before trial in Warren County. In the statement he clearly delineated the process for manufacturing methamphetamine and informed the officer about availability of certain elements required to make the drug. He also indicated he had manufactured methamphetamine in the past using this method for his own personal use. He

claims such evidence of prior bad acts is inadmissible under Iowa Rules of Evidence 404(b) and 403. Iowa Rule of Evidence 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Evidence of prior crimes is admissible if: (1) the evidence is relevant to establish a legitimate issue in the case (other than a general propensity to commit wrongful acts); and (2) there is clear proof the individual against whom the evidence is offered committed the prior bad act. *State v. Schaffer,* 524 N.W.2d 453, 455 (Iowa App. 1994). The State charged Scarberry and Fry with conspiracy to manufacture methamphetamine and possession of pseudoephedrine. Evidence that Scarberry knew how to manufacture methamphetamine and had done so for his own personal use is relevant to establish his knowledge about manufacturing the illegal substance. Furthermore, the State established the evidence using clear proof against Scarberry, his own statement to Officer Hickey.

However, our inquiry does not end there. Relevant evidence may nevertheless be excluded if its probative value is outweighed by its potential for unfair prejudice. Iowa R. Evid. 403; *State v. Wade,* 467 N.W.2d 283, 284 (Iowa 1991). In making the Rule 403 determination, we consider the following factors:

> (1) the actual need for the evidence in view of the issues and the other available evidence, (2) the strength of the evidence showing that the prior bad acts were committed by the accused, (3) the strength or weakness of the prior bad acts evidence in supporting the issue sought to be proven, and (4) the degree to which the jury will probably be roused by the evidence improperly.

State v. [redacted] 578 N.W.2d 250, 254 (Iowa App. 1998); *Zeliadt*, 541 N.W.2d at 562. The State asserts an actual need for the evidence because the statements connected Scarberry directly to manufacturing of methamphetamine. In light of the fact the majority of the State's evidence was circumstantial, we agree the State had an actual need for the statement. As discussed above, the evidence is strong because it is Scarberry's own statement to a police officer. Scarberry's statement also strongly supports the possession of a precursor charge because he knew how to manufacture methamphetamine using pseudoephedrine as a precursor. This evidence makes it much more likely Scarberry did conspire with Fry to manufacture methamphetamine and more likely he would have possessed pseudoephedrine to further that purpose. Finally, Scarberry argues the jury was "improperly aroused" by the evidence. We do not agree. Given the nature of this case and the other evidence introduced by the State, including the multiple items seized in the car, we do not believe the jury would have been prejudiced against Scarberry by the introduction of his statement. Accordingly, we conclude the district court did not abuse its discretion by allowing evidence of Scarberry's statement to Officer Hickey.

IV. Sufficiency of the Evidence. Scarberry contends there is insufficient evidence to support the conspiracy and possession charges. We will uphold a jury verdict under a sufficiency of the evidence challenge if it is supported by substantial evidence. *State v. Chang*, 587 N.W.2d 459, 461-62 (Iowa 1998). If a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt, the evidence is substantial. *Thomas*, 561 N.W.2d at 39. We review the

evidence in the light most favorable to the State, and this includes all legitimate inferences that may fairly and reasonably be deduced from the evidence. *State v. Casady*, 597 N.W.2d 801, 804 (Iowa 1999).

A conspiracy is a combination or agreement between two or more persons to do or accomplish a criminal or unlawful act, or to do a lawful act in an unlawful manner. *State v. Ross,* 573 N.W.2d 906, 914 (Iowa 1998). Evidence of a conspiracy may be proven circumstantially by "conduct of the alleged participants or evidence of a scheme." *State v. Cartee,* 577 N.W.2d 649, 652-53 (Iowa 1998). The State produced substantial evidence of a conspiracy in this case. The trooper stopped Scarberry and Fry in Fry's car with Scarberry driving. A consent search of the vehicle revealed many items that the State's experts testified are commonly associated with manufacturing methamphetamine. The search of Scarberry's person revealed a substantial amount of cash and some methamphetamine. Fry, the passenger in the vehicle, was found in possession of methamphetamine, baggies, and a digital scale. In addition, Scarberry later admitted to a police officer that he knew how to manufacture methamphetamine, had done so in the past, and knew where to get the necessary materials. Under the circumstances of this case, a reasonable jury could find beyond a reasonable doubt Scarberry engaged in a conspiracy with Fry to manufacture methamphetamine. We affirm Scarberry's conviction for conspiracy to manufacture methamphetamine.

Scarberry also argues there is insufficient evidence to support his conviction for possession of pseudoephedrine with intent to use as a precursor.

In support of this contention, he argues he was unaware of the items in the car and in the trunk. A person who is not in actual possession, but who has knowledge of the presence of something and has the authority or right to maintain control of it either alone or together with someone else, is in constructive possession of it. *State v. Padavich*, 536 N.W.2d 743, 751 (Iowa 1995). Additionally, we have held a fact finder may infer constructive possession when the thing is found in a place which is subject to the defendant's dominion and control, or to the joint dominion and control of the defendant and other persons. *State v. Maghee*, 573 N.W.2d 1, 10 (Iowa 1997). Although Scarberry denies knowledge of the pseudoephedrine in the vehicle, it was found in a place that had been subject to Scarberry's control because he was the driver of the car. Scarberry relies on *State v. Torres*, 506 N.W.2d 470 (Iowa App. 1993), where we held the evidence was insufficient to support the defendant's drug conviction because the defendant had no knowledge of the drugs found in the trunk of the car. *Id. at* 472. Scarberry's reliance on *Torres* is misplaced. In *Torres*, the defendant was merely a passenger in the car and the drugs were found in the trunk of the car. *Id.* at 471. In the present case, Scarberry was the driver and the pseudoephedrine was found in the interior of the vehicle rather than in the trunk and therefore was subject to Scarberry's immediate dominion and control. There was sufficient evidence to convict Scarberry of possession of pseudoephedrine. Accordingly, we affirm Scarberry's convictions.

AFFIRMED.

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