

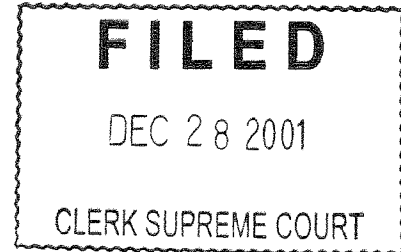
IN THE COURT OF APPEALS OF IOWA

No. 1-127 / 00-960
Filed December 28, 2001

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JOHN KEVIN HATCHER, JR.,
Defendant-Appellant.



Appeal from the Iowa District Court for Humboldt County, Joel E. Swanson, Judge.

The defendant appeals his convictions and sentences following a jury trial for one count each of delivery of methamphetamine, manufacturing methamphetamine while in possession of an offensive weapon, manufacturing marijuana while in possession of an offensive weapon, possession of methamphetamine, and possession of explosive materials. **AFFIRMED.**

Maggi Moss and Jennifer Larson of Parrish, Kruidenier, Moss, Dunn, Montgomery & Boles, L.L.P., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, and Derk Schwieger, County Attorney, for appellee.

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

VAITHESWARAN, J.

John Hatcher appeals his judgment and sentences on drug and explosive charges. He contends: (1) the evidence was insufficient to support his conviction for manufacturing methamphetamine; (2) the district court should not have admitted testimony of prior drug-related incidents; and (3) his trial counsel provided ineffective assistance in a number of respects. We affirm.

I. Background Facts and Proceedings

A jury could have found the following facts. On July 20, 1999, Melissa Roberts, Hatcher's friend turned police informant, went to Hatcher's farmstead with a concealed tape recorder. Hatcher and another acquaintance offered her methamphetamine. She declined. Hatcher described the methamphetamine manufacturing process to Roberts and showed her how to make a "mini-batch" of the drug. Roberts conveyed this information to state authorities, who subsequently arrested Hatcher.

In a post-arrest interview, Hatcher admitted he made methamphetamine as often as twice a week and as recently as a few days before the arrest, but stated he gave it away rather than sold it. State personnel searched his farmstead and discovered materials necessary to make methamphetamine, as well as a shotgun, ammunition, and blasting caps.

The State charged Hatcher with delivery and possession of methamphetamine, manufacture of methamphetamine and marijuana while possessing an offensive weapon, possession of psilocybin mushrooms, and possession of explosive materials. See Iowa Code §§

101A.14(1), 124.401(1)(a)(b)(c)(d)(f); 124.401(5); 724.3 and 907.3(1)(k), (2)(e), (3)(e) (1999).

Before trial, the prosecutor learned that a member of the jury pool knew Melissa Roberts. The attorneys questioned the prospective juror on the record and the State then challenged her for cause. Defense counsel did not join in the challenge. The district court declined to remove the prospective juror from the pool.

At trial, Roberts testified about her role as a police informant. Additionally, over defense counsel's objections, she testified that she had regularly obtained and used methamphetamine provided by Hatcher.

All but the mushroom charge were submitted to the jury, which convicted Hatcher on each of the five remaining counts. Hatcher filed a motion for new trial, asserting in part that the verdict was contrary to the law and evidence. He also filed a motion in arrest of judgment, claiming the evidence did not support some elements of the crimes charged. The court overruled both motions and imposed concurrent sentences on the convictions. This appeal followed. The case was transferred to our court for disposition.

We initially determined that the district court used an incorrect standard in ruling on Hatcher's new trial motion. We remanded the case to allow the district court to reconsider its ruling in light of the newly-adopted standard, but retained jurisdiction to consider the remaining issues following the court's ruling. On

remand, the court again denied the motion for new trial using the appropriate standard. The case is now before us for disposition of the appeal.¹

II. Sufficiency of Evidence

The jury was instructed that to find Hatcher guilty of unlawfully manufacturing methamphetamine while in possession of an offensive weapon, the State would, among other facts, need to prove that "[o]n or about the 20th day of July, 1999, the defendant manufactured Methamphetamine." Hatcher contends the evidence was insufficient to establish that he manufactured methamphetamine on that date. We review this issue is on error, upholding the verdict if it is supported by substantial evidence. *State v. Turner*, 630 N.W.2d 601, 610 (Iowa 2001).

We have stated, "[t]he date fixed in the indictment or information for the commission of a crime is not material, and a conviction can be returned upon any date within the statute of limitations, absent a fatal variance between the allegations and proof." *State v. Brown*, 400 N.W.2d 74, 77 (Iowa Ct. App. 1986). The record contains substantial evidence that Hatcher manufactured methamphetamine within the limitations period. A former state trooper testified that when he went out to Hatcher's farmstead on July 20, 1999, he found starting fluid cans, coffee filters covered with sludge, and a pseudoephedrine bottle. He tied these items to the process of manufacturing methamphetamine. Another officer stated he also found a tank with a hose attached to it, a bucket containing sludge, and a lithium battery, all associated with the manufacture of

¹ Our court did not receive the district court's ruling on remand until November 2001, although it was decided much earlier.

methamphetamine. A special narcotics enforcement agent testified he located ether, muriatic acid, tubing, scales, other drug paraphernalia, and guns and ammunition. This evidence, together with Hatcher's admission that he "cooked" methamphetamine just days before his arrest, is sufficient to establish he manufactured methamphetamine within the limitations period.

III. Prior Bad Acts

Hatcher also contends the district court should not have admitted Roberts' testimony that she obtained methamphetamine from Hatcher and used it with him. We review this issue for abuse of discretion. *State v. Mitchell*, 633 N.W.2d 295, 299 (Iowa 2001).

Under Iowa Rule of Evidence 404(b), "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" but may be admissible for other purposes such as "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Iowa R. Evid. 404(b). In deciding whether to admit bad acts evidence, a district court must determine whether the evidence is relevant for a legitimate purpose and, if relevant, whether its probative value is substantially outweighed by the danger of unfair prejudice. *Mitchell*, 633 N.W.2d at 288-89. Additionally, the court must determine whether there is clear proof the defendant committed the prior acts. *State v. Rodriguez*, ___ N.W.2d ___, ___ (Iowa 2001).

The district court concluded the testimony was relevant because it addressed Roberts' relationship with Hatcher and the way she obtained drugs. The court also concluded the evidence did not appear to be prejudicial and was

limited in scope. Based on this reasoning, the court admitted the bad acts evidence.

The court's ruling did not amount to an abuse of discretion. Roberts' testimony that she regularly obtained methamphetamine from Hatcher was relevant to establish his intent to deliver the drug. See *State v. McDaniel*, 512 N.W.2d 305, 308 (Iowa 1994). Our highest court has found the prejudicial effect does not substantially outweigh the probative value of the evidence in this context. *Id.* As for the "clear proof" requirement, corroboration of bad acts evidence is not required.² See *State v. Brown*, 569 N.W.2d 113, 117 (Iowa 1997); *State v. Seevanhsa*, 495 N.W.2d 354, 358 (Iowa Ct. App. 1992). Roberts identified the time period during which she was obtaining drugs from Hatcher, stated she used them on a weekly basis, and said she did not get the drugs from anyone but Hatcher. For these reasons, we affirm the district court's admission of the prior bad act evidence.

IV. Ineffective Assistance of Counsel

Hatcher contends trial counsel provided ineffective assistance by failing to: (A) object to admission of the audiotape; (B) challenge a prospective juror for cause; (C) have voir dire and opening and closing statements recorded; and (D) object to the standard used by the district court in considering his new trial motion. Our review of these constitutional claims is de novo. *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001). We must determine whether (1) counsel

²The State argues Hatcher waived this argument by failing to raise it before the trial court. We disagree. Although trial counsel did not explicitly refer to the absence of clear proof, he objected to the evidence on the ground it referred to uncharged crimes and lacked a time reference. We conclude this objection was sufficient to preserve error.

breached an essential duty and (2) prejudice resulted. *Strickland v. Washington*, 446 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d. 674, 692-3 (Iowa 1984).

A. Foundation for Admission of Audiotape. Hatcher maintains defense counsel should have objected to admission of the audiotape offered through Roberts on the ground that the State failed to lay a sufficient foundation. The State was required to establish the tape was "accurate and trustworthy." *State v. Weatherly*, 519 N.W.2d 824, 826 (Iowa Ct. App. 1994). The State made this showing, as Roberts testified that deputies made sure the tape was working before they gave it to her. Accordingly, Hatcher's attorney did not breach an essential duty in failing to object to the tape's admissibility based on lack of foundation.

B. Challenge for Cause. Hatcher next maintains his trial attorney was ineffective in failing to join in the State's challenge of a prospective juror for cause. To justify reversal on this ground, a defendant must show "the juror held a fixed opinion of the merits of the case such that he could not judge impartially the guilt or innocence of the defendant." *State v. Hardin*, 498 N.W.2d 677, 682 (Iowa 1993). Additionally, the defendant must establish the juror either sat on the jury or the defendant was forced to use a peremptory challenge to remove the juror that might have been used to remove another biased juror. *State v. Neuendorf*, 509 N.W.2d 743, 746 (Iowa 1993). Hatcher has not demonstrated either. Before voir dire began, the county attorney informed the court that a prospective juror approached Roberts and told her she "was excited" to serve on the jury. When called in for questioning, the potential juror denied this statement. Although she admitted her sister owned a convenience store at which Roberts

worked and further admitted she had read general accounts of the case in the newspaper, the potential juror stated she was coming into the case with a "clean slate." This testimony does not establish that the prospective juror held a fixed opinion on the merits of the case or could not judge Hatcher impartially. Hatcher also did not establish that the prospective juror actually served on the jury or that another biased juror remained on the jury because Hatcher exercised his last peremptory challenge to remove her. See *State v. Tillman*, 514 N.W.2d 105, 108 (Iowa 1994). Accordingly, Hatcher's attorney did not breach an essential duty by declining to challenge the prospective juror for cause, and we reject this ineffective assistance of counsel claim.

C. Recording of Proceedings. Hatcher maintains his trial attorney should have insisted on having voir dire, opening, and closing statements recorded. Hatcher does not point to any errors that occurred during these portions of the trial, arguing only that the absence of a complete record "makes it difficult, if not impossible to ascertain the damage." Our highest court rejected an identical argument in *State v. Oetken*, 613 N.W.2d 679, 689 (Iowa 2000). That case is controlling.

D. Standard for Reviewing New Trial Motion. Hatcher contends his trial attorney should have objected to the standard used by the district court in considering his new trial motion. On our limited remand, the court cited and applied the correct standard. See *State v. Ellis*, 578 N.W.2d 655, 659 (Iowa 1998). Therefore, this issue has been resolved. On the merits, the district court stated:

the State presented numerous experts testifying to their observations, evidence obtained and analysis. Cases such as this involve a great many law enforcement personnel and many testified not only [sic] the search but the confiscation and inventory of evidentiary materials. The State presented an overwhelming amount of credible evidence, most of which was uncontroverted.

The court found after a review of all the evidence that the State had "presented the greater amount of credible evidence which the Court finds supports the jury's verdict in this matter." We conclude the district court did not abuse its discretion in denying the new trial motion. See *State v. Reeves*, ___ N.W.2d ___, ___ (Iowa 2001).

We affirm Hatcher's convictions, judgment, and sentences.

AFFIRMED.