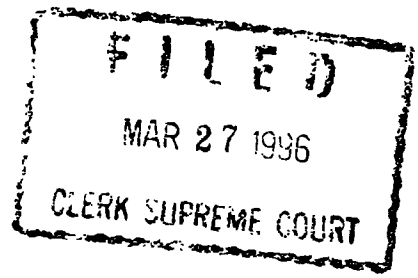
IN THE COURT OF APPEALS OF IOWA

No. 5-525 / 94-1231



000225

STATE OF IOWA,

Appellee,

vs.

DALE RAY FRELAND,

Appellant.

Appeal from the Iowa District Court for Marshall County, Carl D. Baker and Dale E. Ruigh, Judges.

Defendant appeals judgment and sentences, following jury trial, entered upon his convictions of possession of methamphetamine in violation of Iowa Code section 124.401(3) (1993), exercising dominion and control over a firearm as a convicted felon in violation of section 724.26, and carrying a loaded weapon in a motor vehicle in violation of section 724.4(1). **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, Ahmet S. Gonlubol, Assistant State Appellate Defender, and Dale Ray Freland, Anamosa, pro se, for appellant.

Thomas J. Miller, Attorney General; Thomas S. Tauber, Assistant Attorney General; Diann Wilder-Tomlinson, County Attorney, and James S. Scheetz, Assistant County Attorney, for appellee.

Considered by Habhab, P.J., Cady, J., and Peterson, S.J. *

* Senior judge from the First Judicial District serving on this court by order of the Iowa Supreme Court.

0002227

PETERSON, S.J.

Dale Ray Freland (Freland) appeals his convictions and sentences for possession of methamphetamine in violation of section 124.401(3) of the Iowa Code, exercising dominion and control over a firearm as a convicted felon in violation of section 724.26 of the Iowa Code, and carrying a loaded weapon in a motor vehicle in violation of section 724.4(1) of the Iowa Code.

Freland appeals raising the following issues. He contends the court failed to suppress evidence that was seized in the search of a motor vehicle in which he was a passenger, and contends the trial court abused its discretion in allowing testimony that he gave an alias after his arrest and then failing to submit a cautionary instruction to the jury about the alias.

Freland also contends he was deprived of his right to effective assistance of counsel in three areas. He contends his counsel failed to move to sever the charge of exercising dominion and control over a firearm as a convicted felon and failing to file a motion to suppress the testimony concerning his use of an alias because it was given by Freland prior to the time that he was given his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), and because his presence was waived at a hearing on a question that was submitted to the court from the jury after they began their deliberations.

Freland was given permission to file a pro se brief in which he raises the following additional issues. He contends that there was insufficient evidence to support his conviction, that the court conducted an improper poll of the jury after they returned their verdict, and that there is new evidence which would be exculpatory with respect to him.

Freland also raises what he refers to as an omnibus issue which he contends should be considered pursuant to the Plain Error Rule. In these allegations, he contends he should have been present at certain hearings and he should have been present at the hearing to respond to the jury question, and the court should have accepted his stipulation that he had been convicted of a felony and that issue should not have been submitted to the jury with respect to the charge of exercising dominion and control over a firearm as a convicted felon. He also contends that the prosecutor was guilty of misconduct. After considering all of these issues, we affirm.

At approximately 2:30 in the afternoon of January 1, 1994, Chris Callaway, a member of the Iowa State highway patrol (Callaway), was northbound on Iowa Highway 330 in Marshall County in his patrol car. The speed limit at that point on that highway is 55 miles per hour. Callaway noticed a southbound vehicle with two men in the front seat. It appeared to Callaway that the vehicle was speeding, so he clocked the car on his radar and determined it was going 60 miles per hour. Callaway also noted that neither the driver nor the passenger were wearing seat belts.

After the two vehicles passed one another, Callaway also noticed in his rearview mirror that the vehicle had a broken taillight. The vehicle in question was a blue 1976 Ford LTD.

Callaway turned his patrol car around and followed the Ford automobile as it continued south on Highway 330. He observed it turn west on County Road E-29 and, at that point, he activated his red lights and his flashing lights. As Callaway proceeded in a westerly direction on E-29, he noticed the Ford automobile turn south into a farm drive. This was between one-quarter mile and one-half mile west of the intersection of Highway 330 and County Road E-29. The Ford automobile proceeded approximately 100 yards along the drive and stopped behind a farmhouse.

Callaway followed the Ford automobile and stopped his patrol car behind it. By this time, the driver and the passenger had left the Ford automobile and had started toward the farmhouse.

Callaway exited his patrol car and beckoned to the driver. The driver approached him and Callaway asked him for his driver's license and registration. In response, the driver gave Callaway a driver's license and a white envelope containing a sheet of notebook paper. Callaway looked at the driver's license and we assume at that time he determined the driver was Robert Glen Cross (Cross). Callaway determined that the driver's license had expired. He also looked in the envelope and found that it contained a piece of notebook paper and not a valid registration.

Callaway asked Cross if he knew anyone at the house and Cross replied that he did not and that they had stopped to ask directions to the interstate highway.

The passenger in the Ford automobile had also exited the vehicle and was moving back and forth between the house and the automobile. Although Callaway did not believe the passenger went to the farmhouse, it was later determined that the homeowner, Elmer Peterson, had talked to the passenger and said that the passenger said he was going to ask for directions.

During this time when Callaway was talking to Cross and the passenger was moving between the Ford automobile and the farmhouse, a dog on the premises was barking, presumably because of this activity. At this point, Callaway decided to move his vehicle and the Ford automobile and its occupants from the farmyard to the county road. He told Cross he wanted to do this because he did not know who lived at the house and he did not know if they were friends of these two. He could see movement in the house and he felt it was odd they had driven to the back door. Because of this, he had assumed they knew someone in the house, although Cross told him that they did not know who lived there. Also, the dog continued to cause some disruption. Callaway thought there were too many variables at that point to control. It was for these reasons he determined to move the site of any further investigation to the county road. Callaway then motioned for both the driver and the

passenger to get back into the Ford automobile and back down the driveway to County Road E-29.

The Ford automobile backed down the driveway, and Callaway followed in his patrol car. He noticed the passenger making some movements that looked like he was bending down and putting something underneath the seat. Callaway at this time also read the sheet of notebook paper Cross had given him which purported to be evidence of a sale of the Ford automobile to Cross.

Both vehicles stopped on the shoulder of County Road E-29, and Cross and Callaway exited their vehicles and met between the two vehicles. Callaway wanted to talk to Cross in the patrol car because of the weather at that time. He accordingly asked Cross if he would consent to a pat-down search and Cross agreed. During this search, Callaway felt a lump in Cross's shirt pocket and asked him what it was. In response, Cross pulled out some papers and, as he did that, a small fold of magazine paper fell to the ground. Callaway recognized this as resembling folds of magazine paper which are used to contain powdered drugs.

Callaway then told Cross he had dropped something and Cross denied dropping anything and at the same time attempted, in Callaway's opinion, to shield what he had dropped from Callaway with his foot. Cross then stooped down and picked up the object and ran toward the Ford vehicle yelling something. Callaway was unable to make out what Cross was saying at this time. However, he noticed that

Cross threw something away. At this time, the passenger started to exit the Ford automobile.

Callaway then drew his weapon and ordered Cross and the passenger to the area between the vehicles and to lay on the ground. Cross and the passenger eventually complied, although Callaway had to repeat his direction several times. Callaway then arrested Cross and the passenger and handcuffed them. He said he arrested the passenger at that time for failure to wear a seat belt and interference, because the passenger was not cooperating.

After Callaway had handcuffed both Cross and the passenger, he patted them down and found a marijuana pipe, a small baggy of marijuana, and an empty bag of syringes in Cross's pocket. Callaway also found a cellophane wrapper with methamphetamine in Cross's billfold. When he patted the passenger down, he did not find anything of any consequence. Callaway assisted both Cross and the passenger to their feet and ordered them to stand next to the car while he requested a backup.

Deputy Perin from the Marshall County sheriff's office arrived and Cross was placed in his vehicle and the passenger was placed in Callaway's vehicle. After the passenger and Cross had been placed in the patrol cars, Callaway contacted a towing service to have the Ford automobile towed. He said that he took this step because he did not have a licensed driver and the vehicle had an improper registration. The

000233

vehicle had Wisconsin license plates on it which were registered to Roniece Henderson. This was the individual who had purportedly sold the vehicle to Cross. While Callaway was sitting in his patrol car with the passenger, he asked the passenger who he was and the passenger replied he was Ryman Fair and he provided Callaway with a social security number. Callaway determined through the dispatcher that Ryman Fair was a real person but the description did not match the appearance of the passenger. Callaway then confronted the passenger with this discrepancy, and the passenger told Callaway he did not wish to speak to him any longer.

Because state troopers are required to complete an inventory of anything in a vehicle that they tow, Callaway then searched the Ford automobile. In the course of that search, Callaway found a red metal box under the front seat on the passenger side of the vehicle. This contained three "eight balls" (3.5 gram packages) of methamphetamine and several smaller quantities of methamphetamine. It also contained three syringes containing a liquid, which subsequently proved to contain methamphetamine, and various items of drug paraphernalia described by an expert witness as tools for drug usage. Callaway also found beneath a plastic drink caddy on the transmission hump in the front seat a loaded .25 caliber semi-automatic pistol. On the back seat of the Ford automobile, there were two jackets. A black leather jacket was behind the driver's seat where Cross had been sitting, and a blue denim jacket was found behind the passenger's seat. In the pockets of the denim jacket were

six new syringes, still in cellophane wrappers, and a box of .25 caliber bullets which would fit the pistol Callaway found under the drink caddy. Callaway also found a police scanner beneath the front seat.

When the search had been completed, the Ford vehicle was towed and Cross and the passenger who had identified himself as Ryman Fair were transported to the Marshall County jail.

After the individuals had been booked into the Marshall County jail, Callaway applied for and obtained a search warrant to allow a drug dog to peruse the car. This yielded no further contraband. After this was completed, however, Callaway seized a mirror and a brass marijuana pipe from the glove compartment that he had noticed at the first search on County Road E-29. The mirror was found to have a fingerprint belonging to the passenger on it. Several hours after the individuals had been booked into the county jail, Callaway determined that the passenger was Dale Ray Freland (Freland).

Freland first contends the district court erred in overruling his motion to suppress the evidence seized in the search of the Ford automobile since he was a passenger. Because a constitutional right is involved, we are obliged to make an independent evaluation of the totality of the circumstances as shown by the entire record. In the de novo review of the propriety of the district court's ruling on the motion to suppress, we may consider the evidence deduced during the suppression

hearing as well as that presented at the trial. *State v. Cook*, 530 N.W.2d 728, 731 (Iowa 1995). We may affirm on appeal where any proper basis appears for the district court's ruling, even though it is not the one upon which the court based its ruling. *Collins v. State*, 477 N.W.2d 374, 376 (Iowa 1991). If an officer makes a lawful custodial arrest of an occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of the automobile. *State v. Edgington*, 487 N.W.2d 675, 677 (Iowa 1992). In this situation, Callaway legally stopped and arrested both passengers in the vehicle for not wearing a seat belt. He additionally arrested Freland for interfering with official acts. Subsequent to these arrests and when both passengers were in custody, he searched the passenger compartment of the vehicle in question and discovered the evidence that was introduced during the trial. We conclude that the district court did not err in overruling the defendant's motion to suppress that evidence. The search was conducted incident to a lawful arrest. Because of this, we do not find it necessary to discuss any other basis for the search.

Freland next contends the trial court abused its discretion by allowing Callaway to testify that Freland gave a false name after he was arrested and further in failing to submit a cautionary instruction to the jury. A trial court will be reversed on discretionary rulings only if it is shown that there is a clear abuse of that discretion. *State v. Kern*, 392 N.W.2d 134, 136 (Iowa 1986). In order to show an

abuse of this discretion, it must be shown that the court exercised its discretion on grounds or for reasons clearly untenable or clearly unreasonable. *State v. Mattly*, 513 N.W.2d 739, 741 (Iowa 1994).

Admissions made by a defendant are evidence. They can be implied by the conduct of the defendant subsequent to a crime, including fabrication when such conduct indicates a consciousness of guilt. A false story told by a defendant to explain or deny a material fact against him is, by itself, an indication of guilt and the false story is relevant to show that the defendant fabricated evidence to aid in his defense. *State v. Cox*, 500 N.W.2d 23, 25 (Iowa 1993); *State v. Peterson*, 532 N.W.2d 813, 820 (Iowa App. 1995).

Freland argues that the use of the alias applied only to the escape charge and, when that charge had been severed from the balance of the offenses, the evidence was no longer relevant and would be prejudicial. However, Freland was also a convicted felon and we believe this evidence would be relevant with respect to the charge of exercising dominion and control over a firearm as a convicted felon. We believe that the trial court did not abuse its discretion in allowing this testimony.

Freland contends that a limiting instruction should have been given once the testimony about the alias had been admitted. He requested that the following instruction be given, which was denied by the trial court.

> You have heard testimony regarding the use of an alias by the Defendant. The use of a false name alone is not indicative of any

> element of the charged offense or of any prior knowledge of contraband in the Cross vehicle.

The trial court is required to instruct the jury on the applicable law. *See State v. Van Rees*, 246 N.W.2d 340, 343 (Iowa 1976). These instructions should not marshall the evidence or give undue prominance to any particular aspect of the case. The court should not attempt to warn against every mistake or misapprehension that the jury may make. The jury should be left to their intelligent apprehension and application of the rules set forth in the instructions. *Hutchinson v. Broadlawns Medical Center*, 459 N.W.2d 273, 275 (Iowa 1990). The trial court ordinarily should not draw attention to specific evidence when instructing the jury. It must walk a middle course and avoid arguing the case for either side in the instructions. *State v. Fagan*, 190 N.W.2d 800, 802 (Iowa 1971). We believe the trial court did not err in refusing to submit the requested instruction.

The defendant in his pro se brief contends that the testimony about the alias shifted the burden of proof to him with respect to the consciousness of the illegal activity on January 1, 1994. We believe that Instructions No. 2, No. 7B, and No. 10 clearly advised the jury that the burden of proof at all times was upon the State.

The defendant in his pro se brief contends that there was insufficient evidence to support the convictions. A verdict will be upheld where there is substantial evidence which supports the charge. *State v. LeGear*, 346 N.W.2d 21, 23 (Iowa 1984). Evidence is substantial if it could convince a rational trier of fact, in this case

the jury, that the defendant is guilty of the crime charged beyond a reasonable doubt. *State v. Rojas-Cardona*, 503 N.W.2d 591, 594 (Iowa 1993). When considering the defendant's challenge to the sufficiency of the evidence, the reviewing court examines all of the evidence in a light most favorable to the State. *State v. Constable*, 505 N.W.2d 473, 478 (Iowa 1993). As the reviewing court, we make legitimate inferences and presumptions which may be fairly and reasonably deduced from the evidence presented at the trial. *State v. Helm*, 504 N.W.2d 142, 145 (Iowa App. 1993).

There was testimony in this situation that Freland was sitting in the passenger seat of the automobile. A search of the vehicle revealed a red box beneath the passenger seat which contained syringes that were full of a liquid. That red box also contained some white rocks which were methamphetamine. There was testimony that a loaded .25 caliber handgun was found in the Ford vehicle adjacent to where Freland. There was also testimony that a blue denim coat was found on the passenger side of the rear seat. The pockets of that jacket contained shells that would fit the pistol found in the front seat and also additional hypodermic needles. The other coat found in the back seat was claimed by Cross. From this it could be inferred that the blue denim coat belonged to Freland.

We believe that the evidence viewed in the light most favorable to the State sufficiently supports Freland's convictions beyond a reasonable doubt.

Freland in his pro se brief alleges that there is new evidence which would support a new trial. In essence, he is contending that Cross, because he has disposed of the charges that were filed against him, would be able to provide potentially exculpatory evidence. Freland raised this issue by filing a motion for a new trial which apparently has not been ruled upon. The burden is on the party filing a motion to see that a ruling is secured on the motion. *Harper v. Cedar Rapids Television Co.*, 244 N.W.2d 782, 786 (1976). The trial court must pass on an issue before it can be raised on appeal. *See State v. Mann*, 512 N.W.2d 528, 536 (Iowa 1994) (issue waived if not raised immediately). Consequently, we find that Freland has not preserved this issue for purposes of appeal.

Freland in his pro se brief raises the following issues which he asks us to consider under the Plain Error Rule:

1. An improper jury poll was conducted.

2. He was not present at a pre-trial hearing on motions.

3. He was not present at a hearing to respond to a jury question.

4. The trial court failed to accept his stipulation concerning his prior felony conviction.

5. The prosecutor was guilty of misconduct in his arguments.

Iowa has not recognized the Plain Error Rule. *State v. Johnson*, 476 N.W.2d 330, 333 (Iowa 1991). Therefore, we decline to review these issues under that rule.

Freland also contends he was denied his constitutional right to effective assistance of counsel. He contends his trial counsel was ineffective by failing to move to sever the felon in possession of a firearm count from the remaining charges, and failing to file a motion to suppress his statements to Trooper Callaway prior to receiving his *Miranda* warnings, and finally, waiving his presence in responding to questions by the jury after they had begun deliberations. Freland contends the present record is insufficient to allow this court to address these issues and the State agrees. Consequently, we reserve these claims for further proceedings under Iowa Code chapter 822.

In summary, we find that the district court did not err in overruling Freland's motion to suppress the evidence found in the vehicle and that the trial court did not abuse its discretion in allowing testimony about an alias given by Freland and failing to submit a cautionary instruction in this regard. We find there was sufficient evidence to support Freland's convictions in this matter and deny his request to consider certain issues pursuant to the plain error rule. We have reviewed all of the arguments raised by defendant and find they are addressed in this opinion or are without merit. We do, however, preserve his claim of ineffective assistance of counsel as limited above for further proceedings pursuant to Iowa Code chapter 822.

AFFIRMED.