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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 9-310 / 88-594

STATE OF IOWA,

Appellee,

vs.

ROBERT DRAPER,

Appellant.

324

Appeal from the Iowa District Court for Woodbury County, Michael S. Walsh, Judge.

Defendant appeals from his conviction, following a jury trial, of two counts of delivery of a controlled substance, one count of possession with intent to deliver, and one count of simple possession. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR RESENTENCING.**

Gary E. Wenell of Baron, Sar, Wenell, Lohr & Jarman, Sioux City, for appellant.

Thomas J. Miller, Attorney General; Bruce Kempkes, Assistant Attorney General; Michael M. Hobart, County Attorney; and J. Keith Rigg, Assistant County Attorney, for appellee.

Heard by Oxberger, C.J., and Donielson and Schlegel, JJ.

DONIELSON, J.

On June 2, 1987, Sioux City Police Officer Skaff was contacted by police informant Rhoades (now known as Zappas) about the potential for a sale of controlled substances. Zappas arranged a meeting on June 2nd at which Thomas Whinery sold the officer methamphetamine ("crank").

On June 5th, a second sale was arranged at which Whinery and Randy Frederick sold the officer more crank. A third sale occurred on June 16th between the officer and Frederick and Whinery. During that sale Frederick described an extensive drug processing operation he had engaged in earlier in the day and referred to a "boss lady."

On June 18th Zappas informed the police Frederick was going to talk with his source about further purchases. A police officer followed him to the Draper residence at 3110 Euclid. Shortly thereafter, Frederick called Zappas and informed him he would be able to obtain an ounce of crank.

Following the fourth sale by Frederick and Whinery to Officer Skaff on June 19th, they were arrested. At the police station a message came over Frederick's pager. The message was, "Randy, this is Schery. Give me a call at home."

Police officers then executed a search warrant at the residence occupied by the defendant, Robert Draper, his wife Schery Ann Draper, and Patrick Harper. During the

search, police discovered methamphetamine, marijuana, and numerous items indicating the presence of a drug processing operation. The Drapers and Harper, along with Whinery and Frederick, were jointly charged with various violations of the Uniform Controlled Substances Act and in due course appeared in a single trial. The jury found Robert Draper guilty of two counts of delivery of a controlled substance, one count of possession with intent to deliver, and one count of simple possession. He was also found to be an habitual offender.

On appeal, Draper urges the trial court persistently treated the defendants as a group rather than individually, and as a consequence many errors occurred during the trial, and the cumulative effect was to deny him a fair and impartial trial. Specifically, he contends the trial court erred: 1) by denying his motion to suppress evidence found during a search of his residence; 2) by not turning over to him a videotaped statement given by a co-defendant; 3) by making many erroneous evidentiary rulings in the admission of numerous items of evidence; 4) by denying his motion for judgment of acquittal after the State failed to present sufficient evidence to support a conviction; 5) by improperly instructing the jury and by refusing his requested interrogatory; and 6) by sentencing him as an habitual offender.

The State, in contesting all of defendant's arguments, asserts the jury could reasonably have concluded from the evidence Draper was "the boss" of an operation for the storage, processing, and packaging of crank and marijuana, and he participated in an agreement or common scheme to deliver drugs on the stated occasions.

I. **Motion to Suppress.** Defendant argues the trial court erred in refusing to grant the renewed motion to suppress evidence obtained by execution of the search warrant on June 20, 1987. Without addressing the State's claim that defendant's motion was untimely, we conclude the trial court did not err in overruling defendant's motion to suppress.

A court reviewing the issuance of a search warrant gives great deference to a prior determination of probable cause by a judge or magistrate in inquiring whether the judge or magistrate had a substantial basis for concluding probable cause existed, and it does not make its own independent determination of probable cause. State v. Bishop, 387 N.W.2d 554, 558 (Iowa 1986). Because of a preference for warrants, a court must construe them in a common sense manner and resolve doubtful cases in favor of their validity. State v. Hennon, 314 N.W.2d 405, 407 (Iowa 1982).

The arguments in defendant's brief are somewhat confusing, but the central thrust of his claim appears to

focus on informant Zappas and his alleged threatening behavior towards codefendant Whinery. It is unclear how this alleged conduct undercuts the probable cause finding made by the magistrate in this matter. The record reveals the application for a search warrant relied on the information of separate informants. An unidentified confidential informant, who had provided the police with reliable information in the past, provided the information set forth in section "B(1)" of the application. This information regarded the processing and dealing of large quantities of drugs from the Draper residence. The deposition of Officer Skaff taken on August 19, 1987, clarified the information found in section "B(1)" of the application was not provided by Zappas.

The record reveals Zappas was crucial in setting up the purchases by the undercover officer. Page four of the search warrant application refers to Zappas' role on June 18, 1987. He informed the police Frederick was going to meet with his suppliers; a police officer then verified his presence at the Draper residence.

Probable cause clearly existed to execute a search of the Draper household on June 20, 1987. Zappas' information played only a minor part in assembling the search warrant application, and the information he supplied was substantiated by subsequent police observations. Assuming Zappas did threaten Whinery on June 2, 1987, it does not

contravene the information contained in the application. Defendant's reliance on Franks v. Delaware, 438 U.S. 154, 98 S. Ct. 2674, 57 L. Ed. 2d 667 (1978), is misplaced. Franks involved the making of false statements in order to obtain a search warrant. Defendant's brief offers no examples of false statements intentionally or recklessly made in order to obtain a search warrant in this case.

II. Video Statement. Defendant contends the trial court erred in not forcing the State to turn over the video statement of codefendant Whinery and in not granting his motion to dismiss for prosecutorial misconduct. From our review of the record, it is apparent the trial court did not err on either ground.

The trial court repeatedly refused to compel the State to produce Whinery's taped statement because it contained no exculpatory evidence. After Whinery had withdrawn from the plea arrangement, the court allowed him to share his edited, transcribed statements with his codefendants. It is unclear as to why defendant believed Zappas' alleged threat towards Whinery on June 2nd would have any bearing on Draper's alleged involvement in the crimes on the 16th, 19th, and 20th. Zappas testified he did not know Robert Draper, and there was no evidence demonstrating Draper was ever aware of the alleged threat prior to his arrest. The circumstances of the case rendered the tape to be without exculpatory value to defendant.

Even assuming the tape was of some value to defendant, we note he had access to this information at the time of trial and it was used in cross-examining witnesses. Defendant offers no example of how he was prejudiced by any delay in receiving the transcribed video statement.

We are cognizant of the fact the Brady rule concerning the suppression of favorable evidence by the prosecution applies to both exculpatory and impeachment evidence. State v. Anderson, 410 N.W.2d 231, 233 (Iowa 1987). The videotaped statements at issue in this case had impeachment potential with regard to Zappas and Officers Skaff and Noltze. However, the State's refusal to provide this information to defendant would not rise to the level of a Brady violation (nor constitute prosecutorial misconduct) because it was not constitutionally "material" to his defense. "Material" evidence required to be disclosed by the State is such that there is a "reasonable" probability if the evidence had been produced, the outcome of the trial would have been different. Id. A "reasonable" probability must be so substantial it undermines the confidence in the outcome of the case. Id. at 234. As noted above, any alleged threat existing between Zappas and Whinery on the 2nd was unlikely to have any effect on defendant's involvement in crimes alleged on June 16th, 19th, and 20th. The trial court did not err in dismissing defendant's motion to dismiss.

III. Evidentiary Ruling. Defendant's third claim of error by the trial court is predicated on numerous evidentiary rulings. Defendant argues he was denied a fair trial because the trial court unconditionally admitted into evidence various pieces of evidence, including statements made by his codefendants. Defendant contends the evidence should have been conditionally admitted into evidence subject to the State's ability to offer independent proof of the existence of the conspiracy and to connect defendant with the conspiracy.

Our evidentiary rules provide for the admission of statements made by a coconspirator, Iowa R. Evid. 801(d)(2), and for the conditional admission of evidence. Iowa R. Evid. 104(b). In order for a coconspirator's statements to be admissible, a trial court must determine by a preponderance of evidence a conspiracy existed. State v. Florie, 411 N.W.2d 689, 695 (Iowa 1987). Evidence relied on in determining the existence of a conspiracy must include some proof independent of the coconspirator's statement which is the subject of an evidentiary ruling. Id. at 696. See also United States v. Helmel, 769 F.2d 1306, 1312 (8th Cir. 1985) (statement of coconspirator is admissible if independent proof establishes by a preponderance of the evidence a conspiracy existed, the defendant and declarant were members of conspiracy, and declaration was made in course of and in furtherance of

conspiracy). This requirement of "independent" proof, however, does not preclude a court from considering the statement at issue when making a determination a conspiracy has been established. Bourjaily v. United States, 483 U.S. 171, 181, 107 S. Ct. 2775, 2782, 97 L. Ed. 2d 144, 156 (1987).

Once a trial court concludes a preponderance of evidence exists to establish a conspiracy, it may conditionally admit such evidence subject to the State being able to connect conditionally-admitted evidence to the conspiracy. United States v. Reda, 765 F.2d 715, 721 (8th Cir. 1985); United States v. American Grain & Related Industries, 763 F.2d 312, 319 (8th Cir. 1985). The failure to "connect-up" conditionally-admitted evidence to an alleged conspiracy may result in a mistrial. Reda, 765 F.2d at 721; American Grain, 763 F.2d at 319.

The general thrust of defendant's argument is that much of the evidence was not conditionally admitted in this case and its relevancy with regard to him was not established. In his brief, defendant cites no less than seventeen examples of evidence he contends was admitted absent evidence of a conspiracy and his connection therewith.

What consequences should result from the trial court's failure to conditionally admit and then ultimately find the evidence relevant and admissible against defendant? The State argues any failure on the trial court's part to

conditionally admit evidence was of no prejudice to defendant. It contends it met its burden to prove by a preponderance the establishment of a conspiracy and to connect up the evidence with the alleged conspiracy.

We agree with the State and find a harmless error standard applicable to this case. Our supreme court has previously recognized application of the harmless error standard to the improper admission of coconspirator statements, State v. Waterbury, 307 N.W.2d 45, 48 (Iowa 1981), and it similarly recognized a defendant would not be prejudiced by confusion surrounding the conditional admission of evidence "subject to being connected up." Id. at 51. As the State established the existence of a conspiracy and the coconspirator statements and evidentiary exhibits would ultimately have been admissible against defendant, we find it a harmless error that the trial court did not initially admit the evidence as conditional. See United States v. Bell, 573 F.2d 1040, 1045 (8th Cir. 1978) (Where government unquestionably met its burden of demonstrating admissibility of coconspirator's statements, lack of on-the-record determination of admissibility did not affect defendant's substantial rights.).

Defendant also claims the district court erred in allowing a witness to read from one of the exhibits and in prohibiting him from presenting evidence with regard to the types of people who frequented the Traxx bar. We find no error with regard to either claim.

IV. Sufficiency of the Evidence. Defendant claims there was insufficient evidence to support a verdict of guilty and the court erred in denying his motion for entry of judgment of acquittal. We will uphold a verdict where there is substantial evidence in the record tending to support the charge. State v. Wheeler, 403 N.W.2d 58, 60 (Iowa App. 1987). The standards governing a challenge to the sufficiency of the evidence are well established:

> When reviewing a challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the state, including legitimate inferences and presumptions which may fairly and reasonably be deduced from the evidence in the record. Direct and circumstantial evidence are equally probative so long as the evidence raises "a fair inference of guilt and [does] more than create speculation, suspicion, or conjecture." It is necessary to consider all the evidence in the record and not just the evidence supporting the verdict to determine whether there is substantial evidence to support the charge. Substantial evidence means evidence which would convince a rational factfinder that the defendant is guilty beyond a reasonable doubt.

Id. (citations omitted).

Viewing the evidence in the light most favorable to the State, it is apparent there was sufficient evidence to sustain the jury's verdict. The record reveals a large-scale drug processing and packaging operation was conducted in defendant's home. On the night of June 20, 1987, the residence was replete with the instrumentalities of the drug trade. A police scanner, small plastic bags, and bags of a cutting agent were found in the kitchen. A purse found in the kitchen contained containers of crank

worth up to $10,000. A bag of marijuana and $9,865 in cash (including three one-hundred-dollar serialized bills received by Frederick from Officer Skaff during the June 16th drug transaction) were found in defendant's bedroom. A downstairs recreation room contained containers commonly used to hold crank; "Inositol," a cutting agent for crank; a grinder; and two measuring scales. A downstairs bedroom contained marijuana, a large quantity of crank, cash, scales, and more containers commonly used to package crank.

Defendant complains the evidence implicating him is purely circumstantial. However, circumstantial evidence is as probative as direct. Once a conspiracy is established, even slight evidence connecting the defendant to the conspiracy may be sufficient proof of his involvement. United States v. Mims, 812 F.2d 1068, 1075 (8th Cir. 1987); Reda, 765 F.2d at 720. An examination of the record reveals there was substantial evidence to raise a fair inference of guilt. The pervasive nature of these drug operations throughout defendant's entire home and the presence in his bedroom of serialized currency from a drug transaction constitutes substantial evidence which would convince a rational fact finder he is guilty beyond a reasonable doubt.

V. Jury Instructions. Defendant claims the trial court erred in giving jury instruction number seven and in

refusing to submit his interrogatory to the jury. A review of instruction six explains the trial court's rationale for submission of instruction seven to the jury. Instruction six reminded the jury that throughout the trial certain evidence had been admitted against only particular defendants. The jury was instructed to consider only evidence admitted with respect to a specific defendant when ascertaining that defendant's guilt or innocence. Instruction seven set forth the names of each defendant, and it specified what exhibits were not admitted against each defendant and thus could not be considered by the jury when determining guilt.

Instruction seven was a specific clarifying instruction which enabled the jury to fully adhere to the admonishment set forth in instruction six. This trial was lengthy (approximately seven weeks), and it involved five defendants and over 140 exhibits. It would be unrealistic to expect the jury to have remembered which pieces of evidence were admissible against specific defendants. The trial court is to be commended for having submitted this instruction to facilitate the jury's deliberations. Contrary to defendant's claim, this instruction did not prejudice him by unduly reinforcing the fact that over 140 exhibits had been admitted against him. See State v. Kern, 307 N.W.2d 29, 31 (Iowa 1981) (Jury instruction which pointed out certain testimony was admissible as to one

defendant but not as to the other was proper and did not give undue emphasis to certain testimony.). Furthermore, placement of defendant's name first on the list of defendants in instruction seven does not constitute error.

Defendant claims the trial court erred in refusing to submit his requested interrogatory to the jury. The interrogatory would have required the jury to specify the location of the methamphetamines or marijuana it deemed defendant had possessed with intent to deliver. The gist of defendant's argument seems to be the circumstances of a joint trial prevented him from "openly and affirmatively" conveying to the jury that drugs found at his residence belonged to his wife or Mr. Harper.

A trial court's refusal to give an instruction requested by a defendant is not an error where the substance of the instruction was adequately incorporated into other instructions that were given to the jury. State v. Spargo, 364 N.W.2d 203, 210 (Iowa 1985). Instructions defining knowledge and possession properly informed the jury of the standards it was to apply in determining if defendant possessed methamphetamines or marijuana with the intent to deliver. Refusal to submit defendant's interrogatory was not in error.

VI. Habitual Offender. Defendant argues the trial court erred in sentencing him as an habitual offender. He contends the habitual offender statute, Iowa Code section

902.8, is inapplicable to his conviction because Iowa's Uniform Controlled Substance Act, Iowa Code Chapter 204, contains its own provisions addressing the enhancement of penalties and the sentencing of repeat offenders. Although we reject defendant's argument that the penalty provisions of Chapter 204 preclude any application of section 902.8, we remand this matter for resentencing consistent with the mandatory minimum sentence provisions of sections 204.413.

Chapter 204 recognizes the applicability of sanctions found outside the controlled substances act. Iowa Code § 204.404. It also provides penalty enhancement provisions for violators of the chapter's provisions, Iowa Code § 204.414 (treble fine), and for offenders who commit two or more offenses under the chapter. Iowa Code § 204.411 (treble fine and/or sentence). Only two potential conflicts between Chapter 204 and the habitual offender statute exist. The first regards the different penalty enhancement provisions which exist between section 204.411 and section 902.8. We are not faced with that situation in this case.

The second potential conflict arises when a defendant is convicted for violating section 204.401(1)(a) or (b). In that case, the defendant must serve one-third of the sentence before becoming eligible for parole, Iowa Code

§ 204.413.[1] In the case of an habitual offender, the minimum sentence required by section 204.413 may be greater than that set forth in section 902.8. Under those circumstances, the specific provisions of section 204.413 would prevail. An habitual offender sentenced pursuant to section 204.401(1)(a) or (b) would therefore be subject to the maximum sentence provision of section 902.9(2) and the minimum sentence requirements of section 204.413.

The circumstances of this case are such that defendant faces a longer minimum sentence if the penalty enhancement provisions of section 204.413 are applied. Defendant is correct in that the trial court should not have applied the three-year provision of section 902.8 to this case, although he probably did not foresee that appealing this issue could ultimately result in a lengthening of the sentence he must serve prior to being eligible for parole. We reverse defendant's sentence and remand for resentencing consistent with this opinion.[2]

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR RESENTENCING.

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1. Mitigating circumstances may exist allowing for a reduction in the sentence by the trial court. Iowa Code § 901.10.

2. As the trial court did not consider defendant's December 1986 conviction in sentencing him as an habitual offender, his arguments in that regard are without merit. His failure to present any evidence demonstrating his past convictions were constitutionally infirm similarly renders his arguments in that regard to be without merit. We also reject his seventh argument claiming cumulative error should have resulted in a new trial in this matter.