

No. 97-2042. [8-703] STATE v. WIXOM

Appeal from the Iowa District Court for Lee County, D.B. Hendrickson and John G. Linn, Judges. **REVERSED.** Considered by Sackett, C.J., Huitink, Streit, Vogel and Mahan, JJ. Zimmer, J., takes no part. Opinion by Streit, J. Dissent by Sackett, C.J., and Vogel, J. (13 pages \$5.20)

Michael Wixom appeals his convictions and sentences, following a jury trial, for three drug-related offenses. In October 1996, Wixom's residence was searched pursuant to a warrant. The police found drugs and drug paraphernalia. Wixom was charged with possession with intent to deliver cocaine, possession with intent to deliver marijuana, and possession with intent to deliver or manufacture amphetamine. At trial, Wixom's girlfriend, Gloria Genck, was called as a witness for the State. During trial, Genck denied making any statements incriminating Wixom. Genck had made similar denials at an earlier motion to suppress. The State attempted to impeach Genck by questioning officers about the subject matter of their discussions with her. According to the officers, Genck made statements implicating Wixom in the manufacture and sale of illegal drugs. The State's true purpose in calling the officers was to offer inadmissible hearsay into evidence. The trial court erred by admitting inadmissible hearsay testimony under the guise of impeachment in violation of *State v. Turecek*, 456 N.W.2d 219 (Iowa 1990). It was error for the trial court to allow the State to impeach its own witness when it knew, prior to calling Genck, she was denying she made previous statements. The

evidence admitted was not cumulative. It was different from all other evidence presented in that it supplied the jury with information about activities pointing to Wixom's intent. The State cites all the other proof the jury could have used to find Wixom guilty. We should not step into the jury box, weigh the evidence, and then declare such errors caused no prejudice. The effect of the admission of the hearsay testimony was a denial of Wixom's right to a fair trial. We reverse and grant defendant a new trial. **DISSENT ASSERTS:** The majority finds that there was no evidence of Wixom's intent to deliver. I disagree. In Wixom's house, police found marijuana hidden in four different places, three rock or salt forms of cocaine and amphetamine, and amphetamine in powder form. Wixom denied knowledge or ownership of any of the drugs seized save for a small amount of the marijuana. He admitted, however, to owning most of the other items seized. Among them were common drug-dealing paraphernalia such as pipes, baggies, razor blades, tweezers, scissors, eye droppers, rolling papers, and soldering ring clamps; several of which were found together in a tupperware container hidden above the ceiling tiles. Police also found several baggies in the trash with their corners knotted or cut off, which is a typical method of how drugs are packaged for distribution. Police also seized several products which are commonly used in the manufacture of methamphetamine, including paint thinner, acetone, starter fluid, drainer opener, numerous inhalers, and ether. While possession of any these items can be explained away based on their appropriate use, Wixom possessed an unusual quantity of certain items which contradicted normal household use. Finally, police found a police scanner, a list of frequencies for police scanners which Wixom admitted to making, measuring scales, and scale weights. A jury could conclude that the use of measuring devices infers sale and distribution as opposed to mere personal use. There was ample evidence that Wixom was operating an illegal drug operation. I would affirm because the State carried its burden of showing that the hearsay testimony was not prejudicial as weighed against the substantial evidence of Wixom's intent to manufacture and deliver illegal drugs.