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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 1-630 / 00-1423
Filed November 16, 2001

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ALMAN MARCH KENYON,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Donna L. Paulsen, Judge.

Alman March Kenyon appeals from the judgment and sentence entered upon jury verdicts finding him guilty of conspiracy to manufacture more than five grams of methamphetamine and possession of ephedrine or pseudoephedrine with the intent to use it as a precursor. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Shellie L. Knipfer, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Donald D. Stanley, Jr., Assistant Attorney General, John P. Sarcone, County Attorney, and Gary Kendell, Assistant County Attorney, for appellee.

Considered by Huitink, P.J., and Mahan and Vaitheswaran, JJ.

HUITINK, P.J.

Alman Kenyon appeals from a judgment entered following jury verdicts finding him guilty of conspiracy to manufacture more than five grams of methamphetamine and possession of ephedrine or pseudoephedrine with the intent to use it as a precursor in violation of Iowa Code sections 124.401(1)(b)(7) (1999) and 124.401(4) (Supp. 1999).

I. Background Facts and Proceedings.

Officers received an anonymous tip on February 7, 2000, to go to the Best Inn in Johnston, and they began surveillance of the vehicle that was described in the tip. A marked police car stopped the vehicle after it left the hotel. Police asked Kenyon, the driver of the vehicle, for a driver's license. Kenyon said he did not have one. Police asked him to get out of the car, and he complied. He then gave his name and information. Police told Kenyon they were investigating a possible complaint of narcotics activity that came through a tip and asked him if narcotics or anything else were in the vehicle. Kenyon answered no. Jonna Ham, the passenger and owner of the vehicle, consented to a search of the vehicle.

An officer opened the trunk and smelled a strong odor of anhydrous ammonia. Inside the trunk police found tubing, a Coleman gas can, a plastic container with a pump attached to it, a plastic laundry soap container, a white plastic container of drain opener, and a blue and red oatmeal box. They also found a large amount of ephedrine or pseudoephedrine. Kenyon was put into the squad car. An officer asked Kenyon where he got the items found in the trunk,

and Kenyon answered that he found them at a car wash located north of the hotel. Another officer testified Kenyon was evasive about the items in the trunk, but he knew about them.

A criminalist with the Iowa Division of Criminal Investigations testified that Kenyon and Ham had everything they needed to manufacture methamphetamine. She also testified they had enough precursors to make six or seven grams of pure methamphetamine. The items found indicated past and future manufacturing of methamphetamine.

Kenyon was charged with conspiracy to manufacture more than five grams of methamphetamine, manufacturing more than five grams of methamphetamine, and possession of ephedrine or pseudoephedrine with intent to use it as a precursor. The trial court overruled his motion for judgment of acquittal and directed verdict as to conspiracy to manufacture more than five grams of methamphetamine and manufacturing more than five grams of methamphetamine. His counsel stated he believed a requisite showing had been made for the precursor charge.

Kenyon was found guilty of conspiracy to manufacture more than five grams of methamphetamine and possession of ephedrine or pseudoephedrine with intent to use it as a precursor. He was acquitted of manufacturing methamphetamine. Kenyon received an indeterminate twenty-five-year sentence on the conspiracy charge and an indeterminate five-year sentence for possession of precursors, to be served concurrently.

On appeal Kenyon contends there was insufficient evidence that he conspired to manufacture methamphetamine in that the State failed to prove an agreement to manufacture methamphetamine. Kenyon also argues he was denied the effective assistance of trial counsel. We affirm.

II. Sufficiency of the Evidence.

Kenyon argues the evidence was insufficient to prove beyond a reasonable doubt that he conspired to manufacture methamphetamine. He contends there was no evidence of an agreement between him and another to manufacture methamphetamine. He maintains his evasiveness about the items in the trunk, his statement that he found them at a car wash, the fact that he was driving Ham's vehicle, and his mere presence are not evidence of an agreement.

Because a jury verdict is binding on this court when supported by substantial evidence, appellate review of Kenyon's sufficiency-of-the-evidence argument is for the correction of errors at law. *State v. Speicher,* 625 N.W.2d 738, 740 (Iowa 2001). Evidence is substantial if a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. *State v. Casady,* 597 N.W.2d 801, 804 (Iowa 1999). This court reviews the evidence in a light most favorable to the State. *Id.* This includes all legitimate inferences that may fairly and reasonably be deduced from the evidence. *Id.*

Iowa Code section 124.401(1)(b)(7) makes it a crime for anyone to "manufacture, deliver, or possess with the intent to manufacture or deliver . . . or conspire with one or more other persons to manufacture, deliver, or possess with the intent to manufacture or deliver . . . [m]ore than five grams but not more than

five kilograms of methamphetamine . . . ." Iowa Code § 124.401(1)(b)(7) (1999). Conspiracy requires that a person, with the intent to promote or facilitate the commission of a crime, either agrees with another that they or one or more of them will engage in conduct constituting the crime or an attempt or solicitation to commit the crime, or agrees to aid another in the planning or commission of the crime or of an attempt or solicitation to commit the crime. Iowa Code § 706.1(1). At least one conspirator must commit an overt act evidencing a design to accomplish the purpose of the conspiracy by criminal means. Iowa Code § 706.1(3).

Direct evidence of an agreement to commit a crime is not required to prove conspiracy. *State v. Mapp,* 585 N.W.2d 746, 748 (Iowa 1998). Instead, "the agreement may be inferred from the surrounding circumstances. All legitimate inferences arising reasonably and fairly from the evidence may be indulged in to support the verdict." *Id.* (quoting *State v. Ruiz,* 496 N.W.2d 789, 792 (Iowa Ct. App. 1992) (citations omitted)).

There is no direct evidence that Kenyon agreed to manufacture methamphetamine with Ham or another. However, in considering the surrounding circumstances, there is sufficient evidence that Kenyon did conspire to manufacture methamphetamine with Ham. Kenyon admitted to police that he found the items in the trunk of Ham's vehicle at a car wash. This admission shows that he presumably played a role in retrieving these items. These items are used for manufacturing methamphetamine, and in fact, Kenyon and Ham had all the materials they needed to do so. Furthermore, Kenyon's evasive answers

to the officer indicate a consciousness of guilt. *See State v. Cox,* 500 N.W.2d 23, 25 (Iowa 1993) (defendant's admissions may be implied by his conduct subsequent to the crime when such conduct indicates a consciousness of guilt). There is sufficient evidence of an agreement to manufacture methamphetamine.

We find this case distinguishable from *State v. Speicher,* 625 N.W.2d 738 (Iowa 2001). Speicher was merely present while methamphetamine was being manufactured. *Speicher,* 625 N.W.2d at 742. There was no evidence of his involvement from which to infer agreement to manufacture methamphetamine. *Id.* at 742-43. In contrast, in this case agreement may be inferred from Kenyon's involvement in finding and retrieving the items used to manufacture methamphetamine. We affirm on this issue.

III. Ineffective assistance of counsel.

Kenyon contends his trial counsel was ineffective in failing to move for judgment of acquittal for the offense of possession of ephedrine or pseudoephedrine with the intent to use it as a precursor. He argues there was no evidence that he had the right to exercise dominion and control over the precursors, and thus the evidence is insufficient to prove beyond a reasonable doubt that he possessed the ephedrine or pseudoephedrine. Therefore, he contends, counsel breached an essential duty in failing to move for judgment of acquittal. He maintains he was prejudiced by counsel's error because the charge was submitted to the jury and he was erroneously convicted of an offense the State failed to prove.

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We review Kenyon's claim of ineffective assistance of trial counsel de novo. *State v. Oetken*, 613 N.W.2d 679, 683 (Iowa 2000). Generally, ineffective-assistance claims are preserved for postconviction relief proceedings. *State v. Hoskins*, 586 N.W.2d 707, 709 (Iowa 1998). Such claims are preserved to allow development of the facts surrounding the conduct of trial counsel. *State v. Atley*, 564 N.W.2d 817, 833 (Iowa 1997). "Even a lawyer is entitled to his day in court, especially when his professional reputation is impugned." *State v. Coil*, 264 N.W.2d 293, 296 (Iowa 1978).

We find the record in this case insufficient to address Kenyon's ineffective-assistance claim. Therefore, we preserve his claim for possible postconviction relief proceedings.

IV. Conclusion.

We affirm the district court's judgment. Kenyon's claim of ineffective assistance of counsel is preserved for possible postconviction relief proceedings.

AFFIRMED.

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