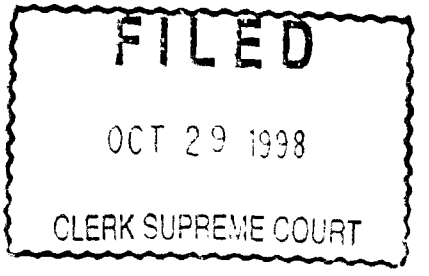
IN THE COURT OF APPEALS OF IOWA

No. 8-336 / 97-1066
Filed October 29, 1998



STATE OF IOWA,

Appellee,

vs.

BRYAN JAMES PELLMAN,

Appellant.

Appeal from the Iowa District Court for Clarke County, Arthur E. Gamble, Chief Judge.

Bryan Pellman appeals from his conviction, following a jury trial, for delivery of a controlled substance. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Dennis Hendrickson, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Jean C. Pettinger, Assistant Attorney General, and John D. Lloyd, County Attorney, for appellee.

Heard by Cady, C.J., and Streit, and Vogel, JJ., but decided by Huitink, P.J., and Streit and Vogel, JJ.

'ER CURIAM

Bryan Pellman appeals from the judgment and sentence following his onviction for delivery of a controlled substance. He claims the district court abused ts discretion by allowing the State to question a defense witness about a prior ıssertion of the privilege against self incrimination. We affirm the district court.

The facts giving rise to this case developed during the sale of nethamphetamine to a government informant. Leonard Briley, a prison inmate vorking as a government informant in exchange for a reduced sentence, testified he gave Pellman $2000 in exchange for methamphetamine. Jerry Nelson, a government ıgent, conducted surveillance of the transaction. He testified Briley addressed the ɔther person as Bryan in the phone conversation to arrange the drug transaction.

At trial, Pellman asserted an alibi defense. He claimed he was at a birthday ɔarty the night of the transaction with Shawna Casteel and Cory Casteel and was not nvolved in the drug buy.

Shawna Casteel testified Pellman was with her at a birthday party at the time ɔf the drug buy. Although Cory Casteel told agent Nelson while he was incarcerated hat he and Pellman were together at the time of the drug buy, he testified consistent vith the alibi defense in a deposition. He later told the court during an offer of proof ɔutside of the jury's presence he intended to invoke his Fifth Amendment privilege ıgainst self incrimination if questioned about the night of the drug buy. The district

court subsequently granted him immunity. When asked about the evening of the drug transaction in the jury's presence, Cory provided testimony consistent with his deposition testimony and supported Pellman's alibi defense.

The State attempted to impeach Cory's testimony by questioning him about the interview with Nelson in which he admitted he and Pellman delivered methamphetamine on the night in question. Cory explained the inconsistency in his testimony by claiming he told Nelson what he believed the agent wanted to hear in order to get out of jail. After obtaining permission from the trial court, the State next attempted to impeach Cory's testimony by questioning him about his prior intention to assert his Fifth Amendment privilege against self incrimination. The following colloquy occurred between the prosecutor and Cory:

> Q. Mr. Casteel, I think we have established here that you initially gave an interview to Agent Nelson that gave one version of events of December 7, 1994, and then later in a deposition on July 25 of 1996 gave a different version of events on December 7 of 1994. Fair statement? A. Yes.
>
> Q. Okay. Yesterday, when faced with the inconsistencies between those statements, you were asked if you were going to testify here today and you declined to do so on the basis of your Fifth Amendment privilege against self incrimination, didn't you? [Defense objection.]
>
> Q. And at that time you were granted immunity for any involvement in a drug delivery on December 7 of 1994, weren't you? A. Yeah.
>
> Q. And you were granted immunity for any claim that you may have committed perjury in that deposition, isn't that right? A. Yeah.
>
> Q. Now I'm curious. If you weren't in Clarke County on December 7 of 1994, and if you were giving the truth in this deposition, which seems to be somewhat consistent with your testimony here

> today, how could you be incriminating yourself by testifying in these proceedings? A. I don't know. My lawyer is the one who told me to do it.

The jury found Pellman guilty of delivery of a controlled substance. The district court sentenced him to an indeterminate ten-year prison term.

On appeal, Pellman claims the district court erred by allowing the State to question Cory Casteel about the assertion of his privilege against self incrimination when there was no inconsistency between the assertion and his trial testimony.

On appellate review of an evidentiary ruling, we grant the district court wide latitude regarding admissibility and will disturb the court's ruling only upon finding an abuse of discretion. *State v. Sallis,* 574 N.W.2d 15, 16 (Iowa 1998).

The Fifth Amendment of the United States Constitution provides no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. The underlying purpose of the Fifth Amendment is to protect innocent individuals. *Grunewald v. United States,* 353 U.S. 391, 421, 77 S. Ct. 963, 982, 1 L. Ed. 2d 931, 952 (1957). In *Grunewald,* the court observed, "Too many, even those who should be better advised, view this privilege as a shelter for wrongdoers. They too readily assume that those who invoke it are either guilty of crime or commit perjury in claiming the privilege." *Id.* (quoting *Ullmann v. United States,* 350 U.S. 422, 426 (1956)).

A witness may generally be impeached by evidence of a statement made on a prior occasion inconsistent with material testimony given at trial. Iowa R. Evid. 613; *State v. Berry,* 549 N.W.2d 316, 318 (Iowa App. 1996). A prior assertion of the privilege against self incrimination may be used for impeachment purposes if the assertion constitutes a significant inconsistency from the witness's trial testimony. *Grunewald,* 353 U.S. at 418-19, 77 S. Ct. at 981, 1 L. Ed. 2d at 951 (holding State's attempts to impeach defendant with previous assertion of his privilege against self incrimination reversible error when assertion was consistent with trial testimony). We have also observed it is generally improper for a prosecutor to require a witness to claim his privilege against self-incrimination in the presence of the jury when the prosecutor knows or has reason to anticipate the witness will assert it. *State v. Allen,* 224 N.W.2d 237, 240-41(Iowa 1974). This rule exists because of the prejudice which arises from the human tendency to treat the claim of privilege as a confession of crime, creating an adverse inference which an accused is powerless to combat by cross-examination. *Id.*; *see also Bowles v. United States,* 439 F.2d 536, 541-42 (D.C. Cir. 1970).

Pellman claims the trial court erred by allowing the State to question Cory about his prior assertion of his privilege against self incrimination. He maintains his direct examination testimony as an alibi witness was entirely consistent with his deposition and trial testimony, and the State therefore did not have a right to impeach

him with his Fifth Amendment assertion. Alternatively, he asserts even if the State's use of his Fifth Amendment claim may be used as a source of impeachment, the cross examination should have been excluded because its probative value of his credibility was outweighed by its impressible impact on the jury.

We must first consider whether Cory's assertion of his Fifth Amendment privilege against self incrimination during the offer of proof was inconsistent with his trial testimony. At trial, Cory provided testimony consistent with Pellman's alibi defense. This testimony is not inconsistent with his assertion of his Fifth Amendment privilege against self incrimination. We therefore find the district court erred by allowing the State to question Cory Casteel about his prior assertion of the privilege against self incrimination.

Although we find the district court erred in permitting cross examination concerning Cory's assertion of his Fifth Amendment right against self incrimination, we find this error harmless in light of the overwhelming evidence supporting the verdict. *See State v. Williams,* 574 N.W.2d 293, 298 (Iowa 1998) (stating reversal is not required unless prejudice results). In this case, Briley's and Nelson's testimony revealed Pellman exchanged methamphetamine for $2000. During the surveillance, Nelson listened to a phone conversation between Pellman and Briley setting up the buy. Following the buy, Briley returned with methamphetamine. Additionally, Nelson testified Cory admitted his own involvement as well as Pellman's involvement

in the drug deal. Nelson further testified Cory described details of the transaction, including the price of the drugs as well as an accurate description of the vehicle involved. Based upon this evidence, we conclude Pellman was not prejudiced by the trial court's error.

We have considered all of Pellman's claims and affirm the district court.

AFFIRMED.