

IN THE COURT OF APPEALS OF IOWA

No. 6-166 / 95-545

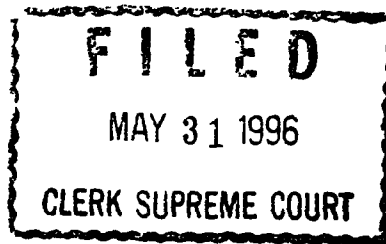
STATE OF IOWA,

Plaintiff-Appellee,

vs.

ANTHONY ANDERSON,

Defendant-Appellant.



Appeal from the Iowa District Court for Muscatine County, Patrick J. Madden,
Judge.

Anthony Anderson appeals the judgment and sentence entered upon his convictions of possession with intent to deliver a controlled substance (cocaine) and possession of a controlled substance (marijuana). **AFFIRMED.**

Linda De1 Gallo, State Appellate Defender, and John F. Fatino and Sarah E. Hennesy, Assistant State Appellate Defenders, for appellant..

Thomas J. Miller, Attorney General, Robert P. Ewald, Assistant Attorney General, Richard R. Phillips, County Attorney, and Kerri L. Snyder, Assistant County Attorney, for appellee.

Heard by Habhab, P.J., and Cady and Huitink, JJ. Vogel, J., takes no part.

HABHAB, P.J.

On October 22, 1994, police executed a search warrant of Anthony Anderson's residence. The search warrant authorized police to (1) search "any and all vehicles at said property;" (2) search "any persons at said property at the time of the execution of the search warrant;" and (3) seize "any and all controlled substances" which they found. When police "knocked and announced," someone opened the door and then shut it immediately. Police officers then knocked down the door with a ram and entered the house.

In the livingroom, police found Anderson, Tom Sink, and Sink's girlfriend, Brandy Helms. Police found in the livingroom a picture frame with "lines" of cocaine drawn out on the glass, a straw, a knife, and a lighter. Nearby, on a small cedar chest in front of the couch, there were stacks of money totaling \$1122. Police also found in the livingroom a metal tray with two baggies of marijuana, two packages of Zig Zag cigarette papers, and scissors or forceps. In a back bedroom, the following items were found: approximately 6.35 grams of cocaine, \$4531 in cash, a box of sandwich bags, an electronic Rolodex, a sifter with cocaine residue, and some mirrors with cocaine residue. The search also uncovered a police scanner, a card with police "10 codes," and a box which had contained an expensive electronic scale.

Police also searched a car parked outside the residence. The car was parked at the front door of the house on the front lawn. Police learned it was rented to Tom Sink. Inside the car police found 4.73 grams of methamphetamine in a brown pill

bottle. In the trunk of the car police found 58.27 grams of methamphetamine in a Tupperware container. Sink was charged with and pleaded guilty to possession with intent to deliver.

Anderson was charged with possession with intent to deliver a controlled substance (cocaine) and possession of a controlled substance (marijuana). The trial information was amended to include statutory citations of Iowa Code sections 124.401A and 124.401B (enhanced penalties for distribution to persons on certain real property). When questioned why he had so much cash around the house, Anderson explained it had come from winnings at the President River Boat the night before, the sale of two automobiles, and wages. Also, Anderson admitted to being a drug user.

Anderson filed a motion in limine seeking, among other things, to prohibit the State from introducing evidence of the methamphetamine found in Sink's car and of Sink's reputation for drug trafficking. In its ruling on the motion, the court allowed the State to introduce evidence of the methamphetamine and noted an offer of proof would be made prior to testimony regarding Sink's reputation. The court also stated it would entertain from Anderson, at the conclusion of the trial, a reasonable cautionary jury instruction regarding the methamphetamine evidence. Anderson never requested such an instruction.

At trial, the offer of proof was made and the court allowed evidence of Sink's reputation as a drug trafficker. The State introduced evidence of records of

Anderson's gambling transactions on the President River Boat through the testimony of a police officer. Anderson objected to the introduction of this evidence on a foundational basis, arguing the officer was not the custodian of the records. The district court overruled the objection. Anderson was found guilty as charged.

Anderson appeals.

I.

Anderson contends the district court erred in admitting evidence of methamphetamine in Sink's car which was parked on the lawn in front of the house being searched for drugs.

When reviewing a district court's ruling on admissibility of evidence, we review for an abuse of discretion. *State v. Jones*, 490 N.W.2d 787, 789 (Iowa 1992); *State v. Alvey*, 458 N.W.2d 850, 852 (Iowa 1990). There is an abuse of discretion only if the defendant shows that such discretion was "exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable." *State v. Neary*, 470 N.W.2d 27, 29 (Iowa 1991). We reverse a district court's use of discretion "only when it is palpably and grossly violative of fact or logic such that it smacks of passion or bias." *State v. Serr*, 322 N.W.2d 96, 99 (Iowa App. 1982).

Evidence is relevant if it has a tendency to make the existence of any material fact more probable or less probable than it would be without the evidence. Iowa R. Evid. 401. While evidence may be relevant, it may not be admissible if the probative value of the evidence is substantially outweighed by the dangers of unfair prejudice.

Iowa R. Evid. 403. The probative value gauges the strength and force of the tendency of the evidence to make a consequential fact more or less probable. *State v. Plaster*, 424 N.W.2d 226, 231 (Iowa 1988). Unfair prejudice is an undue tendency to suggest decisions on an improper basis. *Id.*

The State's argument is the methamphetamine evidence was relevant to the issue of Anderson's intent to deliver cocaine. It was the issue of intent to deliver, not possession, which was highly contested in the case. In addition to being a highly contested issue, most, if not all, of the State's evidence on the issue of intent to deliver was circumstantial evidence.¹

Sink was a known drug trafficker and had a container of methamphetamine in the trunk of his rented car. When police arrived at Anderson's house, Sink was in the livingroom with Anderson. There was a large amount of money, cocaine, and drug paraphernalia in the livingroom, also. We find the evidence of methamphetamine is relevant to the issue of whether Anderson was intending to deliver cocaine to Sink. Next, however, we must determine if the evidence was admissible by weighing the probative value of the evidence and the danger of unfair prejudice.

The probative value of the evidence is high when the remaining evidence is taken into consideration. In the house, police found over \$5000 in cash, a large amount of cocaine, a sifter, and packing material. Special agent Ronald Deist of the

¹ Circumstantial evidence is just as probative as direct evidence. *State v. Parrish*, 502 N.W.2d 1, 3 (Iowa 1993), *State v. Garr*, 461 N.W.2d 171, 173 (Iowa 1990).

Iowa Division of Narcotics Enforcement and special agent Kevin Winker of the Iowa Division of Criminal Investigation both testified a sifter is used by dealers to dilute pure cocaine and increase their profits. They further testified a sifter is used by dealers and not by users because users do not have a large enough amount of cocaine to sift, whereas dealers do. Agent Winker also testified the amount of cocaine found in the house was consistent with an intent to distribute. Special agent Daniel Stepleton of the Iowa Division of Narcotics Enforcement testified the combination of the large amount of cash, the amount of cocaine, the sifter, and the packaging materials were consistent with drug dealing. Given the large amount of circumstantial evidence of drug dealing, we find the probative value of the methamphetamine evidence to be high.

In contrast, we find the danger of unfair prejudice is relatively low. Certainly once it was established the methamphetamine evidence was relevant, some prejudice exists, for such evidence is bound to have a detrimental effect on Anderson's case. However, it is not this inherent prejudice which we are to examine; rather, we consider "whether the evidence has an undue tendency to suggest a decision on an improper basis, appeals to the sympathies of the jury, or otherwise might cause the jury to base their decision on something other than the relevant legal propositions." *State v. Delaney*, 526 N.W.2d 170, 175 (Iowa App. 1994). We conclude the danger of unfair prejudice does not substantially outweigh the probative value of the

methamphetamine evidence. Consequently, the district court did not abuse its discretion in admitting the evidence at trial.²

II.

The prosecutor called special agent Ronald Deist to testify as to Tom Sink's involvement in the trafficking of methamphetamine. During Deist's direct testimony, the prosecutor stopped her examination and, as previously arranged, she made an offer of proof in chambers. The substance of the offer established that Diest was familiar with Sink and, based on general police intelligence information, conversations with other officers, an anonymous informant, and concerned citizens, Diest testified he had reason to believe Sink was involved in the distribution of methamphetamine.

Defense counsel objected on the ground the officer's knowledge was based on hearsay.³ The prosecutor countered the information was reliable because it had been received from other law enforcement officers in an official capacity and had been corroborated by an actual controlled buy of methamphetamine from Sink.

² We note Anderson did not request a cautionary jury instruction regarding the methamphetamine evidence, even though the district court, in its ruling on the motion in limine, told Anderson it would entertain such a request. We do not, however, rely on this factor in making our determination that the methamphetamine was admissible evidence.

³ Anderson also complains this evidence was inadmissible because it was impermissible testimony regarding Sink's reputation. *See* Iowa R. Evid. 404(a)(1). We refuse to consider this argument, however, since Anderson has failed to properly preserve this particular objection for review. Our review is limited to the grounds asserted before the trial court. *State v. Matlock*, 289 N.W.2d 625, 628 (Iowa 1980).

After further argument, the district court ruled on the objection. It first excluded any information about the specific case involving Sink. It further ruled:

However, I will allow Agent Diest to testify about information he's received in his formal capacity as a police officer in his dealing specifically with other police officers during briefings and conversations to talk about Mr. Sink. I view that as information that Agent Diest has obtained during the normal course of his job in the normal course of his duties and obligations as an agent for law enforcement, and I don't think for that reason that it is hearsay.

. . . .
. . . I think Agent Deist, he doesn't operate in a vacuum. He learns information about his job through official channels, and I'm -- all I'm indicating is that he can indicate what he has learned about Mr. Sink through official channels.

The court further limited Deist's testimony to information from official law enforcement channels, not from informants.

Officer Deist then gave the following testimony in the presence of the jury:

Q. Are you familiar with the names Brandy Helms and Tom Sink in your capacity as a DNE officer? A. Yes, I am.

Q. In your capacity as a DNE officer do you have regular meetings and receive official communications from local law enforcement, including the task force in the Burlington area? A. Yes, I do.

Q. And what was the information that you had regarding Tom Sink from those meetings and communications? A. That Mr. Sink was involved in narcotics trafficking in the Burlington and Muscatine areas, more specifically reference methamphetamine.

Hearsay evidence is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Iowa R. Evid. 801(c). Hearsay evidence is generally

inadmissible. Iowa R. Evid. 802; *State v. Summage*, 532 N.W.2d 485, 487 (Iowa App. 1995).

Under the circumstances here, we need not address whether the testimony at issue is hearsay for we believe any error in admitting this testimony was harmless and nonprejudicial. In reaching this conclusion, we note the admission of hearsay is presumed to be prejudicial unless the contrary is affirmatively established. *State v. McKettrick*, 480 N.W.2d 52, 60 (Iowa 1992). We believe this presumption has been affirmatively overcome and that Anderson was not harmed by this testimony for the reasons that follow.

When police arrived at Anderson's house, they found over \$5000 in cash, a large amount of cocaine, a sifter, and packing material. Deist and Winker both testified a sifter is used by dealers to dilute pure cocaine and increase their profits. They further testified a sifter is used by dealers and not by users because users do not have a large enough amount of cocaine to sift, whereas dealers do. Winker also testified the amount of cocaine found in the house was consistent with an intent to distribute. Stepleton testified the combination of the large amount of cash, the amount of cocaine, the sifter, and the packaging materials were consistent with drug dealing. Given the large amount of evidence of drug dealing,⁴ we find Anderson was

⁴ The methamphetamine found in Sink's automobile can certainly be considered by the jury as additional physical evidence that Sink was a known methamphetamine trafficker.

not prejudiced by the testimony at issue, even if it were found to be impermissible hearsay.

We find no error under this division.

III.

Anderson contends the district court erred in admitting into evidence business records relating to Anderson's casino gambling activity. The State introduced this evidence in an attempt to refute an alleged statement made by Anderson after his arrest that the money found in his house was gambling winnings won the night prior to his arrest on the President River Boat Casino.⁵ We review for an abuse of discretion.

During the search of Anderson's house, police found a "VIP card" which had been issued to Anderson by the President River Boat Casino. Special agent Daniel Stepleton investigated Anderson's gambling activities and, in doing so, obtained a computer printout showing Anderson's gambling activities on the President River Boat Casino.⁶

Both the State and Anderson agree the district court erred in admitting the computer printout because there was not an adequate foundation provided for the

⁵ Anderson testified at trial he never said all the cash in his house was gambling winnings; rather, he claimed he said only some of the money was gambling winnings.

⁶ The computer printout was retrieved from the casino by a gaming agent in the Division of Criminal Investigations.

evidence. See Iowa R. Evid. 803(6); *Beachel v. Long*, 420 N.W.2d 482, 485 (Iowa App. 1988). The question before us is whether Anderson suffered prejudice by the admission of this evidence. As previously noted, prejudice is presumed if hearsay is admitted, unless the contrary is affirmatively established. *McKettrick*, 480 N.W.2d at 60; *State v. Farris*, 359 N.W.2d 190, 193 (Iowa 1984); *State v. Curry*, 436 N.W.2d 371, 373 (Iowa App. 1988).

We first note the evidence at issue appears to be a minor part of the State's case against Anderson. They presented this evidence in an attempt to refute an alleged statement made by Anderson. In addition, the testimony at trial reveals that Anderson, himself, was able to take advantage of this evidence at trial.

First, the evidence supported Anderson's testimony at trial that he had told Stepleton only some of the money in his house at the time of the search was gambling winnings. This was the case since the card had only been obtained by Anderson just prior to his leaving the casino the night before the search took place and, therefore, it only recorded Anderson's gambling activity for the last forty-five minutes he was at the casino. Second, since the gambling activity information the card provided was limited to the activity taking place after Anderson acquired the card, the computer printout provided an incomplete account of Anderson's gambling activity on the night before the search. Consequently, Anderson was able to minimize the effectiveness the State had intended this evidence to have. We find there was no prejudice suffered. Thus, we refuse to reverse the conviction on this issue.

Upon consideration of all arguments raised by both parties on appeal, we affirm Anderson's convictions.

AFFIRMED.