

**IN THE COURT OF APPEALS OF IOWA**

No. 0-240 / 09-0891  
Filed May 12, 2010

**STATE OF IOWA,**  
Plaintiff-Appellee,

**vs.**

**ANTHONY TYLER DANIELS,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Polk County, Robert A. Hutchison,  
Judge.

Defendant appeals his convictions for conspiracy to deliver a controlled substance (cocaine base), conspiracy to deliver a controlled substance (marijuana), and possession with intent to deliver a controlled substance (marijuana). **AFFIRMED IN PART, REVERSED IN PART AND REMANDED.**

Mark C. Smith, State Appellate Defender, and Theresa R. Wilson,  
Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Elisabeth S. Reynoldson, Assistant  
Attorney General, John P. Sarcone, County Attorney, and Stephanie Cox,  
Assistant County Attorney, for appellee.

Considered by Vaitheswaran, P.J., Doyle, J., and Mahan, S.J.\*

\*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

**MAHAN, S.J.****I. Background Facts & Proceedings**

On April 28, 2008, officer Chad Ruroden of the Des Moines Police Department observed two men getting into a vehicle that matched the description of a stolen vehicle. Officer Ruroden approached the men, and saw the man on the passenger side drop a white bag on the ground. The officer conducted a pat down search of the man on the driver's side, Jonathon Green, and discovered thirty-nine rocks of crack cocaine in his jacket pocket. The man on the passenger side stated his name was Tyrone Daniels.<sup>1</sup> The officer discovered 34.10 grams of marijuana in twelve separate baggies in the white bag Daniels had dropped on the ground.

Green and Daniels stated Daniels was accompanying Green that day while Green went to purchase crack cocaine from a man they knew only as "Black." They also stated that on other occasions Green would accompany Daniels while Daniels purchased marijuana from a man known as "Kool-Aid." Daniels gave a signed statement, as Tyrone Daniels, on April 28, 2008, as follows:

I Tyrone Daniels have bought marijuana and I have sold marijuana. I usually buy up to 4 oz. a day from an individual named Kool-Aid located at the Douglas Woods Apt. I have bought marijuana for about 5 mo. from Kool-Aid as well.

Green and Daniels cooperated with police officers to conduct a controlled buy of crack cocaine from "Black" on April 28, 2008. They also conducted a

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<sup>1</sup> Tyrone Daniels is the name of defendant's brother. Defendant's true name is Anthony Daniels.

controlled buy of marijuana from “Kool-Aid” on April 29, 2008. On April 29, Daniels signed a Memorandum of Understanding, as Tyrone Daniels, stating he would fully cooperate with law enforcement officials until June 29, 2008. The agreement provided that if Daniels did not cooperate, the agreement would be null and void. The agreement also provided, “it is agreed and understood by the Defendant that in the event the Defendant breaches this agreement, his admission of criminal activity is and shall be admissible against him in any criminal case or investigation.”

After the controlled buy on April 29, the police department lost contact with Daniels. They then filed warrants for his arrest under the name of Tyrone Daniels. When Tyrone Daniels was apprehended the officers discovered that Tyrone Daniels was the name of defendant’s brother, and that Anthony Daniels was actually the person they were seeking. New arrest warrants were then issued in the name of Anthony Daniels.

On November 17, 2008, Anthony Daniels was found hiding underneath the bed at his girlfriend’s apartment. When officers pulled him out from underneath the bed, they saw a handgun next to his left leg. Daniels was charged with possession of a controlled substance (cocaine base) with intent to deliver, conspiracy to deliver a controlled substance (cocaine base), failure to possess a tax stamp, conspiracy to deliver a controlled substance (marijuana), and possession of a controlled substance (marijuana) with intent to deliver.

Daniels filed a motion in limine seeking to bar evidence of the handgun and evidence concerning the Memorandum of Agreement. The district court

ruled that the evidence of the handgun was more prejudicial than probative and the evidence would be inadmissible. The court found the Memorandum of Agreement was admissible because it was probative and contained similar statements to that in the April 28, 2008 written statement. Daniels then asked for a cautionary instruction with respect to this evidence, and the court agreed to give such an instruction.

The jury found Daniels guilty of conspiracy to deliver a controlled substance (cocaine base), conspiracy to deliver a controlled substance (marijuana), and possession of a controlled substance (marijuana) with intent to deliver. After the trial the State amended the trial information to allege that Daniels was a habitual offender. Daniels filed a motion for new trial.

The district court denied the motion for a new trial, finding the greater weight of the credible evidence supported the verdict. Daniels stipulated that he had two prior felony convictions.<sup>2</sup> The court determined Daniels should be sentenced to a term of imprisonment not to exceed fifteen years on the charge of conspiracy to deliver a controlled substance (cocaine base), and fifteen years on the charge of possession of a controlled substance (marijuana) with intent to deliver. The court determined Daniels's sentence for the conspiracy charge for marijuana merged into the sentence for possession with intent to deliver. The other sentences were made concurrent to each other, but consecutive to

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<sup>2</sup> In exchange for defendant's admission that he had two prior felony convictions, the State agreed to dismiss a charge of malicious prosecution against him, which arose from his use of a false name.

separate charges in Johnson County, where probation revocation proceedings were pending. Daniels appeals.

## **II. Evidence of Firearm**

The defendant had a motion in limine ruling in his favor on this issue. However, at the trial, during the cross-examination of officer Ruroden, Daniels's attorney asked if Daniels had brass knuckles, a knife, or club when he was searched on April 28, 2008. Due to these questions, the State asserted Daniels had opened the door to permit evidence Daniels had a handgun at the time he was arrested. The district court stated defense counsel's questions "left the impression with the jury that you've got a pacific client, and that just isn't right."

The court further stated:

I was trying to give you a shield this morning, but you now have turned that into a sword. And I just—I think that's a violation of fair play, for more of a better term. I think you have taken something that I offered you as a protection and then tried to use it as a weapon against the State. And that isn't right.

The court stated it always thought the evidence was relevant, but had earlier decided it was more prejudicial than probative. The court decided that was no longer the case, and the evidence would be admissible.

Daniels contends the district court abused its discretion by permitting the State to present evidence that there was a handgun near him when he was found hiding under the bed in his girlfriend's apartment. He contends the evidence was not relevant to any issue in the case. He also asserts that even if the evidence was relevant, it was more prejudicial than probative. He claims the evidence

should have been inadmissible as evidence of another bad act under Iowa Rule of Evidence 5.404(b).

In considering evidence of prior bad acts, the court must first determine whether the evidence is relevant. *State v. Reynolds*, 765 N.W.2d 283, 289 (Iowa 2009). The evidence must be probative of some issue other than the defendant's propensity to commit wrongful acts. *State v. Mitchell*, 633 N.W.2d 295, 298 (Iowa 2001). Evidence of other acts may be admissible to show "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Iowa R. Evid. 5.404(b).

If the evidence is found to be relevant, the court must then determine whether the probative value of the evidence is outweighed by the danger of unfair prejudice. Iowa R. Evid. 5.403; *Reynolds*, 765 N.W.2d at 290. "Unfair prejudice arises when the evidence would cause the jury to base its decision on something other than the proven facts and applicable law, such as sympathy for one party or a desire to punish a party." *State v. Taylor*, 689 N.W.2d 116, 124 (Iowa 2004). We review a district court's decision admitting prior bad acts evidence for an abuse of discretion. *Id.*

Admissions made by a defendant are evidence. *State v. Cox*, 500 N.W.2d 23, 25 (Iowa 1993). Admissions may be implied by the conduct of a defendant subsequent to a crime when such conduct indicates a consciousness of guilt. *State v. Nance*, 533 N.W.2d 557, 562 (Iowa 1995). Defendant conceded that evidence he was hiding under the bed was relevant for purposes of showing his consciousness of guilt. See *State v. Crawley*, 633 N.W.2d 802, 804 (Iowa 2001)

(noting evidence of concealment, like evidence of flight, is probative of consciousness of guilt). The fact that he had a firearm near him while he was hiding under the bed is part of the circumstances of that incident, and also indicates a consciousness of guilt. See *State v. Wimbush*, 260 Iowa 1262, 1268, 150 N.W.2d 653, 656 (1967) (providing “concealment, assumption of a false name, and related conduct, are admissible as evidence of consciousness of guilt, and thus of guilt itself” (emphasis added) (citation omitted)). We conclude the evidence of the firearm was relevant.

Daniels asserts that even if we find the evidence to be relevant, it was unduly prejudicial because it was “designed to invoke the jury’s fear of the violent, armed drug dealer,” and cited a case stating juries have an instinct to punish drug dealers.<sup>3</sup> However, defense counsel stated in opening arguments “[t]he evidence in this case is going to show really one thing, the evidence is going to show that Mr. Daniels here is a drug dealer.” Daniels gave a written statement that he bought and sold marijuana. Based on the overwhelming evidence Daniels was a drug dealer, as well as the fact he opened the door to this questioning, we find Daniels was not prejudiced by evidence he was found near a handgun at the time he was arrested. Under the facts of this case, the evidence of the firearm is not the type of evidence “which may cause a jury to base its decision on something other than the established propositions of the case.” See *State v. Brown*, 569 N.W.2d 113, 117 (Iowa 1997).

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<sup>3</sup> *State v. Liggins*, 524 N.W.2d 181, 188-89 (Iowa 1994).

### III. Memorandum of Understanding

A. Daniels claims the district court erred by admitting the Memorandum of Understanding. He contends the memorandum contains inadmissible plea negotiations.<sup>4</sup> Our review of this issue is for the correction of errors at law. See *State v. Simpson*, 450 N.W.2d 819, 821 (Iowa 1990).

Iowa Rule of Criminal Procedure 2.10(5) provides:

If a plea discussion does not result in a plea of guilty, or if a plea of guilty is not accepted or is withdrawn, or if judgment on a plea of guilty is reversed on direct or collateral review, neither the plea discussion nor any resulting agreement, plea, or judgment shall be admissible in any criminal or civil action or administrative proceeding.

Also, under Iowa Rule of Evidence 5.410(4), “any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn” is not admissible in any civil or criminal proceeding.

The purpose of Iowa Rule of Criminal Procedure 2.10(5) is to encourage plea discussions involving a defendant without concern about the peril the State will subsequently use those discussions against the defendant. *Simpson*, 450 N.W.2d at 822. Under the rule, a plea discussion that does not result in a guilty plea is inadmissible. *State v. Hovind*, 431 N.W.2d 366, 369 (Iowa 1988).

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<sup>4</sup> The State argues Daniels did not preserve error on his claim the memorandum contained inadmissible plea negotiations. His motion in limine, however, states “the document was prepared and executed in anticipation of a plea agreement,” and cites Iowa Rule of Evidence 5.410(4). Defense counsel also mentioned the issue of plea negotiations during the hearing on the motion in limine. Additionally, the issue was raised in defendant’s motion for new trial. We conclude the issue has been adequately preserved for our review.



Not all discussions, however, are plea negotiations under the rule. *State v. Taylor*, 336 N.W.2d 721, 726 (Iowa 1983). We consider (1) whether the defendant exhibited an actual subjective expectation to negotiate a plea at the time of the discussion; and (2) whether that expectation was reasonable given the totality of the circumstances. *Id.* (citing *United States v. Robertson*, 582 F.2d 1356, 1366 (5th Cir. 1978)). There is a distinction between those discussions in which a defendant is merely making an admission, and those discussions in which a defendant is seeking to negotiate a plea agreement. *State v. Boggs*, 741 N.W.2d 492, 505 (Iowa 2007).

The “Memorandum of Understanding” is a five page document that outlines Daniels’s agreement to fully cooperate with law enforcement officials. We agree with the State that the parties were not engaged in plea negotiations at the time the defendant executed the document. In addition, there was no evidence presented during the criminal proceedings of Daniels’s “actual subjective expectation” at the time he signed the memorandum of understanding. We note however, that although the memorandum requires defendant to be “truthful, honest, and candid as to all matters within his knowledge as they relate to the pending investigations,” defendant signed the document under the name Tyrone Daniels, which was not his real name. We determine that because Daniels was using a false name, he did not have an expectation that he was negotiating a legitimate plea agreement. Such an expectation would not be reasonable under the circumstances.

Because Daniels was not legitimately negotiating a plea agreement, the Memorandum of Understanding is not protected by Iowa Rule of Criminal Procedure 2.10(5).

**B.** Daniels also claims the Memorandum of Understanding was inadmissible because it was irrelevant. Alternatively, he claims that even if it was relevant, it was more prejudicial than probative. He states the memorandum contains admissions to offenses which are not supported by the facts. We review the court's decision on this issue for an abuse of discretion. *Taylor*, 689 N.W.2d at 124.

The district court found the memorandum was relevant. As noted above, a defendant's admissions are relevant evidence. See *Cox*, 500 N.W.2d at 25. The court also found that on balance, the evidence was more probative than prejudicial. The court stated, "I think it's important that the jury knows some of the requirements that you have in here such as the fact that he agrees to cooperate fully, he agrees to be honest and truthful, and so forth." The court also agreed to give a cautionary instruction to reduce any prejudicial effect from the admission of the Memorandum of Understanding.<sup>5</sup> We conclude the district court

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<sup>5</sup> The instruction provided:

You have heard testimony and received evidence that the defendant signed a "Memorandum of Understanding," a document provided by the office of the Polk County Attorney.

The Memorandum of Understanding contains "boilerplate" language, or language that is commonly contained in such agreements in a number of cases. You should not infer that the defendant conspired to deliver a Schedule II controlled substance, or that he possessed a Schedule II controlled substance with the intent to deliver on or about April 28, 2008, merely because there is evidence defendant signed this document.

did not abuse its discretion in permitting the State to present the Memorandum of Understanding. We also reject any claim of ineffective assistance of counsel.

#### **IV. Illegal Conviction**

Daniels claims the district court erred when it did not merge the conviction for possession of a controlled substance (marijuana) with intent to deliver with the conviction for conspiracy to deliver a controlled substance (marijuana). The district court found these counts merged as a matter of law, and merged the sentences, but did not merge the convictions. The State concedes the convictions should be merged under Iowa Code section 706.4 (2007). We remand the case for amendment of the judgment order to reflect that the conviction for conspiracy to deliver a controlled substance (marijuana) is merged into the conviction for possession of a controlled substance (marijuana) with intent to deliver.

**AFFIRMED IN PART, REVERSED IN PART AND REMANDED.**

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In reaching your verdict, you must consider all evidence and the instructions that I have given to you.