IN THE COURT OF APPEALS OF IOWA

No. 0-346 / 09-0894
Filed July 14, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

RONALD ALLEN GILBERT,
Defendant-Appellant.

Appeal from the Iowa District Court for Taylor County, David L. Christensen (trial) and Gary G. Kimes (sentencing), Judges.

Defendant appeals from the judgment and sentence entered following his conviction of possession of a precursor with the intent to manufacture. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Thomas J. Gaul, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Bridget A. Chambers, Assistant Attorney General, and Clinton L. Spurrier, County Attorney, for appellee.

Considered by Sackett, C.J., and Eisenhauer and Mansfield, JJ. Tabor, J., takes no part.

SACKETT, C.J.

Defendant, Ronald Gilbert, appeals from the judgment and sentence entered following his conviction of possession of a precursor with the intent that the product be used to manufacture a controlled substance, in violation of Iowa Code section 124.401(4)(b) (Supp. 2007). He contends, (1) there is insufficient evidence to support a finding that he intended the precursor to be used in the manufacture of methamphetamine, and (2) his trial counsel was ineffective in not having the sentencing proceedings reported. We affirm Gilbert's conviction and preserve his claim of ineffective assistance of counsel for postconviction relief.

I. BACKGROUND. On May 13, 2008, Gilbert was charged by trial information with five counts of purchasing pseudoephedrine in excess of the legal limit and one count of possession of a precursor with the intent to manufacture a controlled substance. The trial information alleged the violations occurred between May 5, 2007, and January 22, 2008. The State dismissed three of the counts of purchasing pseudoephedrine in excess of the legal limit and Gilbert pleaded guilty to the remaining two counts alleging illegal purchases. A bench trial proceeded on March 10, 2009, on the remaining count of possession of a precursor with the intent the product be used to manufacture a controlled substance.

At trial, the State presented pharmacy logs showing Gilbert's purchases of pseudoephedrine between May of 2007 and March of 2008. It also called Alfred Fletchall and Deputy Robert Hitch to testify. Fletchall testified that he met and used methamphetamine with Gilbert during the latter half of 2007. He lived with

the defendant for approximately a month in November of 2007. He testified that sometimes during this period, Gilbert would ask him for rides because Gilbert did not have a valid driver's license. He stated that Gilbert would ask to be dropped off in the country with what Fletchall believed was "cooking material." When Fletchall would pick him up several hours later, Gilbert would have the bags and also jars of clear liquid. After picking Gilbert up, then Gilbert would "bubble off," or reduce the liquid in the jars to a solid form. Fletchall estimated that he did this with Gilbert at least ten times between June and December of 2007. On cross-examination he admitted when he took Gilbert to the country, he did not have actual knowledge as to what was contained in the bags. He testified he never participated in the "cooking" part of manufacturing methamphetamine but did assist in "bubbling off." He admitted they once "bubbled off" methamphetamine at the home of a person named Jim Meek. Fletchall was arrested in January 2008 on charges of purchasing pseudoephedrine and providing it to others for the purpose of manufacturing methamphetamine. He agreed to cooperate with police and informed them about methamphetamine manufacturing in the area. He pleaded guilty to possession of a precursor substance.

Deputy Hitch testified about how methamphetamine is commonly made in the area, describing how pseudoephedrine is transformed to a clear liquid using other chemicals and the "bubbling off" process. He stated due to the law setting limits on the purchase of pseudoephedrine, people intending to make methamphetamine will buy small batches of pseudoephedrine from multiple pharmacies to try to avoid detection. He described the purchase logs he

analyzed. He gave the opinion the concentration of Gilbert's purchases and the repeated purchases of pseudoephedrine from multiple pharmacies in a short time frame were consistent with the actions of persons who manufacture methamphetamine. He also testified that remnants of a methamphetamine lab were discovered in Jim Meek's house.

At the close of the evidence, Gilbert's counsel moved for a judgment of acquittal. The court overruled the motion and found Gilbert guilty of possession of a precursor with intent to manufacture a controlled substance. On June 1, 2009, judgment and sentence for the two counts of purchasing pseudoephedrine in excess of the legal limit and for one count of possession of a precursor with the intent to manufacture a controlled substance was entered. The sentencing hearing was not reported. For each count of purchasing pseudoephedrine in excess of the legal limit, Gilbert was sentenced to one year in prison. He was sentenced to serve five years in prison for his conviction of possession of a precursor with the intent to manufacture a controlled substance. The sentences were ordered to be served concurrently. Gilbert appeals contending, (1) there was insufficient evidence to support the conviction of possession of a precursor with the intent to manufacture, and (2) he received ineffective assistance of counsel when his attorney failed to have the sentencing hearing reported.

II. SUFFICIENCY OF EVIDENCE. Gilbert first claims the State failed to provide sufficient evidence he intended the pseudoephedrine be used to manufacture a controlled substance. He argues the only evidence suggesting the pseudoephedrine was used or intended to be used to manufacture

methamphetamine was Alfred Fletchall's testimony. Gilbert contends Fletchall's testimony was not corroborated as required by Iowa Rule of Criminal Procedure 2.21(3). Without corroboration, he argues, there is insufficient evidence to support the conviction. The State contends Fletchall's testimony was adequately corroborated, and even without Fletchall's testimony, there is sufficient evidence to sustain the verdict.

Our review of claims challenging the sufficiency of the evidence supporting a guilty verdict is for correction of errors at law and if substantial evidence supports it, we will uphold the verdict. *State v. Nitcher*, 720 N.W.2d 547, 556 (Iowa 2006). "Evidence is substantial if it would convince a rational fact finder that the defendant is guilty beyond a reasonable doubt." *State v. Bash*, 670 N.W.2d 135, 137 (Iowa 2003). We must view the evidence in a light most favorable to the State, including legitimate inferences and presumptions that can reasonably be deduced from the evidence. *State v. Webb*, 648 N.W.2d 72, 76 (Iowa 2002).

To support a finding of guilt on violating Iowa Code section 124.401(4)(b), the State had to prove Gilbert possessed pseudoephedrine, "with the intent that the product be used to manufacture [a] controlled substance." Iowa Code § 124.401(4)(b); *see State v. Truesdell*, 679 N.W.2d 611, 617 (Iowa 2004). "[P]ossession of a precursor, without more, is insufficient to support the essential element of intent to manufacture." *Truesdell*, 679 N.W.2d at 619. Yet, intent can be shown through other circumstantial evidence and inferences drawn from the evidence. *State v. Nance*, 533 N.W.2d 557, 562 (Iowa 1995).

Iowa Rule of Criminal Procedure 2.21(3) provides in relevant part,

> A conviction cannot be had upon the testimony of an accomplice or a solicited person, unless corroborated by other evidence which shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof.

When the State relies on the testimony of an accomplice to establish the elements of an offense, it must also bring forth corroborating evidence independently linking the defendant to the crime. *State v. Douglas*, 675 N.W.2d 567, 569 (Iowa 2004). "'[A] witness is an accomplice . . . if he could be charged with and convicted of the specific offense for which an accused is on trial.'" *State v. Berney*, 378 N.W.2d 915, 917 (Iowa 1985) (quoting *State v. Johnson*, 318 N.W.2d 417, 440 (Iowa 1982), *cert. denied*, 459 U.S. 848, 103 S. Ct. 106, 74 L. Ed. 2d 95 (1982)). Corroborative evidence may be direct or circumstantial but it must substantiate some material aspect of the accomplice's testimony and connect the defendant to the offense. *State v. Brown*, 397 N.W.2d 689, 695 (Iowa 1986).

Fletchall was not charged or tried as an accomplice. Assuming arguendo Fletchall was an accomplice, the deputy's testimony corroborates Fletchall's testimony. Deputy Hitch testified Gilbert purchased substantial pseudoephedrine during the time period Fletchall testified he gave Gilbert rides to places where Gilbert cooked methamphetamine and assisted Gilbert in the "bubbling off" process. Deputy Hitch also gave the opinion that the amounts of pseudoephedrine Gilbert purchased were not consistent with personal medical use. The deputy noted Gilbert made small purchases, in short periods of time,

from multiple pharmacies. He gave the opinion that persons using pseudoephedrine to make methamphetamine often buy it in this manner to avoid detection and suspicion.

III. INEFFECTIVE ASSISTANCE OF COUNSEL. We examine ineffective-assistance-of-counsel claims de novo. *State v. Nitcher*, 720 N.W.2d at 553. To establish ineffective assistance of counsel, the defendant must prove trial counsel failed to perform an essential duty and prejudice resulted. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984); *State v. Doggett*, 687 N.W.2d 97, 100 (Iowa 2004). The trial record is often inadequate to address claims of ineffective assistance of counsel and we generally preserve these claims for postconviction relief to develop a record on counsel's performance. *Berryhill v. State*, 603 N.W.2d 243, 245 (Iowa 1999). We will address the claim if the record is sufficient to resolve it. *State v. Wills*, 696 N.W.2d 20, 22 (Iowa 2005).

Gilbert contends he received ineffective assistance of counsel when his attorney failed to have the sentencing hearing reported. He claims due to this error, the record does not show whether the court gave Gilbert an opportunity for allocution and does not show whether the court gave specific reasons for the sentence.

"When the defendant appears for judgment, the defendant must . . . be asked whether the defendant has any legal cause to show why judgment should not be pronounced against the defendant." Iowa R. Crim. P. 2.23(3)(*a*). Prior to entering judgment, the defendant "shall be allowed to address the court . . . to

make a statement in mitigation of punishment." *Id.* 2.23(3)(*d*). The court must also "state on the record its reason[s] for selecting the particular sentence." *Id.*

Since the sentencing hearing was not reported, the only evidence showing whether the requirements of rule 2.23 were met is the judgment and sentencing order filed. The sentencing order does not provide enough information for us to determine whether the court substantially complied with rule 2.23. We are unable to evaluate whether this void in the record is a result of ineffective assistance of counsel. Resolving this claim requires further factual development and is therefore appropriate for consideration in a postconviction relief proceeding. Accordingly, we preserve Gilbert's ineffective assistance of counsel claim.

IV. CONCLUSION. We affirm Gilbert's convictions. There is substantial evidence to support a finding that Gilbert possessed pseudoephedrine with the intent that it be used to manufacture methamphetamine. Assuming this evidence was presented in the form of accomplice testimony, it was sufficiently corroborated by additional evidence. We are unable to address Gilbert's ineffective assistance of counsel claims on the current record and preserve them for postconviction relief proceedings.

AFFIRMED.