**IN THE COURT OF APPEALS OF IOWA**

No. 0-730 / 09-1463
Filed January 20, 2011

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

**vs.**

**ROBERT JACKSON WHITE,**
Defendant-Appellant.

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Appeal from the Iowa District Court for Polk County, Douglas F. Staskal (motion to suppress) and Robert A. Hutchinson (trial and sentencing), Judges.

White appeals from the judgment and sentence entered following his convictions of conspiracy to deliver a controlled substance, possession of a controlled substance with intent to deliver, and failure to possess a tax stamp. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Bradley Bender, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Bridget Chambers, Assistant Attorney General, John P. Sarcone, County Attorney, and Steven Bayens and Mark Taylor, Assistant County Attorneys, for appellee.

Considered by Vaitheswaran, P.J., and Eisenhauer and Danilson, JJ. Tabor, J., takes no part.

**EISENHAUER, J.**

Robert Jackson White appeals from the judgment and sentence entered following his convictions of conspiracy to deliver a controlled substance, possession of a controlled substance with intent to deliver, and failure to possess a tax stamp. He contends the court erred in denying his motion to suppress, in overruling portions of his motion in limine, and in instructing the jury. He also contends the evidence is insufficient to support his convictions. We affirm.

***I. Background Facts and Proceedings.*** On August 14, 2008, White was arrested at a bus terminal in Des Moines after Samuel Herrera deposited a duffel bag containing marijuana in the minivan White was driving. Law enforcement officers had discovered twenty-five pounds of marijuana in Herrera's bag during a stop in Omaha, Nebraska, and learned Herrera was transporting it to a man named "Rob" in Des Moines. Herrera revealed he had delivered marijuana to Rob three weeks earlier and described Rob as "a black male . . . who was approximately 5'10" tall, stocky build, and was in his early 30's." Herrera had Rob's phone number saved in his cellular phone under the name "Rob I," an abbreviation for "Rob Iowa." Herrera later identified White as the man he knew as "Rob."

Herrera was to meet White in the parking lot of the bus station when he arrived in Des Moines. Herrera consented to cooperate with law enforcement by completing the delivery of the marijuana. Upon disembarking the bus, Herrera was unable to locate the Chevy Silverado White drove at the last exchange. White then called Herrera to tell him he was in a minivan. After locating White's

vehicle, Herrera walked to the east side of the parking lot and the minivan pulled up. Herrera placed the duffel bag in the back of the vehicle and then excused himself to find a restroom as he had been instructed by law enforcement officers. White was arrested.

A search of the minivan yielded Herrera's duffle bag containing marijuana on the floor behind the passenger's seat, documents bearing White's name, and $300 in cash. While searching White's house, officers discovered $26,670 in a safe, $880 in a jewelry box, and a currency counter. Herrera's phone number was saved in White's cellular phone contacts under the name "Sam."

The State charged White with conspiracy to deliver a controlled substance, possession of a controlled substance with intent to deliver, and failure to possess a drug tax stamp.

White claimed he knew Herrera through mutual acquaintances and had met Herrera in El Paso, Texas, where Herrera lived. White told officers he was the only person Herrera knew in Des Moines and had picked him up at the bus terminal once before. At trial, Benjamin Rios of El Paso, Texas testified he knew both White and Herrera and had introduced them prior to August 2008. Rios testified White was in El Paso frequently and he had seen Herrera and White together on at least one occasion. Herrera testified at trial about a similar delivery of marijuana to White in Des Moines a few weeks before White's August 2008 arrest.

Following a jury trial, White was convicted on all three counts. He stipulated he was a habitual offender. At sentencing, the district court merged

his convictions for conspiracy to deliver and possession of a controlled substance and sentenced White to an indeterminate forty-five year prison term. He was sentenced to fifteen years imprisonment on the drug tax stamp violation, to be served concurrently.

***II. Motion to Suppress.*** White first contends the district court erred in denying his motion to suppress the evidence obtained during the search of his vehicle and his home. He contends the search warrant was defective and lacked probable cause to justify its issuance because it contained false information. White argues without the false information there is not probable cause to issue the warrant.

The Fourth Amendment requires a search warrant to be supported by probable cause. U.S. Const. amends. IV, XIV, § 1. The test is "whether a person of reasonable prudence would believe a crime was committed on the premises to be searched or evidence of a crime could be located there." *State v. Gogg*, 561 N.W.2d 360, 363 (Iowa 1997). After considering all the circumstances set forth in the affidavit, the issuing judge must make a practical, common-sense decision as to whether probable cause exists. *Id.* The same common-sense approach is followed in determining whether evidence seized pursuant to a warrant must be suppressed. *Id.* at 363-64.

We review the district court's denial of the motion to suppress de novo. *Id.* at 363. However, we give great deference to the judge's finding of probable cause, drawing all reasonable inferences to support it. *Id.* at 364. Close cases are decided in favor of upholding the validity of the warrant. *Id.*

The search warrant contained the following statements: "Samuel Herrera then put the black duffel bag inside the window stating 'here it is.' Rob took control of the duffle bag placing it behind the passenger seat." The State concedes these statements are false. However, the inclusion of a false statement alone is insufficient to attack a warrant; a defendant must show the affiant consciously falsified the challenged information or acted with reckless disregard for the truth when applying for the warrant. *State v. Niehaus*, 452 N.W.2d 184, 186-87 (Iowa 1990). Reckless disregard can be shown in two ways: (1) proof that the applicant harbored serious doubts about the informant's truthfulness; or (2) showing circumstances evincing an obvious reason to doubt the informant's veracity. *State v. McPhillips*, 580 N.W.2d 748, 751 (Iowa 1998). Negligence or mistake is insufficient. *Id.* Only after the requisite showing has been made does the court review the remainder of the application to determine whether probable cause existed to issue the warrant. *Niehaus*, 452 N.W.2d at 186-87.

We conclude White is unable to make a showing the challenged statements were made with knowledge as to their falsity or with a reckless disregard for the truth. The detective who wrote the affidavit was receiving information from the officers at the scene. There is no showing the detective knew the information to be false, nor was there any reason for the detective to seriously doubt the information being given to him by other law enforcement personnel. The circumstances indicate erroneous information was included by mistake or negligence rather than intentionally or with reckless disregard for the

truth. Accordingly, we affirm the district court's denial of White's motion to suppress on the grounds the affidavit for the search warrant contained false statements.

***III. Sufficiency of the Evidence.*** White next contends the court erred in denying his motions for judgment of acquittal because there was insufficient evidence to support his convictions. He argues the evidence is insufficient to prove he knowingly possessed the marijuana found in the duffel bag as required for his convictions for possession with intent to deliver and failure to possess a drug tax stamp. He also argued the evidence does not sufficiently establish an agreement between Herrera and himself to distribute the marijuana.

Our review of claims of insufficient evidence to support a conviction is for correction of errors at law. *State v. Truesdell*, 679 N.W.2d 611, 615 (Iowa 2004). Substantial evidence exists to support a verdict when the record reveals evidence that a rational trier of fact could find the defendant guilty beyond a reasonable doubt. *Id*. In making this determination, "[w]e view the evidence in the light most favorable to the verdict," including all reasonable inferences that may be deduced from the record. *Id.*

Viewing the evidence in the light most favorable to upholding the verdict, we conclude the district court properly denied White's motions for judgment of acquittal because substantial evidence supports the verdicts. The manner in which Herrera was traveling was consistent with someone trafficking drugs, which is what initially aroused law enforcement officers' suspicions. Herrera was carrying a large quantity of marijuana when stopped and testified he was

delivering it to White, whom he had made a delivery to some weeks earlier. The evidence seized from White's home—a large quantity of cash, a currency counter, and his passport—is consistent with drug trafficking activities.

Text messages exchanged between White and Herrera also establish White had knowledge of and was participating in drug trafficking. After passing through two checkpoints on his trip to Des Moines, Herrera sent a message to White stating, "You was right they had both checkpoints open," to which White replied, "That shit is something else. So no probs?" Herrera responded everything went "straight." White also sent a text message to an unidentified person with a Denver phone number stating, "load got took Omaha PD." When the person responded, "That's y I don't fuck with that," White responded by stating he was kidding.

Because there is sufficient evidence to show White knew of and participated in a plan to transport a large quantity of marijuana from Texas to Iowa for sale, we affirm his convictions.

***IV. Jury Instruction.*** White also contends the district court erred in instructing the jury on the definition of reasonable doubt. Our review is for the corrections of errors at law. *State v. Marin*, 788 N.W.2d 833, 836 (Iowa 2010). "We review the related claim that the trial court should have given the defendant's requested instructions for an abuse of discretion." *Id.* Error in giving or refusing to give a particular instruction does not require reversal unless prejudice is shown. *Id.* When the error is not of constitutional magnitude, the test of prejudice is whether it sufficiently appears that the rights of the

complaining party have been injuriously affected or that the party has suffered a miscarriage of justice. *Id.*

The court gave the following instruction:

> The burden is on the State to prove the defendant guilty beyond a reasonable doubt.
>
> A reasonable doubt is one that fairly and naturally arises from the evidence or lack evidence produced by the State.
>
> If, after a full and fair consideration of all the evidence, you are firmly convinced of the defendant's guilt, then you have no reasonable doubt and you should find the defendant guilty.
>
> But if, after a full and fair consideration of all the evidence or lack of evidence produced by the State, you are not firmly convinced of the defendant's guilt, then you have a reasonable doubt and should find the defendant not guilty.

Although this language was approved in *State v. McFarland*, 287 N.W.2d 162, 163 (Iowa 1980), White notes the Unites States Supreme Court approved a jury instruction defining reasonable doubt as that which would have caused a reasonable person to hesitate to act. *See Victor v. Nebraska*, 511 U.S. 1, 20, 114 S. Ct. 1239, 1250, 127 L. Ed. 2d 583, 599 (1994). White requested the court give an instruction with language indicating reasonable doubt exists where the evidence leads a person to hesitate to act.

The court was required to instruct the jury as to the law applicable to all material issues in the case. *Marin*, 788 N.W.2d at 837. However, the court is not required to give any particular form of an instruction; it must merely give instructions that fairly state the law as applied to the facts of the case. *Id.*

We find no abuse of discretion in the court's decision to use the instruction given rather than those proposed by White. The court's instruction fairly states the law. Furthermore, in light of the evidence of his guilt, White cannot show the

outcome of trial would have been different had an alternate instruction been given. Accordingly, we affirm.

***V. Motion in Limine.*** Finally, White contends the court erred in overruling his motion in limine to exclude Herrera's testimony about the prior delivery of marijuana to White. He argues this evidence constitutes bad-acts evidence prohibited by Iowa Rule of Evidence 5.404(*b*). While the denial of a motion in limine may not preserve an issue for our review unless an objection to the evidence is made at trial, here we find the ruling was sufficient to preserve the issue. *See State v. Alberts*, 722 N.W.2d 402, 406 (Iowa 2006) (holding where a motion in limine is resolved in such a way it is beyond question whether or not the challenged evident will be admitted during trial, there is no reason to raise the issue again during trial). Our review is for an abuse of discretion. *State v. Newell*, 710 N.W.2d 6, 18 (Iowa 2006). "[W]e find an abuse of that discretion only when a party claiming it shows the discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable." *Id.*

Rule 5.404(*b*) states:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

In order to be admissible, the evidence must be probative of "some fact or element in issue other than the defendant's criminal disposition." *Newell*, 710 N.W.2d at 20. If a court determines prior-bad-acts evidence is relevant to a legitimate factual issue in dispute, the court must then decide if its probative

value is *substantially* outweighed by the danger of unfair prejudice to the defendant. *Id.* Evidence that is unfairly prejudicial is evidence that has an undue tendency to suggest decisions on an improper basis commonly, though not necessarily, an emotional one. *Id.* Because the weighing of probative value against probable prejudice is not an exact science, we give a great deal of leeway to the trial judge who must make this judgment call. *Id.* at 20-21.

We conclude the evidence was admissible under the exceptions listed in rule 5.404(*b*). White denied knowledge of the marijuana, and the evidence of a prior drug delivery contradicts his claim. *See State v. Serr*, 322 N.W.2d 96, 100 (Iowa 1982) (holding evidence of prior marijuana sales countered the defendant's characterization of what occurred as accidental rather than a conscious transaction in delivery of controlled substance case). It was evidence of a plan or ongoing scheme to engage in drug trafficking. This type of evidence was not likely to prejudice the jury. *See State v. Taylor*, 689 N.W.2d 116, 124 (Iowa 2004) ("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.").

We affirm White's convictions of conspiracy to deliver a controlled substance, possession of a controlled substance with intent to deliver, and failure to possess a tax stamp.

**AFFIRMED.**