IN THE COURT OF APPEALS OF IOWA

No. 1-015 / 09-1704
Filed March 21, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

PAUL ALLEN PITTS,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, George L. Stigler, Judge.

Defendant appeals his convictions for ongoing criminal conduct, two counts of possession of a controlled substance (marijuana) with intent to deliver, possession of a controlled substance (methamphetamine) with intent to deliver, and manufacturing methamphetamine. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Patricia Reynolds, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kyle Hanson, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Brad Walz, Assistant County Attorney, for appellee.

Considered by Eisenhauer, P.J., Danilson, J., and Miller S.J.* Mansfield and Tabor, JJ., take no part.

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

MILLER, S.J.

I. Background Facts & Proceedings

On July 2, 2008, Paul Pitts received burns from a fire in his home in Waterloo, Iowa. Police officers were suspicious the fire was caused by the manufacture of methamphetamine and obtained a search warrant for Pitts's home.[1] Officers found drug paraphernalia, a digital scale, baggies, mason jars with white residue, Coleman camp fuel, a pellet gun, and a cutting agent (MSM).[2] The officers also found marijuana weighing 18.8 grams and 0.4 grams, and methamphetamine weighing 0.08 and 0.21 grams.

On March 23, 2009, an officer smelled a strong chemical odor near Pitts's house. The officer walked near Pitts's garage, which was eighteen to twenty feet from the home, and found a small fire and smelled anhydrous ammonia. Pitts told officers only two other people were in the home, but officers discovered four more than that. Pitts agreed to let officers search the garage. At a glance they saw items consistent with the manufacture of methamphetamine. The officers contacted the drug task force, and a search warrant was obtained. Pitts told officers everything in the house was his and nothing belonged to anybody else but him.

In a safe within the home officers found MSM, a baggie of marijuana, baggies of methamphetamine, a glass vial of methamphetamine, and unused

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[1] Pitts initially consented to a search of his home, but put conditions on the search, stating officers could only search two rooms and not open any drawers or move any items. The officers did not agree to these limitations and obtained a search warrant.

[2] MSM is methylsulfonylmethane, a legal substance which is sometimes used by drug dealers as a cutting agent for methamphetamine. The dealers mix MSM with methamphetamine in order to increase profits.

baggies. On top of the safe was another baggie of suspected methamphetamine. Also in the house officers found two scales, a marijuana grinder, drug paraphernalia, and baggies containing methamphetamine residue. On the back of a receipt were notations they believed were drug notes. The marijuana weighed 24.9 grams and 0.6 grams. The methamphetamine in baggies weighed 0.07, 0.78, 1.88, and 0.18 grams.

In the garage officers found coffee filters, aluminum foil, rubber gloves, muriatic acid, and casings from lithium batteries. They found a pitcher with white residue, and tubing attached to a soda bottle, which was consistent with the manufacture of methamphetamine. Items in the garage tested positive for chemicals related to the manufacture of methamphetamine, including ether, lithium, starting fluid, and pseudoephedrine.

Pitts was charged with ongoing criminal conduct, possession of methamphetamine, manufacturing methamphetamine, possession of methamphetamine with intent to deliver, and two counts of possession of marijuana with intent to deliver. At Pitts's criminal trial the State presented the evidence we have outlined. Pitts testified he was a drug addict and the methamphetamine and marijuana found in the home were for his own personal use. He stated he used the scales to weigh drugs after he purchased them to determine if he received the correct amount. Pitts admitted he had gone to one business and then immediately went to another business to purchase pseudoephedrine. He denied selling drugs or manufacturing drugs.

The State presented the rebuttal testimony of John Tomlinson, who stated he had purchased methamphetamine from Pitts. Tomlinson testified he did not want to pay Pitts because the methamphetamine he received contained another ingredient and was not "real dope." As a rebuttal witness, Officer Nicholas Berry testified to occasions, sometimes within a short period, when Pitts purchased pseudoephedrine from two different stores.[3]

A jury found Pitts guilty on all counts. Pitts was sentenced to consecutive terms of imprisonment not to exceed twenty-five years, fifteen years, and fifteen years, for a total of fifty-five years, on the first three counts. On the other charges he was sentenced to terms of fifteen years, fifteen years, and fifteen years, all to be served concurrently with each other and concurrent to the sentences on the first three charges. Pitts appeals all of his convictions except the conviction for possession of methamphetamine.

II. Ineffective Assistance

Pitts contends he received ineffective assistance from his defense counsel. Claims of ineffective assistance of counsel are reviewed de novo. *State v. Bergmann*, 600 N.W.2d 311, 313 (Iowa 1999). To establish a claim of ineffective assistance of counsel, a defendant must show (1) the attorney failed to perform an essential duty, and (2) prejudice resulted to the extent it denied

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[3] Officer Berry testified that Pitts purchased pseudoephedrine two times in January 2008. In February 2008, within twenty minutes Pitts had purchased pseudoephedrine from Wal-Mart and Target, and later in February purchased pseudoephedrine from Target and then Wal-Mart. He purchased pseudoephedrine in March 2008. In April, within twenty-five minutes, Pitts purchased pseudoephedrine from Target and Wal-Mart. He also purchased some pseudoephedrine in December 2008 and March 2009.

defendant a fair trial. *State v. Carroll*, 767 N.W.2d 638, 641 (Iowa 2008). We presume that representation by counsel is competent, and a defendant has the burden to prove by a preponderance of the evidence that counsel was ineffective. *Jasper v. State*, 477 N.W.2d 852, 855 (Iowa 1991).

A. Pitts contends he received ineffective assistance because defense counsel did not object on hearsay grounds to testimony by Officer Berry that he had purchased pseudoephedrine on certain times and dates. He asserts the State failed to present a sufficient foundation to show the evidence would have been admissible under the business records exception to the hearsay rule. *See* Iowa R. Evid. 5.803(6); *State v. Reynolds*, 746 N.W.2d 837, 842 (Iowa 2008) (noting a party must establish the applicability of the business records exception to the hearsay rule).

The State recognizes the testimony of Officer Berry on this issue was hearsay, but claims Pitts was not prejudiced because substantially the same evidence was already in the record. *See State v. Newell*, 710 N.W.2d 6, 19 (Iowa 2006) ("[E]rroneously admitted hearsay will not be considered prejudicial if substantially the same evidence is properly in the record."). Pitts had agreed on cross-examination that he had "gone to one business and then immediately gone to another business to purchase pseudoephedrine before," and that he probably had done this on at least three occasions. There is no evidence, however, showing that any of the incidents admitted by Pitts were the same as any of the incidents testified to by Officer Berry. Furthermore, the testimony by Officer Pitts

was much more detailed, and included incidents where Pitts allegedly made only one purchase of pseudoephedrine on a given day.

The State also posits that defense counsel had a strategic reason for not objecting to the testimony of Officer Berry, stating "[r]ather than objecting and forcing the State to call additional witnesses to emphasize the testimony, counsel elected a reasonable course of action by letting the objection pass." This is pure speculation, however, because defense counsel has not been given an opportunity to say whether there was a strategic reason for the decision not to object to Officer Berry's hearsay testimony. We conclude there is not sufficient evidence in the record to permit us to address this issue, and determine it should be preserved for a possible postconviction action. *See Berryhill v. State*, 603 N.W.2d 243, 245 (Iowa 1999) (noting that where the trial court record is inadequate, we may preserve a clam of ineffective assistance of counsel for possible postconviction proceedings).

B. Pitts also contends he received ineffective assistance because defense counsel did not object, and in fact elicited evidence that in July 2008 Pitts initially consented to a search, and then changed his mind and limited his consent to search. Generally, evidence of a party's refusal to consent to a search is irrelevant, and therefore not admissible. *See State v. Thomas*, 766 N.W.2d 263, 272 (Iowa Ct. App. 2009) ("We conclude the evidence of Thomas's refusal to consent was irrelevant and unfairly prejudicial, and the district court erred in admitting it.").

The State claims Pitts was not prejudiced by counsel's failure to object because Pitts did not deny possessing drugs, but disputed only whether he had the intent to deliver. The State asserts the evidence was not relevant to the issue of intent, and therefore, Pitts was not prejudiced by the admission of the evidence. In addition to the illegal drugs found in the home, officers found evidence which was alleged to be consistent with distribution (baggies, scales, and drug notes), and manufacturing (containers and tubing). The jury could have considered Pitts's limitation of consent as evidence creating an inference of guilt on more than just the possession charges.

The State also points out that because defense counsel did not object to the evidence, the State never had an opportunity to explain its theory of relevancy. It asserts the evidence may have been offered to show Pitts had dominion and control over the house, or it may have been offered to preempt a defense claim that Pitts was a cooperating occupant who had nothing to hide. The State claims that on these theories the evidence would have been admissible under *Thomas*. *See id*. at 270–71. Because there is insufficient information as to why this evidence may have been admissible, we conclude there is not sufficient evidence in the record to permit us to address this issue, and determine it should be preserved for a possible postconviction action. *See Berryhill*, 603 N.W.2d at 245.

III. Pellet Gun

Finally, Pitts contends the district court erred by overruling his objection to evidence that he possessed a pellet gun. During the search of the home in July

2008, officers found a pellet gun. Defense counsel objected to the State's intention to introduce the pellet gun and a photograph of the pellet gun on the ground that it was unduly prejudicial because it would inflame the passions of the jurors regarding drug dealers who have guns. The State responded that it intended to introduce the pellet gun for the purpose of showing that it had tested the pellet gun for fingerprints, and was in fact diligent in trying to locate fingerprints.[4] The court questioned defense counsel about whether he was going to question the State's attempts to get fingerprints off of various items. Defense counsel responded, "[W]e may do that—we may not. I don't know."

The district court ruled:

> The submission of these photos and the submission of the actual pellet gun itself would have the relevance of the photos and the gun as I see it in terms of what may or may not be argued at some later point is that if the defense contends that the State did not do everything it reasonably could have done in terms of lifting prints so we would know, the jury would know, which item belongs to this defendant as opposed to his son or others in that home, I think it's relevant in that regard because it does have probative value in terms of assisting the jury to make its determination as to whether the State did everything that it reasonably could have done to make its best case and so I will overrule the objection. I do find that the probative value does outweigh the prejudicial effect of both the photos and the pellet gun itself.

We generally review evidentiary rulings by the district court for an abuse of discretion. *State v. Helmers*, 753 N.W.2d 565, 567 (Iowa 2008). We will find the court has abused its discretion when it has exercised its discretion on "grounds or for reasons clearly untenable or to an extent clearly unreasonable." *State v. Maghee*, 573 N.W.2d 1, 5 (Iowa 1997).

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[4] The State was not able to lift any fingerprints from the pellet gun.

In order to be admissible, evidence must be relevant. Iowa R. Evid. 5.401. Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Iowa R. Evid. 5.403. "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). "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." *Newell*, 710 N.W.2d at 20–21.

We conclude the evidence of the pellet gun was relevant. The State attempted to establish Pitts's ownership of items in the home through fingerprints on the pellet gun and other items. Although the State was not able to get any fingerprints from the pellet gun, the fact that the pellet gun had been tested established that the State was diligent in its investigation of the items found in the home. When specifically questioned by the court, defense counsel did not disclaim the possibility of raising an issue regarding the diligence of the State in its investigation.

Furthermore, the evidence was not unduly prejudicial. The evidence of the pellet gun was one of about seventy-five exhibits admitted during the trial, and was shown in only a few of the 200 photographs. The pellet gun was mentioned only three times[5] during a trial that spanned from July 28 to August 4,

[5] Special Agent Kyle Bassett testified he found the pellet gun in a drawer, and the pellet gun was admitted as an exhibit during his testimony. Office Kevin Boyland testified he checked the pellet gun for fingerprints, but was unable to lift any usable

2009, and covered 746 pages of transcript. The State's evidence was confined to whether there were any fingerprints on the pellet gun. The pellet gun was not mentioned during opening statements or closing arguments. We do not believe the evidence of the pellet gun would cause the jury to base its decision on something other than the proven facts and applicable law.

We conclude the district court did not abuse its discretion in concluding the probative value of this evidence was not outweighed by its prejudicial effect.

We affirm Pitts's convictions.

AFFIRMED.

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prints from the pellet gun. On direct examination of Pitts, he was shown a photograph of the drawer, and identified an item as a pellet gun.