

IN THE COURT OF APPEALS OF IOWA

No. 2-261 / 11-0918
Filed May 23, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ARTEMIO GARCIA PENA,
Defendant-Appellant.

Appeal from the Iowa District Court for Greene County, William C. Ostlund, Judge.

Artemio Garcia Pena challenges his conviction for conspiracy to deliver methamphetamine, arguing the record lacked corroboration for an accomplice's testimony, and contesting the amount of legal fees. **AFFIRMED IN PART, VACATED IN PART AND REMANDED.**

Mark C. Smith, State Appellate Defender, and Rachel C. Regenold, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sharon Hall, Assistant Attorney General, and Nicola J. Martino, County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Tabor and Mullins, JJ.

TABOR, J.

In his appeal from a conviction for conspiring to deliver methamphetamine, Artemio Garcia Pena contends the State offered insufficient evidence to corroborate the testimony of his would-be accomplice, Alberto Cruz Salinas. Pena also argues the district court illegally ordered him to pay \$3506.60 in attorney fees.

Considering a combination of circumstances in the record pointing to Pena's involvement in a drug conspiracy, we conclude the jury was entitled to find Salinas's testimony adequately corroborated. We vacate the district court's restitution order and remand to the district court for entry of an order requiring Pena to pay no more than \$1800 in attorney fees.

I. Background Facts and Proceedings

Pena's conviction for conspiracy to deliver methamphetamine arose from his nephew Alberto Salinas's unknowing interaction with the Central Iowa Drug Task Force. On May 28 and July 8, 2010, Salinas sold methamphetamine to a confidential informant who was working with the regional task force. Both sales took place at Casey's General Store in Scranton, Iowa. In May, Salinas sold the informant methamphetamine packaged in two small, square, transparent blue bags and one aluminum foil ball. In July, Salinas packaged the drugs in a red, square bag, the same size as those used in the May sale.

Salinas and the informant entered into a third methamphetamine transaction on August 4, 2010 at the Dollar General store in Jefferson, Iowa.

That time, Salinas used an empty L & M cigarette package to hide three small, knotted baggies of the controlled substance.

Based on these purchases, law enforcement obtained a search warrant for 1107 Lincoln Street in Scranton, where Salinas was staying at the time. Also living at that residence were defendant Pena; Pena's wife, Paula; his stepdaughter, Ashley Johnston; and another young man. Deputy Sheriff Jack Junior Williams and Iowa Department of Narcotics Enforcement Special Agent Hunter Bellon executed the warrant on August 20, 2010. Williams, Bellon, and other participating task force officers all wore clothing identifying them as law enforcement and arrived in five vehicles, two of which were marked with official insignia. They found Pena and his wife sitting in a Ford Taurus in the driveway of the residence. When Pena saw the officers, he walked very quickly to the front door of the house. Officers circled behind the house to find him exiting the back door and cutting through the back yard. He made a throwing motion as he continued to run—despite officers' orders to stop. Officers eventually apprehended him as he tried to scale a fence.

In Pena's pockets, officers found \$1000 in cash,¹ a lighter, lip balm, tweezers, and a plastic baggie containing three smaller square baggies—two red and one clear—similar to those used by Salinas in the May and July sales to the informant. All three contained methamphetamine. Subsequent lab tests showed

¹ Agent Bellon testified the cash, rolled into a tube and secured with a rubber band, broke down into denominations of "10's, 20's and 50's" arranged in "one-hundred dollar increments" that were "opposite facing" for "the ease of counting" out to drug customers.

the cash contained trace amounts of methamphetamine.² When looking for what Pena threw while fleeing, officers retrieved an L & M cigarette box near the fence line. Pena also had a parts list for a Honda Accord in his pocket.

Because the search warrant identified the Accord as the vehicle driven to the controlled buys, officers searched it. In the trunk they found a box containing a black digital scale and small square red and clear baggies matching those sold to the confidential informant and found on Pena.

Upon entering the residence, officers located Salinas. A search of his pockets revealed the same style of red baggie containing methamphetamine, another small baggie of marijuana, and some pills.

On the roof of the house, officers found two security cameras, one pointed at the front and one pointed at the rear of the residence. In the garage, officers located two walkie-talkies. A padlocked upstairs bedroom contained a safe that held Pena's identification card. Also inside the room were two television sets, which officers believed may have been connected to the security cameras. An officer removed the cameras from the house before investigators could determine whether they were being used as monitors.

At trial, Samuel Molina testified³ that he encountered Pena at the Kum & Go convenience store in Perry in the summer of 2010. Pena asked Molina if he

²John Kruzich, a criminalist for the National Guard Counter Drug Program, testified to the significance of finding methamphetamine on the currency. He explained that he performs ion scanning tests on thousands of dollars in different denominations to obtain a baseline for what drugs are present on money. While the guard regularly finds traces of cocaine on currency, no other drugs are found as a baseline.

³ At the time of his testimony, Molina, who was not a citizen, had been arrested for third offense operating while intoxicated, a class "D" felony. In exchange for his testimony,

wanted to buy drugs. He repeated his offer a second time in the Kum & Go car wash. Pena showed Molina the illicit substance, identifying it as “ice” and cocaine, and informed Molina that his supplier was based at La Tapatia, a Mexican grocery store in Des Moines.

A September 27, 2010 trial information charged Pena with one count of conspiracy to deliver methamphetamine, a class “C” felony, in violation of Iowa Code section 124.401(1)(7) (2009). The second count charged him with possession of methamphetamine, a serious misdemeanor, in violation of section 124.401(5). Pena entered a guilty plea for the second count, but went to trial on the conspiracy charge. A jury convicted him on April 6, 2011. He filed a motion for a new trial on April 15, alleging insufficient evidence to corroborate Salinas’s testimony or to sustain his conspiracy conviction. The court denied the motion at his June 6, 2011 sentencing hearing. The court sentenced him to imprisonment not to exceed ten years, with a mandatory one-third to be served. This term runs concurrent with his one-year jail sentence for possession of methamphetamine. The court additionally ordered Pena to pay \$3506.60 in attorney fees. Pena timely filed this appeal.

II. Scope and Standard of Review

We review sufficiency challenges for correction of legal error and will uphold the verdict if it is supported by substantial evidence. *State v. Nitchev*, 720 N.W.2d 547, 556 (Iowa 2006). Substantial evidence is that proof which would convince a rational finder of fact of the defendant’s guilt beyond a reasonable

the State offered to reduce the charge to an aggravated misdemeanor. Absent the reduction, his conviction would have constituted grounds for deportation.

doubt. *State v. Meyers*, 799 N.W.2d 132, 138 (Iowa 2011). We view the evidence in the light most favorable to the verdict. *State v. Brubaker*, 805 N.W.2d 164, 171 (Iowa 2011) (instructing courts to review the totality of the evidence and not simply that which supports the verdict). The burden remains on the State to prove every fact necessary to constitute the crime charged. *Id.*

Corroborative evidence may be either direct or circumstance; it need not be strong or confirm each critical fact, so long as it sustains some material part of the accomplice's testimony, thereby tending to connect the accused with the crime and support the credibility of the accomplice. See *State v. Hoeck*, 547 N.W.2d 852, 859 (Iowa Ct. App. 1996).

We review challenges to illegal sentences for errors at law. *Tindell v. State*, 594 N.W.2d 436, 437 (Iowa 2001).

III. Analysis

A. Did the State Present Sufficient Evidence to Corroborate Salinas's Accomplice Testimony?

Pena contends his conviction for conspiracy to deliver methamphetamine should be reversed for insufficient evidence because the State relied upon the uncorroborated testimony of accomplice Alberto Salinas. The State does not dispute that Salinas was Pena's accomplice. See *State v. Barnes*, 791 N.W.2d 817, 823 (Iowa 2010) ("In general, a person is an accomplice if he or she could be charged and convicted of the same offense for which the defendant is on trial."). The requirement to corroborate the testimony of an accomplice appears as a rule of criminal procedure: "A conviction cannot be had upon the testimony

of an accomplice . . . 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.” Iowa R. Crim. P. 2.21(3).⁴

The supporting rationale for the corroboration rule is two-fold: independent evidence further connects the defendant with the crime charged and acts as a counterweight against an accomplice’s dubious credibility, given the accomplice’s natural self-interest in shifting blame onto the defendant. *Barnes*, 791 N.W.2d at 824.

In this case, authorities originally charged Salinas with three counts of delivery of methamphetamine. In exchange for his testimony against Pena, the State offered to recommend a suspended sentence on two counts of delivery and a concession on a probation violation. At Pena’s trial, Salinas testified that he began using methamphetamine during his junior year of high school. While his other uncle, Arturo Pena, first provided him with the illicit substance, defendant Pena began supplying him with small amounts for personal use after graduation in the summer of 2010. At that time, Salinas had a falling out with his roommate and moved into Pena’s house. Pena asked Salinas to sell methamphetamine. Pena would provide a particular quantity and would expect a corresponding dollar amount in return. Salinas could keep any surplus drugs or money. Salinas

⁴ The district court relayed rule 2.21(3) to the jury in instruction number 15, which defines “accomplice,” and states, in part: “A person cannot be convicted only by the testimony of an accomplice. The testimony of an accomplice must be corroborated by other evidence tending to connect the defendant with the crime.”

did not rely solely on his uncle as a supplier; he established other connections to purchase methamphetamine and marijuana.

Salinas testified to driving his uncle to purchase supplies. The two would travel to La Tapatia in Des Moines. Pena kept a scale and baggies in the trunk of the Honda Accord. Salinas said all the methamphetamine he sold to the confidential informant was obtained through Pena, and he returned the proceeds to his uncle. His uncle gave him the L & M package of cigarettes used in the sale. Salinas testified that he does smoke, but only Marlboro Reds. He also explained the surveillance cameras at Pena's residence were intended to watch for intruders or police, and that he and Pena used the walkie-talkies to set up the cameras. Salinas further testified to his uncle's tendency to prepare baggies for sale that were lighter than the weight expected by the buyers so that Pena could reap a greater profit from his supply.

Pena does not contest his possession of methamphetamine. He questions on appeal whether independent evidence sufficiently corroborated Salinas's testimony on the conspiracy element.⁵ The court defined "conspiracy"

⁵ The court provided the jury with the following marshaling instruction:

The State must prove all of the following elements of Conspiracy to Deliver Methamphetamine:

1. On or about the 20th day of August, 2010, the defendant knowingly possessed a controlled substance, methamphetamine.
2. The defendant knew the substance was a controlled substance, methamphetamine.
3. The defendant possessed with the intent to deliver the controlled substance, methamphetamine, to another or conspired with another person to do so.

If the State has proved all of these elements, the defendant is guilty of Conspiracy to Deliver Methamphetamine. If the State has failed to prove anyone of the elements, the defendant is not guilty.

as “an agreement by two or more persons to commit an unlawful act, coupled with the intent to achieve the agreement’s objective, and an action or conduct that furthers the agreement.”

Pena argues he had no involvement in the controlled sales to the confidential informant, and that his name did not come up before police executed the search warrant. He notes that Salinas drove the Accord to the controlled buys, and the scale and baggies in the trunk were consistent with Salinas’s use of the vehicle to deal drugs. Pena discounts the presence of the surveillance cameras and walkie-talkies, arguing each item had a legitimate use. Pena further argues that Molina’s testimony does not show Pena conspired with Salinas.

The State acknowledges that law enforcement was unaware of Pena’s involvement in dealing methamphetamine before executing the warrant at his residence but points to several aspects of its case that corroborate Salinas’s testimony and show Pena’s active participation in an ongoing conspiracy to deliver methamphetamine. The corroborating evidence falls into roughly five categories: (1) the packaging and weight of the drugs; (2) Molina’s testimony concerning Pena’s propositions to sell him drugs and the reference to the location of Pena’s supplier; (3) Pena’s connection to the Honda Accord used by Salinas during the controlled buys; (4) the security installations at Pena’s residence; and (5) the amount and condition of the cash found on Pena’s person when he fled from police. While none of these circumstances may singularly establish Pena’s participation in a drug conspiracy, in combination, we consider

them ample to convince the jury of Pena's connection to the charged crime and of the credibility of Salinas's information. See *State v. Astello*, 602 N.W.2d 190, 198 (Iowa Ct. App. 1999).

First, similarities in physical evidence recovered by law enforcement show a connection between the drug dealing of Salinas and Pena. The small square, colored baggies Salinas used in his sales to the informant matched those baggies found on Pena and in the trunk of the Accord. Salinas described them as "custom" bags, especially useful because they did not add weight to the product on the scale. In addition, the relatively light baggies of methamphetamine found on Pena were consistent with the weights sold by Salinas, according to Agent Bellon. As to Salinas's assertion that Pena's portions fell below the amounts expected by customers, Bellon echoed Salinas's explanation that some dealers will slight the weight of a baggie of methamphetamine to stretch the sales from a bulk supply. Similar custom packaging and lighter amounts, independent of one another, buttress Salinas's testimony.

In addition, on August 4, 2010, Salinas delivered methamphetamine to the informant inside an L & M cigarette package. Salinas explained it was his uncle's chosen brand, and that Salinas smoked Marlboro Reds. Police located another pack of L & M cigarettes by Pena's fence line, after seeing him make a throwing motion while fleeing through his yard. The appearance of the two L & M brand packages contributes to the corroborative evidence.

Second, Molina's testimony tends to corroborate Salinas's statement that Pena did not merely possess methamphetamine, but intended to sell the product as well. Moreover, the fact that Molina and Salinas both recalled the same Des Moines store as the location of Pena's supplier lends further credence to Salinas's testimony.

Third, the blue Honda Accord provides an additional nexus between Pena and Salinas. Although it was registered to Pena's step-daughter, Salinas drove the vehicle to each meeting with the informant. A search of the vehicle's trunk unearthed a digital scale and the distinct baggies used for packaging throughout the case. At the time of his arrest, Pena was carrying a parts list for the Accord. Paula Pena explained that because her husband lacked a driver's license, he relied on Salinas to drive him, and that the two spent a great deal of time together. This evidence supports Salinas's testimony regarding his trips with Pena to purchase methamphetamine.

Fourth, the State presented evidence that Pena outfitted his house with two security cameras on the roof and two television monitors inside a padlocked bedroom. Agent Bellon testified that in his experience in working drug cases, surveillance cameras are used to detect law enforcement presence and to protect drugs or cash kept at the dealer's residence. Pena's wife, Paula, testified that the cameras were installed to deter burglars and supervise children in a backyard pool. The jury was entitled to decide for itself which explanation was more believable. See *State v. Maring*, 619 N.W.2d 393, 395 (Iowa 2000).

Fifth, at the time of his arrest, Pena carried \$1000 of cash in denominations commonly paid by individuals purchasing drugs for personal use. The cash tested positive for traces of methamphetamine, which was a rare substance to be found on paper currency outside the drug trade, according to expert testimony. Paula Pena testified that her husband was paid in cash for his work on cars, and because he did not own a bank account, he kept all his cash on him. As with her testimony concerning the security cameras, it was up to the jurors whether to accept the wife's innocent explanation for her husband's conduct.

Considering the totality of these circumstances in the light most favorable to the verdict, we find that the State's evidence sufficiently corroborates Salinas's testimony that Pena was involved in dealing methamphetamine. While the State did not present evidence of a formal agreement between Salinas and Pena to deliver drugs, the jury was entitled to infer the existence of such an alliance through the circumstances outlined above. *See State v. Fintel*, 689 N.W.2d 95, 102 (Iowa 2004) (explaining an agreement to form a conspiracy "may be inherent in and inferred from the circumstances, especially declarations, acts, and conduct of the alleged conspirators"). Other witness accounts, as well as physical evidence found during execution of the search warrant, corroborated Salinas's accusations that he and Pena conspired to deliver methamphetamine. Accordingly, the State has met its burden, and we will not disturb the jury's verdict.

B. Did the District Court Order Excessive Attorney Fees?

The district court ordered Pena pay \$3506.60 for his court-appointed attorney. Pena points out that this amount surpasses the \$1800 limitation imposed by our legislature. The State agrees that Pena cannot be required to pay more than \$1800 as restitution for court-appointed representation.

Section 815.14 establishes the rate at which a public defender shall be compensated, but recognizes that the amount is subject to the fee limitations set forth in section 13B.4. Because Pena was convicted of a serious misdemeanor and a class “C” felony, the fee limitation is \$1800. See Iowa Code § 13B.4(4)(a) (requiring state public defender to “establish fee limitations for particular categories of cases”); Iowa Admin. Code r. 493-12.6(1) (2011) (applying the highest fee limitation when a defendant has multiple charges, and establishing \$1800 limit for class “C” felonies). Because the district court’s order exceeds this amount, it is invalid.

Both parties agree the impermissible attorney-fee award can be severed from the otherwise valid sentence. See *State v. Keutla*, 798 N.W.2d 731, 735 (Iowa 2011). Accordingly, we vacate the order requiring Pena to pay \$3506.60 and instead remand the case to the district court for entry of a restitution order that does not require him to pay more than \$1800 in legal fees.

AFFIRMED IN PART, VACATED IN PART AND REMANDED.