

**IN THE COURT OF APPEALS OF IOWA**

No. 3-019 / 12-0219  
Filed April 10, 2013

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

**vs.**

**FERNANDO HERNANDEZ,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Polk County, Donna L. Paulsen,  
Judge.

Hernandez appeals from his convictions of several drug-related charges.

**AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Robert Ranschau, Assistant  
Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Tyler Buller, Assistant Attorney  
General, John Sarcone, County Attorney, and Stephan Bayens, Assistant County  
Attorney, for appellee.

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

**TABOR, J.**

A jury found Fernando Hernandez guilty of three drug-related offenses based largely on the testimony of two accomplices who cooperated with law enforcement by recording their phone conversations. On appeal, he contends the State did not sufficiently corroborate their testimony that he was involved in the crimes. He also contends the district court abused its discretion in providing the jurors with a compact disc (CD) player so that they could listen to the recorded evidence during their deliberations.

Finding sufficient independent evidence to corroborate Hernandez's identity and participation in the conspiracy, we affirm the district court's denial of his motion for judgment of acquittal. We also conclude the trial court acted within its discretion in allowing the jury access to a CD player to review phone calls during its deliberations, as the recordings were properly admitted into evidence and not testimonial in nature. Accordingly, we affirm.

**I. Background Facts and Proceedings**

Dale Campbell met Hernandez—who he knew as Michael—sometime in 2008 when he sold Hernandez his uncle's car. Hernandez asked Campbell if he wanted to sell methamphetamine for him. Campbell agreed and thereafter had contact with Hernandez every ten days to two weeks. Most of the time they met in person, but sometimes another person would collect money from Campbell and supply him with methamphetamine. Campbell also had frequent phone contact with Hernandez.

In 2009, the police arrested Campbell for possession of marijuana with intent to deliver. It was not his first drug-related arrest. Knowing he faced incarceration, Campbell decided to cooperate with law enforcement. He agreed to record his phone calls with Hernandez beginning in February 2010.

In a phone call recorded on February 4, 2010, Campbell arranged to purchase one ounce of methamphetamine from Hernandez. Rodney Rocha delivered the methamphetamine. Campbell also recorded a call to Hernandez after the delivery, confirming he had received the methamphetamine. Hernandez was concerned that the police were watching him, and he told Campbell that he did not want anyone to see them together.

In a phone call recorded on February 8, 2010, Campbell asked Hernandez about depositing a payment for the methamphetamine. Hernandez said he would send his daughter to collect the money. The two also discussed driving to Salt Lake City to get more methamphetamine. Hernandez wanted Campbell to round up a group of buyers to pool their money for a larger purchase.

The defendant's daughter, Erica Hernandez, collected the money from Campbell. After leaving his residence, law enforcement officers stopped her vehicle and discovered she possessed two hundred dollars in cash. Officers followed Erica to a car stereo installation business where they discovered money marked for drug buys in the cash register.

In a series of recorded conversations, Campbell expressed his interest in buying a larger amount of methamphetamine. Hernandez told Campbell he would sell him three pounds of methamphetamine, indicating he would call back

with details. The next day, Hernandez asked Campbell if he needed any marijuana and also spoke of selling “ice”—a street name for methamphetamine. In a subsequent call, the men discussed the price of \$20,000 for one pound of methamphetamine and Campbell said he had that much cash on hand. Hernandez told Campbell to be ready for a delivery. Hernandez also related concern about the delivery person getting arrested. He told Campbell to wire money via Western Union, giving the name “Fernando Hernandez Puga” as the recipient of the money.

Hernandez called Rocha and told him a load of methamphetamine would be transported to Des Moines in the hidden compartment of a truck. Upon its arrival, Rocha called Hernandez, who told him to deliver the methamphetamine to Campbell. Meanwhile, Hernandez called Campbell to tell him Rocha would be delivering the methamphetamine and to expect a phone call from Rocha to schedule delivery.

At the appointed time, Rocha brought Campbell 616 grams—nearly one and one-half pounds—of methamphetamine in an ice cream pail. At Campbell’s signal, police arrested Rocha. Like Campbell, Rocha decided to cooperate with law enforcement. Rocha had started working for Hernandez about six months earlier, agreeing to deliver methamphetamine and pick up money for him. A search of Rocha’s home yielded digital scales, baggies, and a drug ledger noting a transaction with “Erica,” Hernandez’s daughter. Rocha had met Hernandez

only once in person, but they had frequent phone contact. When police arrested Hernandez, he called Rocha from jail to advise him that, if called to testify, Rocha should deny knowing Hernandez.

The State charged Hernandez with conspiracy to deliver methamphetamine, possession of methamphetamine with intent to deliver, and failure to possess a tax stamp. Information provided by Rocha led to the arrest of four other individuals responsible for trafficking methamphetamine from Salt Lake City to Des Moines. Those individuals were charged as co-conspirators. Authorities also charged Erica Hernandez in the conspiracy.

Fernando Hernandez stood trial in December 2011. Both Campbell and Rocha testified, providing a foundation for the recorded phone calls to be entered into evidence. Both men identified the other voice on the recordings as belonging to Hernandez. At the close of trial, the court provided the jury with a CD player for its deliberations. The jury found Hernandez guilty as charged. Hernandez stipulated to being a second or subsequent offender.

The district court entered judgment against Hernandez on January 24, 2012. It merged Hernandez's convictions for conspiracy to deliver and possession with intent to deliver, imposing an indeterminate fifty-year sentence on the merged counts. The court also sentenced Hernandez to five years for the tax stamp conviction and ordered the prison terms be served concurrently. Hernandez filed a timely notice of appeal.

## **II. Motion for Judgment of Acquittal**

At the close of the State's case, Hernandez moved for judgment of acquittal. He argued the only evidence linking him to the charges was the statements of co-conspirators Rocha and Campbell, which were not corroborated by other evidence in the record. On appeal, Hernandez contends the court erred in denying his motion for judgment of acquittal because the State presented insufficient evidence to corroborate his involvement.

We review Hernandez's sufficiency-of-the-evidence claim for correction of errors at law. See *State v. Brubaker*, 805 N.W.2d 164, 171 (Iowa 2011). We will uphold the verdict if substantial evidence supports it. *Id.* Evidence is substantial if it would convince a reasonable fact finder the defendant is guilty beyond a reasonable doubt. *Id.* We consider all evidence in the record—not just the evidence supporting guilt—when we make sufficiency-of-the-evidence determinations. *Id.* We view the evidence in the light most favorable to the State, drawing all reasonable inferences to uphold the verdict. *State v. Williams*, 695 N.W.2d 23, 28 (Iowa 2005).

Iowa Rule of Evidence 2.21(3) states in pertinent 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.

Evidence corroborating an accomplice's testimony may be either direct or circumstantial. *State v. Bugely*, 562 N.W.2d 173, 176 (Iowa 1997). We require the corroborating evidence to "support some material part of the accomplice's testimony, thereby tending to connect the defendant to the commission of the

crime and to support the credibility of the accomplice.” *State v. Hoeck*, 547 N.W.2d 852, 859 (Iowa Ct. App. 1996).

We find ample evidence to corroborate the testimony offered by Campbell and Rocha. The State introduced recorded phone conversations between Hernandez and Campbell, and between Hernandez and Rocha. Both accomplices identified Hernandez as the person on the other end of the call. Hernandez argues the State’s witnesses had only “momentary personal contact” with him and, therefore, cannot be relied upon to testify it was “definitely” his voice on the other end of the recordings. But the State need not establish corroborative evidence beyond a reasonable doubt. See *id.* Furthermore, Campbell testified he saw Hernandez “once every ten days, two weeks over a year,” and while he did not always meet with Hernandez directly during this period, they did have direct contact “[m]ost of the time.” It was up to the jury to decide whether the identifications provided by Campbell and Rocha were sufficient.

In addition to the accomplices’ identification of the defendant, the voice on the other end of the recorded calls gives the name “Fernando Hernandez Puga” as the person to whom Campbell should wire money in exchange for purchasing a large quantity of methamphetamine. Rocha’s cooperation with law enforcement also led them to arrest four men identified as being involved with the trafficking end of the conspiracy; phone records show contacts between those men and Hernandez as well. We also find corroboration in the fact that law enforcement discovered nearly three pounds of methamphetamine in the truck

discussed by Hernandez and nearly one and one-half pounds in the ice cream container.

Viewing the evidence in the light most favorable to the State and drawing all reasonable inferences, we find substantial evidence supports the jury's verdict. Accordingly, we affirm the district court's denial of Hernandez's motion for judgment of acquittal.

### **III. Supplying the Jury with a CD Player**

Hernandez's second assignment of error concerns the submission of exhibits to the jury during its deliberations. Without a request from either party, the district court sent a CD player to the jury room to allow the jurors to listen to the recorded phone calls made by Campbell and Rocha. Hernandez complains that in doing so the court unduly emphasized that evidence.

Iowa Rule of Evidence 2.19(5)(e) provides that upon retiring for deliberations, the jury may take with it all papers and exhibits which have been received in evidence, as well as the court's instructions. However, "the jury shall not take with it depositions, nor shall it take original public records and private documents as ought not, in the opinion of the court, to be taken from the person possessing them." Iowa R. Evid. 2.19(5)(e). Depositions are not supplied to the jury after it retires because "[a] deposition, if constantly available for reference by the jury, could assume a disproportionate importance in relation to other trial testimony, for which the jurors were required to call upon their recollections only." *State v. Baumann*, 236 N.W.2d 361, 366 (Iowa 1975).



The district court has discretion in determining what exhibits to submit to the jury. *State v. Voll*, 655 N.W.2d 548, 550 (Iowa Ct. App. 2002). A court abuses its discretion when it exercises its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *State v. Long*, 814 N.W.2d 572, 576 (Iowa 2012). In exercising its discretion, it is appropriate for the trial court to consider “(i) whether the material will aid the jury in a proper consideration of the case; (ii) whether any party will be unduly prejudiced by submission of the material; and (iii) whether the material may be subjected to improper use by the jury.” *State v. Jackson*, 387 N.W.2d 623, 629 (Iowa 1986). Reversal is only warranted if the trial court abuses its discretion and prejudice results. *Id.*

No Iowa cases address the propriety of allowing a jury unlimited access to audio recordings during deliberation. But in *State v. Miller*, 535 N.W.2d 144, 147 (Iowa Ct. App. 1995), this court considered whether a trial court abused its discretion in granting a jury’s request to hear tape recordings of phone conversations that had been admitted into evidence. The jury made one request to hear the tapes, which was denied. *Miller*, 535 N.W.2d at 147. After the jury renewed its request because some jurors felt the tape was “very muffled” when played at trial, the court allowed the jury to listen to the recordings in the courtroom. *Id.*

Citing to cases from other jurisdictions, our court listed a number of factors to consider when deciding whether to grant such a request. *Id.* These included the reasonableness of the request, the ease or difficulty in complying with the

request, what is likely to be gained or lost, the threat of unbalanced emphasis on the testimony, the length of the requested testimony, the time consumed in jury deliberations before the request, the complexity of the issues in the case, and the nature and specificity of the requested evidence. *Id.* We then found the trial court acted within its discretion in allowing the jury to hear the tape recordings again:

The request was specific and relevant to the fact finding process. It was reasonable in view of the poor quality of the voices on the tape. The tapes were easily accessible. They were not lengthy or complex. Moreover, we are unable to conclude that any testimony was unfairly overemphasized by granting the request. . . . Instead of placing undue emphasis, the repeated request by the jury was, most likely, compatible with a responsible and conscientious concern that the tapes be understood and evaluated as carefully as possible.

*Id.* at 147-48.

In the present case, the district court noted the poor audio quality of the recordings, remarking, “They’re really hard to hear. So if you think your hearing is going bad, no it’s—It’s they’re just hard to decipher.” While the jury in *Miller* was not given unrestricted access to the recordings, we nevertheless find the reasoning in that decision to be sound here as well. Allowing the jury an opportunity to re-examine the recordings in the jury room, especially when identification was a key issue at trial, was “compatible with a responsible and conscientious concern that the tapes be understood and evaluated as carefully as possible.” *Id.*

Other jurisdictions have examined the question of whether a jury should be allowed unsupervised access to video or audio recordings. The Colorado

Court of Appeals decided it was error to allow the jury unsupervised access to testimonial out-of-court statements but that nontestimonial records “depict the event itself rather than a narration thereof” and therefore could be examined by a jury during deliberations without court supervision. *People v. Rogers*, 68 P.3d 486, 494 (Colo. App. 2002). This distinction would conform to the view presented in rule 2.19(5)(e), which allows a deliberating jury to access properly admitted exhibits but not depositions.

Wyoming has recognized a similar distinction when assessing the propriety of providing recorded exhibits to a jury during deliberations. *Warner v. State*, 897 P.2d 472, 475 (Wyo. 1995). The *Warner* court noted the “general rule” is that testimonial video or audio tape recordings should be permitted in the jury room only in rare circumstances because they may function as a “speaking witness” whose testimony may be unduly emphasized. *Id.* But the Wyoming court found these concerns did not apply “with respect to tape recordings of criminal acts such as drug transactions.” *Id.* The Wyoming Supreme Court held the trial court’s exercise of discretion in such instances should be upheld so long as the audio recording is otherwise admissible and “where the state introduces something more than a minimal amount of other evidence of culpability.” *Id.*

In *Holloway v. State*, 809 So. 2d 598, 609 (Miss. 2000), the prosecution played an audio recording of the defendant’s statement for the jury. The jury was also provided copies of a transcript of the statement to follow along with while the statement was played. *Holloway*, 809 So. 2d at 609. Both the recording and the transcript were entered into evidence and provided to the jury during its

deliberations. *Id.* at 609-10. The Mississippi Supreme Court did not find error in allowing the jury access to the recording and transcript during deliberations. *Id.* at 610. This court based its holding on its state rules of criminal procedure, which provide: “The court shall permit the jury, upon retiring for deliberation, to take to the jury room a copy of the instructions and exhibits and writings which have been received in evidence, except depositions.” *Id.* The court found the language of its rule was “within reason, mandatory.” *Id.*

Appreciating the logic of the decisions from other appellate courts, we conclude the district court here was within its discretion to allow the jury access to a CD player to listen to the recorded telephone calls. Hernandez does not argue the court improperly admitted the recordings into evidence. Unlike depositions, the recordings were not testimonial in nature. Rather they were depictions of a criminal event. The court provided the jury with the ability to replay the recordings to aid in its determination of the contested issues. Hernandez does not suggest the jury used the recordings for an improper purpose.

Even assuming the court abused its discretion in allowing the jury unfettered access to the recordings, Hernandez’s claim must fail because he has failed to show he was prejudiced by any error. *See State v. Shea*, 218 N.W.2d 610, 615 (Iowa 1974) (applying the non-constitutional standard for harmless error, that is whether the defendant’s substantial rights were adversely affected by allowing exhibits in the jury room). The record does not show the jurors even listened to the recordings during deliberations. Nor does Hernandez establish

the recordings alone induced the jury's verdict. See *Jackson*, 387 N.W.2d at 629 (holding the jury's use of "freeze frame technique" on film footage of a robbery was not grounds for reversal). On this record, we find any error was harmless.

**AFFIRMED.**