IN THE COURT OF APPEALS OF IOWA

No. 6-227 / 05-0582
Filed June 14, 2006

STATE OF IOWA,
Plaintiff-Appellee,

vs.

THOMAS DEAN PETERSON,
Defendant-Appellant.

Appeal from the Iowa District Court for Greene County, Gary L. McMinimee, Judge.

Defendant appeals following conviction and sentence for multiple drug-related offenses. **CONVICTIONS AFFIRMED, SENTENCE VACATED IN PART, AND REMAINING SENTENCES AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Theresa Wilson, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sheryl Soich, Assistant Attorney General, and Nicola J. Martino, County Attorney, for appellee.

Considered by Zimmer, P.J., and Miller and Hecht, JJ.

ZIMMER, P.J.

Thomas Peterson appeals following conviction and sentence for one count of manufacturing more than five grams of methamphetamine in violation of Iowa Code section 124.401 (2003), one count of possession of marijuana with intent to deliver in violation of section 124.401(1)(d), two counts of possession of a precursor substance (pseudoephedrine and lithium) in violation of section 124.401(4), one count of failure to affix a tax stamp in violation of section 453B.12, and three counts of delivery of methamphetamine in violation of section 124.401(1)(c). We affirm Peterson's convictions, vacate a portion of his sentence for failure to affix a tax stamp, and affirm the remaining terms of his sentences.

I. Background Facts and Proceedings.

On two occasions during a ten-day period in the fall of 2003, Peterson purchased a 100-count bottle of pseudoephedrine from a local pharmacy. On the latter occasion he was accompanied by Gregory Phillips. Pharmacy personnel reported the sales to law enforcement.

On December 4, 2003, the Greene County Sheriff's office executed a search warrant at Phillips's residence in Cooper, Iowa. Peterson had been living at the residence since mid-November and was occupying the upstairs south bedroom.

Officers found marijuana, drug paraphernalia, and a number of items related to the manufacturing of methamphetamine—including lithium batteries, powdered pseudoephedrine, and empty blister packs—in the upstairs south bedroom. The upstairs north bedroom, which appeared to be unoccupied, also

contained a variety of items related to the manufacture of methamphetamine. One of these items was a large glass pickle jar holding a blue liquid containing methamphetamine, ingredients used in methamphetamine manufacture, and a by-product of the manufacturing process. Still more items related to the manufacturing process were found in and around the Phillips residence, as well as in the car Peterson was driving.[1]

In April 2004 the State filed a trial information charging Peterson with five drug-related offenses, including the manufacturing, marijuana possession, precursor possession, and tax stamp violations noted above. The trial information also charged Gregory Phillips with one count of manufacturing methamphetamine, two counts of possession of a precursor, and one count of possession of firearm by a felon. In October 2004 the trial information was amended to add eight additional drug-related charges against Peterson: one count of ongoing criminal conduct, and seven counts of delivery of methamphetamine.

Peterson waived his right to a jury trial, and the matter was tried to the court. At trial, the State introduced items seized during the search, and offered testimony from a law enforcement officer that Peterson had "made statements showing that he actually participated in the manufacturing . . . ." The State also called witnesses who alleged first-hand knowledge of Peterson's involvement in the manufacture and delivery of methamphetamine. Among those witnesses were Gregory Phillips and Joey Godwin.

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[1] The car belonged to Peterson's daughter, but was being driven by Peterson and contained Peterson's employment identification badge.

Phillips, who had pled guilty to and was sentenced for manufacturing methamphetamine prior to Peterson's trial, testified that he had witnessed Peterson manufacture methamphetamine and had heard Peterson discuss manufacturing methamphetamine with Godwin. Phillips also testified that on one occasion Peterson brought methamphetamine to Phillips's home and the two men had smoked it together. Phillips further claimed that he had witnessed Peterson sell methamphetamine to Peterson's brother on two occasions.

During examination by counsel, Godwin stated he and Peterson manufactured methamphetamine while Peterson was living with Phillips. Godwin described the manufacturing process they had used, which included "bubble[ing]" the methamphetamine in "gallon pickle jars, gallon glass jars" in the north bedroom. However, Godwin was not asked to identify the glass pickle jar seized by police, which had been previously admitted into evidence as Exhibit 20B.

After counsel finished their examination of Godwin, the court asked Godwin some questions. After clarifying some pertinent dates, the court began questioning Godwin about Exhibit 20B. Defense counsel objected "to the Court's questioning," stating "I believe the evidence is in." The court overruled the objection, and Godwin identified Exhibit 20B as a jar he and Peterson had used in the "bubbling off" process just a few days before the search warrant was executed. The prosecutor and defense counsel were then given an opportunity to ask Godwin additional questions before trial was recessed for the day.

The following morning, Peterson moved that Godwin's testimony be stricken, or that a mistrial be ordered, because the testimony presented "entirely new" evidence that Peterson "was not given notice of." Although the court did

strike portions Godwin's testimony, it declined to strike his testimony regarding Exhibit 20B. The court concluded the minutes of testimony had put Peterson on notice that Godwin would be testifying regarding the manufacturing process, including the fact he and Peterson "would bubble [the material] off in the north bedroom," which "would also alert [Peterson] to inquiry regarding the jar that was seized on December 4th." The court also explained it had questioned Godwin about Exhibit 20B to determine whether it "had anything to do with these manufacturing processes . . . . If it didn't, I would think that would substantially hurt the State's case. If it did, I suspect it helps the State's case."

Following trial, the court issued its written findings of fact, conclusions of law, and verdicts. The court convicted Peterson of eight drug-related offenses, as noted above. The court acquitted Peterson of the ongoing criminal conduct charge and four counts of delivery of methamphetamine. Peterson filed a motion in arrest of judgment and a motion for a new trial. The motion was overruled by the court, and sentence was imposed.

Peterson filed a timely notice of appeal. On appeal, he contends (1) the record does not contain sufficient evidence to support two of his convictions for delivery of methamphetamine because they are based solely on uncorroborated accomplice testimony, (2) the court erred when it overruled his objection to and denied his motion for mistrial regarding the court's questioning of Godwin, and (3) the court illegally imposed a DARE surcharge as part of his sentence for the tax stamp conviction.

II. Scope and Standards of Review.

We review challenges to the sufficiency of the evidence and the legality of sentence for the correction of for errors at law. Iowa R. App. P. 6.4; *State v. Turner*, 630 N.W.2d 601, 610 (Iowa 2001) (substantial evidence); *State v. Davis*, 544 N.W.2d 453, 455 (Iowa 1996) (illegal sentence). Although rulings on evidentiary objections and motions for mistrial are also subject to on error review, such rulings are reversed only upon a demonstrated abuse of discretion. *State v. Sallis*, 574 N.W.2d 15, 16 (Iowa 1998) (evidentiary rulings); *State v. Choudry*, 569 N.W.2d 618, 620 (Iowa Ct. App. 1997) (mistrial). However, to the extent this matter involves constitutional issues, our review is de novo. *Id*.

III. Sufficiency of the Evidence.

Peterson was convicted of three counts of delivering methamphetamine: one count for delivery to Phillips, one count for delivery to Peterson's brother, and one count for delivery to a Nate Carlson. The convictions for delivery to Phillips and Peterson's brother were based upon Phillips's testimony. Peterson contends Phillips is an accomplice, and thus his uncorroborated testimony is insufficient to support these two convictions. *See* Iowa R. Crim. P. 2.21(3) ("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 . . . .").

However, one is not an accomplice unless he or she

> "'could be charged with and convicted of the specific offense for which an accused is on trial.'" Thus, proof that the person had knowledge that a crime was planned or proof that the person was present when the crime was committed is insufficient standing alone to make the person an accomplice.

State v. Douglas, 675 N.W.2d 567, 571 (Iowa 2004) (citations omitted). When, as here, the facts and circumstances are undisputed and permit only one inference, whether a witness is an accomplice is a question of law for the court. *State v. Harris*, 589 N.W.2d 239, 241 (Iowa 1999).

As Peterson points out, the record more than adequately establishes that Phillips was an accomplice to the crime of manufacturing methamphetamine. However, Peterson is challenging the sufficiency of the evidence to support his convictions for delivery of methamphetamine. The record reveals Phillips's only involvement in these crimes was as a witness to the events and, in one case, as a recipient of the drugs. This falls far short of demonstrating that Phillips could have been charged with and convicted of delivering methamphetamine. Thus, Phillips was not an accomplice to the specific crimes charged.

Because Phillips was not an accomplice, the delivery convictions could be based on his testimony alone. Having reviewed that testimony, we conclude it is sufficient to uphold both convictions. *See State v. Hopkins*, 576 N.W.2d 374, 377 (Iowa 1998) (noting evidence is substantial when, viewing all evidence in the light most favorable to the State, a rational trier of fact could be convinced of defendant's guilt beyond a reasonable doubt).

IV. Questioning by the Court.

Peterson next contends the court's questioning of Godwin deprived him of a fair trial because the court solicited new evidence regarding his involvement in manufacturing methamphetamine, specifically testimony relating to Godwin's identification of Exhibit 20B, the glass pickle jar seized by police. Peterson

asserts the court's questioning assisted the State in carrying its burden of proof on the manufacturing charge,[2] and that without the court-elicited testimony "there would have been a significant question as to whether the State could prove constructive possession of the jar by Peterson."[3]

A trial judge has the discretion to question witnesses when it is "necessary in the interest of justice." Iowa R. Evid. 5.614(*b*); *Mills v. State*, 383 N.W.2d 574, 578 (Iowa 1986). The court "may ask questions of witnesses in an attempt to clarify testimony and to elicit facts necessary to a clear presentation of the issues." *State v. Dixon*, 534 N.W.2d 435, 441 (Iowa 1995) (citing *United States v. Scott*, 26 F.3d 1458, 1464 (8th Cir. 1994)).[4] However, the practice is not encouraged. *State v. Cuevas*, 288 N.W.2d 525, 532-33 (Iowa 1980).

"By engaging in the examination of witnesses the court becomes vulnerable to a multiplicity of criticisms," including bias, prejudice and advocacy. *Id*. at 533. Thus, the court must strive to "preserve an attitude of impartiality and [guard] against . . . an impression that the court believes the defendant is guilty." *Dixon*, 534 N.W.2d at 441 (citing *Scott*, 26 F.3d at 1464). Although an impression of partiality is necessarily of particular concern in a jury trial, the concern is lessened, and the district court's latitude is broader, when the court

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[2] Although Peterson contends this alleged error requires reversal of all his convictions and sentences, the verdict and order clearly indicates the court considered the disputed evidence only in relation to the manufacturing charge.

[3] Neither Peterson's objection nor his motion to strike or for a mistrial specifically addressed the concern he raises on appeal. However, the propriety of the court's questioning appears to have been contemplated by both the district court and the prosecutor, and the State concedes error has been preserved on this issue.

[4] Receded from on other grounds in *State v. Huss*, 657 N.W.2d 447, 454 (Iowa 2003).

serves as fact finder. *Compare Dixon*, 534 N.W.2d at 441 (Iowa 1995), *with In re Marriage of Worthington*, 504 N.W.2d 147, 149 (Iowa Ct. App. 1993).

Our supreme court addressed the extent to which a trial judge may properly interrogate witnesses in *Mills v. State*, 383 N.W.2d 574 (Iowa 1986), which also involved a trial to the court. The issue in *Mills* was whether trial counsel was ineffective for failing to object when the court questioned the defendant on a matter seminal to the State's case. *Mills*, 383 N.W.2d at 575.

> The court of appeals had reversed Mill's conviction, holding it was
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> > an abuse of discretion for a trial court to elicit the elements necessary to establish the State's case. . . . We do not suggest that the trial court intended to aid the prosecution in this manner. . . .[I]t is likely that the court was merely attempting to clarify evidence and supplement its notes. The fact remains, however, that the court went beyond this intended purpose and elicited testimony that was not only damaging, but essential to the conviction.
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> *Id*. at 576.

However, upon further review, the supreme court vacated our opinion and affirmed the defendant's conviction, holding that the trial judge "was within his discretion" when questioning the witness. *Id*. at 578. The court noted the information the judge sought to elicit went to the legal issue before him, and that if answered one way the question might have led to acquittal, while if answered another it might have led to a finding of guilt. *Id*. Observing that "[a] trial is not a game; it is a serious quest for the truth," the court held that because "[t]he record was obscure on this point, . . . the judge could bring out the fact; otherwise justice might have miscarried." *Id*.

Although it involved the propriety of judicial comments in the context of a criminal jury trial, we draw additional guidance from the supreme court's opinion in *State v. Dixon*, 534 N.W.2d 435 (Iowa 1995). There, the court held:

> When a criminal defendant asserts that a trial judge's comments prevented a fair trial, we will engage in a balancing of the potential prejudice caused by the trial judge's comments and the overall fairness of the trial. Where the judge appears to have lost his or her appearance of neutrality, or appears to have accentuated and emphasized the prosecution's position, we will find the balance tipped adversely against the fairness of the trial.

Dixon, 534 N.W.2d at 441 (citing *Scott*, 26 F.3d at 1464).

Turning to the facts of this case, we recognize the trial court's questioning of Godwin produced new and previously unsolicited evidence that supported the manufacturing charge and, as Peterson asserts, assisted the State in carrying its burden of proof. Nevertheless, we cannot conclude, under the particular circumstances of this case, that the court's questioning was an abuse of its discretion or that it deprived Peterson of a fair trial.

Here, the court pursued a line of questioning initiated by counsel in an effort to clarify the significance of an admitted exhibit. The court's questioning was limited in scope, neutrally phrased, and not designed to elicit any particular response. As the court itself noted, it did not know how Godwin would respond to its inquiries. Although Godwin's identification of Exhibit 20B did assist the State in establishing the manufacturing charge, the court's questioning could have easily led to testimony that detracted from or had a negligible impact on the State's case. Moreover, we have reviewed the court's actions during the entire course of the proceedings, and conclude that overall the trial was conducted in a fair manner. The court acted as an impartial moderator and fact finder, and did

not adopt a partisan role or otherwise indicate a bias in favor of either party. Notably, Peterson was acquitted of five of the thirteen charges against him.

Peterson suggests that, even if the court acted in an impartial and unbiased manner, he was deprived of a fair trial because the State could not have met its burden on the manufacturing charge without Godwin's testimony directly tying Peterson to Exhibit 20B. We cannot agree. The disputed testimony is only one of many pieces of evidence—including the remainder of Godwin's testimony on direct and cross examination, testimony from Phillips, Peterson's incriminating statements to law enforcement, evidence found in Peterson's bedroom and vehicle, and the reasonable inferences to be drawn from the evidence—that support the manufacturing conviction. Even if the disputed testimony had been stricken, the remaining record more than adequately supports the determination that Peterson is guilty of manufacturing more than five grams of methamphetamine.

We cannot conclude the court's limited and impartial questioning, conducted in an effort to elicit testimony it believed necessary to a fully informed determination of a legal issue before it, was either an abuse of discretion or served to deprive Peterson of a fair trial. We accordingly reject this assignment of error.

V. DARE Surcharge.

Finally, Peterson contends and the State concedes that the district court illegally imposed a DARE surcharge as part of Peterson's sentence for the tax stamp conviction. Pursuant to section 911.2, a DARE surcharge may be imposed only upon convictions for offenses "provided for in chapter 321J or

chapter 124, division IV." Because failure to affix a tax stamp is an offense provided for in chapter 453B, imposing a DARE surcharge for the tax stamp conviction was not authorized by statute. That portion of Peterson's sentence is accordingly void. *State v. Kapell*, 510 N.W.2d 878, 879 (Iowa 1994).

VI. Conclusion.

We affirm Peterson's convictions. Because the Code does not authorize imposition of a $10 DARE surcharge for the offense of failure to affix a tax stamp, we vacate that portion of the sentence for Peterson's tax stamp conviction. The remaining terms of Peterson's sentences are affirmed.

CONVICTIONS AFFIRMED, SENTENCE VACATED IN PART, AND REMAINING SENTENCES AFFIRMED.