

IN THE COURT OF APPEALS OF IOWA

No. 8-418 / 07-1004
Filed July 16, 2008

STATE OF IOWA,
Plaintiff-Appellee,

vs.

BRIEN JUSTIN HINES,
Defendant-Appellant.

Appeal from the Iowa District Court for Pottawattamie County, Charles L. Smith III, Judge.

Defendant appeals his conviction for delivery of a controlled substance (methamphetamine). **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Stephan J. Japuntich, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, Matthew D. Wilber, County Attorney, and Amy L. Zacharias, Assistant County Attorney, for appellee.

Considered by Miller, P.J., and Vaitheswaran, J., and Beeghly, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2007).

BEEGHLY, S.J.**I. Background Facts & Proceedings**

Adam Parish was an apartment manager in Council Bluffs, Iowa. Parish noticed suspected drug activity by Brien Hines in the area. Parish previously used illegal drugs and testified he “wanted to get drugs off the street,” so he called a narcotics tip line. Parish met with deputy sheriff Gary Reed, who was assigned to the Southwest Iowa Narcotics Enforcement Task Force, and Parish agreed to assist in a controlled purchase of illegal drugs.

On December 15, 2006, Parish telephoned Hines and asked to purchase methamphetamine. Deputy Reed searched Parish, then placed a recording device on him and furnished him with \$400. Hines picked Parish up in his vehicle. Another person, Bobbi Brown, was also in the vehicle. Hines drove Parish and Brown to a house and got out of the vehicle. When Hines got back he asked Parish for the money. After driving to another location Hines got out again, and when he came back he gave methamphetamine to Parish. After Hines dropped Parish off at the apartment building, Parish turned the methamphetamine over to Deputy Reed. Parish was paid \$160 for his assistance.

Hines was charged with delivery of a controlled substance (methamphetamine), in violation of Iowa Code section 124.401(1)(b)(7) (2005). The parties were unable to discover the whereabouts of Brown at the time of trial. In an offer of proof, Dan Chapman stated Brown had told him on two occasions that she had actually made the drug deals, and she did not know why Hines had

been arrested. Chapman stated Brown was distressed and worried about Hines. Also, Rose Ann Stokes stated Brown told her she took the money from Parish and gave him the drugs. Stokes stated Brown did not seem concerned about the situation.

The district court ruled the corroborating circumstances did not clearly indicate the trustworthiness of the statements, and the court concluded the testimony would be excluded as hearsay. Hines then argued that the court had denied him his constitutional right to present a defense. The district court also denied this objection.

During the trial, Hines presented evidence to show he owed \$200 to Parish for an unpaid telephone bill. Hines claimed Parish was angry with him because of the bill and so lied about the incident. Hines also presented testimony from Stokes, Kim Karnes, and Shadron Crooks that they had seen Parish use illegal drugs in September or October of 2006. These witnesses, plus Shane Karnes, testified Parish indicated to them that he disliked Hines.

The jury found Hines guilty of delivery of a controlled substance. Hines filed a motion for new trial, and attached an affidavit from Brown. In the affidavit, Brown stated she was staying in Nebraska for fear of being arrested. She stated:

In regards to the drug transaction that took place on 15 December 2006, I could testify that Brien Hines did not give drugs to Adam Parish. I could testify that Adam Parish did not give any money to Brien Hines. If I were to be questioned in this regard as to who was actually involved in the transaction, I would take the 5th.

The district court denied the motion for new trial. Hines was sentenced to a term of imprisonment not to exceed twenty-five years. He now appeals.

II. Sufficiency of the Evidence

Hines claims the sufficiency of the evidence to support his conviction depends upon the credibility of Parish. He asserts Parish was not a credible witness. Hines asserts the evidence shows Parish had ill will toward him because of the \$200 telephone bill. Hines also asserts that Parish was not credible because Parish testified he had quit using illegal drugs several years previously, while witnesses testified they had seen Parish using illegal drugs within a few months before the incident involved in this case.

We review challenges to the sufficiency of the evidence for the correction of errors at law. *State v. Schmidt*, 480 N.W.2d 886, 887 (Iowa 1992). A guilty verdict is binding on appeal, unless there is not substantial evidence in the record to support it, or the verdict is clearly against the weight of the evidence. *State v. Shortridge*, 589 N.W.2d 76, 80 (Iowa Ct. App. 1998). Substantial evidence means evidence that could convince a rational fact finder that the defendant is guilty beyond a reasonable doubt. *Id.*

Inherent in our standard of review of jury verdicts in criminal cases is the recognition that the jury is free to accept or reject the testimony of witnesses. *State v. Arne*, 579 N.W.2d 326, 328 (Iowa 1998). “In fact, the very function of the jury is to sort out the evidence and place credibility where it belongs.” *State v. Thornton*, 498 N.W.2d 670, 673 (Iowa 1993).

In finding Hines guilty, the jury could well have determined that Parish was a more credible witness than the witnesses presented by Hines. An audio recording of the incident supports Parish’s testimony. Furthermore, police

surveillance confirmed that Hines exited and entered the vehicle on several occasions before he returned Parish to the apartment building. Parish was searched before he left with Hines, and returned with 5.4 grams of methamphetamine, which he turned over to Deputy Reed.

We conclude there is substantial evidence in the record to support the jury's verdict. We determine the district court properly denied Hines's motion for judgment of acquittal.

III. Hearsay Evidence

Hines claims the district court erred by denying his request to present the testimony of Chapman and Stokes concerning Brown's prior statements to them. In addition, he contends the court's decision denied him his constitutional right to present a defense.

We review the district court's ruling on a hearsay objection for the correction of errors at law. *State v. Dullard*, 668 N.W.2d 585, 589 (Iowa 2003). On constitutional issues, our review is de novo. *State v. Mitchell*, 670 N.W.2d 416, 418 (Iowa 2003).

A. Brown's out-of-court statements to Chapman and Stokes would be considered hearsay under Iowa Rule of Evidence 5.801(c), because the statements were offered to prove the truth of the matter asserted. Hearsay statements are not admissible unless they come within a recognized exception. Iowa R. Evid. 5.802. Hines claimed the statements were admissible as statements against interest, under rule 5.804(b)(3), which applies when a declarant is unavailable. This rule provides, "A statement tending to expose the

declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.” Iowa R. Evid. 5.804(b)(3).

Rule 5.804(b)(3) requires (1) proof the declarant was unavailable as a witness,¹ and (2) corroborating circumstances that clearly indicate the trustworthiness of the statement. *State v. Traywick*, 468 N.W.2d 452, 454 (Iowa 1991). Statements exposing a declarant to criminal liability but exculpating the accused are suspect. *United States v. Salvador*, 820 F.2d 558, 561 (2nd Cir. 1987). The court must consider the corroboration requirement as a preliminary question as to the admissibility of the evidence, and not an ultimate determination of the weight to be given the evidence. *United States v. Garcia*, 986 F.2d 1135, 1141 (7th Cir. 1993).

The district court determined there was not a showing that corroborating circumstances clearly indicated the trustworthiness of Brown’s statements. The evidence showed Parish called Hines asking to buy drugs, and Hines then came to pick up Parish in his vehicle. Brown’s statements were contradicted by the audio recording, where Hines is heard asking for the money after the first stop. The audio recording and surveillance show Hines was the one who left the vehicle. Parish testified Hines provided him with methamphetamine after the last stop before they returned to the apartment building.

Furthermore, Chapman testified Brown was distressed that Hines was in jail, but at the time of Brown’s second statement to him Hines was out of jail on

¹ The State does not dispute that Brown was unavailable as a witness at the time of trial. David Daley, a private investigator, testified to his efforts to serve Brown with a subpoena.

bond. Stokes testified Brown was not very concerned about the fact Hines was in jail, and in fact made the statement “nonchalantly.” These conflicting statements do not provide a clear indication of trustworthiness.

We conclude the district court did not err in finding the evidence was not admissible under the hearsay exception found in rule 5.804(b)(3).

B. The right to present a defense is protected by the due process clause of the Fourteenth Amendment. See *State v. Begey*, 672 N.W.2d 747, 751 (Iowa 2003). Generally, a district court’s ruling excluding certain evidence does not have constitutional implications. *Traywick*, 468 N.W.2d at 455. An allegedly erroneous evidentiary ruling must go to the heart of the case in order to be considered to be of such magnitude that the ruling implicates the due process clause. *Id.* The ruling must call into question the integrity of the fact-finding process. *Id.*

The district court ruled Hines had not been denied his constitutional right to present a defense. On our de novo review, we affirm the district court’s ruling. Considering the audio recording and the surveillance of Hines’s actions, Brown’s statements did little to impeach Parish’s testimony about the drug transaction. We conclude the integrity of the fact-finding process was not called into question by the court’s ruling.

IV. Motion for New Trial

Hines asserts the district court should have granted his motion for new trial under Iowa Rule of Criminal Procedure 2.24(b)(8), based on newly-

discovered important and material evidence. He claims Brown's affidavit provided new evidence that he did not deliver illegal drugs to Parish.

A district court has broad discretion in ruling on a motion for new trial based on a claim of newly-discovered evidence. *State v. Smith*, 573 N.W.2d 14, 21 (Iowa 1997). A defendant must show (1) the evidence was discovered after the verdict; (2) could not have been discovered earlier in the exercise of due diligence; (3) is material to the issues of the case and not merely cumulative; and (4) probably would have changed the result of the trial. *State v. Jefferson*, 545 N.W.2d 248, 249 (Iowa 1996).

The district court denied the motion for new trial. We conclude the district court did not abuse its discretion by denying the motion. Hines could not show the evidence was discovered after the verdict because Hines sought to introduce the same evidence through the testimony of Chapman and Stokes. Furthermore, we have already found the evidence would not have probably changed the result of the trial because Brown's statements were contradicted by the audio recording.

V. Ineffective Assistance of Counsel

Hines contends that if we found he failed to preserve error on any of the issues raised above, this was due to ineffective assistance of counsel. We have addressed all of Hines's arguments on the merits. We therefore conclude that we need not address these issues as a claim of ineffective assistance of counsel.

We affirm Hines's conviction.

AFFIRMED.