IN THE COURT OF APPEALS OF IOWA

No. 9-998 / 08-1534
Filed February 24, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JERREDD LEE ELKEN,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Robert A. Hutchison, Judge.

Defendant appeals from the judgment entered following his drug related convictions. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Dennis Hendrickson, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kyle Hanson, Assistant Attorney General, John P. Sarcone, County Attorney, and Robert Diblasi, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Doyle and Mansfield, JJ.

VOGEL, P.J.

Defendant Jerredd Elken appeals from the judgment entered on his convictions for conspiracy to manufacture a controlled substance (methamphetamine), in violation of Iowa Code section 124.401(1)(b)(7), possession of lithium as a precursor, and possession of ephedrine or pseudoephedrine as a precursor, both in violation of section 124.401(4), as a habitual offender, in violation of section 902.8.[1] Elken contends his trial counsel was ineffective for failing to object to (1) a comment regarding post-arrest silence, (2) a comment regarding his failure to accept responsibility, and (3) submission of a general intent instruction. Elken also asserts the district court admitted statements of his family members that he claims were hearsay. We affirm.

I. Background Facts and Proceeding

Elken's vehicle was stopped on December 6, 2007, after a West Des Moines police officer noted "suspicious activity" surrounding the vehicle. After discovering Elken did not have a valid driver's license, he was arrested for driving while revoked. His passenger, Julie Grandstaff, provided the officers with a fake name and social security number, and was arrested for harassment of a public official. During an inventory search of the car, various items consistent with

[1] The testimony was difficult to follow in the appendix, as each witness's name was not designated at the top of each page where the witness's testimony appears. Although not applicable to this appeal, effective January 1, 2009, the rules of appellate procedure require the name of each witness whose testimony is included in the appendix to appear at the top of each page where the witness's testimony appears. *See* Iowa R. App. P. 6.905(7)(*c*).

manufacturing methamphetamine were found, prompting an investigation by Detective Chris Scanlan from the Mid-Iowa Narcotics Enforcement. Grandstaff eventually pled guilty to conspiracy to manufacture methamphetamine and agreed to testify against Elken. Following a jury trial, Elken was convicted, sentenced, and now appeals.

II. Standard of Review

Our review of claims alleging ineffective assistance of counsel is de novo. *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001). We review a defendant's hearsay claims for correction of errors at law. *State v. Musser*, 721 N.W.2d 734, 751 (Iowa 2006).

III. Ineffective-Assistance-of-Counsel Claims

In order to succeed on a claim of ineffective assistance of counsel, Elken must prove by a preponderance of evidence that (1) counsel failed to perform an essential duty, and (2) prejudice resulted. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). To establish prejudice the defendant must show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *State v. Bugley*, 562 N.W.2d 173, 178 (Iowa 1997). A reasonable probability is a probability sufficient to undermine confidence in the outcome of defendant's trial. *Id.* The applicant must state the specific ways in which counsel's performance was inadequate and identify how competent representation probably would have changed the outcome. *Dunbar v. State*, 515 N.W.2d 12, 15 (Iowa 1994).

Generally, we do not resolve claims of ineffective assistance of counsel on direct appeal unless the record on an issue is sufficient to allow us to resolve the issue. *State v. Reyes*, 744 N.W.2d 95, 103, (Iowa 2008). "[W]e preserve such claims for postconviction relief proceedings, where an adequate record of the claim can be developed and the attorney charged with providing ineffective assistance may have an opportunity to respond to defendant's claims." *State v. Biddle*, 652 N.W.2d 191, 203 (Iowa 2002).

A. Post-*Miranda* Silence

Elken first asserts his trial counsel was ineffective for failing to object to questioning regarding his post-arrest silence. A violation of due process occurs when a prosecutor calls attention to a defendant's exercise of his constitutional post-*Miranda* right to remain silent. *State v. Baccam*, 476 N.W.2d 884, 886 (Iowa Ct. App. 1994) citing *Doyle v. Ohio*, 426 U.S. 610, 618, 96 S. Ct. 2240, 2245, 49 L. Ed. 2d 91, 96 (1976). At trial, on direct examination, detective Scanlan responded to the prosecutor's questions as follows:

> Q: And you had occasion to attempt an interview with Mr. [Elken]; correct? A: I did.
> Q: And he did not speak to you; correct? A: He did not.
> Q: And then you interviewed a Julie Grandstaff; correct? A: I did.
> Q: And she spoke with you; correct? A: She did.

The State argues the record is unclear when this "silence" occurred, that is whether it was before or after Elken was arrested and given *Miranda* warnings for his drug related charges, as Detective Scanlan testified:

> Q: Did you ultimately go to the West Des Moines Police Department? A: I did.
> Q: And when you were there, did you have occasion to come into contact with a Jerredd Lee Elken? A: I did.

> Q: And was Mr. Elken arrested for a conspiracy to manufacture at that time? A: Not at that time.

As the record is unclear on this issue, but defense counsel likely had more detailed information, we will preserve this issue for a possible postconviction proceeding. *State v. Bass*, 385 N.W.2d 243, 245 (Iowa 1986).

B. Grandstaff's Testimony

In a related issue, Elken contends testimony by Grandstaff also violated his right to be silent, post-arrest, and his counsel should have objected. Grandstaff testified that she pled guilty and in doing so decided to take responsibility for her actions. The State asked her "did you believe Mr. Elken was not taking responsibility for his actions," to which she replied, "yes." Elken asserts this caused him prejudice, as it violated his right to remain silent, as to whether he acknowledged his participation in any criminal conduct. The State argues counsel's failure to object to this questioning was part of his trial strategy; however, as with the previous claim, we preserve this issue for a possible postconviction proceeding. *Bass*, 385 N.W.2d at 245.

C. Jury Instructions

Elken next contends he received ineffective assistance of counsel because his attorney should have objected when the jury received two instructions on intent: instruction twenty-nine was the uniform jury instruction on

specific intent and instruction thirty-two defined general intent.[2] Elken argues the jury should not have received the general intent instruction because he was charged with no general intent crimes. When a defendant makes an ineffective-assistance-of-counsel claim alleging the attorney should have objected to a specific instruction, "the instruction complained of [must be] of such a nature that the resulting conviction violate[s] due process." *State v. Maxwell*, 743 N.W.2d 185, 195 (Iowa 2008). If the instruction does not misstate the law or contradict other instructions, there is no prejudice. *Id.* at 197.

In addition to the specific and general intent instructions, the district court gave specific marshalling instructions. Instructions twenty-six and twenty-seven contained the same basic language, each distinguishing separate drug charges and what the jury must find:

> In Count [II and III], the State must prove all of the following elements of possession of [drug charge] with intent it be used to manufacture a controlled substance:

---

[2] Instruction twenty-nine read:

> "Specific Intent" means not only being aware of doing an act and doing it voluntarily, but in addition, doing it with a specific purpose in mind.
>
> Because determining the defendant's specific intent required you to decide what the defendant was thinking when an act was done, it is seldom capable of direct proof. Therefore, you should consider the facts and circumstances surrounding the act to determine the defendant's specific intent. You may, but are not required to, conclude a person intends the natural results of their acts.

Instruction thirty-two read:

> To commit a crime a person must intend to do an act which is against the law. While it is not necessary that a person knows the act is against the law, it is necessary that the person was aware he was doing the act and he did it voluntarily, not by mistake or accident. You may, but are not required to, conclude a person intends the natural results of their acts.

> 1. On or about December 6, 2007, the defendant possessed [drug].
> 2. The defendant knew that the substance the defendant possessed was [drug].
> 3. The defendant possessed this substance with the intent it be used to manufacture a controlled substance.
>
> If the State has proved all of these elements, the defendant is guilty of possession of [drug] with intent it be used to manufacture a controlled substance.
>
> If the State has failed to prove any one of the elements, the defendant is not guilty in Count [I and II].

Instruction sixteen on conspiracy read similar to these instructions and contained the language, "[T]he defendant entered into the agreement with the intent to promote or facilitate the manufacture of a controlled substance."

Instructions are to be read together. *State v. Johnson*, 243 N.W.2d 598, 604 (Iowa 1976). When the jury received all the instructions, most importantly, the marshalling instructions, it was clear what the prosecution needed to prove to convict Elken of the crimes charged. The marshalling instructions each contained a definite statement requiring the jury to find Elken possessed a particular substance with the "intent it be used to manufacture" or as to the conspiracy charge, that Elken "entered into the agreement with the intent to promote or facilitate the manufacture of a controlled substance."

Although the inclusion of both general and specific intent instructions could have been confusing, we conclude, in this case, the marshalling instructions plainly defined the necessary intent the jury was to find when a specific act was a required element of each charge to be proven. *State v. Pierce*, 287 N.W.2d 570, 575 (Iowa 1980). Moreover, even with the inclusion of a general intent instruction, the jury still needed to apply the specific mens rea elements in the marshalling instructions in order to find Elken guilty of the crimes

charged. *State v. Keeton*, 710 N.W.2d 531, 534 (Iowa 2006) (holding whether "assault" is a general or specific intent crime, the State was still required to prove defendant possessed the mens rea required by the statute). Furthermore, Elken's defense was that he did not even know the methamphetamine-making ingredients were in the car. As his attorney said in closing argument, "[H]e has no indication, no way of knowing that . . . these items are in the backseat." Elken did not try to defend on the basis that he knew of the precursors, but lacked the intent to manufacture a controlled substance. We conclude Elken's counsel was not ineffective for failing to object to the district court's submission of both general and specific intent instructions to the jury.

IV. Hearsay

Finally, Elken asserts the court erred in allowing statements he claims were hearsay. Grandstaff testified on redirect that at a pretrial conference, Elken's mother and two of his friends were

> giving me signals and talking to me, mouthing to me, saying that . . . "help him get this plea. Take this plea now." It was on my shoulders. They made me feel as it was on my shoulders.

Elken's attorney objected, but the district court allowed this testimony to come in, reasoning it was offered for the limited purpose of explaining a letter Grandstaff later wrote to Elken. As such, the district court allowed the objected to testimony to explain "subsequent conduct."

During cross examination, defense counsel asked Grandstaff about the letter she wrote to Elken which suggested she was attempting to exonerate Elken for the charged offenses. On redirect, the State questioned Grandstaff's purpose in writing the letter. The State argues the comments "mouthed" by Elken's

mother and friends were admissible as they demonstrated the pressure they were putting on Grandstaff and why she felt compelled to write the letter which tended to exonerate Elken.

When an out-of-court statement is offered, not to show the truth of the matter asserted but to explain responsive conduct, it is not regarded as hearsay. *State v. Mitchell*, 450 N.W.2d 828, 832 (Iowa 1990). We agree with the State, the letter Grandstaff wrote to Elken was in response to the pressure she felt Elken's supporters were conveying to her at the pretrial conference. The comments therefore were properly admitted, not to prove the truth of the words Elken's mother and friends were "mouthing" to Grandstaff, but rather to explain why Grandstaff wrote the subsequent letter to Elken. There was no error in the admission of this testimony.

Finding no error by the district court, we affirm Elken's convictions, but preserve two issues for possible postconviction proceedings.

AFFIRMED.