IN THE COURT OF APPEALS OF IOWA

No. 1-730 / 10-0286
Filed November 9, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JOSEPH MICHAEL STEPHEN,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Scott D. Rosenberg, Judge.

The defendant appeals, following convictions for conspiracy to manufacture methamphetamine, possession of lithium with intent to be used to manufacture methamphetamine, and possession of methamphetamine. **AFFIRMED.**

Scott L. Bandstra and Karmen Anderson of Bandstra Law Firm, Des Moines, for appellant.

Joseph Stephen, Newton, pro se.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, John Sarcone, County Attorney, and Robert DeBlasi, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Potterfield and Danilson, JJ.

DANILSON, J.

Joseph Stephen appeals from judgments imposed upon his convictions for conspiracy to manufacture methamphetamine, possession of lithium with intent to be used to manufacture methamphetamine, and possession of methamphetamine. Stephen, through counsel, contends (1) there is insufficient evidence to support the convictions for conspiracy to manufacture methamphetamine and possession of lithium with intent to be used to manufacture methamphetamine; (2) his speedy trial rights were violated; (3) his trial counsel was ineffective in several respects; (4) his first appellate counsel was ineffective; (5) he was denied his right to testify; (6) the district court did not exercise its discretion in sentencing; (7) he was denied the right to be present when the court addressed a jury question; and (8) his sentences constitute cruel and unusual punishment. Stephen, pro se, also argues (9) pictures of lithium batteries and a propane tank were subject to a "best evidence" objection; (10) he was entitled to a spoliation instruction; and (11) the sentences imposed were a result of "double counting." We have reviewed Stephen's properly preserved claims. Finding no prejudicial error, we affirm.

I. Background Facts and Proceedings.

On April 13, 2009, at about 1:15 a.m., Police Officer Paul Parizek stopped a pickup truck driven by Michael Scopa for no rear license plate on Vandalia Road, which was "a pretty dark and isolated area." However, upon further investigation after the stop, Parizek determined a plate existed but was dusty and the license plate light was inoperable. Joseph Stephen was a passenger in the pickup. Parizek approached the passenger side of the pickup. Scopa was

looking out the driver side rearview mirror, and Stephen was partially facing toward the driver side of the vehicle and appeared to be using both of his hands near the area of this seatbelt buckle.

Officer Parizek had Scopa exit the vehicle and asked for consent to search him, which Scopa allowed. The officer then had Stephen exit the vehicle; Stephen informed Parizek he had a pocketknife in his pocket and consented to be searched. Upon patting Stephen down, Parizek found a small plastic bag containing methamphetamine in his back pants pocket. According to Parizek, Stephen stated he didn't know it was there.

Scopa consented to a search of the vehicle, which was described by the officer as "a mess." In the area of the bench seat where Parizek had seen Stephen making downward motions with his hands, the officer found two small plastic bags between the cushions of the seat: one containing five stripped batteries; the other, a white powder. On the bench seat Parizek found a pair of channel locks pliers. On the floorboard on the passenger side of the pickup, the officer found a plastic sack containing a respirator/fume mask. In the bed of the pickup, Parizek found two plastic pitchers, coffee filters, napkins, and—zipped in a duffle bag—a propane tank with a modified valve. When asked about these items, Stephen denied any knowledge.

While Stephen was sitting in Parizek's patrol car, Stephen stated he "knew [he was] going to prison." He made no statements in relation to Scopa.

On May 13, 2009, Stephen and Scopa were charged as codefendants in a four-count trial information: Count I, conspiracy to manufacture methamphetamine; Count II, possession of lithium with intent to be used to

manufacture methamphetamine; Count III, possession of anhydrous ammonia with intent to be used to manufacture methamphetamine; and Count IV, applicable to Stephen only, possession of methamphetamine.

On July 1, 2009, the district court signed an order of dismissal in Stephen's case.[1]

On July 31, 2009, a four-count trial information was filed again charging Stephen with Count I, conspiracy to manufacture methamphetamine; Count II, possession of lithium with intent to be used to manufacture methamphetamine; Count III, possession of anhydrous ammonia with intent to be used to manufacture methamphetamine; and Count IV, possession of methamphetamine. Notice of habitual offender enhancement was filed that same date, alleging Stephen had previously been convicted on January 21, 1999, of possession of a controlled substance with intent to deliver, and on May 14, 2003, of manufacturing a controlled substance.

On October 5, 2009, just prior to scheduled depositions, Stephen's trial attorney, Rachel Seymour, requested a hearing before the court. The prosecutor was aware of the hearing, but did not attend. Seymour stated to the court:

> [W]e do have a status conference, discovery, and a motion on my request for discovery scheduled for later this week.
>
> This trial is set with co-defendant Michael Scopa. Mr. Scopa is out of custody. His attorney until this morning was Roger Owens. Mr. Owens, . . . said he has withdrawn from Mr. Scopa's case . . . .

[1] The single page "Notice of Intent Not to Prosecute and Order of Dismissal" contained the following statements: "The County Attorney, after examining the records, talking to the witnesses and taking all things into consideration, declines to prosecute this case because it is in the interest of justice to do so. The defendant is being prosecuted by the U.S. Government."

The "Order of Dismissal" provides: "IT IS HEREBY THE ORDER OF THE COURT that the Plaintiff's Motion to Dismiss is hereby sustained without prejudice."

> Your Honor, the reason I've requested to see the court is I've been representing Mr. Stephen since April. This case has been unusual from the standpoint of, in the middle of the prosecution on the original case number in this matter . . . [m]y client's case, Mr. Stephen, went federal. Mr. Scopa's case has always stayed under the State's jurisdiction.
>
> After the federal indictment was unsuccessful, Mr. DeBlasi [the prosecutor] refiled this matter, and we are now back, set for a new trial on October 21.

Seymour then asked to be allowed to withdraw from the case pursuant to Rule of Professional Conduct 32:1.16(*b*)(7).[2] The court granted the motion to withdraw and appointed Kent Balduchi to represent Stephen. The depositions scheduled for that day did not occur.

A motion hearing was held on October 14, 2009. Balduchi informed the court that former counsel had subpoenaed, and he was in receipt of,

> multiple CD's or disks that have been represented to me to contain recorded statements of my client, Mr. Stephen in phone conversations from the jail. . . . Mr. Stephen is of the impression or belief that there are conversations between himself and his codefendant Mr. Scopa that are not contained within them.

After further discussion, the court instructed Balduchi, "if you believe that you need more time before trial, I would ask that you file a motion to continue by Friday, the 16th."

The prosecutor then brought up the topic of possible depositions, stating:

> [W]e had witnesses here and were prepared to go. I don't want to get in a position down the road where I'm defending an ineffective assistance of counsel claim because depositions weren't taken by this attorney. So if that's going to be an issue, I would like to address that as soon as possible.

The court asked Balduchi if he intended on taking depositions. Balduchi stated,

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[2] Rule 32:1.16(*b*) provides in part: "Except as stated in paragraph (c), a lawyer may withdraw from representing a client if . . . (7) other good cause for withdrawal exists."

> I would like to reserve that decision at this point in time, Your Honor. I do fully understand and appreciate that if we would elect to take those depositions that it is simply not practical to keep the trial date we have.

No motion to continue trial was filed.

At the October 21 and 23, 2009 jury trial, Officer Parizek testified about his stop of the pickup and the items he found while searching both the occupants and the vehicle.

Des Moines Police Officer Chad Nicolino was called to the scene of the traffic stop on April 13, 2009, because the officer who made the stop had located items consistent with the manufacturing of methamphetamine. Nicolino testified he was currently assigned as an investigator to the narcotics control section and he had been a narcotics officer since April 2004. Nicolino testified he attended an eighty-hour narcotics investigation course and a forty-hour clandestine laboratories course. He had taken part in five to ten "meth-lab investigations." Nicolino stated:

> Some of the items that we commonly see when we investigate meth labs or meth lab dump sites are—Coleman fuel is a common item used in the manufacturing of methamphetamine. Pseudoephedrine or ephedrine boxes. They are typically empty. What they do is they'll take the ephedrine or pseudoephedrine out of the boxes and use them in the process to manufacture methamphetamine, so what is left behind I just the discharged box.
>
> We will oftentimes see the lithium batteries. Sometimes the outer casing of a lithium battery is taken off or pried off so the lithium strip can be removed, and it is used in the process—used in the process to manufacture methamphetamine.
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> . . . .
>
> Coffee filters are used at different stages in the manufacturing of methamphetamine to separate the product in different stages of the manufacturing.

Officer Nicolino further stated that based on his training and experience the stripped batteries found in the pickup were lithium batteries. He identified pictures of items found in Scopa's truck as items used in various stages of the manufacturing of methamphetamine. Nicolino further testified, over defendant's foundation and hearsay objections, that based on later analysis, the white powdery substance in the small plastic bag found between the cushions was fifty grams of pseudoephedrine, and the plastic bag found in Stephen's rear pocket contained methamphetamine.

On cross-examination, Officer Nicolino acknowledged no tests were conducted to confirm the batteries contained lithium. He also acknowledged the cab of the truck was "fairly messy" and there were no discarded Sudafed boxes, battery cases, stirring devices, or acids such as drain cleaner.

Criminalist Nila Bremer testified she had been employed in that capacity for thirty years. Bremer stated her primary responsibility was to analyze samples from suspect clandestine laboratories. She had analyzed more than 1500 suspected methamphetamine laboratories. Bremer stated there were twelve methods of manufacturing methamphetamine, but one of the two most often encountered was the lithium ammonia reduction method. She explained the five steps of that method. Bremer further testified that based on a picture of the stripped batteries found in Scopa's truck, they were "lithium batteries that have had their can removed." She stated, "I've seen hundreds of these, and they have a very unique appearance. And this is consistent with the appearance that I have seen over and over again." Bremer testified there was no way to mistake a lithium battery in stripped-down form with a regular battery. Bremer also stated

propane tanks are "one of the very popular containers for anhydrous ammonia for those involved in the manufacturing of meth using the lithium ammonia method." When shown a picture of the propane tank found in the truck, she stated it was a "modified propane tank" and though she had not seen one "exactly looking like this one," the red coupling device looked to be consistent with what would fit on the valve of an anhydrous ammonia tank.

Bremer testified she was the author of the report identifying the contents of the plastic bags. She opined the crushed pseudoephedrine would yield twelve grams of pseudoephedrine hydrochloride, a methamphetamine precursor, with a maximum theoretical yield of eleven grams of methamphetamine. Bremer testified the amount of methamphetamine found in the bag in Stephen's pocket was 0.20 grams.

On cross-examination Bremer agreed the yield of pure methamphetamine could range between two and eleven grams. She acknowledged no fingerprints or DNA analyses were conducted in relation to the investigation. She further acknowledged the propane tank was not submitted to the laboratory for examination. Bremer stated that stripped lithium batteries and anhydrous ammonia are hazardous and typically destroyed prior to trials. She also stated that her laboratory does accept lithium, but does not accept anhydrous ammonia.

At the close of the State's evidence, Stephen moved for a directed verdict as to Counts I, II, and III:

> Specifically, with respect to Count I, the State has not met its burden of proof to make a prima facie case or create a jury question with regard to a conspiracy existing between Mr. Stephen and anyone else, including Michael Scopa.

> There has been no evidence offered either by physical exhibits or testimony which one can draw any conclusion that Mr. Stephen acted in concert in any way, shape, or form to further the act of manufacture of methamphetamine.
>
> With regard to Count II, possession of lithium with the intent to be used to manufacture a controlled substance, again, the State has not made a prima facie case in which a jury question has been created or the matter can be submitted to the jury due to a failure to establish that the alleged item was, in fact, lithium.
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> . . . .
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> [With respect to Count III,] [t]here is no testimony in any way, shape, or form that the contents of that tank were anhydrous ammonia . . . .

The motion was denied.

The defense requested a spoliation jury instruction concerning the destruction of the "alleged lithium batteries and anhydrous ammonia," arguing Des Moines had the resources of either testing or preservation, and in destroying the items the defendant was deprived of a reasonable examination. The State resisted, stating the Des Moines Police Department followed its procedures and called Summit Disposal Company, "who Mr. Balduchi knows, tested the substances in the field before they were destroyed." "Officer Nicolino was present when the tests were conducted and could have testified that the results were lithium and anhydrous, but the Court did not allow that testimony." The court rejected the requested spoliation instruction, finding the evidence was destroyed pursuant to a neutral and routine evidence policy regarding hazardous materials and there was no evidence of intent to prevent the defendant from testing. The court stated the parties were free to argue the issue in closing.

The defense rested without presenting evidence and moved for judgment of acquittal on Counts I, II, and III. The motion for judgment of acquittal was denied.

Stephen was found guilty of conspiracy to manufacture methamphetamine, possession of lithium with intent to use in manufacturing, and possession of methamphetamine. He was acquitted of the possession of anhydrous ammonia for use in manufacturing charge.

At the sentencing hearing held January 29, 2010, Stephen stipulated to two prior felonies: he was convicted on September 6, 2000, of possession of lithium, and on May 13, 2003, of manufacturing a controlled substance, both of which were violations of chapter 124.

In an order nunc pro tunc, filed February 11, 2010, the court imposed sentences of incarceration not to exceed forty-five years each on Counts I and II, and a term not to exceed fifteen years on Count IV.

> The sentences in Count I and II shall run concurrent to each other but shall run consecutive to his sentence in Count IV for an indeterminate term of incarceration not to exceed sixty (60) years. Additionally, these sentence shall run consecutive to his parole revocation.

The court found "mitigating circumstances do not exist and the defendant shall be required to serve the mandatory minimum sentences established under Iowa Code sections 902.8, 124.411, and 124.413 prior to being eligible for parole."

Stephen now appeals, raising numerous challenges, which we will address in turn.

II. Sufficiency of Evidence.

Stephen first contends there was insufficient evidence to convict him on Count I, conspiracy to manufacture methamphetamine, and Count II, possession of lithium with intent to be used to manufacture methamphetamine.

A. Conspiracy to manufacture methamphetamine. Iowa Code section 124.401(1) makes it a crime "for any person to . . . act with, enter into a common scheme or design with, or conspire with one or more other persons to manufacture, . . . a controlled substance." To support a conviction for conspiracy to manufacture methamphetamine, the State was required to prove four elements: (1) Stephen agreed with another that one or both of them would manufacture or attempt to manufacture methamphetamine; (2) Stephen entered into such an agreement with the intent to promote or facilitate the manufacture of methamphetamine, (3) Stephen or another committed an overt act to accomplish the manufacturing of methamphetamine; and (4) the alleged co-conspirator was not a law enforcement agent or assisting law enforcement when the conspiracy began. *See State v. Speicher*, 625 N.W.2d 738, 741 (Iowa 2001); *accord State v. Weatherly*, 679 N.W.2d 13, 16 (Iowa 2002).

> Prior decisions have described an agreement to form a conspiracy as a "concert of free wills," "union of the minds of at least two persons," and "a mental confederation involving at least two persons." Both direct and circumstantial evidence may be used to prove such a meeting of the minds. Circumstantial evidence includes the declarations and conduct of the alleged conspirators and all reasonable inferences arising from such evidence. Importantly, an agreement need not be—and often times is not—formal and express. A tacit understanding—one "inherent in and inferred from the circumstances"—is sufficient to sustain a conspiracy conviction.

Speicher, 625 N.W.2d at 741-42 (citations omitted).

1. Preservation. Stephen challenges the sufficiency of the evidence to establish he agreed with Scopa to participate in the manufacturing process. The State contends this issue was not adequately raised in the trial court, citing *State v. Truesdell*, 679 N.W.2d 611, 615 (Iowa 2004) ("To preserve error on a claim of

insufficient evidence for appellate review in a criminal case, the defendant must make a motion for judgment of acquittal at trial that identifies the specific grounds raised on appeal."). We disagree.

In his motions for directed verdict and judgment of acquittal, Stephen argued:

> Specifically, with respect to Count I, the State has not met its burden of proof to make a prima facie case or create a jury question with regard to a conspiracy existing between Mr. Stephen and anyone else, including Michael Scopa.
>
> There has been no evidence offered either by physical exhibits or testimony which one can draw any conclusion that Mr. Stephen *acted in concert* in any way, shape, or form to further the act of manufacture of methamphetamine.

By arguing the sufficiency of the evidence that Stephen "acted in concert" with another, Stephen has adequately preserved a challenge to the first element of conspiracy noted above—"Stephen agreed with another that one or both of them would manufacture or attempt to manufacture methamphetamine." *See Speicher*, 625 N.W.2d at 741.

2. Scope and standard of review. "Because a jury verdict is binding on us when supported by substantial evidence, our appellate review is limited to the correction of errors at law." *Id.* at 740. Evidence is substantial if it could convince a rational jury of a defendant's guilt beyond a reasonable doubt. *Id.* We view the record in the light most favorable to the State, but must consider all the evidence—not just that evidence supporting guilt. *Id.* Direct and circumstantial evidence are equally probative, but the inferences to be drawn from the proof in a criminal case must "raise a fair inference of guilt as to each essential element of the crime." *Id*. at 741 (citation omitted).

3. There is substantial evidence to support a finding that Stephen and Scopa agreed one or both of them would manufacture or attempt to manufacture methamphetamine. Stephen argues the case before us is like *Speicher*, in which the court overturned a defendant's conspiracy conviction finding his mere presence in a garage where a methamphetamine lab was located and knowledge of another's manufacturing was not sufficient to permit a jury to infer the defendant agreed to participate in the manufacturing process. 625 N.W.2d at 742-43. We disagree.

Although prior case law on this issue is instructive, conspiracy is an inherently fact-based crime, which requires us to look to the particular facts, circumstances, and reasonable inferences in this case. *See Weatherly*, 679 N.W.2d at 18. When we do so, we conclude the record contains substantial evidence of an agreement between Stephen and Scopa.

Stephen was a passenger in Scopa's vehicle, which contained many of the ingredients necessary to manufacture methamphetamine. Stephen was not merely present in the vehicle containing numerous elements of methamphetamine manufacturing. He was observed making motions consistent with shoving something between the cushions of the truck's bench seat and when that area was searched, the police officer found both crushed pseudoephedrine and stripped lithium batteries—both precursors to methamphetamine. The jury could reasonably infer Stephen's furtive movements show these precursors were his. As noted in *State v. Heuser*, 661 N.W.2d 157, 161-62 (Iowa 2003), "[t]he manufacturing process for methamphetamine requires pseudoephedrine hydrochloride and lithium." A defendant in possession of both

may allow a jury to reasonably infer intent to manufacture methamphetamine. *See id.* at 166. Moreover, Stephen was in possession of the finished product, methamphetamine, which he does not challenge. In addition, other materials used in the manufacture of methamphetamine—the pitchers, the coffee filters, and the propane tank—were present in Scopa's vehicle and clearly not in Stephen's constructive possession as they were located in the bed of the pickup. Thus, both Scopa and Stephens could have been viewed by the jury as each having possession of some of the necessary ingredients to manufacture methamphetamine. This evidence allowed the jury to reasonably infer the two men agreed to participate in the manufacture of methamphetamine.

Viewing the evidence in the light most favorable to the State, the conduct of Stephen and Scopa and all reasonable inferences arising therefrom is sufficient evidence from which a reasonable jury could find a tacit understanding one or both would manufacture or attempt to manufacture methamphetamine.

B. Possession of lithium with intent to be used to manufacture methamphetamine. Stephen argues there is insufficient evidence of constructive possession of lithium to support count II. This claim was not properly preserved for our review. At trial, as to Count II (possession of lithium with intent to be used to manufacture methamphetamine), the only challenge was to the sufficiency of the proof that the batteries contained lithium. Because the claim made here was not made in his motion for judgment of acquittal, it was not preserved for our review.[3] *See Truesdell*, 679 N.W.2d at 615.

[3] Unlike *Truesdell*, where the court reached the issue because the defendant argued trial counsel's failure to preserve error constituted ineffective assistance of

III. Speedy Trial.

Stephen claims his statutory speedy trial rights were violated, claiming the dismissal of the first indictment was "premature" and "circumvented the law to gain more time to prosecute." However, Stephen did not move to dismiss the later filed indictment on speedy trial grounds.[4] Rather, Stephen raises his speedy trial claim in the context of asserting we may correct an "illegal sentence." We agree with the State a challenge that the government violated rule 2.33 is not one that may be brought as a challenge to an illegal sentence. *See Tindell v. State*, 629 N.W.2d 357, 359 (Iowa 2001) (discussing illegal sentences which can be challenged at any time under Iowa Rule of Criminal Procedure 23(5)(*a*), and stating "to be 'illegal' for purposes of rule 23(5)(*a*), the sentence must be one not

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counsel, *see* 679 N.W.2d at 615, Stephen's several claims of ineffective assistance of trial counsel, which will be discussed later, do not include failure to preserve error as to the sufficiency of the evidence of constructive possession.

[4] Iowa Rule of Criminal Procedure 2.33(2) provides:

> *Speedy trial.* It is the public policy of the state of Iowa that criminal prosecutions be concluded at the earliest possible time consistent with a fair trial to both parties. *Applications for dismissals under this rule* may be made by the prosecuting attorney or the defendant or by the court on its own motion.
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> . . . .
>
> b. If a defendant indicted for a public offense has not waived the defendant's right to a speedy trial the defendant must be brought to trial within 90 days after indictment is found or the court must order the indictment to be dismissed unless good cause to the contrary be shown.
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> c. All criminal cases must be brought to trial within one year after the defendant's initial arraignment pursuant to rule 2.8 unless an extension is granted by the court, upon a showing of good cause.
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> d. If the court directs the prosecution to be dismissed, the defendant, if in custody, must be discharged, or the defendant's bail, if any, exonerated, and if money has been deposited instead of bail, it must be refunded to the defendant.

(Emphasis added.)

In *State v. Abrahamson*, 746 N.W.2d 270 (Iowa 2008), the supreme court held manufacturing and conspiracy are alternative means of committing a single offense under section 124.401(1) and thus the "same offense" for speedy trial purposes, *see* Iowa R. Crim. P. 2.33(1), and is not applicable in the circumstances presented here.

authorized by statute"); *see also State v. Gansz*, 403 N.W.2d 778, 780 (Iowa 1987) (holding "under the circumstances the defendant clearly acquiesced in the trial date selected by the district court and may not now claim that it was in contravention of his statutory speedy trial rights"); *State v. Mary,* 401 N.W.2d 239, 241 (Iowa Ct. App. 1986) ("[B]ecause the right to a speedy trial is personal, it is one which a defendant 'may forego at his or her election.'" (citation omitted)); *cf. State v. Utter*, ___ N.W.2d ___, ___ (Iowa 2011) (addressing defendant's claim that the State violated speedy indictment rule as a claim of ineffective assistance of counsel for failing to move to dismiss).

IV. Ineffective Assistance of Counsel.

Stephen asserts his two trial attorneys and two appellate attorneys have been ineffective in various respects.

Two elements must be established to show the ineffectiveness of defense counsel: (1) counsel failed to perform an essential duty and (2) this omission resulted in prejudice. *State v. Graves*, 668 N.W.2d 860, 869 (Iowa 2003). A defendant's inability to prove either element is fatal. *Id.*

> "Generally, ineffective-assistance claims are preserved for postconviction relief proceedings to afford the defendant an evidentiary hearing and thereby permit the development of a more complete record." If the record on appeal shows, however, that the defendant cannot prevail on such a claim as a matter of law, we will "affirm the defendant's conviction without preserving the ineffective-assistance-of-counsel claims." Conversely, if the record on appeal establishes both elements of an ineffective-assistance claim and an evidentiary hearing would not alter this conclusion, we will reverse the defendant's conviction and remand for a new trial.

Id. (citations omitted).

A. Rachael Seymour. Stephen argues his first trial counsel, Rachael Seymour, was ineffective in (1) failing to investigate available witnesses, (2) failing to determine whether or not the seatbelt buckle of Scopa's truck was operational, and (3) in withdrawing without first taking depositions. Because Seymour was granted permission to withdraw, and any and all of these matters could have been conducted by subsequently appointed counsel, Stephen cannot establish prejudice with regard to his claims against Seymour. *See Ledezma v. State*, 626 N.W.2d 134, 145-46 (Iowa 2001).

B. Kent Balduchi. Stephen asserts Kent Balduchi was also ineffective in failing to investigate available witnesses, in failing to determine whether or not the seat belt buckle of Scopa's truck was operational, and in failing to challenge pictures submitted as exhibits. He also asserts counsel failed to present any evidence on behalf of the defendant, but concedes the record is inadequate to determine if this constituted ineffective assistance. We conclude both the record and argument are inadequate to address these claims, and we preserve them for possible postconviction proceedings. *See* Iowa Code § 814.7(3).

Stephen's claim that counsel was ineffective in failing to file a motion to suppress evidence resulting from the stop of Scopa's truck is without merit. *See State v. Louwrens*, 792 N.W.2d 649, 652 (Iowa 2010) (noting "an officer's reasonable mistake of fact supporting his belief that a traffic violation or other criminal activity is underway will suffice as probable cause for a stop"); *State v. Mitchell,* 498 N.W.2d 691, 693 (Iowa 1993) (officer's observation of traffic offense, no matter how minor, justifies stop of vehicle).

Stephen next argues Balduchi was ineffective in failing to object to leading questions asked by the prosecutor. He relies upon Iowa Rule of Evidence 5.611(*c*)[5] as grounds for possible objection, but has not established that objections would have been sustained or that had objections been made and sustained, the result of the trial would likely have been different. His ineffectiveness claim consequently fails. *See State v. Pierson*, 554 N.W.2d 555, 562 (Iowa 1996) (noting counsel need not make every possible evidentiary objection to satisfy standard of normal competency).

Stephen also contends his constitutional right to testify was violated and trial counsel failed to explain the consequences of not testifying. This claim, though brought under a different heading, is more appropriately addressed as a claim of ineffective assistance of counsel. The record before us on the issue is nonexistent, and we cannot address it in this proceeding. *See State v. Fountain*, 786 N.W.2d 260, 267 (Iowa 2010) (concluding issue could not be addressed "because the record simply does not exist").

C. First Appellate Counsel. On appeal, Stephen also contends his first appellate counsel, who filed a proof brief and then withdrew upon getting new employment, was ineffective. Because later appointed counsel has raised the issues asserted to have been erroneously omitted by earlier counsel, no prejudice resulted and the claim fails. *See Ledezma*, 626 N.W.2d at 143 ("To sustain this burden, the applicant must demonstrate "that there is a reasonable

[5] Rule 5.611(*c*) provides: "Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness's testimony." However, the district court has considerable discretion in admitting or excluding the answers to leading questions. *State v. Leonard*, 243 N.W.2d 887, 891 (Iowa 1976).

probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.").

V. Exercise of Sentencing Discretion.

Stephen contends the district court did not understand it had discretion in tripling his sentence pursuant to Iowa Code section 124.411.

We review for the correction of errors at law. *State v. Thomas*, 547 N.W.2d 223, 225 (Iowa 1996). When a sentence is not mandatory, the district court must exercise its discretion in determining what sentence to impose. *Id.* The district court must demonstrate its exercise of discretion by stating upon the record the reasons for the particular sentence imposed. *Id.*

At sentencing, the State argued the court could impose a sentence of up to 105 years if it tripled each conviction for second or subsequent offense and ran the sentences consecutively. Stephen's attorney argued for imposition of a sentence either enhanced as an habitual offender or tripled as a second or subsequent offender, but not both. The court stated:

> The Court has had the opportunity to review the presentence investigation report. I've heard Mr. Stephen at this time. I've heard Mr. Balduchi, and I have heard from the State through Mr. DiBlasi.
>
> The Court finds at this time that the nature and circumstances of this offense and the fact that the defendant was on parole at the time theses offenses occurred, and further that the defendant has a lengthy criminal history, that it is important to impose a sentence which places the defendant outside of society for a significant amount of time in order to protect the public from further criminal activity. And if the defendant is sincere in seeking some rehabilitation in regard to his addiction, which he admits that he is an addict, perhaps this time away from being exposed to these drugs can help and focus him in regard to recovery, a sincere recovery, while he's incarcerated.
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> The Court understands the State's position in regard to consecutive sentences and maximum punishment. The Court feels that the State is merely expressing its exasperation on the fact that

> this defendant continues to commit criminal acts, and that he did commit these criminal acts while on parole.
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> . . . .
>
> The Court also understands the position of the defendant. This addiction is a disease. . . .
>
> You had the opportunity, Mr. Stephen, to continue once you were paroled to do that treatment and to take advantage of recovery and to be involved in that. Instead, though, while on parole, you exasperated the situation, made it much worse, by committing these offenses . . . .
>
> For that reason the Court finds that in regard to Count I the defendant is adjudged guilty of conspiracy to manufacture . . . methamphetamine . . . and sentence you to a term of incarceration based upon the second and subsequent offense and as a habitual offender to a total of 45—be incarcerated for a period not to exceed 45 years.

The court imposed the same sentence on Count II and ran the two concurrently. The court also imposed a term not to exceed fifteen years on Count IV "enhanced because of the admission made on the record today that it's a second and subsequent offense, and the defendant is an habitual offender," which was to be served consecutively to Counts I and II. In its written order, the court found no mitigating circumstances which would justify waiving the mandatory minimum sentence.

The sentence imposed was within the court's discretion. *See State v. Sisk*, 577 N.W.2d 414, 416 (Iowa 1998) ("We find that the district court properly sentenced defendant by imposing the penalty for an habitual offender under chapter 902 and then enhancing that sentence pursuant to section 124.411(1)"). We conclude the district court was aware of its discretion or at least there were no statements clearly suggesting the implication sought by Stephens, that the district court was unaware of its discretion. We also conclude the district court did not abuse that discretion in imposing the sentences here.

VI. Right to be Present at Judge-Jury Communication.

The record reveals a jury note was sent to the court asserting, "We are 11-1 for guilty on counts I & II." The court "contacted counsel and discussed how to answer the note," and without objection the court answered "Jurors, Thank you for your note. I would like you to keep deliberating." Stephen contends he was denied his right to be present during trial proceedings having learned only after conviction that the jury had asked a question during its deliberations. Stephen attempts to raise the issue as trial error and argues we are to presume prejudice.

The supreme court recently observed in *Everett v. State*, 789 N.W.2d 151, 157 (Iowa 2010), "what was known to the lawyer—that the jury had posed a question—was imputed to the defendant, and thus, having failed to file a motion for new trial, the defendant's only recourse was to raise an ineffective-assistance-of-counsel claim." Thus, this claim must be addressed as one of ineffective assistance of counsel. *Everett*, 789 N.W.2d at 158. We do not presume prejudice as claimed by Stephen; rather, the "defendant must show the probability of a different result is 'sufficient to undermine confidence in the outcome.'" *Id.* He has not attempted to do so.

VII. Sentence Does Not Constitute Cruel and Unusual Punishment.

While Stephen asserts there is a constitutional prohibition to cruel and unusual punishment, his claim here boils down to his assertion that "[i]t is unclear in the record why the court ran the conviction of possession of methamphetamine consecutive to other sentence." He asks that the case be remanded for resentencing.

The reasons for imposing consecutive sentences need not be detailed but must provide at least a cursory explanation to allow appellate review of the trial court's discretionary action. *State v. Barnes*, 791 N.W.2d 817, 827 (Iowa 2010).

"[A] reviewing court has the authority to consider whether imprisonment for a term of years for a particular crime or crimes is so excessive as to violate the Cruel and Unusual Punishment Clause." *State v. Bruegger*, 773 N.W.2d 862, 872 (Iowa 2009). "Legislative judgments are generally regarded as the most reliable objective indicators of community standards for purposes of determining whether a punishment is cruel and unusual." *Id.* at 873. Consequently, "a sentence for a term of years within the bounds authorized by statute is not likely to be 'grossly disproportionate' under the Cruel and Unusual Punishment Clause." *Id.*

The term imposed here was within the bounds authorized by statute. *See Sisk*, 577 N.W.2d at 416. As pointed out by the State and defendant, the court would have been within its statutory authority to impose a term of incarceration of 105 years had it run all three sentences consecutively—it did not do so. The court's stated reasons for sentencing included the defendant's lengthy criminal history, the fact he committed the instant offenses while on parole, the prospect for rehabilitation, and the protection of the public. We conclude the court's reasons for ordering consecutive sentences were adequately expressed in its overall explanation for the sentence it imposed. *See Barnes*, 791 N.W.2d at 828. And, the sentence was not grossly disproportionate to the underlying crimes as to constitute cruel and unusual punishment.

VIII. Pro Se Claims.

Stephen in his pro se brief asserts two additional claims. First, he argues the photographs of the lithium batteries should have been objected to as not the "best evidence." He also contends he was entitled to a spoliation instruction because the lithium batteries were destroyed and not available for trial. Finally, he argues he has been subjected to "double counting" in his sentencing.

A. Best Evidence. The defendant's claim is a misapprehension of what the "best evidence" rule is. In *State v. Schlenker*, 234 N.W.2d 142, 145 (Iowa 1975), the court stated:

> The items seized consisted of meat and other food and cooking products. They were not introduced into evidence. The State offered exhibits in the form of photographs purporting to show them. Defendant contends these photographic exhibits should have been excluded under the best evidence rule. He insists the State was required to introduce the food items themselves or to explain their absence.
>
> The State is right in arguing the best evidence rule is inapplicable. In *Schiltz v. Cullen-Schiltz & Assoc., Inc*., 228 N.W.2d 10, 19-20 (Iowa 1975), we pointed out the '(r)ule of best evidence obtainable is expressly, if not solely, applicable to documentary evidence, *Daniels v. Bloomquist*, 258 Iowa 301, 312, 138 N.W.2d 868, 875, and has no application where the fact to be proved is independent of any writing even though the fact has been reduced to a writing or is evidenced by a writing. 2 Jones on Evidence (Sixth ed., Gard), § 7:4. *See also* 4 Wigmore on Evidence (Chadbourn Rev.), section 1174.' Defendant's objection on the ground of the best evidence rule was properly overruled. This assignment is without merit.

See also State v. Khalsa, 542 N.W.2d 263, 268 (Iowa Ct. App. 1995). The best evidence rule has no application here.

If we presume Stephen's challenge is to the fact that no evidence of testing was presented, we note circumstantial evidence is considered as persuasive as direct evidence. *See State v. Brubaker*, ___ N.W.2d ___, ___

(Iowa 2011); *cf. In re C.T.*, 521 N.W.2d 754, 757 (Iowa 1994) ("Similarly, the statute prohibiting the sale of drugs does not require testing of the purported drug as a prerequisite to conviction of the crime. The identity of a substance as an illegal drug may be proved by circumstantial evidence.").

B. Spoliation Instruction. Stephen argues he was entitled to a spoliation instruction. A spoliation instruction is "a direction to the jury that it [may] infer from the State's failure to preserve [evidence] that the evidence would have been adverse to the State." *State v. Vincik,* 398 N.W.2d 788, 795 (Iowa 1987).

We review for correction of errors of law. *State v. Hartsfield*, 681 N.W.2d 626, 630 (Iowa 2004). If a defendant generates a jury question on the following four specific factors, a spoliation instruction "should be given." *Id*.

> We held in *Langlet* there must be substantial evidence to support the following facts in order to justify a spoliation inference: (1) the evidence was "in existence"; (2) the evidence was "in the possession of or under control of the party" charged with its destruction; (3) the evidence "would have been admissible at trial"; and (4) "the party responsible for its destruction did so intentionally." [*State v. Langlet*, 283 N.W.2d 330,] 335 [(Iowa 1979)].

Id.

Ordinarily evidence destroyed under a neutral record destruction policy is not considered intentionally destroyed so as to justify a spoliation instruction. *See State v. Bowers*, 661 N.W.2d 536, 543 (Iowa 2003). *But see Hartsfield*, 681 N.W.2d at 632-33 (concluding defendant was entitled to instruction where a videotape of alleged assault was erased pursuant to a standard practice, but the "State knew the defendant wanted to obtain the video—a "key piece of evidence that would have provided a reliable record of what happened," which was "unique

and not cumulative"; because the destruction of the tape denied defendant his theory of defense, failure to instruct was reversible error).

At trial, defense counsel requested this spoliation instruction,

> If you find that the alleged lithium batteries and anhydrous ammonia existed and the State knowingly and intentionally destroyed the lithium batteries and the anhydrous ammonia, you may but are not required to, conclude that the information contained in the lithium batteries and anhydrous ammonia would be unfavorable to the State and favorable to the defendant.

The State resisted, contending the testimony of Officer Nicolino was "that procedurally those are hazardous materials and by procedure the Des Moines Police Department is instructed to call a disposal company and destroy that evidence."

We conclude there was not substantial evidence presented here of any bad faith or purpose in the destruction of the lithium batteries or propane tank. *See Langlet,* 283 N.W.2d at 333 ("[T]he circumstances of the act must manifest bad faith. Mere negligence is not enough, for it does not sustain the inference of consciousness of a weak case."). Because the record does not contain substantial evidence supporting the fourth *Hartsfield* factor, we conclude the court did not err in not giving the spoliation instruction.

In addition, even if we were to find the trial court erred by not giving a spoliation instruction, such an error was not prejudicial. *See Hartsfield,* 681 N.W.2d at 633 (noting an instructional error is not reversible error unless there is prejudice; "Prejudice exists when the rights of the defendant 'have been injuriously affected' or the defendant 'has suffered a miscarriage of justice."' (citation omitted)). We note first Stephen was acquitted of Count III, possession

of anhydrous ammonia with intent to be used to manufacture methamphetamine. As to Count II, possession of lithium with intent to be used to manufacture methamphetamine, this case is not like *Hartsfield* where the court found defendant was denied key evidence, which the defendant asserted "would contradict the testimony of the State's witnesses." *Id.*

Stephen does not assert the stripped batteries were not lithium batteries, which Officer Nicolino and Criminalist Bremer identified with certainty. It is true no evidence of testing was done, but Bremer testified stripped lithium batteries "have a very unique appearance" and there was no way to mistake lithium batteries in stripped-down form with regular batteries. *Cf. Brubaker*, ___ N.W.2d at ___ (concluding circumstantial evidence pills were illegal substance was speculation where criminalist testified that the pills appeared to be Clonazepam, but an "examination of the pills reveals that they are similar in size, shape, and consistency to aspirin and other over-the-counter drugs readily available without a prescription").

C. Sentencing Enhancements. Citing federal case law, Stephen argues he has been improperly subjected to "double counting" in sentencing. The concept arises in terms of federal sentencing guidelines, not state sentencing:

> "Double counting occurs when one part of the Guidelines is applied to increase a defendant's punishment on account of a kind of harm that has already been fully accounted for by application of another part of the Guidelines." *United States v. Hipenbecker,* 115 F.3d 581, 583 (8th Cir.1997) (quotations omitted); *United States v. Donelson,* 450 F.3d 768, 774 (8th Cir. 2006). Even if the court finds double-counting, it is permissible where "(1) the [Sentencing] Commission intended the result and (2) each statutory section concerns conceptually separate notions related to sentencing." *Hipenbecker,* 115 F.3d at 583.

United States v. Myers, 598 F.3d 474, 476 (8th Cir. 2010). In the context of Iowa statutory sentencing, even if we were to apply the concept of double-counting, the legislature has "intended the result" as it has provided for enhanced sentencing as a result of a defendant's being an habitual offender, which "dovetails" with section 124.401 and the enhanced sentencing for a second or subsequent drug offences in section 124.411. *See Sisk*, 577 N.W.2d at 416.

As explained in *Sisk*,

> We have previously held that chapter 124 "clearly was not intended to stand completely on its own in sentencing." *State v. Draper,* 457 N.W.2d 600, 603 (Iowa 1990). In *Draper,* we examined whether sections 902.8 and 902.9(2) applied to a defendant who violated chapter 204 because that chapter has its own enhancement provision for second or subsequent violations. (Chapter 204 was transferred in its entirety to chapter 124 in the 1993 Code.) We found section 902.9 "dovetails" with section 204.401 by stating that it applies to the sentencing of "'any person convicted of a felony'" unless otherwise specified by another statute. *Id.* (quoting Iowa Code § 902.9 (1987)).
>
> We also held in *Draper* that the penalty imposed under section 902.9(2) was not "separate" from chapter 204, rather it was the "'penalty imposed for violation of this division.'" *Id.* (quoting Iowa Code § 204.404). We explained that chapter 204 "simply borrows from chapter 902 in setting the length of the sentence for certain violations." *Id.*
>
> In *Draper* we found that the defendant, who was convicted of three class "D" felonies pursuant to chapter 204 and found to be an habitual offender, was properly sentenced to fifteen years on each count pursuant to section 902.9(2) rather than to five years on each count pursuant to section 902.9(4) (providing sentence for class "D" felonies). However, because the defendant's prior convictions were not under chapter 204, we expressed "no opinion on the interplay between Iowa Code sections 204.411 and 902.9(2) in a situation where the terms of both might apply." *Id.* at 604 n.3.
>
> Here, where the terms of both sections 124.411 and 902.9(2) do apply, we find the district court properly sentenced defendant by looking first to chapter 902 to determine the penalty imposed for the violation of section 124.401(1)(c), a class "C" felony. Section 902.9(3) provides that a class "C" felon, *not an habitual offender,* shall be sentenced to no more than ten years. However, defendant was found to be an habitual offender;

> therefore, he must be sentenced pursuant to section 902.9(2) which provides that an habitual offender shall be sentenced to no more than fifteen years.
>
> Next, because defendant's previous convictions were under chapter 124, the district court properly applied the repeat offender enhancement of section 124.411(1) which authorized it to punish defendant for a period not to exceed three times the period of fifteen years "otherwise authorized" by section 902.9(2).
>
> We find that the district court properly sentenced defendant by imposing the penalty for an habitual offender under chapter 902 and then enhancing that sentence pursuant to section 124.411(1).

The analysis applies equally to Stephen.

IX. Conclusion.

Substantial evidence supports the defendant's convictions; no reversible trial error occurred; and the sentences imposed were statutorily authorized, adequately explained, and not grossly disproportionate to the offenses. Stephen's claims of ineffective assistance of counsel are either not currently reviewable or not proved. We therefore affirm.

AFFIRMED.

Vogel, P.J., concurs; Potterfield, J., dissents.

POTTERFIELD, J. (dissenting)

I cannot agree that the State's evidence here, viewed in the light most favorable to the State, was sufficient to prove the agreement element of conspiracy. Our supreme court's opinions in *State v. Weatherly*, 679 N.W.2d 13 (Iowa 2004), *State v. Nickens*, 644 N.W.2d 38 (Iowa 2002), and *State v. Speicher*, 625 N.W.2d 738 (Iowa 2001), make it clear that more than a defendant's presence at a crime scene is necessary to prove even a tacit agreement to conspire in the manufacture of a controlled substance.

In *Speicher*, the State's insufficient evidence is summarized as showing that two people were together at a meth lab, both smelled of ether, and fled from the police. 625 N.W.2d at 742.

Nickens's conviction for conspiracy to possess cocaine with intent to deliver was reversed where the State presented only evidence that Nickens shared a small apartment where cocaine and a firearm were found. 644 N.W.2d at 42. In both *Speicher* and *Nickens*, the court found the State did not present sufficient evidence of the defendant's involvement from which to infer agreement, an essential element of the conspiracy offence. *See id.*; *Speicher*, 625 N.W.2d at 743.

The supreme court decided *Weatherly* after both *Speicher* and *Nickens* and found that *Weatherly* and *Speicher* involved similar facts. *Weatherly*, 679 N.W.2d at 18. But in *Weatherly*, the supreme court stated its task was to "search for the existence of additional evidence, absent in *Speicher*, to support a conspiracy." *Id.* In that search, the court noted that Weatherly was carrying a portion of the meth lab with him when he left the motel room which had been

rented by another person, and that the meth lab was "in full operation." 679 N.W.2d at 18. Weatherly also made statements implying that other persons were involved in the meth operation. *Id*.

In the majority's well-written decision here, the fact that is said to distinguish this case from *Speicher* is Stephen's conduct in attempting to hide something in the truck seat near the location where police found lithium batteries and pseudoephedrine. Yet, this conduct by Stephen is no more telling than Speicher's flight from the location of a meth lab. Stephen clearly knew about Scopa's manufacture of methamphetamine and knew that the baggies contained precursors. That knowledge is no more indicative of an agreement to manufacture than was Speicher's knowledge of the presence of the methamphetamine lab, as was evidenced by his flight from the scene. Although the jury may have concluded that both Scopa and Stephen possessed some ingredients of methamphetamine, the leap to an agreement between the two men "rests on nothing but conjecture and speculation." *See Speicher*, 625 N.W.2d 743. One or both of the men might be involved in the manufacture of methamphetamine, as the majority concludes, but there is no evidence they were involved together.

While the State chooses to characterize Scopa's truck as a "rolling meth lab," the record shows only that it was a motor vehicle that contained meth lab equipment, and also was used for transportation. The truck did not contain a meth lab in operation or ready for operation. Neither Stephen nor Scopa made statements indicating either was involved with the other in the manufacture of methamphetamine.

I would reverse Stephen's conviction for conspiracy to manufacture methamphetamine for insufficient evidence. I concur in all other aspects of the majority's opinion.