IN THE COURT OF APPEALS OF IOWA

No. 2-1187 / 12-0614
Filed February 13, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DELIOS LONEWOLF,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Richard G. Blane, Judge.

A defendant appeals his judgment and sentence for conspiracy to deliver methamphetamine, (1) challenging the sufficiency of the evidence supporting the jury's finding of guilt, (2) asserting the jury's finding of guilt on the conspiracy count and not guilty finding on a methamphetamine possession count were "fatally inconsistent," and (3) contending the district court erred in excluding certain testimony. **AFFIRMED.**

Thomas P. Graves of Graves Law Firm, P.C., Clive, for appellant.

Thomas J. Miller, Attorney General, Linda J. Hines, Assistant Attorney General, John P. Sarcone, County Attorney, and Mark Taylor, Assistant County Attorney, for appellee.

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

VAITHESWARAN, P.J.

The State charged Delios Lonewolf with conspiracy to deliver methamphetamine, possession of methamphetamine with intent to deliver, failure to affix a tax stamp, and possession of marijuana. A jury found him guilty on the conspiracy and possession of marijuana counts but not guilty on the possession of methamphetamine and failure to affix a drug tax stamp counts.

On appeal, Lonewolf (1) challenges the sufficiency of the evidence supporting the jury's finding of guilt on the conspiracy count, (2) asserts the jury's finding of guilt on the conspiracy count and not guilty finding on the methamphetamine possession count were "fatally inconsistent," and (3) contends the district court erred in excluding certain testimony.

I. Sufficiency of the Evidence—Conspiracy to Deliver Methamphetamine

The jury was instructed on the crime of conspiracy to deliver methamphetamine, as follows:

> The State must prove all of the following elements of the crime of Conspiracy to Deliver a Controlled Substance, methamphetamine:
>
> 1. On or about the 9th day of September 2011, Defendant Delios Keahna Lonewolf agreed with Brian Dodson, or, Michaela Robin Gienger, or both:
>
> a. that one or more of them would deliver a controlled substance, methamphetamine, or solicit another to deliver that controlled substance, or
>
> b. that one [or] more of them would attempt to deliver a controlled substance, methamphetamine.
>
> 2. The Defendant entered into the agreement with the intent to promote or facilitate the delivery of the controlled substance, methamphetamine.
>
> 3. The Defendant, or Brian Dodson or Michaela Robin Gienger committed an overt act to promote or facilitate the conspiracy.

> 4. Delios Keahna Lonewolf, Brian Dodson and Michaela Robin Gienger were not law enforcement agents investigating the delivery of a controlled substance or assisting law enforcement agents in the investigation when the conspiracy began.

The primary evidence implicating Lonewolf in a conspiracy to deliver methamphetamine came from Brian Dodson and Robin Gienger. The jurors were instructed that, if they found Dodson and Gienger to be co-conspirators, their testimony alone would be insufficient to convict Lonewolf and they would have to find "other evidence tending to connect [Lonewolf] with the conspiracy and commission of the crime."

Lonewolf argues that the record does not contain other evidence corroborating the co-conspirators' testimony.[1] We disagree.

Corroborative evidence "need not be strong," "need not confirm every material fact testified to" by a co-conspirator, and need not confirm every element of the crime. *State v*. *Doss*, 355 N.W.2d 874, 879 (Iowa 1984). It is sufficient if it tends "to connect the defendant to the commission of the crime." *Id.*

Dodson testified that an acquaintance asked him to arrange a purchase of methamphetamine for a relative. Dodson contacted Gienger and asked her whether she knew anyone who could deliver two ounces of methamphetamine. After a brief period, she responded that she had found someone to make the sale. She quoted a price of $1500 per ounce. Dodson conveyed the information to his acquaintance and arranged a meeting at his house. On the day of the scheduled meeting, Lonewolf, Gienger and a third individual came to Dodson's house. After making small talk, Gienger told Lonewolf to go to the car and get

[1] Contrary to the State's assertion, we are persuaded that error was preserved on this issue.

the methamphetamine. Lonewolf returned with a plastic bag, which Dodson slipped into his pocket.

Gienger, in turn, testified that she spoke to Lonewolf, who told her he could produce two ounces of methamphetamine. Lonewolf picked her up and drove to Dodson's house. After entering the house, Gienger told Lonewolf to return to the car and get the methamphetamine. Lonewolf did so. Momentarily, police arrived and executed a search warrant.

The testimony of these co-conspirators was corroborated by text messages between Dodson and Gienger and between Gienger and Lonewolf. While portions of the messages were somewhat cryptic absent explanatory testimony from the co-conspirators, an untrained eye could discern that a drug deal was imminent and Lonewolf was involved in the deal.

Also corroborative of the co-conspirators' testimony was Dodson's neighbor's testimony that he saw Lonewolf come back to the vehicle after entering the house and fumble for a few minutes before returning to the house.

Finally, police found approximately $1200 in cash when they searched Lonewolf. While this sum did not coincide with the $1500 per ounce figure quoted by Gienger, it was nonetheless a large enough amount to lead a reasonable juror to believe that Lonewolf was involved in a conspiracy to deliver methamphetamine. Notably, officers also found a baggie of methamphetamine in Dodson's pocket.

We conclude this evidence, while not strong, was sufficient to corroborate key facts recounted by Dodson and Gienger. *See id.* at 879–80.

In reaching this conclusion, we have considered and rejected Lonewolf's related assertion that the testimony of both co-conspirators was subject to attack based on their drug use and the plea deals they struck or hoped to strike. As the court stated in *Doss*, "Any corroborative evidence tending to connect the defendant to the commission of the crime supports the credibility of the accomplice and is sufficient". *Id.* at 879.

II. Factual Inconsistency

Lonewolf contends the jury rendered inconsistent verdicts by finding him guilty on the conspiracy count and not guilty on the methamphetamine possession count.

The Iowa Supreme Court addressed inconsistent verdicts in *State v. Halstead*, 791 N.W.2d 805 (Iowa 2010). There, the court described a verdict involving a factual inconsistency as one in which there "is no legal flaw in the jury's verdict, but the verdicts seem inconsistent with the facts." *Halstead*, 791 N.W.2d at 807. The court contrasted this type of inconsistency with "legally inconsistent" verdicts in which a defendant is convicted of a compound crime but acquitted on all predicate offenses. *Id.* The court noted that it was not faced with a factual inconsistency but a "narrow issue" involving "a single defendant who is convicted of a compound crime and acquitted of the predicate crime in a single proceeding." *Id.* at 808. The court stated, "In these cases, the jury verdict is inconsistent as a matter of law because it is impossible to convict a defendant of the compound crime without also convicting the defendant of the predicate offense." *Id.* at 807. The court held that "in a case involving conviction of a

compound felony when the defendant is acquitted of the underlying predicate crime, the conviction cannot stand." *Id.* at 814.

In his written filings, Lonewolf suggests the conspiracy count here is a compound crime, possession of methamphetamine is a predicate offense, and his acquittal on that offense or the related drug tax stamp charge precluded a finding of guilt on the conspiracy count. He also argues that "no reasonable jury could find [him] guilty of the conspiracy based on the facts presented at trial."

At oral arguments, Lonewolf conceded conspiracy to deliver methamphetamine is not a compound felony and we are not dealing with a legal inconsistency. He urged us to focus on "factual inconsistencies" and, specifically, the apparent anomaly in the jury's finding that he did not possess methamphetamine yet conspired to deliver it.

Lonewolf faces an uphill battle on his factual inconsistency argument in light of the court's pronouncements in *Halstead*. The court emphasized that, by focusing "solely on the legal impossibility of convicting a defendant of a compound crime while at the same time acquitting the defendant of predicate crimes," it did not have to "engage in highly speculative inquiry into the nature of the jury deliberations," an inquiry that the court characterized as "open[ing] a Pandora's box." *Id.* at 815. The court also declared that "any potential remedy should be available only when the jury verdicts are truly inconsistent or irreconcilable." *Id.* And, the court admonished reviewing courts to "carefully examine the pleadings and the instructions to ensure that the jury verdicts are so inconsistent that they must be set aside." *Id.*

With these limitations in mind, we are persuaded that the jury could find Lonewolf guilty of conspiring to deliver methamphetamine without finding him guilty of possessing the substance. As discussed, Dodson testified about the meeting he arranged. Gienger testified to the agreement she reached with Lonewolf to deliver two ounces of methamphetamine, as well as the text messages memorializing that agreement. Gienger also testified that Lonewolf picked her up and drove her to the meeting. This evidence, together with the corroborating evidence discussed above, support the conspiracy to deliver count, even if Lonewolf did not possess the methamphetamine to be delivered. In fact, the jury was instructed that "[t]he delivery of a controlled substance does not have to be committed for there to be a conspiracy to deliver." Based on this record, we conclude there was no factual inconsistency.

III. Exclusion of Evidence

Finally, Lonewolf contends the district court erred in sustaining a hearsay objection to a defense witness's testimony that, in his view, would have exculpated him. *See State v. Paredes*, 775 N.W.2d 554, 560 (Iowa 2009) (reviewing hearsay claims for errors of law). Lonewolf's appellate attorney, who was also Lonewolf's trial attorney, claimed the witness would have testified to overhearing Dodson deny Lonewolf's involvement in the drug transaction. In his view, the overheard conversation was admissible under the residual hearsay exception. *See* Iowa R. Evid. 5.807.[2]

[2] Rule 5.807 provides in relevant part:

> A statement not specifically covered by any of the exceptions in rules 5.803 or 5.804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court

Lonewolf's attorney concedes he did not raise this exception at trial and did not make an offer of proof. For that reason, he presents the claim under an ineffective-assistance-of-counsel rubric. While we generally preserve such claims for postconviction relief, both sides agree the issue should be decided on direct appeal.

Lonewolf must establish that counsel's performance was deficient and that prejudice resulted. *See Strickland v*. *Washington*, 466 U.S. 668, 687 (1984). We are convinced he cannot establish *Strickland* prejudice because the expected testimony that Lonewolf was not involved in the crime was cumulative of Lonewolf's own testimony that he was not involved in the crime. *See State v*. *Schaer*, 757 N.W.2d 630, 638 (Iowa 2008). Specifically, Lonewolf stated, he had "no idea" how to manufacture methamphetamine, "wouldn't even know where to start" buying methamphetamine for distribution, never sold Gienger methamphetamine, did not bring two ounces of methamphetamine to sell on the day in question, and was not involved in the drug transaction on that day. He said he went to Dodson's house to "look at a computer and also to give Ms. Gienger a ride." Based on this duly-admitted testimony, there was no reasonable probability that the excluded testimony would have altered the outcome. Lonewolf's ineffective-assistance-of-counsel claim necessarily fails.

> determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

We affirm Lonewolf's judgment and sentence for conspiracy to deliver methamphetamine.

AFFIRMED.