IN THE COURT OF APPEALS OF IOWA

No. 3-017 / 11-2086
Filed February 13, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

TONY LEWIS GRIDER,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, James C. Bauch, Judge.

Tony Grider appeals his convictions for various drug offenses. **AFFIRMED.**

Lars G. Anderson of Holland & Anderson, L.L.P., Iowa City, for appellant.

Thomas J. Miller, Attorney General, Lina J. Hines, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Brad Walz, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Potterfield and Doyle, JJ. Bower, J. takes no part.

DOYLE, J.

Tony Grider appeals his convictions for conspiring to manufacture a controlled substance and/or manufacturing a controlled substance (more than five grams of methamphetamine), possession of ephedrine and/or pseudoephedrine with the intent to manufacture a controlled substance, possession of ether with the intent to manufacture a controlled substance, and possession of marijuana, in violation of Iowa Code sections 124.401(1)(b), (4), and (5) (2009). He claims: (1) his trial counsel was per se ineffective for waiving the reporting of closing arguments in violation of Iowa Rule of Criminal Procedure 2.19(4); (2) the trial court erred in admitting evidence of his prior manufacture of methamphetamine; and (3) the trial court applied the wrong standard in reviewing his motion for new trial. Additionally, a plethora of complaints are listed in Grider's pro se supplemental brief. We affirm.

***I. Background Facts and Proceedings*.**

In May of 2011, the Black Hawk County Sheriff's deputies conducted a "trash rip" at Grider's residence.[1] Deputies found several Sudafed packages stuffed inside a cigarette box, plastic tubing, syringes and syringe caps, and plastic baggies. Inside one of the baggies was a bent spoon with black burn marks. Also found was a letter addressed to Grider and a paycheck bearing his name. A search warrant was obtained for Grider's residence.

[1] In his opening statement, the assistant county attorney explained: "[B]asically what is done in a trash rip is [law enforcement officers] wait for the garbage to be out by the curb. They have waste management pick it up like it normally would and then after that happens they take a look at the garbage to see what's in there." A deputy testified Waterloo Waste Management sent a truck to Grider's residence at his request. The truck was clean in the back with no other trash in it. The deputy observed Grider's trash being placed in the truck. He then followed the truck back to the waste management area. Grider's trash was removed from the truck and given to the deputy to inspect.

Grider lived in the home with other individuals. Grider and two other persons were present in the home when the search warrant was executed. During the search of the house, investigators found a meth pipe, marijuana, and other drug related paraphernalia in Grider's bedroom. When investigators found the detached garage locked, they asked Grider about a key to the garage. Grider did not respond. Investigators entered the garage through a window. During the search of the house, the key to the garage was found on a key ring with other keys inside the pocket of a coat which was with other items in a clothes basket located in Grider's bedroom.

During the search of the garage, investigators discovered items consistent with the manufacture of methamphetamine inside a shop vac. The items included plastic bags containing receipts, lithium battery packaging, pseudoephedrine blister packaging, coffee filters and used filters, and a Gatorade bottle containing sludge. Other items commonly used in the manufacture of methamphetamine were also found in the garage.

Grider was arrested, charged, and ultimately found guilty by a jury of four drug charges: (1) conspiring to manufacture a controlled substance and/or manufacturing a controlled substance (methamphetamine); (2) possession of ephedrine and/or pseudoephedrine with intent to manufacture a controlled substance; (3) possession of ether with the intent to manufacture a controlled substance; and (4) possession of marijuana. As a habitual offender, Grider was sentenced to twenty-five years on one count and fifteen years on each of the other counts. All sentences were ordered to be served concurrently. Grider now appeals.

II. Discussion.

A. Waiver of Reporting of Closing Arguments.

On appeal, Grider asserts his trial counsel was per se ineffective for waving the reporting of closing arguments in violation of Iowa Rule of Criminal Procedure 2.19(4). We review claims of ineffective assistance of counsel de novo. *Ennenga v. State*, 812 N.W.2d 696, 701 (Iowa 2012). Ineffective assistance of counsel requires a defendant to prove (1) trial counsel failed to perform an essential duty and (2) such failure resulted in prejudice. *See id.* "If the claim lacks prejudice, it can be decided on that ground alone without deciding whether the attorney performed deficiently." *Ledezma v. State*, 626 N.W.2d 134, 142 (Iowa 2001). In order to show prejudice, an applicant 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. Madsen*, 813 N.W.2d 714, 727 (Iowa 2012).

In criminal cases, the reporting of opening statements and closing arguments is mandatory: "The reporting of opening statements and closing arguments shall not be waived as provided in Iowa [Rule of Civil Procedure] 1.903(2)." Iowa R. Crim. P. 2.19(4). Reasoning that "[b]oth opening statements and closing arguments are revealing of a party's strategy and may be necessary for [an appellate court] to adequately review the performance of counsel," the rule was amended in 2010 to require the reporting of opening statements and closing arguments. *State v. Fountain*, 786 N.W.2d 260, 267 & n.3 (Iowa 2010).

Assuming without deciding that Grider's counsel breached an essential duty by waiving the reporting of closing arguments, we note Grider does not even

give us a hint as to what occurred during closing arguments.[2] He does not assert any specific error arose during the course of those proceedings. He does not assert any improper argument was made. He does not assert his counsel failed to object to any improper argument. He does not assert he was prejudiced by anything that occurred during closing arguments. Finally, he does not even explain how he was prejudiced by the lack of a reported closing argument. Not having maintained anything untoward occurred during closing arguments or that he was prejudiced thereby, his claim is without merit. *See State v. Oetken*, 613 N.W.2d 679, 689 (Iowa 2000).

In order to side step *Oetken*, Grider argues a violation of rule 2.19(4) by counsel should be deemed per se ineffectiveness of counsel, or, in other words, prejudice should be presumed. "Per se-ineffective-assistance cases are strictly limited to those situations in which counsel has totally abrogated his duties, effectively depriving the defendant of counsel." *State v. Moore*, 638 N.W.2d 735, 739 (Iowa 2002). Our courts have adopted a narrow view of per se ineffective assistance. *Id.* The doctrine comes into play when "there is an unusually high risk of prejudice to a party and the proofs of prejudice may be difficult to establish . . . ." *Id.* at 740 (citations omitted). We cannot say that the failure to have closing arguments reported implicates a total abrogation of duties on the part of counsel, thereby effectively depriving a defendant of counsel. We

[2] Having a contemporaneous record of the proceedings is obviously preferable for appellate review, but there are alternative methods available to make proceedings appear of record which would not otherwise so appear, i.e., a bill of exceptions. Iowa R. Crim. P. 2.25; *see also State v. McFarland*, 287 N.W.2d 162, 164 (Iowa 1980). Grider did not employ this method to make a record for appeal. He makes no assertion that this method would have been inadequate to preserve the record in this case.

therefore decline to accept Grider's invitation to elevate violations of rule 2.19(4) to per se ineffective assistance.

B. Evidence of Prior Meth Manufacturing by Grider.

On Grider's direct examination by his counsel, the following exchange occurred:

> Q. You didn't manufacture methamphetamine at your house, did you? A. I do not mess with dope at all. Period. No pot. Nothing.

A recess was then held, and the State, in an abundance of caution, alerted the court, Grider, and his counsel, it planned to call a rebuttal witness to testify the witness and Grider had "manufactured methamphetamine together at the Grider residence" and that Grider was "knowledgeable of what the materials are to manufacture methamphetamine." Grider's counsel objected, asking that the information be excluded under Iowa Rule of Evidence Rule 5.404(b),[3] "and obviously if it does come in, it would be more impeachment purposes only."

The district court responded:

> I would indicate to the jury that they're not to consider it as—in deciding this case with regard to whether [Grider is] guilty or not of this offense, but rather for impeachment purposes only. Going to impeachment of the truthfulness of the defendant. . . . I think it's fair game because Mr. Grider was pretty emphatic on the witness stand about it. I think it is fair game on that.

The State followed up on its cross-examination of Grider:

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[3] Iowa Rule of Evidence 5.404(b) provides:

> Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Q. You know how to make methamphetamine, Mr. Grider? A: No.
Q. Excuse me? A. I do not.

The State then called its rebuttal witness. The witness testified that in April 2011, he and Grider had cooked methamphetamine together in the basement of Grider's house. He further testified Grider knew how to cook methamphetamine. Following the witness's direct-examination testimony, and before he was cross-examined, the court instructed the jury:

> Ladies and gentlemen of the jury, the evidence was introduced here through this witness for purposes of impeachment. In other words, to impeach what the defendant may have previously stated. That's for you to decide. You shouldn't draw any inferences that he's guilty of this charge pursuant to what has been testified to. But it goes to truth and veracity.

On appeal, Grider argues admission of the witness's testimony "was not appropriate for impeachment purposes . . . or under any exception to Iowa [Rule of Evidence] 5.404(b)." "We review a district court's evidentiary rulings regarding the admission of prior bad acts for an abuse of discretion." *State v*. *Reynolds*, 765 N.W.2d 283, 288 (Iowa 2009). An abuse of discretion occurs, and reversal is warranted, "when the trial court exercises its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable." *State v*. *Richards*, 809 N.W.2d 80, 89 (Iowa 2012); *State v*. *Alberts*, 722 N.W.2d 402, 408 (Iowa 2006). "A ground or reason is untenable when it is not supported by substantial evidence or when it is based on an erroneous application of the law." *State v*. *Rodriquez*, 636 N.W.2d 234, 239 (Iowa 2001) (citation omitted).

"The credibility of a witness can be attacked in a variety of ways." *State v*. *Parker*, 747 N.W.2d 196, 207 (Iowa 2008) (footnote omitted). One is

accomplished "by proof through other witnesses that the material facts were not as testified to by the witness," referred to as "impeachment by contradiction." *Id.* at n.3; *see also United States v*. *Kincaid-Chauncey*, 556 F.3d 923, 932 (9th Cir. 2009). "Impeachment by contradiction permits courts to admit extrinsic evidence that specific testimony is false, because contradicted by other evidence." *Kincaid-Chauncey*, 556 F.3d at 932 (internal quotation marks omitted). This method of impeachment is recognized by the federal courts as "an exception to the collateral fact rule embodied in Federal Rule of Evidence 608(b), which generally prohibits the introduction of extrinsic evidence to attack the credibility of a witness."[4] *Id.*; *see also Brunner v*. *Brown*, 480 N.W.2d 33, 35 (Iowa 1992) ("Our rules of evidence are patterned after the federal rules, and we give considerable weight to their rationale and the cases interpreting them."). In the federal courts, impeachment by contradiction is authorized by rule 607, and rule 403 governs its application.[5] *United States v*. *Gilmore*, 553 F.3d 266, 271 (3d Cir. 2009); *see also United States v*. *Castillo*, 181 F.3d 1129, 1133 (9th Cir. 1999) ("Impeachment by contradiction is properly considered under [r]ule 607, not [r]ule 608(b).").[6]

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[4] Like Federal Rule of Evidence 608(b), Iowa Rule of Evidence 5.608(b) provides, in relevant part: "Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's credibility, other than conviction of crime as provided in rule 5.609, may not be proved by extrinsic evidence."

[5] Iowa Rule of Evidence 5.607 is identical to its federal counterpart, rule 607, and states: "The credibility of a witness may be attacked by any party, including the party calling the witness." Rule 5.403 contains the general balancing test whereby relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

[6] The Ninth Circuit in *Castillo* noted that "counsel and courts sometimes have difficulty distinguishing between [r]ule 608 impeachment and impeachment by

Iowa recognizes the method of impeaching a witness by contradiction. *See State v*. *Roth*, 403 N.W.2d 762, 767 (Iowa 1987), *overruled on other grounds by State v*. *Campbell*, 714 N.W.2d 622, 630 (Iowa 2006); *see also* 7 Laurie Kratky Dorè, Iowa Practice Series: Evidence § 5.607:4, at 518 (2011-12 ed.) ("Contradiction of a witness' by eliciting material and non-collateral facts contrary to the witness testimony is an approved method of attacking credibility."). But the method comes with a limitation. "In general, a witness may be impeached by contradiction only if 'the statements in issue [have] been volunteered on *direct* examination.'" *Kincaid-Chauncey*, 556 F.3d at 932 (citation omitted). "[E]xtrinsic evidence may not be admitted to impeach testimony invited by questions posed during cross-examination." *Id.* This is because,

> when the testimony to be contradicted is offered under cross-examination, impeachment by contradiction is far less likely to achieve its intended purpose of rooting out perjury because opposing counsel may manipulate questions to trap an unwary witness into 'volunteering' statements on cross-examination and because it is often difficult to determine whether testimony is invited or whether it is volunteered on cross-examination.

Id. at 932-33 (internal quotation marks and citation omitted).

Grider's statement that he did not manufacture meth at his home was elicited during his direct examination, so impeachment by contradiction was appropriate for this statement. Grider's statement that he did not know how to manufacture meth was elicited on cross-examination, so impeachment by

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contradiction.'" 181 F.3d at 1132 (quoting 4 Joseph M. McLaughlin, *Weinstein's Federal Evidence*, § 608.12(6)(a), at 608-41 (2d ed. 1999)). The court explained: "Rule 608(b) prohibits the use of extrinsic evidence of conduct to impeach a witness' credibility in terms of his general veracity. In contrast, the concept of impeachment by contradiction permits courts to admit extrinsic evidence that specific testimony is false, because contradicted by other evidence." *Id*.

contradiction would not ordinarily be appropriate for this statement. The distinction between manufacturing and knowing how to manufacture meth is virtually indistinguishable. A reasonable juror could conclude that a person who manufactures meth, knows how to manufacture it. We therefore conclude the rule's general application to only direct examination does not come into play here.

On appeal, Grider argues the witness's rebuttal testimony was more prejudicial than probative. *See*, *e.g.*, *id.*; *Gilmore*, 553 F.3d at 271; *United States v. Cerno*, 529 F.3d 926, 934 (10th Cir. 2008); *see also* 1 Kenneth S. Brown et al., *McCormick on Evidence* § 45 at 216 (6th ed. 2006) (noting that the Federal Rules "do [ ] not expressly mention specific contradiction as a permissible method of impeachment" but that federal courts are correct in continuing to permit resort to this technique). However, no rule 5.403 balancing argument was made to the district court. Issues must be presented to and passed upon by the district court before they can be raised and decided on appeal. *See State v. Talbert*, 622 N.W.2d 297, 300 (Iowa 2001).

Recognizing this state of affairs, Grider suggests the issue be decided under an ineffective-assistance-of-counsel rubric, because those claims are an exception to customary error preservation rules. *See State v. Ondayog*, 722 N.W.2d 778, 784 (Iowa 2006). Grider argues the witness's testimony "was of the very same crime that [Grider] was charged with, manufacturing methamphetamine. [The rebuttal witness] testified he had manufactured methamphetamine with [Grider] at [Grider's] home, the same place involved in

the charge against [Grider] in a close time proximity to the time involved in the charge."

The State counters the evidence against Grider was overwhelming. It points out that the key to Grider's garage was found hidden in his bedroom among his possessions. Among the items found in Grider's trash were empty pseudoephedrine packaging and ether. The State's pseudoephedrine log showed Grider had purchased pseudoephedrine so frequently in the Spring of 2011, he had exceeded the limits placed on such purchases. Marijuana was found in Grider's bedroom. Although the evidence may not be as "overwhelming" as characterized by the State, we conclude that even had Grider's counsel raised and made a rule 5.403 argument, the results of the proceedings would not have been any different.

On appeal, Grider does not elaborate on his argument that the witness's testimony was inadmissible under rule 5.404(b). Mention of an issue without elaboration or supportive authority is not sufficient to raise the issue for review. *See* Iowa Ct. R. 6.14(1)(c) ("Failure in the brief to state, to argue or to cite authority in support of an issue may be deemed [a] waiver of that issue."); *see also Schreiber v. State*, 666 N.W.2d 127, 128 (Iowa 2003) ("[W]hile the petitioners allude to equal protection in one sentence in their appellate brief, they do not present an argument on the issue, and it could be deemed waived."); *Soo Line R.R. v. Iowa Dep't of Transp.*, 521 N.W.2d 685, 691 (Iowa 1994) (stating "random mention of [an] issue, without elaboration or supportive authority, is insufficient to raise the issue for [reviewing court's] consideration"). Nevertheless, we agree with the State that it had a legitimate non-character

theory of admissibility for the witness's rebuttal testimony—Grider's knowledge of how to manufacture meth.

For the reasons articulated previously, the testimony's probative value was not outweighed by the danger of unfair prejudice. Accordingly, the district court did not err in admitting the testimony, and Grider's counsel was not ineffective for not raising or making a rule 5.403 argument.

C. Motion for New Trial.

Following the jury trial, Grider filed a pro se motion for new trial. The court denied his motion at a post-trial hearing, stating:

> I have reviewed your motion for new trial and your amended motion for new trial, and I don't find that they are the basis for changing the verdict of the jury and granting you a new trial. There was substantial evidence, both direct and circumstantial, for the basis of the charges that the jury could draw beyond-a-reasonable-doubt conclusions that you were involved in each of those charges, and so I'm going to overrule your motion for a new trial.

Later at the same hearing, Grider's attorney made a motion for new trial grounded in previously asserted motions in limine, motions to suppress, and "all of the various matters that were raised with the court both at the close of the evidence and prior to that." The court adhered to its rulings previously made. Later that day, the court wrote in an order, "Court overrules defendant's motion for new trial [and] to change counsel. The court incorporates its ruling from the record."

Grider now asserts the district court applied the incorrect standard in reviewing his motion for new trial based upon the court's use of the phrase "substantial evidence" in its oral ruling, rather than "contrary to evidence" or, more specifically "contrary to the weight of the evidence." *See* Iowa R. Crim. P.

2.24(2)(b)(6); *State v. Ellis*, 578 N.W.2d 655, 659 (Iowa 1998). However, neither Grider nor his counsel made a motion for new trial based on the verdict being contrary to law or evidence. Therefore, the weight-of-the-evidence standard is not applicable and the district court's superfluous reference to "substantial evidence" in denying the motion for new trial is not reversible error.

D. Pro se Claims.

Employing the "throw some mud at the wall and see what sticks" technique, Grider sets forth thirty-three statements and assertions in his pro se supplemental brief.[7] With the following in mind, we find his "arguments" are waived and warrant no relief.

Grider's pro se brief does not comply with the rules of appellate procedure in numerous respects, including not addressing error preservation, standard of review, or citing to the pertinent parts of the record.[8] Iowa R. App. P. 6.903(2)(g)(1), (2), & (3). Furthermore, most of his statements are conclusory and unsupported by authority. "When a party, in an appellate brief, fails to state, argue, or cite to authority in support of an issue, the issue may be deemed waived." *State v. Adney*, 639 N.W.2d 246, 250 (Iowa Ct. App. 2001); *see also* Iowa R. App. P. 6.903(2)(g)(3) (stating the argument section shall include "[a]n argument containing the appellant's contentions and the reasons for them with

[7] "As is generally the case, such interminable assignments [of error] instead of impressing the court with the thought of an imperfect trial, rather cast discredit upon the worth of any of them." *Shepard v. United States*, 160 F. 584, 592 (8th Cir. 1908).

[8] In a wholesale disregard for the rules of appellate procedure, Grider's pro se brief contains no certificate of compliance (rule 6.903(1)(g)(4)), no table of contents (rule 6.903(2)(a)), no table of authorities (rule 6.903(2)(b)), no routing statement (rule 6.903(2)(d)), no statement of the case (rule 6.903(2)(e)), no statement of the facts (rule 6.903(2)(f)), no conclusion (rule 6.903(2)(h)), and no request for oral or non-oral submission (rule 6.903(2)(i)).

citations to the authorities relied on and references to the pertinent parts of the record . . . [and f]ailure to cite authority in support of an issue may be deemed waiver of that issue"); *State v. McCright*, 569 N.W.2d 605, 607 (Iowa 1997); *Metro. Jacobson Dev. Venture v. Bd. of Review*, 476 N.W.2d 726, 729 (Iowa Ct. App. 1991). As noted above, random mention of an issue, without elaboration or supportive authority, is not sufficient to raise an issue for review. *Schreiber*, 666 N.W.2d at 128 (Iowa 2003). We do not consider conclusory statements not supported by legal argument. *See*, *e.g.*, *Baker v. City of Iowa City*, 750 N.W.2d 93, 103 (Iowa 2008) (holding that a party's "conclusory contention" was waived where the party failed to support it with an argument and legal authorities); *State v. Piper*, 663 N.W.2d 894, 913-14 (Iowa 2003), *overruled on other grounds by State v. Hanes*, 790 N.W.2d 545, 551 (Iowa 2010), (concluding the defendant waived consideration of the merits of his claims on appeal which were presented as one-sentence conclusions without analysis); *McCleeary v. Wirtz*, 222 N.W.2d 409, 417 (Iowa 1974) (holding that a "subject will not be considered" where a "random discussion" is not supported by a legal argument and citation to authority); *see also Brown v. Allen*, 344 U.S. 443, 537 (1953) ("One who must search a haystack for a needle is likely to end up with the attitude that the needle is not worth the search."); *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) ("[a] skeletal 'argument', really nothing more than an assertion, does not preserve a claim. . . . Judges are not like pigs, hunting for truffles buried in briefs."). In the few instances where Grider does cite authority, he failed to preserve error on appeal because the district court did not rule on the issues. *See Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) ("It is a fundamental

doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal.").

Pro se or not, parties to an appeal are expected to follow applicable rules. It has long been the rule that procedural rules apply equally to parties who are represented by counsel and to those who are not. *In re Estate of DeTar*, 572 N.W.2d 178, 180 (Iowa Ct. App. 1997) ("Substantial departures from appellate procedures cannot be permitted on the basis that a non-lawyer is handling [his of] her own appeal."). Pro se parties receive no preferential treatment. *Hays v. Hays*, 612 N.W.2d 817, 819 (Iowa Ct. App. 2000). "The law does not judge by two standards, one for lawyers and the other for lay persons. Rather, all are expected to act with equal competence. If lay persons choose to proceed pro se, they do so at their own risk." *Metro. Jacobson Dev. Venture*, 476 N.W.2d at 729. Although this may seem harsh to a pro se litigant, it is justified by the notion that appellate judges must not be cast in the role of advocates for a party who fails to comply with court rules and inadequately presents an appeal. *See Piper*, 663 N.W.2d at 913-14.

For the above reasons, we do not consider Grider's pro se arguments. To set forth those arguments here would serve no useful purpose.

III. Conclusion.

We find Grider's claims of ineffective assistance of counsel unpersuasive. Error, if any, in the admission of the witness's rebuttal testimony was not unfairly prejudicial. The district court did not err in denying Grider's motion for new trial. Grider's pro se claims on appeal are waived. We affirm Grider's convictions.

AFFIRMED.