IN THE COURT OF APPEALS OF IOWA

No. 3-739 / 12-0739
Filed August 21, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

THINH VAN QUANG,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Mary Pat Gunderson, Judge.

Appellant appeals his convictions for conspiracy to manufacture methamphetamine, manufacturing methamphetamine, possession of lithium, and possession of methamphetamine with intent to deliver. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Andrew Tullar of Tullar Law Firm, P.L.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Elisabeth Reynoldson and Katie Fiala, Assistant Attorneys General, John P. Sarcone, County Attorney, and Joseph Crisp, Assistant County Attorney, for appellee.

Considered by Mullins, P.J., Bower, J., and Huitink, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2013).

HUITINK, S.J.

I. Background Facts & Proceedings.

The evidence presented in this case could support the following factual findings. On May 15, 2011, at about 3:00 a.m., police officers and firefighters responded to a report of a fire at a home in Des Moines. When they arrived they saw Thinh Quang attempting to put out the fire with a garden hose. During an investigation officials determined the fire started as the result of manufacturing methamphetamine. Items used in the manufacture of methamphetamine were found in the home, such as empty pseudoephedrine packages, lithium batteries, muriatic acid, propane, and coffee filters. The residents of the home were Quang, La Lovan, Donna Waldron, and Luong Kei.

Officers found a digital scale, an empty battery package, and empty pseudoephedrine packages in Quang's bedroom. A magazine with pages ripped out was found in Quang's room. Methamphetamine packaged in strips of paper, similar to that of the magazine, was found in a vehicle at the residence. Additionally, Quang had black stains on his hands. There was evidence that stripping lithium from battery packs could lead to this staining.

Waldron, a codefendant, testified she used methamphetamine. She stated Quang asked her to buy pseudoephedrine for him and in exchange she would receive methamphetamine. She stated she purchased pseudoephedrine for Quang between December 2010 and May 2011. Waldron testified she had personally observed Quang manufacturing methamphetamine. Waldron also stated she observed Quang offer to sell methamphetamine to people who came

to the house. Waldron testified that in exchange for testifying in Quang's case the State had agreed to recommend probation in her own criminal case.

A jury found Quang guilty of conspiracy to manufacture methamphetamine, in violation of Iowa Code section 124.401(1)(b)(7) (2011); manufacturing methamphetamine, in violation of section 124.401(1)(b)(7); possession of lithium with intent to manufacture a controlled substance, in violation of section 124.401(4); and possession of a controlled substance with intent to deliver, in violation of section 124.401(1)(c)(6). The district court sentenced Quang to a total term of imprisonment of forty years. Quang now appeals his convictions and sentences.

II. Cross-Examination.

During Waldron's cross-examination, defense counsel asked if she would have been facing a mandatory prison sentence if convicted of the offenses she had been charged with. The prosecutor objected. The court ruled the jury was not to be given any information about specific sentences faced by either Waldron or Quang. The court stated it was concerned that if the jury was informed Waldron was facing a mandatory prison sentence then it would speculate that Quang was facing the same. The court determined defense counsel could ask Waldron whether she had been facing prison time but could not ask her about a mandatory prison sentence. When Waldron's cross-examination continued, she testified she had been facing the possibility of prison time, but because she agreed to testify in Quang's trial, the State agreed to recommend probation.

Quang contends he was not able to fully cross-examine Waldron about her plea agreement with the State. He asserts the court's ruling limiting his

cross-examination violated his rights under the Confrontation Clauses of the United States and Iowa Constitutions. *See* U.S. Const. amend. VI; Iowa Const. art. I, § 10.

Our review of claims based on the Confrontation Clause is de novo. *State v. Newell*, 710 N.W.2d 6, 23 (Iowa 2006). On the other hand, when "a defendant has been allowed to elicit testimony from the accomplice that he has received a plea agreement in exchange for testifying, but is prohibited from inquiring into the specific penalties the accomplice may have faced without the plea-agreement, it has been held review should be for abuse of discretion." *State v. Runyan*, 599 N.W.2d 474, 479 (Iowa Ct. App. 1999). This case does not involve a situation where a defendant was entirely denied his right to confrontation and where a constitutional error is involved. *See id.* at 478-79. We conclude our review is for an abuse of discretion. There is an abuse of discretion when a court exercises its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *State v. Sackett*, 499 N.W.2d 312, 313 (Iowa Ct. App. 1993).

In general, "[a] defendant should be permitted wide latitude in seeking to show bias of an alleged accomplice who testified for the prosecution." *State v. Armento*, 256 N.W.2d 228, 229 (Iowa 1977). A witness's awareness of the possible penalties that witness might be facing is relevant on the issue of bias. *State v. Horn*, 282 N.W.2d 717, 728 (Iowa 1979). Our supreme court has stated:

> The rule is unquestioned that a defendant may inquire about the concessions the accomplice hopes to receive or has been promised for his testimony, and where the State has gone so far as to enter into a bargain with the accomplice the defendant must be allowed to inquire about the terms of the bargain so that the jury may better understand the possible motivations of the accomplice as he sits on the stand.

State v. Donelson, 302 N.W.2d 125, 131 (Iowa 1981).

The Iowa Supreme Court has also stated, however, if a jury did not know precisely what a witness believed the penalty would be for the charges against that witness, this "could not materially have affected the jury's impression of his motivation in testifying for the State." *Armento*, 256 N.W.2d at 230. In other cases as well, appellate courts have determined a defendant was not prejudiced even though the scope of cross-examination was limited on the issue of the penalties a witness would have faced prior to an agreement with the State. *See Horn*, 282 N.W.2d at 728; *Runyan*, 599 N.W.2d at 481; *Sackett*, 499 N.W.2d at 315; *Luke v. State*, 465 N.W.2d 898, 905 (Iowa Ct. App. 1990); *but see Donelson*, 302 N.W.2d at 131.

We determine Quang has not shown he was prejudiced by the court's ruling. Even though Waldron did not testify to the specific number of years in prison she was facing, or that she was facing a mandatory prison term, it would have been clear to the jury she received a highly favorable plea bargain with the State. We determine the additional information "was of little importance as the withheld information was of little, if any, additional impeachment value in light of the defense's utilization of the known terms of the agreement for impeachment purposes." *See State v. Frazier*, 559 N.W.2d 34, 42 (Iowa Ct. App. 1996). We conclude Quang has not shown he is entitled to a new trial based on the court's ruling.

III. Pharmacy Records.

Prior to trial the State indicated it intended to present as an exhibit an Iowa Pseudoephedrine Transaction Log showing purchases of pseudoephedrine by Quang, Lovan, and Waldron between August 2010 and May 2011. Under section 124.212A, a pharmacy is required to enter information about each person purchasing pseudoephedrine in an electronic logbook. That information is kept in an electronic repository by the Governor's Office of Drug Control Policy (Office). Iowa Code § 124.212B. The exhibit in this case contained information obtained from the electronic repository.

Quang objected to the exhibit on the grounds of foundation, hearsay, and the Confrontation Clause. The district court ruled the State did not need to have a person from the Office testify about the records. Prior to trial, the court determined that under the Confrontation Clause, Quang could question pharmacists who entered the type of information that went into the central repository. The State then presented the testimony of sixteen pharmacists, from each of sixteen different pharmacies in the Des Moines area, who testified about their general practice in obtaining information about people who purchase pseudoephedrine and putting that information into an electronic logbook. The information obtained from the Office showed either Quang, Lovan, or Waldron had purchased pseudoephedrine at these sixteen locations.

Quang then renewed his objection to the exhibit. On the issue of hearsay, the district court determined the exhibit was admissible under Iowa Rule of Evidence 5.803(6), the business records exception. On the issue of the Confrontation Clause, the court found the records contained in the exhibit were

testimonial in nature. The court noted Quang was able to cross-examine each of the pharmacists who testified about the records, and this satisfied his rights under the Confrontation Clause. On the issue of foundation, the court found the records were regularly kept in the course of business by each pharmacy and it was not necessary to bring anyone in from the Office for the records to be admissible.

A. On appeal, Quang argues the State did not present a sufficient foundation for the Iowa Pseudoephedrine Transaction Log showing purchases of pseudoephedrine by Quang, Lovan, and Waldron to be admissible. He points out that none of the sixteen pharmacists testified they had personally sold pseudoephedrine to him. He also points out that no one from the Office testified about the records. We review a district court's decision determining whether a party has established a proper foundation for an exhibit for an abuse of discretion. *State v. Musser*, 721 N.W.2d 734, 750 (Iowa 2006).

Iowa Rule of Evidence 5.901(a) provides the requirement of authentication "is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Pharmacies are required by law to collect information about each person who purchases pseudoephedrine. Iowa Code § 124.212A. Sixteen pharmacists representing pharmacies where pseudoephedrine had been purchased by Quang, Lovan, or Waldron testified about their practice in implementing this requirement. The information generated by these pharmacies was placed in a central repository, and pertinent portions were retrieved for use as an exhibit in this case. *See id.* § 124.212B. We conclude the district court did not abuse its discretion in determining the State

presented sufficient evidence to show the exhibit was what the State purported it to be.

B. Quang also claims the exhibit was inadmissible hearsay. He asserts the State did not adequately show the exhibit came within the business records exception to the hearsay rule found in Iowa Rule of Evidence 5.803(6) because no one from the Office testified that the records were kept in the course of a regularly conducted business activity. We review claims of hearsay for the correction of errors at law. *State v. Paredes*, 775 N.W.2d 554, 560 (Iowa 2009).

In order for evidence to be admissible under the business records exception to the hearsay rule a party must show: (1) it is a business record; (2) it was made at or near the time of an act; (3) it was made by, or from information transmitted by, a person with knowledge; (4) it was kept in the course of a regularly conducted business activity; and (5) it was the regular practice of that business activity to make such a business record. *State v. Reynolds*, 746 N.W.2d 837, 841 (Iowa 2008).

The testimony of the sixteen pharmacists established that as part of their business they made a record of each sale of pseudoephedrine; the record was made at the time of the sale; the record was made by the person making the sale; the records were kept in the course of a regularly conducted business activity, and was in fact required by law; and it was their regular practice to make these records. These records were generated by the pharmacies, and the State presented evidence from each pharmacy to establish the records met the requirements to come within the business records exception. The Office merely kept information generated by others; as section 124.212B provides, it serves as

an "electronic repository."[1] We determine testimony by someone from the Office was not necessary to establish the exhibit came within the business records exception. We conclude the district court did not err in determining the State had adequately established the foundational elements for the Iowa Pseudoephedrine Transaction Log to be admissible under the business records exception found in rule 5.803(6).

C. Quang furthermore contends the exhibit was inadmissible under the Confrontation Clause because the information in the exhibit was testimonial in nature and he did not have the opportunity to cross-examine each person who provided information contained in the exhibit. As noted above, our review of claims based on the Confrontation Clause is de novo. *Newell*, 710 N.W.2d at 23.

The Confrontation Clause protects the right to in-person confrontation at trial and the right to cross-examination. *Musser*, 721 N.W.2d at 753. "An out-of-court statement by a witness that is testimonial in nature is barred under the Confrontation Clause unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness." *Id.* However, the Confrontation Clause does not apply to nontestimonial statements. *Id.*

We disagree with the district court's determination the information concerning purchases of pseudoephedrine was testimonial in nature. Like the abstract of a driving record at issue in *State v. Shipley*, 757 N.W.2d 228, 237

[1] Because the information is kept by the Office in an electronic repository, it is possible that information obtained from the repository would be fully automated and involve no human declarant, in which case it would not be hearsay. *See Reynolds*, 746 N.W.2d at 843. We distinguish this from the information from the pharmacies, which involves a human declarant putting the information into the electronic logbook. We believe the hearsay rule clearly applies to this first step, the generation of the information placed into the electronic repository. It is less clear the hearsay rule even applies to the second step, obtaining information out of the electronic repository.

(Iowa 2008), the records here were created prior to the events leading up to Quang's criminal prosecution. The records of the sales of pseudoephedrine would have existed even if there had been no criminal prosecution. *See Shipley*, 757 N.W.2d at 237. The pharmacists were statutorily required to make a record at the time of each sale of pseudoephedrine. *See* Iowa Code § 124.212A. Thus, the records would exist whether or not the State decided to prosecute Quang.

The pharmacists who entered the information showing the sales of pseudoephedrine could not be considered witnesses against Quang because there was no prosecution at the time the entries were made. *See Shipley*, 757 N.W.2d at 237. "They were simply [ ] workers with no axe to grind who performed their routine, ministerial tasks in a nonadversarial setting pursuant to a statutory mandate." *Id.* The pharmacists were following their statutorily mandated duties, not attempting to generate evidence to use in a possible criminal prosecution at some point in the future. We conclude, because the records were nontestimonial in nature, the Confrontation Clause does not apply.[2]

The next question is whether the Iowa Pseudoephedrine Transaction Log, which gathered out of the electronic repository information concerning purchases of pseudoephedrine by Quang, Lovan, and Waldron, was testimonial in nature. The exhibit was created for use in the criminal prosecution against Quang. In *Shipley*, the Iowa Supreme Court determined an abstract of a defendant's driving

[2] We have considered the United States Supreme Court case of *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 329 (2009), but it does not change our conclusion. That case involved laboratory reports showing a seized substance was cocaine. *Melendez-Diaz*, 557 U.S. at 308. The sole purpose of the laboratory reports was to provide evidence for use in the criminal prosecution against the defendant. *Id.* at 310. It was clear, therefore, that the reports were testimonial in nature and the Confrontation Clause applied. *Id.* at 311.

record, entered into evidence without testimony from a witness from the Iowa Department of Transportation, did not violate the Confrontation Clause because the abstract was merely a true and accurate copy of a document that existed in a government data bank prior to the commencement of the criminal proceedings in that case. *Id.* at 238-39. Also, the driving records were available for purposes other than criminal prosecution. *Id.* at 239.

These same factors are present here. The Iowa Pseudoephedrine Transaction Log was a copy of information that would have otherwise existed in the electronic repository. Additionally, the information contained in the electronic repository was available for purposes other than criminal prosecutions. *See* Iowa Code § 124.212B(3) (providing a pharmacy has access to the information that pharmacy had previously placed in the repository). By being able to access this information, a pharmacist could decline to make a sale that would place a person over the permissible limit of pseudoephedrine purchases. *See id.* § 124.213 (limiting the amount of pseudoephedrine a person may purchase in a twenty-four hour period and a thirty-day period). We conclude there was no Confrontation Clause violation in the present case.

IV. Jury Instruction.

Quang claims the district court erred by not giving his proposed jury instruction on reasonable doubt. His proposed instruction provided:

> The burden is on the State to prove Mr. Quang guilty beyond a reasonable doubt.
>
> A reasonable doubt is one that fairly and naturally arises from the evidence in the case, or from the lack or failure of evidence produced by the State.
>
> A reasonable doubt is a doubt based upon reason and common sense, and not the mere possibility of innocence. A

> reasonable doubt is the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt, therefore, must be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it. However, proof beyond a reasonable doubt does not mean proof beyond all possible doubt.
>
> If, after a full and fair consideration of all the evidence, you are firmly convinced of the defendant's guilt, then you have no reasonable doubt and you should find the defendant guilty.
>
> But if, after a full and fair consideration of all the evidence in the case, or from the lack or failure of evidence produced by the State, you are not firmly convinced of the defendant's guilt then you have a reasonable doubt and you should find the defendant not guilty.

This instruction is based on Iowa Criminal Jury Instruction 100.10.

The district court did not give Quang's proposed instruction on reasonable doubt. Instead, the court gave the instruction requested by the State, as follows:

> The State has the burden of proving the defendant guilty beyond a reasonable doubt. A reasonable doubt is one that clearly and naturally arises from the evidence or lack of State's evidence in the case. If, after a full and fair consideration of all the evidence in the case, you are firmly convinced of the defendant's guilt then you may be said to have no reasonable doubt, and you should find the defendant guilty. But if, after full and fair consideration of all the evidence or lack of the State's evidence in the case, you are not firmly convinced of the defendant's guilt, then you have a reasonable doubt and you should find the defendant not guilty.

We review a district court's ruling on a challenge to jury instructions for the correction of errors at law. *State v. Frei*, 831 N.W.2d 70, 73 (Iowa 2013). "We review the related claim that the trial court should have given the defendant's requested instructions for an abuse of discretion." *Id*.

The Iowa Supreme Court has determined there was no error in giving the instruction on reasonable doubt that was given in this case. *See State v. McFarland*, 287 N.W.2d 162, 163 (Iowa 1980) (finding, "[t]his instruction is adequate"). More recently, the court again addressed the issue in *Frei*, 831

N.W.2d at 76-78, where the instruction on reasonable doubt was very similar to the instruction given in this case and to the instruction given in *McFarland*. The court determined there was no error in giving this instruction. *Frei*, 831 N.W.2d at 79. We conclude the district court did not err in instructing the jury on reasonable doubt.

V. Motion for New Trial.

Quang asserts the district court should have granted his motion for new trial. He filed a motion for new trial on March 5, 2012. The matter was set for a hearing on March 12, 2012, and then continued to April 13, 2012. Before the hearing on his motion for new trial was held, however, the sentencing hearing was held on April 3, 2012, and the sentencing order was entered that day. Quang never obtained a ruling on his motion for new trial. He filed a notice of appeal on April 23, 2012.

The State claims Quang has failed to preserve error on this issue because he did not obtain a ruling on his motion for new trial prior to filing his notice of appeal. By filing his notice of appeal, Quang stripped the district court of jurisdiction to consider his motion for new trial. *See State v. Williams*, 285 N.W.2d 248, 266 (Iowa 1979). "A motion not ruled on in the trial court, where there has been no request or demand for ruling, preserves no error." *State v. Schiernbeck*, 203 N.W.2d 546, 547 (Iowa 1973). Because there is nothing for us to review, Quang has not preserved error on this issue. *See State v. Manna*, 534 N.W.2d 642, 644 (Iowa 1995).

VI. Merger of Offenses.

Quang contends he should not have been convicted of conspiracy to manufacture methamphetamine and manufacturing methamphetamine. Section 706.4 provides, "A conspiracy to commit a public offense is an offense separate and distinct from any public offense which might be committed pursuant to such conspiracy. A person may not be convicted and sentenced for both the conspiracy and public offense."

Quang claims he received an illegal sentence because the court did not merge the sentences for these offenses. An illegal sentence may be challenged at any time. *See State v. Lathrop*, 781 N.W.2d 288, 293 (Iowa 2010). We review a claim of an illegal sentence based on merger for the correction of errors at law. *State v. Anderson*, 565 N.W.2d 340, 342 (Iowa 1997).

"Section 706.4 expressly prohibits multiple punishments for a conspiracy to commit a public offense and any public offense that might be committed pursuant to such conspiracy." *State v. Reed*, 618 N.W.2d 327, 336 (Iowa 2000). The statute operates to prevent a defendant from being twice punished for the same conduct. *See State v. Cartee*, 577 N.W.2d 649, 654 (Iowa 1998). The statute "implicitly assume[s] that the public offense of which the defendant was convicted would be the same public offense of which the defendant had been convicted of conspiring to commit." *State v. Smith*, 476 N.W.2d 86, 91 (Iowa Ct. App. 1991). Section 706.4 does not apply where a defendant has been convicted of two separate and distinct offenses. *Cartee*, 577 N.W.2d at 654.

The State claims Quang could be convicted of conspiracy to manufacture methamphetamine and manufacturing methamphetamine because there is

evidence to show he committed two separate offenses. The State claims Quang engaged in conspiracy to manufacture methamphetamine when he entered into an agreement with Waldron that if she provided him with pseudoephedrine he would provide her with methamphetamine. The State claims Quang was engaged in a separate offense of manufacturing methamphetamine at the time his residence caught on fire.

We note the trial information charged Quang with conspiracy to manufacture methamphetamine in the time period between August 2010 through May 15, 2011, in violation of section 124.401(1)(b)(7). The charge of manufacturing methamphetamine claims the offense occurred on or about May 15, 2011, in violation of the same code section, section 124.401(1)(b)(7). Thus, Quang was charged with two means of violating the same code section.[3] Based on the trial information and the evidence presented, we conclude the charge of conspiracy to manufacture methamphetamine and the charge of manufacturing methamphetamine referred to the same conduct. We determine that under section 706.4, Quang may not be convicted and sentenced for both the conspiracy and the public offense.

We conclude Quang should be convicted and sentenced solely on the substantive offense of manufacturing methamphetamine. *See State v. Waterbury*, 307 N.W.2d 45, 52 (Iowa 1981) (holding where a defendant is convicted of both conspiracy to commit an offense and the same substantive

[3] *See also State v. Maghee*, 573 N.W.2d 1, 7 (Iowa 1997) ("Likewise, here, the conspiracy count was an alternative means of violating Iowa Code section 124.401(1), our present drug trafficking statute. Thus, Maghee could only be sentenced for a single offense, a violation of section 124.401(1).").

offense, the defendant should be convicted and sentenced solely on the substantive offense). We remand for a new judgment entry and a new sentencing order.

VII. Sentencing.

Quang claims the district court did not give adequate reasons on the record for imposing consecutive sentences. The district court sentenced him to a term of imprisonment not to exceed twenty-five years on the conspiracy and manufacturing charges, to be served concurrently. He was also sentenced to a term not to exceed five years on the possession of lithium charge, and ten years on the possession with intent to deliver charge, each to be served consecutively to the other charges.

We review a district court's sentencing decision for an abuse of discretion. *State v. Barnes*, 791 N.W.2d 817, 827 (Iowa 2010). Iowa Rule of Criminal Procedure 2.23(3)(d) requires a court to state on the record its reasons for selecting a particular sentence. "Although the reasons need not be detailed, at least a cursory explanation must be provided to allow appellate review of the trial court's discretionary action." *Id.*

In this case, the district court stated at the sentencing hearing that it was imposing consecutive sentences based on Quang's prior criminal history, the seriousness of the offense, the amount of drugs he was manufacturing, and the gravity of the crime. We conclude the court adequately conveyed its reasons for sentencing Quang to consecutive sentences. *See id.*

We affirm Quang's convictions for manufacturing methamphetamine, possession of lithium with intent to manufacture a controlled substance, and

possession of a controlled substance with intent to deliver. We determine the case should be remanded for a new judgment entry dismissing the conviction for conspiracy to manufacture methamphetamine due to merger, and a new sentencing order should be issued.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.