

IN THE COURT OF APPEALS OF IOWA

No. 0-168 / 09-0740
Filed April 21, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DANIEL RUSSELL PHILP,
Defendant-Appellant.

Appeal from the Iowa District Court for Lee (South) County, Mary Ann Brown, Judge.

Daniel Russell Philp appeals his conviction for conspiracy to manufacture more than five grams of methamphetamine. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Stephan Japuntich, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kyle Hanson, Assistant Attorney General, and Michael Short, County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Potterfield and Mansfield, JJ.

MANSFIELD, J.

Daniel Russell Philp appeals from the judgment and sentence entered upon a jury verdict finding him guilty of conspiracy to manufacture more than five grams of methamphetamine in violation of Iowa Code section 124.401(1)(b)(7) (2007). Philp contends the evidence is insufficient to show a mutual understanding as required to sustain a conviction for conspiracy. Philp also alleges errors in his trial counsel's failure to request a curative instruction after the district court reversed itself on the admission of an exhibit, and in the admission of testimony and exhibits pertaining to other persons' purchases of pseudoephedrine products. For the reasons set forth herein, we affirm.

I. Background Facts and Proceedings.

On November 15, 2008, Michael Onofrietti was stopped for a traffic offense by a state trooper in Lee County. The officer arrested Onofrietti for driving while under suspension and also based upon an outstanding Illinois arrest warrant. While detained in the Lee County jail, Onofrietti sought leniency by requesting to speak with investigators from the Lee County Narcotics Task Force regarding a possible methamphetamine manufacturing operation.

Onofrietti told investigators that Randy Englebrecht was operating a methamphetamine lab on property rented from his daughter, Ashley Englebrecht, located at 2217 300th Street in Montrose. Based on the information provided by Onofrietti, the Lee County Narcotics Task Force obtained a search warrant for the Englebrecht property.

On November 16, 2008, the Task Force executed the warrant. When the Task Force arrived, Philp was standing in the front yard. Philp was immediately

detained along with two others on the property, Jeffrey Squire and Sabrina Wurster.

The Englebrecht property consists of a two-level home, an attached garage, and a large barn. The search of each of these buildings revealed multiple items consistent with the manufacturing of methamphetamine.

Within the residence, the officers began their search in the kitchen. On the kitchen table, officers discovered a plate which tested positive for the presence of methamphetamine, five or six “foilies” or aluminum foil strips used to ingest methamphetamine, and a tooter straw used to snort or breathe in methamphetamine. The kitchen also contained plastic bags with twisting on the top indicative of distribution, a pitcher with a white crud substance, a wooden spoon, coffee filters, all-purpose masks, and multiple copies of a local police interview containing the name of a possible “snitch.”

A secondary bedroom contained a marijuana pipe and Sabrina Wurster’s purse. In Sabrina’s purse, officers found marijuana and a small black pouch containing packaging materials.

An open box of pseudoephedrine pills and a bottle of liquid fire (a form of sulfuric acid) was found in the bathroom. The liquid fire was within a plastic bag to prevent spilling while being transported.

Within the master bedroom the officers discovered three hydrogen chloride generators with white residue. The officers also found aquarium tubing run through pop bottle caps, two large canisters of salt, camp fuel, aluminum foilies, used and unused coffee filters, two empty mason jars, a jar full of camp fuel, and two plates which field-tested positive for methamphetamine. Within the

master bedroom closet, officers also found four plastic bags containing a blue liquid and an Igloo cooler holding a pitcher with white residue, a wooden spoon, liquid fire within a plastic bag, and additional coffee filters. A dresser in the master bedroom also contained Randy Englebrecht's wallet, a receipt for pseudoephedrine, mail addressed to Randy Englebrecht, and two digital scales.

In the basement of the residence, officers uncovered more camp fuel and a green duffel bag containing aquarium tubing with a connected pop bottle top, coffee filters, plastic bags, lithium batteries, and two wrenches. The basement also had a workbench that was strewn with used coffee filters, plastic bags, foilies, and a wooden spoon covered in white residue. Two blue coolers also housed additional plastic bags, aquarium tubing, coffee filters, and a wrench.

In the attached garage, the officers found another Igloo cooler that contained multiple stripped lithium batteries. A trash bag also contained three empty boxes, one empty blister pack of pseudoephedrine, and a bike wheel inner-tube thought to be used for stealing or siphoning out anhydrous ammonia from farmers' fertilizer tanks.

The officers then searched the large barn, which revealed a cooler containing another pitcher with white residue, a wooden spoon, and coffee filters. The officers also found several empty and rusted cans of camp fuel and starting fluid. The starting fluid cans had holes punched in the bottom to drain out the liquid ether. In addition, part of the barn interior was hidden by a blue tarp. Behind the tarp, officers found a makeshift table with installed lighting. Near the table, an LP tank with an altered fitting was found in a green camouflage bag. Anhydrous ammonia could be smelled leaking from the tank; therefore, officers

took the tank outside the barn and fired at it to dissipate the gas into the atmosphere. Under the table, officers found a red bag containing more coffee filters and aquarium tubing, as well as a yellow crate containing an empty coffee bean grinder box, a plastic bag filled with a white crud substance, a plastic bag filled with stripped lithium battery casings, an empty pseudoephedrine box, and oxidized lithium metal strips. Behind the barn, officers also found a burn pile with a half burnt can of camp fuel and other pieces of trash.

Based upon the evidence found during the search and additional information provided by Onofrietti, the State charged Philp by trial information with conspiracy to manufacture more than five grams of methamphetamine pursuant to Iowa Code section 124.401(b)(7). The State also sought a penalty enhancement under section 124.411 since Philp had previously been convicted of possession of precursors with intent to manufacture in 2003. The case went to trial beginning February 17, 2009.

At trial, Officer Brian DePriest, Field Supervisor for the Lee County Narcotics Task Force, testified to the physical evidence found during the search of the Englebrecht property. Officer DePriest also stated that the smell of ether or camp fuel "was very strong" and could be smelled "anywhere in the residence." According to Officer DePriest, the smell was so pungent that even though it was a cool November day, the officers "had to leave the doors open" during the search. In addition, Officer DePriest opined that based on the multitude of physical evidence found on the Englebrecht property, methamphetamine had been manufactured on the property "for quite some time," and that there had been "multiple" methamphetamine cooks. He further opined

that the methamphetamine manufacturing performed at the Englebrecht residence would have required “a large supply” of pseudoephedrine, and that “pill-gathering schemes” are often used so manufacturers “can stay off the radar” on their pseudoephedrine purchases.

The State then elicited the testimony of Amber Clay, a correctional officer at the Lee County Sheriff’s Office. Officer Clay testified that on January 20, 2009, Philp asked her to deliver a chess game to Randy Englebrecht, who was being held in a separate cell block. Officer Clay explained that before delivering the game to Englebrecht, she went through it and found a note “in between the board.” Officer Clay testified that when she discovered the note, Randy Englebrecht told Philp out loud that “he just got busted.” Philp replied that he was not aware what had been taken. Randy Englebrecht then stated that Philp “should have waited until later,” to which Philp once again replied that he didn’t know anything. The State then attempted to enter the note into evidence, but Philp’s objection based on relevancy was sustained.

After the sustained objection, the State moved on to the testimony of Sara Holvoet, a pharmacist at a local Wal-Mart. Holvoet testified that Philp’s driver’s license listed his address as 2217 300th Street in Montrose (the same address as the Englebrecht property), and that from August 23, 2008, through November 14, 2008, Philp purchased five packages of pseudoephedrine. Holvoet further testified about pseudoephedrine purchases made by Ashley Englebrecht, Randy Englebrecht, Sabrina Wurster, and Mike Onofrietti. On

cross-examination, Holvoet admitted that all the purchases by Philp and the other individuals were made “in a legal fashion.”¹

The State’s next witness was Michael Onofrietti. Onofrietti testified that beginning around September 2008, he began working for Randy Englebrecht performing handyman projects in the large barn located on the Englebrecht property. Onofrietti testified that in the far corner of the large barn a blue tarp enclosed an area where he was not allowed to be. In this area, Onofrietti noticed a “strong smell of ammonia on occasion . . . [m]aybe biweekly.” Onofrietti also stated that on a “couple of occasions [he] was actually out there in the barn while they (Philp and Randy Englebrecht) were in there,” and that he could smell odors emanating from the area behind the blue tarp during those times. Onofrietti further stated that the only people he ever saw go behind the blue tarp in the large barn were Philp and Randy Englebrecht, and that “if one of them was behind there, usually both of them were behind there.”

Onofrietti further testified that on one occasion, he overheard Randy Englebrecht say that he was going to be “whipping up a batch,” but that he was “waiting for Mr. Philp to get off work.” Onofrietti also overheard a conversation between Philp and Randy Englebrecht regarding obtaining anhydrous ammonia from farmers because “they needed to stock up for the winter.”

Onofrietti also admitted to helping purchase pseudoephedrine for Randy Englebrecht “quite a few” times and that on each occasion Randy Englebrecht

¹ Iowa Code sections 124.212(4) and 124.213 restrict the amount of pseudoephedrine any individual can purchase from a pharmacy or retailer during certain prescribed time periods.

gave him fifty dollars per box. Onofrietti stated that he was first approached about buying pills by his roommate at the time, Miranda Graham.

At this time, the State reoffered the note on the mistaken claim that the note was passed on January 23, 2009, the same day Philp sat in on Onofrietti's deposition. Philp again objected to the note on relevancy grounds, but was overruled. After the note was admitted, the State moved to a new line of questioning, and did not have the note read or published to the jury.

On cross-examination, it was clarified that the attempt to pass the note actually occurred on January 20, 2009. Again, the note was not read or published to the jury. Eventually, a morning recess was taken. Following the recess, the trial court reversed its earlier ruling and withdrew the note from evidence. The trial court informed the jury:

Before we resume with [defense counsel's] continued cross-examination, I'm going to change my earlier ruling and I'm going to sustain the objection to State's Exhibit 129 being admitted into evidence and 129 will not be in evidence.²

When cross-examination resumed, Onofrietti stated that he never actually saw Philp manufacture methamphetamine, but that he saw Philp and Randy Englebrecht behind the tarp and would smell ammonia shortly thereafter.

² The note apparently stated:

OK M [Michael Onofrietti] going to say we stayed the night there which we say yes but not Saturday to Sunday. We stayed Friday to Saturday and we went home Saturday night came back Sunday morning. We left M out there to finish up dumpsters which he did not do. You fired him after we pick him up walking down the highway. So you told him you'd pay him if he finished up the dumpster so he could have some money.

But about the day he says and we say see he do [not] even know what days are what because he too high.

According to Onofrietti, when he would smell ammonia, he would leave the barn because the odor bothered his asthma.

Following Onofrietti's testimony, the State offered the pseudoephedrine purchase log of Miranda Graham. Philp's objection based on relevancy was overruled.

The State's next witness was Nila Bremer, a criminalist from the drug identification section of the Iowa Department of Criminal Investigations Laboratory. Bremer testified that the items and substances found at the Englebrecht residence were consistent with the manufacturing of methamphetamine using the lithium ammonia reduction method. Bremer stated that several items found on the Englebrecht property contained detectable and sizable amounts of substances consistent with the manufacturing of methamphetamine, including the pitchers, coffee filters, and the blue liquid found in the master bedroom. Bremer also opined that the pseudoephedrine purchases made by Philp alone could yield between approximately 1.5 grams and 5.5 grams of pure methamphetamine.

The State's final witness was Officer Isaac Skinner, an investigator for the Lee County Task Force. Officer Skinner testified that he reviewed the pseudoephedrine purchase logs for Philp, Ashley Englebrecht, Randy Englebrecht, Sabrina Wurster, Michael Onofrietti, and Miranda Graham, and noted "clustering" in their purchases. Accordingly, he opined "these people were gathering pills . . . so they could then prepare for a cook."

Philp presented one witness in his defense, his mother, Pearl Philp. Pearl testified that Philp was at the Englebrecht property on November 15, 2008, to cut

down a tree. Pearl further stated that she recommended that Philp use pseudoephedrine because he had “been suffering with a clogged nose and his chest is constantly coughing, coughing, coughing.” Pearl also testified Philp listed his address as the Englebrecht property because he was dating Ashley; however, Philp was living with her on a “consistent basis” from August until November 2008.

The case was submitted to the jury, and on February 19, 2009, Philp was found guilty of conspiracy to manufacture more than five grams of methamphetamine. Following the verdict, Philp admitted to his previous conviction for the purposes of the enhancement provision. On April 6, 2009, Philp was sentenced to a term of incarceration not to exceed thirty years subject to the mandatory minimum requirements of Iowa Code section 124.413. Philp appeals.

II. Sufficiency of the Evidence.

Philp argues the evidence does not establish that he entered into an agreement to manufacture methamphetamine as required to support his conspiracy conviction. We review challenges to the sufficiency of the evidence for correction of errors at law and will uphold the jury’s verdict if supported by substantial evidence. *State v. Nitcher*, 720 N.W.2d 547, 556 (Iowa 2006). Evidence is substantial if it “can convince a rational jury that the defendant is guilty beyond a reasonable doubt.” *Id.* We review the evidence in the light most favorable to the State, including all legitimate inferences and presumptions that may fairly and reasonably be deduced from the record. *State v. Casady*, 597 N.W.2d 801, 804 (Iowa 1999). Direct and circumstantial evidence are equally

probative. *State v. Speicher*, 625 N.W.2d 738, 741 (Iowa 2001). However, the inferences drawn must raise a fair inference of guilt and do more than raise only suspicion, speculation, or conjecture. *Id.*

An agreement to form a conspiracy may be described as a “concert of free wills,” “union of the minds of at least two persons,” and “a mental confederation involving at least two persons.” *State v. Fintel*, 689 N.W.2d 95, 102 (Iowa 2004). “Since a conspiracy is by nature clandestine, it will often rest upon circumstantial evidence and inferences drawn from that evidence.” *State v. Corsi*, 686 N.W.2d 215, 219 (Iowa 2004). Thus,

[a]n agreement that, because of its purpose or the means contemplated, amounts to a conspiracy need not be formal or express, but may be a tacit understanding; the agreement may be inherent in and inferred from the circumstances, especially declarations, acts, and conduct of the alleged conspirators.

Casady, 597 N.W.2d at 805 (citations omitted). However, circumstantial evidence that proves mere presence at the scene of the crime or association with those involved in the crime is not sufficient to show an agreement. *Speicher*, 625 N.W.2d at 742-43. To determine whether a conspiracy exists in a particular situation requires a close look at the circumstances, as the existence of a conspiracy is generally fact-dependent. *State v. Weatherly*, 679 N.W.2d 13, 18 (Iowa 2004).

Applying the foregoing standards, we are convinced that substantial evidence supports the jury’s finding of an agreement to manufacture methamphetamine. Every portion of the Englebrecht property contained items consistent with the manufacturing of methamphetamine, and both the residence

and the large barn reeked of ammonia. Philp was arrested at the Englebrecht property and listed the property as his home address on his driver's license.

Contrary to Philp's contentions, the evidence shows much more than his "presence and knowledge." See *State v. Fintel*, 689 N.W.2d 95, 101-03 (Iowa 2004) (rejecting a similar contention). Philp was shown to be purchasing pseudoephedrine at the same time and at the same location as other individuals tied to the Englebrecht property, which indicated he was participating in a pill-gathering scheme. Most importantly, Onofrietti testified that he could smell ammonia in the barn while Philp and Randy Englebrecht were working in the corner of that barn behind the blue tarp. Onofrietti testified that the blue tarp covered a restricted area where he was not supposed to go. Onofrietti testified that Philp and Randy Englebrecht were the only two persons he saw behind the tarp, and "if one of them was behind there, usually both of them were behind there." When the barn was subsequently searched, a table, lighting, anhydrous ammonia, and other methamphetamine-manufacturing materials were all found behind the blue tarp.

Further, Onofrietti overheard two conversations: one where Randy Englebrecht talked about "waiting for Mr. Philp to get off work" before he "whipp[ed] up a batch," and another where Englebrecht and Philp together discussed the need "to stock up" on anhydrous ammonia for the winter. Although Philp claims Onofrietti was "a compromised witness," the credibility given to him was for the jury to determine. See *State v. Thornton*, 498 N.W.2d 670, 673 (Iowa 1993) ("The jury is free to believe or disbelieve any testimony as it chooses and

to give weight to the evidence as in its judgment such evidence should receive.”). Accordingly, the evidence was sufficient to sustain Philp’s conspiracy conviction.³

III. Curative Instruction.

Philp next argues that his trial counsel was ineffective for failing to request a curative instruction after the district court reversed its prior ruling and withdrew from evidence the note passed by Philp to Englebrecht within the Lee County Jail. Philp asserts that since a curative instruction was not given, the jury “could employ [the note] for an improper purpose . . . to find indicia of a conspiracy between [Philp] and [Randy] Englebrecht.”

We review ineffective assistance of counsel claims de novo. *Ledezma v. State*, 626 N.W.2d 134, 141 (Iowa 2001). Although claims of ineffective assistance of counsel are generally preserved for postconviction relief proceedings, we will consider such claims on direct appeal where the record is adequate. *State v. Barse*, 748 N.W.2d 211, 214 (Iowa 2008). We conclude the record here is adequate to decide this issue.

To prevail, Philp must demonstrate: (1) his counsel failed to perform an essential duty and (2) prejudice resulted. *State v. Buck*, 510 N.W.2d 850, 853 (Iowa 1994). To establish the first prong, Philp “must overcome the presumption that counsel was competent and show that counsel’s performance was not within the range of normal competency.” *Id.* To establish the second prong, Philp must

³ As part of his challenge to the sufficiency of the evidence, Philp also alleges that “the State failed to show an overt act independent of evidence tending to show agreement.” We disagree with this assertion. Even if we assume, arguendo, that the State needed independent evidence of both an agreement and an overt act, the State met this burden. For example, a reasonable jury could find an overt act committed in furtherance of the conspiracy based upon Philp’s purchases of pseudoephedrine while inferring an agreement from the other evidence.

show a counsel's failure worked to his actual and substantial disadvantage so that a reasonable probability exists that but for counsel's error the result of the proceeding would have differed. *Id.* Philp must prove both elements by a preponderance of the evidence. *Ledezma*, 626 N.W.2d at 142.

Here, we conclude this claim must be rejected because Philp cannot establish prejudice resulting from his trial counsel's failure to request a curative instruction. The note was neither read nor published to the jury. The jury thus never became apprised of its contents. Furthermore, the trial court made clear to the jury that the note was not in evidence and instructed the jury at the end of the trial that their verdict could only be based upon "[e]xhibits received by the court." See *State v. Pace*, 602 N.W.2d 764, 774 (Iowa 1999) (stating "when improper evidence has been promptly stricken and the jury admonished to disregard it, no error occurs"). We do not believe that a curative instructive would have made any difference. As we have stated, there was considerable evidence in the record supporting a conspiracy conviction, including Onofrietti's testimony, an abundance of methamphetamine manufacturing items located on the property, Philp's residence at the property, and Philp's pseudoephedrine purchases. Philp was checkmated by the trial evidence, not by the note inside the chess game. Accordingly, we do not find Philp's counsel to be ineffective.

IV. Admission of Pseudoephedrine Purchase Logs.

Philp further argues that the district court erred in admitting exhibits relating to pseudoephedrine purchases made by individuals other than himself—i.e., Ashley Englebrecht, Randy Englebrecht, Sabrina Wurster, Michael Onofrietti, and Miranda Graham. Philp contends those purchase logs were irrelevant and

unfairly prejudicial. Additionally, Philp argues that his counsel was ineffective for failing to object to the related foundational testimony from Sara Holvoet. We find these arguments to be without merit.

We review a trial court's ruling on the admission of evidence for an abuse of discretion. *State v. Henderson*, 696 N.W.2d 5, 10 (Iowa 2005). An abuse of discretion occurs when the trial court exercises its discretion "on grounds or for reasons clearly untenable or to an extent clearly unreasonable." *State v. Maghee*, 573 N.W.2d 1, 5 (Iowa 1997). Ineffective assistance of counsel claims are reviewed de novo. *Ledezma*, 626 N.W.2d at 141.

The logs recording purchases of pseudoephedrine were relevant to show the surrounding circumstances from which a reasonable jury could infer an agreement to manufacture methamphetamine. See *State v. Milom*, 744 N.W.2d 117, 120-21 (Iowa Ct. App. 2007); see also *Casady*, 597 N.W.2d at 805 (holding "the agreement may be inherent in and inferred from the circumstances, especially declarations, acts, and conduct of the alleged conspirators"). Officer DePriest testified that the magnitude of the physical evidence found at the Englebrecht residence revealed "multiple" methamphetamine cooks which would have required "a large supply" of pseudoephedrine. He further stated that in order to "stay off the radar" and have "a less detectable case or scheme," the methamphetamine lab would have required multiple individuals to help in the collection of pseudoephedrine and other supplies. Furthermore, Officer Skinner testified that the timing of the purchases made by Philp, Ashley Englebrecht, Randy Englebrecht, Sabrina Wurster, Michael Onofrietti, and Miranda Graham revealed "clustering" which corresponds with behaviors of individuals who are

gathering pills for the manufacturing of methamphetamine and not personal use. Finally, each of the individuals had already been linked to the Englebrecht property where the methamphetamine manufacturing operation was being conducted. Accordingly, we conclude the trial court appropriately exercised its discretion in admitting the purchase logs of pseudoephedrine. Furthermore, since the evidence was admissible, Philp's counsel had no duty to object to Holvoet's related testimony and therefore was not ineffective. See *State v. Scalise*, 660 N.W.2d 58, 62 (Iowa 2003) (stating counsel is not ineffective for failing to pursue a meritless issue).

V. Conclusion.

Upon our review, we conclude sufficient evidence supports Philp's conviction of conspiracy to manufacture more than five grams of methamphetamine. We also find that Philp's counsel was not constitutionally ineffective for failing to request a curative instruction regarding the jailhouse note. Lastly, we hold that the district court did not err and Philp's trial counsel was not ineffective regarding the pseudoephedrine purchase logs. We therefore affirm Philp's conviction.

AFFIRMED.