IN THE COURT OF APPEALS OF IOWA

No. 2-775 / 12-0197
Filed October 31, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JOHNNY LEWIS ARTHUR ANDERSON,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, David F. Staudt, Judge.

Johnny Anderson appeals following his conviction for possession of a simulated controlled substance and possession of a controlled substance, each with the intent to deliver while in the immediate possession or control of a firearm. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and David Arthur Adams, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, Mary Triick, Legal Intern, Thomas J. Ferguson, County Attorney, and Brad Walz, Assistant County Attorney, for appellee.

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

DANILSON, J.

John Anderson appeals following his conviction for possession of a simulated controlled substance with intent to deliver while in the immediate possession or control of a firearm, and possession of a controlled substance with the intent to deliver while in the immediate possession or control of a firearm. He contends the sentences on the two counts should merge; the trial court erred in concluding the marital privilege did not apply to prohibit Rebecca Gladney from testifying; and the trial court erred in admitting Gladney's hearsay testimony. Finding no error, we affirm.

I. Background Facts.

On October 2, 2009, Waterloo police officers executed a search warrant at the house of Loretta Murphy. Two adults were in the house at the time of the search: Rebecca Gladney and the brother of the defendant. In a makeshift bedroom in the basement, officers discovered, among other things, a quantity of marijuana, simulated marijuana, a .45 caliber pistol, plastic baggies, and ammunition for a variety of weapons. Also in the bedroom were documents and identification cards belonging to the defendant, John Anderson: one document was a paycheck to Anderson with the address of the house being searched, another was a prescription for Anderson at that same address. A baggie of suspected marijuana and ammunition for the .45 caliber pistol were found in the same drawer as a workplace ID bearing a picture of Anderson. Police also found social security cards for Anderson and Rebecca Gladney.

Anderson was charged in count I with possession of a simulated controlled substance with intent to deliver, while in immediate possession of a firearm and being a second offender, and in count II with possession of a controlled substance with intent to deliver, while in immediate possession of a firearm and being a second offender.[1]

At trial, Rhonda Weber, a Waterloo police officer, testified that she tested items seized from the search for the presence of marijuana—the items were all plant material with the general appearance of marijuana. She found one item with the general packaging of marijuana (approximately one ounce) tested negative for the presence of marijuana. Other items, some of loose plant material and some packaged baggies, tested positive for the presence of marijuana.

Gladney was called to testify. Upon being sworn in, she addressed the judge, who then sent the jury out of the courtroom. She stated, "I cannot do this, I can't. These papers, I don't—I don't—I want to plead my 5th Amendment. I don't want to do this." After some discussion with the witness, the prosecutor (who said he "plan[ned] on asking her about her previous statements about the marijuana not being hers and about the weapon because she hadn't said anything different about that"), and counsel for the defendant (who intended to "come hard at her as far as cross-examination and there could be several things that I may ask her that . . . may not be in her best interests"), the court appointed an attorney to represent Gladney.

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[1] In count III, Anderson was charged with possession of a firearm by a felon. The trial on that count was severed.

In briefing counsel appointed for Gladney, James Metcalf, Anderson's counsel stated, "Just—they're not married?" The court responded, "No." However, the defendant stated, "Yeah. We established common-law marriage in Des Moines, Iowa. We had a hearing on it." Metcalf consulted with Gladney and reported to the court that Gladney's concerns did not "rise . . . to the point where she could stand behind the 5th Amendment"; that she was "likely going to testify that she really doesn't remember saying all those things to the police"; and he had informed her that her recollection would likely be refreshed either by Duncan's report or the video recording of her prior statements.

Gladney then testified before the jury that on October 2, 2009, she was staying at Loretta Murphy's house and that Murphy is Anderson's mother. She testified that on the day of the search, though she and Anderson had been boyfriend and girlfriend since September of 2008, they had "broken up." The prosecutor asked, "And you and Mr. Anderson are again boyfriend and girlfriend or have a relationship; correct?" Gladney responded, "Yes." Gladney testified that on October 2, 2009, she was "homeless at the time and me and Johnny were broken up and his mom told me she didn't want me in the streets and it was okay, since Johnny was out of the house, that I could stay there." She testified she did not remember giving a previous interview at the police department on October 2: "I don't remember anything after what happened that day." She further testified she did not remember having marijuana in the basement bedroom; did not remember seeing the .45 caliber pistol found in the bedroom; and "I don't remember anything after they came in the house."

Proceedings Concerning Claim of Marital Privilege.

Outside the presence of the jury, the court addressed the defendant's claim he could invoke the marital privilege to keep Gladney from testifying as to statements he made to her. An offer of proof was made concerning whether or not Gladney and Anderson had established a common law marriage. Gladney stated she had successfully invoked the privilege in an earlier proceeding in Polk County; she prepared an affidavit for the proceedings in the Polk County court, dated March 29, 2010; she believed she was in a common-law marriage with Anderson; they had in the past had a joint bank account; on occasion, she had used the surname Anderson (on Facebook and in writing letters); she introduces Anderson as her husband; Anderson's family members introduce her as Anderson's wife; and they had plans to formalize the marriage, but "Black Hawk County won't allow it because of this case right now."

On cross-examination, Gladney stated Anderson was arrested in Polk County in November 2009 and had been in custody since that time. The prosecutor asked:

> Q. During that time prior to November of 2009, how long before then were you holding yourself out as husband and wife? A. We were like—we were that—like even for a long time. It was shortly after we started dating. I mean when we broke up, everybody, you know, we broke up, we would break up and get back together all the time. So even when we were broke up, people still call me his wife and I would still call him my husband.
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> . . . .
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> Q. So back in October of 2009 . . . you considered yourself married to Johnny Lewis Arthur Anderson? A. Yes, and before that.

The court asked what relationship she claimed when speaking to the police on October 2, 2009. Counsel for the parties reviewed the recording of Gladney's statements to police that day and reported to the court that

> [t]here is no mention of the relationship throughout the course of the videotape. There [are] some comments about not staying there all the time, there [are] some comments about being together, there [are] no comments about the status of that. There is also no mention of husband and wife. There's also no mention of boyfriend girlfriend per se either.

The prosecutor introduced the jail's visitor logs. On October 3 and 7, 2011, in the column heading "relationship," Gladney wrote "fiance"; on October 13, she wrote "husband"; on October 14, she wrote "fiance"; and on October 17, 24, and 25, she wrote either "husband" or "wife." An exhibit was introduced showing Gladney had been signing herself in as "fiance" going back to 2010. Another exhibit was the Department of Corrections' ICON report listing Rebecca Gladney as a friend, approving visits, and noting relationship is "non-immediate family."

The defense offered a photocopy of Gladney's Facebook page listing her as Rebecca Anderson and her relationship status as "married"; she testified that her status had not changed since opening her Facebook account over a year ago. Gladney also presented an envelope addressed to Rebecca Anderson she received from Anderson postmarked in May 2010 when he was at the Oakdale classification center.

Tierra Ellis testified she grew up with Anderson and Gladney and that when Anderson was released from incarceration in 2008, Anderson and Gladney represented themselves as husband and wife. She was asked if there had been

a formal marriage, to which she responded: "[A]ll I know is the common-law and when [sic] got official once he's been in jail now."

The court ruled that the defendant had failed to prove the existence of a common law marriage by a preponderance of clear, consistent, and convincing evidence, citing *State v*. *Ware*, 338 N.W.2d 707 (Iowa 1983). The court observed there was no documentation prior to October 2009, "which is the critical juncture"; Gladney was inconsistent in identifying her status; and there had been nothing showing a district court in Polk County had ruled on the issue. The court stated the evidence "doesn't even make a preponderance of the evidence."

Trial continued.

The jury returned and Gladney testified that when Anderson stayed at his mother's house, the downstairs makeshift bedroom was his. She testified she could not remember if Anderson had identification cards in the room. She acknowledged that Anderson worked at the company that was on the work ID found in the room. She denied the .45 caliber pistol was hers and testified she did not remember seeing it before. She acknowledged she had reviewed the video of her prior statements to police and in that recording she told the investigating officer the gun came from Anderson and that she had found it and thrown it away. She further testified that she was the only person staying in the bedroom on October 2, 2009; the ammunition found in that room was not hers; the safe found in the room was not hers and she had never seen it; she did not remember seeing the long gun case found in the room; the marijuana in the top drawer of the dresser was not hers; the marijuana found near the television was

not hers; and she did not ever have any prescription drugs with Anderson's name on them. When asked if the marijuana found in the room was Anderson's she stated, "I don't know." The prosecutor asked, "Isn't it true that on the video you told Investigator Duncan that the marijuana there was the defendant's?" Gladney responded, "Again, I don't remember much of the video even after watching it. I don't remember."

Robert Duncan then testified he gave Gladney a ride to the police station from the Murphy residence on October 2, 2009, and spoke with her for about forty-five minutes. He stated she did not appear to have been under the influence of either drugs or alcohol. Officer Duncan testified Gladney stated the gun was Anderson's; that she found it in the bedroom and threw it in a garbage can outside and later told Anderson about it "and he got upset with her and she suspected that he went out and got it out of the garbage can." The following then occurred:

> Q. Did Miss Gladney . . . state why—whether Mr. Anderson had that weapon for protection? A. Yes—
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> [Defense attorney]: Objection, Your Honor, it calls for hearsay and also privilege and further I don't think this question was asked of Miss Gladney.
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> Prosecutor: I tried to ask what—about the conversation and she didn't even remember what she saw on the video.
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> THE COURT: Overruled. You may answer.
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> . . . .
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> Q. Did Ms. Gladney tell you where Mr. Anderson had said anything about why he had the gun. A. For protection, yes.
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> . . . .
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> Q. Who did Miss Gladney say lived at the room at 812 Boradway where that .45 was located?
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> [Defense attorney]: Objection, calls for hearsay.
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> THE COURT: Overruled.
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> A. It would be herself and Mr. Anderson.

> Q. Did Miss Gladney, at the time that you interviewed her on October 2, 2009, appear to have any trouble remembering whose marijuana it was at the residence? A. No.
> Q. What did Miss Gladney say about the marijuana that was located at the residence?
> [Defense attorney]: Calls for hearsay objection.
> THE COURT: Overruled.
> A. She said it was Mr. Anderson's.

The jury was instructed that prior statements not made under oath could only be used "to decide if you believe the witness."

Anderson was found guilty on both counts. The court overruled the defendant's motions for judgment of acquittal and for new trial, which asserted, in part that the verdicts were against the weight of the evidence; and the court erred in denying the request to invoke the marital privilege.

Anderson was sentenced to a term of no more than fifteen years on each count, the terms to be served concurrent to each other, but consecutive to all other cases. He now appeals.

II. Discussion.

A. *Merger*. Anderson's claim that the offenses merged into one, is grounded in the constitutional protection against double jeopardy. Our review of constitutional issues is de novo. *State v*. *Spilger*, 508 N.W.2d 650, 651 (Iowa 1993).

Anderson argues that the two counts should merge because "[t]here was no specific charge for any specific amount of the drug discovered in a particular place" and that "the possession of simulated marijuana and real marijuana at the same time and in the same place are both violations of Iowa Code sections 124.401(d) and (e) [2009] and must be viewed as alternate means of committing

the same offense." The State claims Anderson committed separate offenses because his convictions were based upon different materials found—some marijuana, some simulated marijuana. We agree. *See State v*. *Bundy*, 508 N.W.2d 643, 644 (Iowa 1993).

Double jeopardy principles protect defendants against multiple punishments for the same offense. "However, multiple punishments can be assessed after a defendant is convicted of two offenses that are not the same." *State v*. *Smith*, 573 N.W.2d 14, 19 (Iowa 1997); *see also* 4A B. John Burns, *Iowa Practice Series*, *Criminal Procedure*, § 38:3 (2011 ed.) ("To constitute the same offense for the purpose of invoking the Double Jeopardy Clause, the offenses must be the same act. Separate acts, even charged under the same statute, are not subject to Fifth Amendment analysis."). The case upon which the defendant relies, *State v*. *Webb*, is inapposite as the court there was not attempting to apply the merger doctrine. *See* 313 N.W.2d 550, 552 (Iowa 1981).

Because Anderson was charged and convicted with multiple counts each based on the possession of a separate and distinct substance there is no merger. *See State v*. *Truesdell*, 511 N.W.2d 429, 432 (Iowa Ct. App. 1993). "Where the alleged acts occur separately and constitute distinct offenses there can be no complaint that one is a lesser included offense of the other." *State v*. *Spilger*, 508 N.W.2d 650, 652 (Iowa 1993).

B. *Marital Privilege*. The party claiming the existence of a common-law marriage must prove all elements of such a marriage by a preponderance of clear, consistent and convincing evidence. *Ware*, 338 N.W.2d at 711; *In re*

Estate of Dallman, 228 N.W.2d 187, 190 (Iowa 1975). The trial court's findings of fact on whether or not a marital relationship exists have the effect of a jury verdict. *State v. Arnold*, 225 N.W.2d 120, 121 (Iowa 1975). We will uphold those findings if supported by substantial evidence. *See* Iowa R. App. P. 6.904(3)(a).

Claims of common-law marriage are carefully scrutinized. *In re Marriage of Martin*, 681 N.W.2d 612, 617 (Iowa 2004). We have set out in some detail above the evidence pertaining to Anderson's claim of a common-law marital relationship. The district court's finding that the defendant failed to prove a marriage is fully supported in the record. In Gladney's testimony prior to the hearing on the marital relationship, she identified Anderson as her boyfriend at the time of the search and that "[w]e'd broken up." All documents offered (Facebook postings, correspondence from Anderson, and jail visitor logs) post-dated the time of the search. We find no error in the court denying invocation of the marital privilege.[2]

C. Hearsay. Anderson contends that Officer Duncan's testimony as to Gladney's prior statements was improper. He acknowledges such statements may be admissible when *not* offered to prove the truth of the matter asserted, *see* Iowa R. Evid. 5.801(c), but he argues this court must look to the "real" purpose for which the evidence was offered. *See State v. Sowder,* 394 N.W.2d 368, 371 (Iowa 1986). Anderson contends that Officer Duncan's testimony as to Gladney's prior statements were not offered for impeachment purposes, but to

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[2] *See* Iowa Code § 622.9 ("Neither husband nor wife can be examined in any case as to any communication made by the one to the other while married, nor shall they, after the marriage relation ceases, be permitted to reveal in testimony any such communication made while the marriage subsisted.").

prove the truth of the matter asserted, that is, that the marijuana and the gun were Anderson's.

Our supreme court has stated:

> The right given to the State to impeach its own witnesses under Iowa Rule of Evidence [5.607] and our decision in *State v. Trost,* 244 N.W.2d 556, 559-60 (Iowa 1976), is to be used as a shield and not as a sword. The State is not entitled under rule [5.607] to place a witness on the stand who is expected to give unfavorable testimony and then, in the guise of impeachment, offer evidence which is otherwise inadmissible. To permit such bootstrapping frustrates the intended application of the exclusionary rules which rendered such evidence inadmissible on the State's case in chief.

State v. Turecek, 456 N.W.2d 219, 225 (Iowa 1990). As opposed to the witness in *Turecek*, the State in this case had every expectation the witness would testify consistently with her previous statements if she was able to recall the facts. The question here was whether Gladney had the ability to recall, and absent the witness lacking competency, the State was entitled to try to refresh the witness's memory or impeach their own witness.

The supreme court in *Turecek*, 456 N.W.2d at 225, cited with approval *United States v. Miller,* 664 F.2d 94, 97 (5th Cir.1981), where the federal court stated:

> Clearly, the Government can impeach its own witness and evidence of a prior inconsistent statement of the witness may be admitted for that purpose even though the statement tends directly to inculpate the defendant. Of course, the prosecutor may not use such a statement under the guise of impeachment for the *primary* purpose of placing before the jury substantive evidence which is not otherwise admissible.

Here, Gladney ultimately recalled many relevant facts, although certainly not her entire statement to Officer Duncan. During her testimony she stated that the basement bedroom that was searched was Anderson's; that when Anderson

stayed in the home with her they stayed in that bedroom; and that the ammunition, safe, and marijuana found in the bedroom were not her possessions. She also confirmed that she had viewed the State's video of her statement to the officer, and admitted she told the officer that she had found a gun in the basement. Although we would not commend the State's presentation of evidence, upon our review of the record we are unable to conclude that the State's primary purpose of presenting the testimony of Gladney was to place before the jury substantive evidence, not otherwise admissible, under the guise of impeachment.

We find no abuse of discretion in the trial court's determination that Officer Duncan's testimony concerning Gladney's prior statements was permissible impeachment evidence.

Even if we were to conclude some of the statements admitted through Officer Duncan's testimony were hearsay, we conclude there was no prejudicial error. "[A]dmission of hearsay evidence over a proper objection is presumed to be prejudicial error unless the contrary is affirmatively established." *State v. Nims,* 357 N.W.2d 608, 609 (Iowa 1984). The contrary is affirmatively established if the record shows the hearsay evidence did not affect the jury's finding of guilt. *Elliott*, 806 N.W.2d at 669. "[N]otwithstanding the presumption of prejudice from the admission of such evidence, the erroneously admitted hearsay will not be considered prejudicial if substantially the same evidence is properly in the record." *State v. Newell*, 710 N.W.2d 6, 18 (Iowa 2006)*; see State v.*

McGuire, 572 N.W.2d 545, 547 (Iowa 1997) (noting a "court will not find prejudice if substantially the same evidence has come into the record without objection").

Gladney testified the basement room was Anderson's. Anderson's personal items, including his workplace identification, were all over the room. Gladney specifically testified the guns and marijuana were not hers. She acknowledged she had reviewed the video of her prior statements to police and in that recording she told the investigating officer the gun came from Anderson and that she had found it and thrown it away. Under these facts, we are convinced the hearsay evidence did not affect the jury's finding of guilty. We therefore affirm.

AFFIRMED.