IN THE COURT OF APPEALS OF IOWA

No. 6-1062 / 06-0382
Filed April 11, 2007

STATE OF IOWA,
Plaintiff-Appellee,

vs.

SAM VICHIT,
Defendant-Appellant.

Appeal from the Iowa District Court for Marion County, Dale B. Hagen, Judge.

Sam Vichit appeals from the judgment and sentence entered on his convictions of conspiracy to deliver more than five grams of methamphetamine. **AFFIRMED.**

Robert Warren Conrad, Knoxville, and Kenneth Weiland, Knoxville, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, Terry E. Rachels, County Attorney, and Douglas A. Eichholz, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Vaitheswaran and Eisenhauer, JJ.

VAITHESWARAN, J.

Knoxville police officers executed a search warrant on the home of Anthony and Jolene Miller. They retrieved eighteen-and-a-half grams of methamphetamine and $1400 in cash. Anthony Miller identified Sam Vichit as his supplier. Officers spoke to Anthony about having Vichit come to the Millers' home to sell him methamphetamine. Anthony agreed, but before arrangements could be made, Vichit showed up at the Millers' home. Law-enforcement officers executed a search warrant on Vichit's home, which resulted in the seizure of drug packaging materials, handguns, and a scale, as well as other items.

The State charged Vichit with conspiracy to deliver more than five grams of methamphetamine. Iowa Code § 124.401(1)(b)(7) (2005). A jury found Vichit guilty as charged, after which the district court ruled on his motion for new trial and imposed sentence.

On appeal, Vichit contends (1) there is insufficient evidence to support the jury's finding of guilt, (2) the district court abused its discretion in overruling his motion for mistrial, (3) the district court erred in denying his request for a jury instruction, and (4) trial counsel was ineffective in failing to challenge the jury's composition and in failing to file a timely motion to suppress evidence.

I. Sufficiency of the Evidence.

Vichit contends the jury's finding of guilt is not supported by substantial evidence. "Evidence is substantial if it could convince a rational jury of the defendant's guilt beyond a reasonable doubt." *State v. Musser,* 721 N.W.2d 758, 760 (Iowa 2006) (citation omitted).

The jury was instructed that the State would have to prove the following elements of conspiracy to deliver a controlled substance:

> 1. Between the spring of 2005 and the 12th day of October, 2005, the defendant agreed with Anthony Miller and/or Jolene Miller:
>
> a. That one or more of them would commit the offense of Delivery of a Controlled Substance, or solicit another to commit the Delivery of a Controlled Substance; or
>
> b. attempt to commit the Delivery of a Controlled Substance.
>
> 2. The defendant entered into the agreement with the intent to promote or facilitate the delivery of a controlled substance.
>
> 3. The defendant, Anthony Miller and/or Jolene Miller committed an overt act.
>
> 4. Anthony Miller and/or Jolene Miller were not law enforcement agents investigating the delivery of controlled substances or assisting law enforcement agents in the investigation when the conspiracy began.

With respect to these elements, Vichit argues: "Taking the evidence in the light most favorable to the State, at best, the State presents no direct evidence of the defendant possessing any drugs 'with the intent to deliver' or entering into any 'conspiracy' to deliver drugs."

First, we note that possession with intent to deliver was not an element the State had to prove. Therefore, we reject that portion of Vichit's argument.

We turn to the conspiracy portion of Vichit's argument. Anthony Miller testified Vichit was his supplier. He also testified he saw Vichit sell drugs to other people. Jolene Miller testified that Vichit supplied her with methamphetamine. She stated that she and her husband, in turn, supplied the methamphetamine to others in the area.

This accomplice testimony was corroborated by several pieces of evidence. A search of Vichit after he arrived at the Millers' home yielded $771 in cash and a cellular phone programmed with the Millers' phone numbers. A

search of Vichit's home resulted in the seizure of a lock box containing packaging materials, a digital scale, drug paraphernalia, two loaded handguns, and trace amounts of methamphetamine in a small plastic container. An officer stated drug dealers often used the type of packaging materials that were found for illegal narcotics sales. Another officer testified that handguns were "[v]ery often" associated with the drug trade.

We recognize that all the methamphetamine that was the basis of this charge was found in the Millers' home. However, a reasonable fact finder could have credited the Millers' testimony that Vichit was the supplier of that methamphetamine. *State v. Williams,* 695 N.W.2d 23, 28 (Iowa 2005) (stating it was the jury's job "to resolve conflicts in the evidence, to pass upon the credibility of witnesses, to determine the plausibility of explanations, or to weigh the evidence").

We also acknowledge testimony from friends of Vichit suggesting Vichit was simply a drug purchaser rather than a drug supplier. Again, however, a reasonable fact finder could have given more credence to the Millers' testimony than to Vichit's friends.

Viewing the evidence in a light most favorable to the State, we believe the cited evidence amounted to substantial evidence supporting the elements of conspiracy to deliver methamphetamine.

II. Motion for Mistrial.

During the search of Vichit's home, officers seized a container with an unidentified "white crystalline substance." The substance was tested but

remained unidentified. Before trial, Vichit filed a motion in limine seeking to exclude any reference to the substance. The district court granted the motion.

At trial, an officer spontaneously mentioned "the white crystalline substance" that was the subject of Vichit's successful motion in limine. Vichit objected and the court admonished the jury to disregard the reference. Vichit later moved for a mistrial, which the court denied.

Vichit contends the district court abused its discretion in denying this motion. He maintains the officer's reference to a "white crystalline substance" was prejudicial because, up to that point, trial counsel "had been able to show the jury that Sam had no controlled substances on his person, in his vehicle at the Millers' home in Knoxville, or in his home in Des Moines."

We find no abuse of discretion in the district court's ruling, given the context in which the prohibited statement arose. Specifically, while being questioned by the prosecutor, the officer testified about the items recovered during the search of Vichit's home. He mentioned that a bag was found containing some sort of residue. On cross examination, defense counsel suggested to the officer that he didn't "even know what that residue is." The officer responded "No, sir." Defense counsel continued:

> Q. And no methamphetamine was actually found in the house, correct? A. Not to my knowledge, sir.
> Q. So you don't know for sure, you are making a guess? A. I'm not sure, sir.

At this point, the prosecutor asked the officer, "That would be an educated guess, wouldn't it?" The officer responded as follows: "Based on my training and experience with narcotics investigations, other search warrants that I have

attended and executed, the scale combined with the baggies, combined with *the white crystalline substance*." (Emphasis added).

While this reference contravened the district court's ruling on Vichit's motion in limine, it was not the only evidence of Vichit's drug possession, as he contends. Another officer previously testified that a search of Vichit's home resulted in the seizure of "a small plastic container that included trace amounts of methamphetamine." The jury reasonably could have believed that the second officer's reference to a white crystalline substance was an allusion to this methamphetamine. Additionally, the district court's immediate admonition to disregard the testimony cured any prejudicial effect. *State v. Brotherton,* 384 N.W.2d 375, 381 (Iowa 1986). For these reasons, we conclude the district court did not abuse its discretion in overruling Vichit's motion for mistrial.

III. "Customer Defense."

Vichit sought a jury instruction delineating a "customer defense" to the State's charge. The proposed instruction stated:

> The Defendant has presented the defense that the Defendant was only a customer. As long as you find that the Defendant was only a customer and did not sell, share, or otherwise deliver or conspire to deliver a controlled substance then you must find the Defendant not guilty.

The district court refused to submit this proposed instruction. Vichit contends this was error.

Vichit cites no authority supporting this defense. For this reason, we conclude the district court did not err in refusing to submit the instruction. *See Beyer v. Todd,* 601 N.W.2d 35, 38 (Iowa 1999) (stating requested instruction must "correctly state[] the law.").

IV. Ineffective Assistance of Counsel.

Vichit claims his trial attorney was ineffective in failing to challenge the composition of the jury or the manner in which it was selected. Vichit also contends his trial counsel was ineffective in failing to move to suppress the evidence seized from his car and residence. We preserve these claims for postconviction relief. *Berryhill v. State,* 603 N.W.2d 243, 245 (Iowa 1999) (stating trial record often inadequate to resolve the claim).

AFFIRMED.