**IN THE COURT OF APPEALS OF IOWA**

No. 7-502 / 06-2018
Filed September 19, 2007

**STATE OF IOWA,**
Plaintiff-Appellee,

**vs.**

**MELVIN LAVERNE MATHIS,**
Defendant-Appellant.

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Appeal from the Iowa District Court for Tama County, Patrick R. Grady, Judge.

Melvin Mathis appeals his judgment and sentence for delivery of methamphetamine. **AFFIRMED.**

John L. Thompson, Tama, for appellant.

Thomas J. Miller, Attorney General, Elisabeth S. Reynoldson, Assistant Attorney General, Brent D. Heeren, County Attorney, and Richard VanderMey, Assistant County Attorney, for appellee.

Considered by Huitink, P.J., and Zimmer and Vaitheswaran, JJ.

**VAITHESWARAN, J.**

Melvin Mathis appeals his judgment and sentence for delivery of methamphetamine. He contends: (1) the evidence is insufficient to support the jury's finding of guilt, (2) the State engaged in prosecutorial misconduct, (3) the district court erred in overruling certain evidentiary objections, (4) the district court should have granted his motion for a mistrial, and (5) trial counsel provided ineffective assistance in several respects.

***I. Sufficiency of the Evidence***

Mathis moved for judgment of acquittal. The district court denied the motion. On appeal, Mathis contends "there was no evidence that [he] had methamphetamine," or that "he placed methamphetamine in the area the State's witness claimed to have found it in."

We review claims of insufficient evidence for errors at law. *State v. Rohm,* 609 N.W.2d 504, 509 (Iowa 2000). We will uphold a finding of guilt if it is supported by substantial evidence. *Id.*

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

> 1. On or about the 16th day of January, 2006, the defendant delivered methamphetamine.
> 2. The defendant knew that the substance he delivered was methamphetamine.

The jury was additionally instructed that "deliver" or "delivery" means "the actual, constructive, or attempted transfer of a substance from one person to another."

The jury could have found the following facts. A man named Joe Privetta agreed to work as a confidential informant for the Tama Police Department. In

that capacity, Privetta made several phone calls to Mathis to arrange a drug buy. Mathis agreed to sell Privetta a quarter of an ounce of methamphetamine for $400. Police officers fitted Privetta with a recording device and Privetta met Mathis to discuss the purchase. Privetta did not go through with the purchase at that time, as Mathis and another man at the scene expressed their suspicions that Privetta was working for the police. Later that night, however, Privetta arranged another meeting with Mathis, who agreed to sell Privetta an eighth of an ounce of methamphetamine for $300. This time, Privetta did not wear a recording device. At the designated time and place, Mathis gave Privetta a napkin in exchange for $300. Privetta assumed the napkin contained the methamphetamine, but it did not. When Privetta questioned Mathis, Mathis told him to look in the roads because he'd be amazed at what he found. Privetta found a bag of methamphetamine approximately twenty to twenty-five yards from where the money exchange took place.

Although Privetta conceded that Mathis did not hand him the methamphetamine, a jury reasonably could have found from this evidence that Mathis delivered the drugs to him. A jury also reasonably could have credited Privetta's testimony over a differing version of events presented by Mathis. *See State v. Wells*, 629 N.W.2d 346, 356 (Iowa 2001) (stating we defer to fact-finder's determinations of witness credibility). As the record contains substantial evidence to support the jury's finding of guilt, we conclude the district court did not err in denying Mathis's motion for judgment of acquittal.

***II. Prosecutorial Misconduct***

Mathis challenges certain statements made by the prosecutor during closing argument. He also challenges the prosecutor's references during cross-examination to a law enforcement building. He contends these comments and references amount to prosecutorial misconduct.

Mathis concedes he did not preserve error by objecting to these references. Therefore, he alternately raises the prosecutorial misconduct issue under an ineffective-assistance-of-counsel rubric. We find the issue can only be reviewed in that context and we find the record adequate to do so. *See* Iowa Code § 814.7(3) (2005) ("If an ineffective assistance of counsel claim is raised on direct appeal from the criminal proceedings, the court may decide the record is adequate to decide the claim . . . .").

To prove ineffective assistance of counsel, a defendant must show (1) counsel failed to perform an essential duty, and (2) prejudice resulted. *Strickland v. Washington,* 466 U.S. 668, 697, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). Under the prejudice prong, a defendant must establish a reasonable probability that, but for counsel's claimed errors, the result of the proceeding would have been different. *Id.* at 695, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698. "[A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *Id.* at 696, 104 S. Ct. at 2069, 80 L. Ed. 2d at 699.

Mathis cannot establish *Strickland* prejudice, as the jury's finding of guilt has overwhelming support in the record. Specifically, two law-enforcement officers corroborated key portions of Privetta's testimony. One officer testified that Privetta told him Mathis had a half ounce of methamphetamine to sell.

Privetta also told the officer that he was trying to buy a quarter ounce of the drug. The officer gave Privetta four $100 bills whose serial numbers had been recorded. The officer also gave him a digital recording device. When the officer learned that Mathis was suspicious of Privetta, he allowed Privetta to remove the recording device.

A second officer stated that Privetta used the officer's cell phone to arrange the drug purchase with Mathis. The officer confirmed Privetta's side of the telephone conversation with Mathis. After the conversation, Privetta told the officer that "a deal had been made." Privetta specified the time and location of the meeting. The officer made copies of the three $100 bills that were given to Privetta to pay for the drugs. He testified that, after the meeting, Privetta brought a baggie of drugs to the sheriff's office.

In light of the overwhelming evidence supporting the jury's finding of guilt, we conclude Mathis could not prevail on this ineffective-assistance-of-counsel claim.

***III. Evidentiary Objections***

Mathis challenges several district court rulings on evidentiary objections.

***A.*** During his cross-examination of Mathis, the prosecutor asked Mathis more than once if the conversation initially tape-recorded by Privetta sounded like a drug transaction. Defense counsel twice objected to the question as asked and answered. The district court overruled the objection once and sustained it once. Mathis contends the court should have "admonished the jury to disregard or have sanctioned the State."

"Error may not be predicated upon a ruling . . . unless a substantial right of the party is affected . . . ." Iowa R. Evid. 5.103(*a*); *State v. Hackney*, 397 N.W2d, 723, 729 (Iowa 1986) (describing this prejudice test). We conclude the questioning was not prejudicial because substantially the same evidence came in to the record without objection. *State v. McGuire,* 572 N.W.2d 545, 547 (Iowa 1997). Specifically, the prosecutor asked Mathis about a telephone conversation he overheard. He then asked, "That sounds like a buyer and a seller of drugs making arrangements, where are we going to meet, working things out, doesn't it?" Mathis answered, "Yes, it did."

***B.*** Mathis next complains that the district court erred in overruling his objections to similar questions of another witness. Again, the challenged evidence was cumulative. Specifically, the prosecutor asked the witness, "And you knew it was a drug deal, right?" No objection followed this question. The witness answered, "Pretty much."

***C.*** Finally, Mathis makes the following argument: "[T]he sole objection to the state's closing was overruled before counsel was allowed to state a reason for objection." Mathis's challenge to this evidentiary ruling is not preserved for our review and is waived. *See State v. Maghee*, 573 N.W.2d 1, 8 (Iowa 1997) (stating that in order to preserve error, an objection must be specific enough to alert the district court to the basis for the complaint); Iowa R. App. P. 6.14(1)(*c*) ("Failure in the brief to state, to argue or to cite authority in support of an issue may be deemed waiver of that issue.").

***IV. Motion for Mistrial***

Mathis moved for a mistrial after an officer testified about a fingerprint card belonging to Mathis. He argued that this evidence violated an earlier court ruling granting his motion to exclude evidence of a prior conviction. The district court effectively denied the mistrial motion.

On appeal, Mathis urges that this testimony apprised the jury of his prior conviction. We conclude the reference was isolated, only indirectly implicated the prior conviction, and, in the context of the entire trial, did not deprive Mathis of a fair trial. *See State v. Newell,* 710 N.W.2d 6, 32 (Iowa 2006).

**V. Disposition**

We affirm Mathis's judgment and sentence for delivery of methamphetamine. We find it unnecessary to address Mathis's remaining ineffective assistance of counsel claims.

**AFFIRMED.**