

**IN THE COURT OF APPEALS OF IOWA**

No. 8-509 / 06-1032

Filed July 30, 2008

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

**vs.**

**RONALD DARWIN HAY,**  
Defendant-Appellant.

---

Appeal from the Iowa District Court for Buchanan County, Lawrence H. Fautsch, Judge.

Appeal from the judgment and sentence for manufacturing methamphetamine, second offense. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Martha Lucey, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sharon Hall, Assistant Attorney General, and Allan W. Vanderhart, County Attorney, for appellee.

Considered by Sackett, C.J., and Huitink and Mahan, JJ.

**SACKETT, C.J.**

Defendant Darwin Hay appeals from his conviction, following a jury trial, for manufacturing methamphetamine as a second offender, in violation of Iowa Code sections 124.401(1)(b)(7) and 124.411 (2005). He contends the district court erred in denying his request for a spoliation instruction<sup>1</sup> and that he is also entitled to relief because of due process violations.<sup>2</sup> We affirm.

**SPOILIATION INSTRUCTION.** Hay was charged after law enforcement found a number of items in Hay's house and garage alleged to be consistent with the manufacture of methamphetamine. Certain of the items seized were photographed and then were disposed of shortly after they were discovered. At trial the pictures were introduced into evidence and there was evidence the items were found on Hay's premises. Hay contended at trial some seventeen items were intentionally destroyed and requested a spoliation instruction. The district court denied Hay's request for the instruction, finding there needed to be a showing of bad faith on the part of law enforcement to justify giving the instruction and the court did not find evidence of it in this case. Hay contends the district court should have given the instruction. The State argues the items were destroyed pursuant to a neutral policy and that Hay suffered no prejudice from the absence of the challenged items at trial.

A spoliation instruction is "a direction to the jury that it may infer from the State's failure to preserve evidence that the evidence would have been adverse to the State." *State v. Hartsfield*, 681 N.W. 2d 626, 630 (Iowa 2004). In *State v.*

---

<sup>1</sup> Hay's appellate attorney has raised this issue.

<sup>2</sup> Hay raises this issue in a pro se brief.

*Langlet*, 283 N.W.2d 330, 333 (Iowa 1979), the court noted the general principle that when evidence is intentionally destroyed, “the fact finder may draw the inference that the evidence destroyed was unfavorable to the party responsible for its spoliation.” This inference is based on the rationale that a party’s destruction of evidence is “an admission by conduct of the weakness of [that party’s] case.” *Id.* The spoliation inference is not appropriate when the destruction is not intentional. *Id.*

We review a trial court’s refusal to give a spoliation instruction for an abuse of discretion. *Hartsfield*, 681 N.W.2d at 630; see also *State v. Vincik*, 398 N.W.2d 788, 795 (Iowa 1987); *State v. Langlet*, 283 N.W.2d 330, 336 (Iowa 1979). However, the trial court does not have discretion to refuse a spoliation instruction when the defendant has generated a jury question on the spoliation inference. *Hartsfield*, 681 N.W.2d at 631. Instructional error is not reversible error unless there is prejudice. *Id.*; see also *State v. Piper*, 633 N.W.2d 894, 914 (Iowa 2003).

There must be substantial evidence to support the following facts in order to justify a spoliation inference: (1) the evidence was “in existence”; (2) the evidence was “in the possession of or under control of the party” charged with its destruction; (3) the evidence “would have been admissible at trial”; and (4) “the party responsible for its destruction did so intentionally.” *Hartsfield*, 681 N.W.2d at 630. Before instructing the jury on the inference, the trial court must make a threshold determination that the foundation for the inference is sufficient, that is that “a jury could appropriately deduce from the underlying circumstances the adverse fact sought to be inferred.” *Id.*

The evidence was in existence and in the State's possession and control. It would have been admissible at trial. Hay argues the destruction of the items was intentional. The State argues that the items were disposed of pursuant to a neutral or routine evidence policy. The State responds that there was evidence the items were caustic or deemed hazardous to store as evidence. An agent testified the items were dangerous to handle and store. There was testimony that the disposal decisions were made at the end of the search and there was never any attempt to hide evidence from Hay or of the officers acting in bad faith. There was no affirmative request for the evidence prior to its destruction. Each item was logged in and photographed prior to disposal.

It appears that the destruction policy was neutral in that it was generally the position of the State to dispose of items that may be caustic or harmful after photographing them and entering them in a log. Furthermore, Hay has not convinced us that he was prejudiced by the admission of photographs of the items rather than the admission of the items themselves. Hay contends he was prejudiced because he introduced evidence the items were used for purposes that were not illegal. He argues without the items available for inspection he "could not present a defense expert regarding the lack of evidence to support the item's use in a methamphetamine lab." We find no merit to this argument and affirm on this issue.

**DUE PROCESS ARGUMENT.** Hay also contends (1) certain evidence should have been suppressed because it was obtained in an illegal search, (2) there is not substantial evidence to support his conviction, and (3) his due

process rights were violated because his brother, who could have provided exculpatory testimony, was excluded as a witness.

On September 30, 2005, a deputy sheriff came to Hay's home to talk to him about a motorcycle of his that was stolen. The deputy saw an overhead garage door was open and he walked inside looking for Hay. He noticed two LP tanks with altered fittings and valves and a bottle of Red Devil Lye drain opener. Eventually Hay came to the door of his home and told the deputy his brother was with him. At the deputy's request Hay stepped out and, when questioned, told the deputy the garage and the things in it were his. The two men went to the garage where the deputy inspected the tanks. There was a glass Frank's Sauerkraut jar containing liquid on a shelf, coffee filters, and white sediment. Hay denied the deputy's request to search his house and garage and a search warrant was obtained. Subsequently the officers additionally found Roto drain opener, a garden hose, Red Devil Lye, an open lithium battery pack containing alkaline batteries, coffee filters, an empty starter fluid can, a light bulb smoking device, a Mason jar with Coleman fuel, a Mountain Dew bottle containing a white mixture with a rag in the bottle and a hose, four ketchup bottles containing salt, a box of glass tubes and beakers, a self-contained-breathing-apparatus mask, miscellaneous glassware, a notebook with Hay's name on it, three hypodermic needles, a spoon with white residue and a cotton ball, a finger scale, plastic baggies some marked with "25" and "100," a can of Coleman fuel, a scale with a small quantity of methamphetamine on it, a snort tube, and a shaving cream can with a false bottom that contained several small clear baggies.

Three items were taken to the DCI laboratory. A criminalist with the division explained at trial the process of manufacturing methamphetamine using the lithium-ammonia reduction method. She examined the three items seized from Hay. The items included a bilayer of liquid with coffee filters and solids. She took samples of the upper layer of the liquid and found it contained methamphetamine. She examined the lower level, which she found consistent with engine starting fluid and it contained ether in addition to methamphetamine, CMP,<sup>3</sup> and a precursor, pseudoephedrine. She examined a metal spoon containing a fiber wad and residue. She found the spoon had crystalline residue containing methamphetamine and dimethyl sulfone which is a veterinary product used as a cutting agent. There was a plastic bag containing a white crystalline substance and dimethyl sulfone.

**A. Motion to Suppress.** Hay contends his motion to suppress evidence should have been granted because the deputy's intrusion was an illegal search and the court should not have believed the deputy's version of the events. The altered LP tank was readily apparent to the deputy as was the incriminating nature of it. The deputy saw it once when walking in an open garage door and again when Hay and the deputy walked in the garage together with Hay's consent. The deputy also observed other items in the garage consistent with the manufacture of methamphetamine.

The evidence was admissible under the plain view exception. An object in plain view may be seized if (1) police intrusion was lawful and (2) the

---

<sup>3</sup> CMP is a by-product of manufacturing methamphetamine.

incriminating feature of the object was immediately apparent. *Horton v. California*, 496 U.S. 126, 136, 110 S. Ct. 2301, 2308, 110 L. Ed. 2d 112, 123 (1990). Both factors were present here and the district court is affirmed in refusing to suppress the evidence.

**B. Substantial evidence.** Defendant contends his conviction is not supported by substantial evidence. We disagree. Hay contends there is not sufficient evidence to prove beyond a reasonable doubt that he was guilty of manufacturing methamphetamine. A test on the Frank's Sauerkraut jar showed liquid and solid waste left from the manufacture of methamphetamine using the lithium-ammonia reduction method. We affirm the district court on this issue.

**C. Brother's testimony.** Hay contends the exclusion of testimony of his brother on competency grounds violated his due process rights because the brother could have provided exculpatory evidence refuting the reason for the deputy's presence on his property and the fact Hay was not involved in the manufacture of methamphetamine. Hay has failed to show how error was preserved on this issue. The evidence at trial was that his brother was receiving total disability as a result of a severe head injury and had been found incompetent to stand trial on a criminal charge. Hay in his testimony sought to establish both that his brother had used methamphetamine and certain records concerning drug transactions were his brother's. There is clear and convincing evidence to support a finding beyond a reasonable doubt that Hay was guilty as charged. We find no basis to accept Hay's argument on this issue and affirm.

**AFFIRMED.**