2013 IL App (4th) 110823-U

NO. 4-11-0823

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
May 22, 2013
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Macoupin County
DEWEY E. MORGAN,	)	No. 09CF229
Defendant-Appellant.	)	
	)	Honorable
	)	Kenneth R. Deihl,
	)	Judge Presiding.

JUSTICE KNECHT delivered the judgment of the court.
Justice Holder White concurred in the judgment.
Justice Harris specially concurred.

ORDER

¶ 1 *Held*: The appellate court held (1) the State presented sufficient evidence of possession of methamphetamine precursor, (2) the trial court did not err when it imposed sanctions preventing defendant's undisclosed witness from testifying, (3) the State's jury instruction No. 17-A was harmless error, and (4) defendant's claim of ineffective assistance of counsel fails.

¶ 2 On November 11, 2009, the State charged defendant, Dewey E. Morgan, with participation in methamphetamine manufacturing (720 ILCS 646/15(a)(1) (West 2008)) (count I), and possession of methamphetamine precursor (720 ILCS 646/20(a)(1) (West 2008)) (count II). In January 2011, a jury acquitted defendant on count I and found him guilty on count II. In August 2011, the trial court sentenced defendant to three years' imprisonment.

¶ 3 On appeal, defendant argues (1) the State failed to prove him guilty beyond a reasonable doubt of possession of methamphetamine precursor, (2) the trial court erred when it

imposed discovery sanctions against defendant for nondisclosure of a potential witness, (3) the court erred "when it instructed the jury regarding the daily amount of pseudoephedrine base that a pharmacy can sell to a purchaser," and (4) defense counsel was ineffective for not disclosing all intended witnesses during discovery and preserving the issue for appeal. We disagree and affirm.

¶ 4 I. BACKGROUND

¶ 5 On November 11, 2009, the State charged defendant with participation in methamphetamine manufacturing (720 ILCS 646/15(a)(1) (West 2008)), and possession of methamphetamine precursor (720 ILCS 646/20(a)(1) (West 2008)).

¶ 6 On January 3, 2011, the trial court held a pretrial hearing and inquired into the parties' potential witnesses. Defendant disclosed his potential witnesses as including defendant, Paul Boston, George Striplin, Kendra Striplin, Karen Berry, and Kevin Morgan. Defendant did not disclose Rachelle Morgan as a potential witness. (We note defendant's brief spells his daughter's name as "Rachel Morgan" but the record spells her name "Rachelle Morgan.") The State's list of potential witnesses did not include Rachelle Morgan. Later that day, the trial court called the case for jury trial.

¶ 7 A. The State's Case in Chief

¶ 8 The State presented the following evidence through testimony from police officers, investigators, a pharmacist, pharmacy technicians, and other witnesses to prove defendant possessed a methamphetamine precursor, namely pseudoephedrine.

¶ 9 1. *Officer Gary Foster*

¶ 10 Officer Gary Foster of the Carlinville police department testified he stopped a black Dodge pickup truck in the driveway of 808 Pine Street in Carlinville on November 11,

2009. Foster observed defendant in the passenger seat. Defendant attempted to exit the vehicle and appeared to be holding a small bag. Officer Foster instructed defendant to return to the vehicle and defendant complied. Foster identified the driver as Nathan Karrick and learned he had outstanding warrants. Foster waited for backup to arrive.

¶ 11 2. *Deputy Chris Thomas*

¶ 12 Deputy Chris Thomas of the Macoupin County Sheriff's department arrived at the scene to assist Officer Foster. Karrick told Thomas he had purchased a box of Sudafed in Litchfield because he had a cold. Thomas arrested Karrick on the outstanding warrants.

¶ 13 Thomas searched the Dodge truck. Thomas found four packages—enclosed in shopping bags—of medication containing pseudoephedrine: (1) A Walgreens brand pseudoephedrine hydrochloride 30-milligram nasal decongestant package containing 96 tablets. The enclosed receipt stated the package was purchased at the Litchfield Walgreens and time stamped 12:27 p.m. on November 11, 2009; (2) a Sudafed brand pseudoephedrine hydrochloride extended release package containing 10 tablets. The enclosed receipt stated the package was purchased at the Litchfield Wal-Mart and time stamped 12:38 p.m. on November 11, 2009; (3) an Equate brand pseudoephedrine sulfate package containing 10 tablets. The enclosed receipt stated the package was purchased at the Litchfield Wal-Mart and time stamped for 12:42 p.m. on November 11, 2009; (4) a Sudafed brand pseudoephedrine hydrochloride extended release package containing 10 tablets. The enclosed receipt stated the package was purchased at the Litchfield Walgreens and time stamped 12:50 p.m. on November 11, 2009.

¶ 14 3. *Sergeant Ryan Dixon*

¶ 15 Sergeant Ryan Dixon of the Macoupin County Sheriff's department arrived at the

Pine Street location to assist the other officers. Dixon observed defendant in the truck's passenger seat. He went over to the passenger's side of the truck and instructed defendant to exit the vehicle. As defendant exited the vehicle, Dixon observed "a big box of pseudoephedrine" on the passenger-side floorboard where defendant's feet were. The box was partially removed from the bag and several other bags were underneath the seat. Dixon discovered a total of four medication packages underneath the seat where defendant had been seated.

¶ 16 4. *Nathan Karrick*

¶ 17 Karrick testified he had known defendant for approximately 44 years and was arrested with defendant on November 11, 2009.

¶ 18 That morning, Karrick and defendant drove his father's Dodge pickup truck to Litchfield. First, they went to the Walgreens pharmacy and Karrick bought a box of Sudafed-brand medication containing pseudoephedrine. Karrick testified defendant also went into the Walgreens pharmacy and purchased medication containing pseudoephedrine. Next, they went to the Litchfield Wal-Mart, which was several blocks away, and Karrick purchased deodorant, body spray, and a box of Equate decongestants containing pseudoephedrine. Karrick testified he was not aware what defendant purchased at Wal-Mart. However, he did know that a total of four packages of pseudoephedrine were purchased.

¶ 19 On the return trip to Carlinville, defendant asked Karrick for one of the packages containing pseudoephedrine. During the drive, defendant received a phone call and Karrick heard defendant say "It's on. Be ready." Karrick explained he "more or less" understood this to mean defendant was planning to cook methamphetamine.

¶ 20 When they returned to Carlinville, both defendant and Karrick exited the vehicle.

Defendant had packages containing pseudoephedrine in his possession. Officer Foster instructed them to get back into the truck and they complied. Defendant shoved the packages "back" underneath the passenger's seat.

¶ 21 Karrick knew defendant cooked methamphetamine and previously purchased methamphetamine from defendant. Karrick had seen materials for methamphetamine manufacture, such as jars and filters, in defendant's residence. Defendant told Karrick he liked to use Sudafed-brand pseudoephedrine when he cooked methamphetamine.

¶ 22 On cross-examination, Karrick testified he purchased one of the packages for his brother "Kevin['s]" "head colds" and stated pseudoephedrine "is perfect for keeping my head cleared out."

¶ 23 5. *The Pharmacist and Pharmacist Technicians*

¶ 24 Lori Beth Walden testified she is a pharmacy technician at the Carlinville Wal-Mart pharmacy. On November 11, 2009, at 11:53 a.m., she sold a 10-tablet package of Sudafed 24-hour decongestant containing pseudoephedrine to defendant.

¶ 25 Suzanne Fleming testified she is a pharmacist at the Litchfield Wal-Mart pharmacy. At Wal-Mart, products containing pseudoephedrine must be purchased at the pharmacy counter. Customers are required to show photo identification, the customer's driver's license information is recorded, and the customer must provide his signature. On November 11, 2009, at 12:38 p.m. Fleming sold a package of Sudafed 24-hour decongestant containing pseudoephedrine to defendant. After the purchase, Fleming contacted Greg Cowell of the Illinois State Police and advised him of defendant's purchase.

¶ 26 Melanie Lawrence testified she is a pharmacy technician at the Litchfield

Walgreens pharmacy. On November 11, 2009, at 12:50 p.m. she sold a 10-tablet box of decongestant containing pseudoephedrine to defendant.

¶ 27 6. *Special Agent Greg Cowell*

¶ 28 Greg Cowell testified he is a special agent with the Illinois State Police Meth Response Team. In the Macoupin County area, pseudoephedrine is commonly used as an ingredient in manufacturing methamphetamine. On November 11, 2009, the Litchfield Wal-Mart pharmacy informed Cowell defendant and Karrick purchased pseudoephedrine a short time apart. Cowell contacted the Litchfield Walgreens pharmacy and learned defendant and Karrick had purchased pseudoephedrine there.

¶ 29 Cowell testified, based on his experience in law enforcement, buying multiple boxes of pseudoephedrine at different locations is indicative of methamphetamine manufacturing. He testified pharmacies have a federal limit of being able to sell up to 3.6 grams of pseudoephedrine per day to an individual. Because one pharmacy cannot sell more than 3.6 grams of pseudoephedrine, persons can go from one pharmacy to the next without the pharmacy knowing whether the individual previously purchased pseudoephedrine that day. Further, Illinois law restricts the purchase of two packages of pseudoephedrine within a single transaction. A single individual would not be able to purchase more than one of the boxes of pseudoephedrine pills purchased by defendant and Karrick in a 24-hour period.

¶ 30 Cowell testified pseudoephedrine is a methamphetamine precursor. The three packages recovered contained 2.4 grams of pseudoephedrine each, and the fourth package contained 2.88 grams of pseudoephedrine, for a total of approximately 10.08 grams of pseudoephedrine.

¶ 31 Cowell admitted the police's search did not discover a methamphetamine lab or other ingredients for the manufacture of methamphetamine.

¶ 32 B. Trial Court's Dismissal of a Juror

¶ 33 On the second day of trial, during the State's evidence, the trial court was informed a juror member may have responded untruthfully to questions during *voir dire*. The State sought to remove the juror. Defense counsel made a motion for a mistrial on the basis "you don't know what the effect is going to be on the rest of the jurors" if a juror is singled out and removed. At the end of the second day, the trial court called the juror into chambers, out of the presence of other jurors, and dismissed the juror.

¶ 34 C. Defendant's Offer of Proof

¶ 35 At the opening of defendant's evidence, he called Allen Dawson as a witness. The State objected on the grounds defendant had not disclosed Dawson as a potential witness. At side bar, the trial court asked defendant's counsel, "Are there any other names of people that you didn't give the Court?" Defense counsel replied, "Not that I'm aware of." The court sustained the State's objection.

¶ 36 Immediately thereafter, defendant called Rachelle Morgan as a witness. The State objected on the grounds defendant had not disclosed Rachelle as a potential witness. The State argued, "what's prejudicial is that [defendant] could be calling a witness that one of the 12 [jury] members knows or has some relationship to. I mean that's the whole point of this whole process giving a witness list." Defense counsel responded, "Obviously, this is Rachelle Morgan, [defendant's] daughter. If somebody knew him—her, they would have known—indicated."

¶ 37 Defendant made an offer of proof of Dawson's and Rachelle's testimony. Rachelle

testified she is defendant's daughter and saw him approximately three to four times a week during the November 2009 time period. Defendant lived with Jeremy Striplin at the Pine Street residence. She testified she has never had a driver's license and did not currently have photo identification. Because she has allergies and does not have a driver's license, her father purchases decongestant medication for her. She asserted defendant purchased medication for her on November 11, 2009. Defendant purchases "cold pills" for her brother, Kevin, who has allergies and also does not have a driver's license. She testified defendant has allergies and uses "about two to three [cold pills] a day."

¶ 38 On cross-examination the State asked whether Rachelle had purchased pseudoephedrine: (1) on May 21, 2010, at the Carlinville Wal-Mart; (2) on June 13, 2010, at Sullivan's pharmacy in Carlinville; (3) on June 13, 2010, at the Springfield Wal-Mart; (3) on June 15, 2010, at the Carlinville Wal-Mart; (4) on July 3, 2010, at Sullivan's pharmacy in Carlinville; and (5) on November 15, 2010, from the Springfield Wal-Mart. Rachelle admitted the November 15, 2010, purchase and stated she did not remember about the other dates.

¶ 39 On redirect, Rachelle testified, "I lost my ID for two years, and like four months ago I found it."

¶ 40 In ruling on the motion, the trial court announced, "[Dawson and Rachelle] were not disclosed to the State. Doesn't seem that both sides could get a fair trial, if we were to allow witnesses to be called that weren't disclosed."

¶ 41 D. State's Jury Instruction No. 17-A

¶ 42 The State proposed a jury instruction based on section 830(d)(1) of the federal Combating Methamphetamine Epidemic Act of 2005 (Epidemic Act) (21 U.S.C. § 830(d)(1)

(2006)), which restricts pharmacies from selling more than 3.6 grams of pseudoephedrine in a day to an individual. Defendant objected to the State's jury instruction on the basis "this is not a federal case" and "it's not relevant to this case." Defendant argued, "it's misleading to the jury to allow a Federal statute that is applicable to pharmacies and then say he was wrong when he bought these [pseudoephedrine packages] because here's the Federal statute. It doesn't apply to him."

¶ 43 The State responded federal law restricts pharmacies from selling 3.6 grams of pseudoephedrine and Cowell testified as such. The State argued the statute "does go to the fact of what the pharmacy can sell, which is a big deal in the fact of the matter that [defendant] went to three different places in a very short time period buying the exact same thing from a pharmacy."

¶ 44 The trial court permitted the State to tender a jury instruction based on section 830(d)(1) of the Epidemic Act.

¶ 45 E. The Verdict

¶ 46 The jury acquitted defendant of participation in methamphetamine manufacturing and found him guilty of possession of methamphetamine precursor.

¶ 47 F. Defendant's Posttrial Motions and the Sentencing Hearing

¶ 48 In late January 2011, defendant filed a motion for judgment for a new trial and a motion for judgment not withstanding the verdict. The motions, among others, asserted the trial court erred (1) because jury instruction No. 17 "required the Defendant to explain why he purchased more than 3.6 grams [of pseudoephedrine] within a 24 hour period," and (2) the evidence was insufficient to convict defendant of count II. The trial court denied the motions.

¶ 49 In August 2011, the trial court sentenced defendant to three years' imprisonment. Defendant filed a motion to reconsider, incorporating his previous posttrial motions. The court denied the motion.

¶ 50 This appeal followed.

¶ 51 II. ANALYSIS

¶ 52 On appeal, defendant argues (1) the State failed to prove him guilty of possession of methamphetamine precursor, (2) the trial court erred when it imposed discovery sanctions against defendant for nondisclosure of a potential witness, (3) the court erred "when it instructed the jury regarding the daily amount of pseudoephedrine base that a pharmacy can sell to a purchaser," and (4) defense counsel was ineffective for not disclosing all intended witnesses during discovery and preserving the issue for appeal. We address defendant's contentions in turn.

¶ 53 A. Defendant's Sufficiency-of-the-Evidence Claim

¶ 54 Defendant concedes he possessed pseudoephedrine, which is a methamphetamine precursor, but he asserts the State failed to prove he possessed pseudoephedrine with the intent to manufacture methamphetamine. Defendant posits the evidence of intent is insufficient because (1) Karrick testified he had not seen defendant cook methamphetamine, (2) no physical evidence suggested methamphetamine manufacture, (3) "there was no evidence presented regarding what defendant meant by ['It's on; be ready']," and (4) "Cowell testified a person can only buy one box of Sudafed at a time, and the defendant needed to buy more than one box, in order to give the pills to his brother, it is certainly logical that the defendant had to go to more than one store to buy the Sudafed." In his reply brief, defendant adds (1) Karrick's testimony was uncorroborated, and (2) "[t]he lenient treatment Karrick received (probation) is but one reason to view his claims

with a strong dose of suspicion." We disagree.

¶ 55 1. *Standard of Review*

¶ 56 "When considering an argument regarding the sufficiency of the evidence to convict, we will affirm if, 'viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " *People v. Scott*, 2012 IL App (4th) 100304, ¶ 18, 966 N.E.2d 340 (quoting *People v. Smith*, 185 Ill. 2d 532, 541, 708 N.E.2d 365, 369 (1999)). This court "will not reverse a criminal conviction unless the evidence is so unreasonable, improbable, or so unsatisfactory as to justify a reasonable doubt of the defendant's guilt." *People v. Campbell*, 146 Ill. 2d 363, 375, 586 N.E.2d 1261, 1266 (1992). The trier of fact has the responsibility to determine the credibility of witnesses and the weight given to their testimony and to draw reasonable inferences from that evidence. *People v. Burney*, 2011 IL App (4th) 100343, ¶ 25, 963 N.E.2d 430 (citing *People v. Jackson*, 232 Ill. 2d 246, 281, 903 N.E.2d 388, 406 (2009)).

¶ 57 2. *Possession of Methamphetamine Precursor*

¶ 58 Section 15(a)(1) of the Methamphetamine Control and Community Protection Act states as follows: "It is unlawful to knowingly participate in the manufacture of methamphetamine with the intent that methamphetamine or a substance containing methamphetamine be produced." 720 ILCS 646/15(a)(1) (West 2008).

¶ 59 3. *Evidence of Intent in This Case*

¶ 60 The State asserts defendant's intent to manufacture methamphetamine is shown by the evidence (1) defendant purchased three boxes of pseudoephedrine within 57 minutes from three different stores in two different towns, (2) Karrick, his shopping companion, bought an

additional two boxes of pseudoephedrine, (3) defendant asked Karrick for one of his boxes, (4) defendant stated " 'It's on' " and " 'Be Ready' " in a phone call, which Karrick took to imply defendant was going to manufacture methamphetamine, (5) defendant told Karrick he liked to use Sudafed when he cooked methamphetamine, (6) there were filters and jars at defendant's residence, and (7) defendant shoved four boxes of pseudoephedrine underneath his seat in the truck when approached by law enforcement. We agree with the State.

¶ 61 Defendant's assertion he was buying a box of pills to give to his brother is not supported by the record. Karrick testified he purchased pseudoephedrine for himself and his brother "Kevin," and Cowell testified Karrick told him the same in an interview. Defendant is attempting to provide a plausible explanation for his possession of the pseudoephedrine—he was buying pseudoephedrine for legitimate medical purposes. It is the jury's role to determine the credibility of Karrick's testimony about why he purchased pseudoephedrine and to assess defendant's arguments.

¶ 62 Based on the testimony about the federal, state, and pharmacy limitations placed on purchasing pseudoephedrine, and the evidence defendant purchased several boxes of pseudoephedrine over a 57-minute interval at three different stores in two different counties, the jury could reasonably infer defendant's activities were designed to avoid detection. See *People v. Willner*, 392 Ill. App. 3d 121, 125, 924 N.E.2d 1029, 1032 (2009) (discussing the legislature's attempt to limit methamphetamine production and stating: "While both ephedrine and pseudoephedrine have legitimate medical uses, methamphetamine manufacturers can extract the methamphetamine's precursors from over-the-counter cold medicines for use in methamphetamine production."). The jury could reasonably infer defendant had no legitimate

purpose for the accumulation of approximately 10.08 grams of pseudoephedrine in less than one hour through deceptive means. See *People v. Reatherford*, 345 Ill. App. 3d 327, 340, 802 N.E.2d 340, 352 (2003). The evidence supports a reasonable inference defendant intended to use this large amount of pseudoephedrine to manufacture methamphetamine.

¶ 63 B. Defendant's Discovery-Sanction Claim

¶ 64 Defendant contends the trial court erred when it imposed discovery sanctions and refused to allow Rachelle Morgan's testimony. Defendant concedes he did not raise this issue before the trial court and plain-error review applies. Defendant asserts the court erred because (1) Rachelle's testimony was material to the defense theory defendant had a legal reason to purchase pseudoephedrine, (2) the court could have permitted a continuance to allow the State to interview Rachelle, (3) "it seems unlikely there would be jurors that did not know the defendant, but knew [Rachelle] Morgan, his daughter, and in addition, because said juror knew [her], that fact would influence the juror's decision on the guilt or innocence of the defendant," and (4) there was no bad faith in counsel's failure to disclose Rachelle as a potential witness.

¶ 65 1. *Standard of Review*

¶ 66 Illinois Supreme Court Rule 413(d)(i) (eff. July 1, 1982) requires criminal defendants to disclose to the prosecution the names and last known addresses of person he intends to call as witnesses. Under Illinois Supreme Court Rule 415(g) (eff. Oct. 1, 1971), once the trial court determines a discovery violation has occurred, it may impose any sanction under the circumstances. A trial court's decision to impose sanctions is reviewed for an abuse of discretion. *People v. Kladis*, 2011 IL 110920, ¶ 23, 960 N.E.2d 1104.

¶ 67 2. *Plain-Error Review*

¶ 68 Plain-error review averts forfeiture where "(1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant; or (2) a clear or obvious error occurred, and the error is so serious that it affected the fairness of the defendant's trial and the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Taylor*, 2011 IL 110067, ¶ 30, 956 N.E.2d 431. The first step is to determine whether error occurred at all. *Id.*

¶ 69 3. *No Error Occurred*

¶ 70 Here, defendant did not disclose Rachelle as a witness until the close of the State's case in chief. Immediately prior to calling Rachelle, counsel called another nondisclosed potential witness and represented to the court he was unaware of other witnesses he had not disclosed to the court. Defendant's offer of proof shows Rachelle's testimony was to be used to present a legal explanation for defendant's purchase and possession of pseudoephedrine—she did not have photo identification required to purchase pseudoephedrine and she, her brother Kevin, and defendant had allergies requiring medication. Defendant does not provide an explanation why Kevin or any of the other disclosed witnesses could not be called to testify about the use of pseudoephedrine to treat "allergies." Defendant does not argue he did not know his daughter's identity prior to trial and does not provide an explanation for failing to disclose her name prior to midtrial. We will not speculate whether a juror would or would not have known Rachelle without also knowing defendant and whether that would influence the juror's decision on defendant's guilt. When objecting to the trial court's dismissal of a juror for failure to disclose information at *voir dire*, defense counsel asserted "you don't know what the effect is going to be on" the jurors. The same logic applies here. As no error occurred, the trial court did not abuse its

discretion in imposing discovery sanctions.

¶ 71 C. Defendant's Jury-Instruction Claim

¶ 72 Defendant asserts the trial court erred when it instructed the jury regarding the daily amount of pseudoephedrine base that a pharmacy can sell to a purchaser. Defendant contends the instruction misled the jury because it (1) failed to make clear he had not committed a crime under federal law and (2) presented an incomplete picture of the law. The State responds "[d]efendant invited the State's evidence and jury instruction that a pharmacy cannot sell more than 3.6 grams of pseudoephedrine within 24 hours to an individual when defense counsel argued that it was not illegal for defendant to go from store to store to purchase cold tablets." On the merits, the State adds the instruction was necessary where testimonial evidence concerning several statutes was confusing and the instruction went to defendant's intent in purchasing multiple boxes of pseudoephedrine from several pharmacies within a short period of time.

¶ 73 1. *Standard of Review*

¶ 74 Illinois Supreme Court Rule 451(a) (eff. July 1, 2006) provides whenever an Illinois pattern jury instruction (IPI) "does not contain an instruction on a subject on which the court determines that the jury should be instructed, the instruction given on that subject should be simple, brief, impartial, and free from argument." The supreme court had consistently explained " ' "[t]he sole function of instructions is to convey to the minds of the jury the correct principles of law applicable to the evidence submitted to it in order that, having determined the final state of facts from the evidence, the jury may, by the application of proper legal principles, arrive at a correct conclusion according to the law and the evidence." ' " *People v. Hudson*, 222 Ill. 2d 392, 399, 856 N.E.2d 1078, 1082 (2006) (quoting *People v. Ramey*, 151 Ill. 2d 498, 535, 603 N.E.2d

519, 534 (1992), quoting *People v. Gambony*, 402 Ill. 74, 81-82, 83 N.E.2d 321, 325 (1948)). A reviewing court considers the jury instructions together and not in isolation. *People v. Cook*, 2011 IL App (4th) 090875, ¶ 27, 957 N.E.2d 563; *People v. Ward*, 187 Ill. 2d 249, 265, 718 N.E.2d 117, 129 (1999). A court's decision to instruct a jury using a non-IPI instruction will not be disturbed absent an abuse of discretion. *Hudson*, 222 Ill. 2d at 400, 856 N.E.2d at 1082.

¶ 75 2. *Special Agent Cowell's Testimony*

¶ 76 During the State's case in chief, the State elicited testimony from Cowell the purchase of pseudoephedrine at multiple locations is suspect criminal behavior because retail stores are limited in the amount of pseudoephedrine it can sell to a single customer. This triggered a back and forth by defense counsel about whether these were state or federal restrictions, and whether these restrictions applied to defendant.

¶ 77 Defense counsel asked Cowell, on cross-examination, whether section 20 of the Methamphetamine Precursor Control Act (Control Act) (720 ILCS 648/20 (West 2008)) permits an individual to purchase multiple packages from a pharmacy within 24 hours. Cowell answered it does. Then, defense counsel presented a hypothetical question about whether it was legal for him, counsel, to purchase Zyrtec-D at the Carlinville Wal-Mart and then to drive over to a pharmacy in Litchfield to purchase another box of Zyrtec-D. Cowell answered this would not be illegal "[i]f you are using them for yourself and you are under the allotted limit."

¶ 78 On redirect, Cowell testified Illinois law limits the amount of pseudoephedrine a pharmacy can sell to 3.6 grams, and in order for defendant to purchase more than the 3.6 grams allowed he would have had to go to different stores.

¶ 79 On re-cross-examination, defense counsel asked whether this was by federal or

state law. Cowell answered this was by federal statute. Counsel asked, "He's not charged under the Federal statute?" to which Cowell responded, "No, he's not charged under the Federal statute."

¶ 80 3. *The Jury Instruction Conference and the Trial Court's Decision*

¶ 81 The State proposed a jury instruction based on the federal 3.6-gram limitation. In objecting to the instruction, defense counsel argued, "it's misleading to the jury to allow a Federal statute that is applicable to pharmacies and then say he was wrong when he bought these because here's the Federal statute. It doesn't apply to him."

¶ 82 The State argued it "would be improper and unfair and unjust for [defendant] to have his instruction [No. 2] on the law admitted and then my instruction on the law not admitted." The State expressed it would not have a problem with defendant's instruction No. 2 (based on section 648/20 of the Control Act (720 ILCS 648/20 (West 2008))) if the State was allowed to present its instruction No. 17 (based on section 830(d)(1) of the Epidemic Act (21 U.S.C. § 830(d)(1) (2006))).

¶ 83 In making its decision, the trial court suggested defendant's instruction No. 2 would cause the "3.6-gram matter" to "linger" in the jury's mind. The parties agreed to revise introductory language to their respective instructions. The court allowed the State to tender People's instruction No. 17-A and defendant to tender defendant's instruction No. 2-A.

¶ 84 4. *People's Instruction No. 17-A*

¶ 85 People's instruction No. 17-A, based on section 830(d)(1) of the Epidemic Act (21 U.S.C. § 830(d)(1) (2006)), stated as follows:

"A pharmacy is required to submit reports by (b)(3).

> With respect to ephedrine base, pseudoephedrine base, or phenylpropanolamine base in a scheduled listed chemical product—
>
> the quantity of such base sold at retail in such a product by a regulated seller, or a distributor required to submit reports by subsection (b)(3) may not, for any purchaser, exceed a daily amount of 3.6 grams, without regard to the number of transactions."

¶ 86 5. *Defendant's Instruction No. 2-A*

¶ 87 Defendant's instruction No. 2-A, based on section 20 of the Control Act (720 ILCS 648/20 (West 2008)), sets forth the restrictions on purchase of pseudoephedrine, namely (1) "no person shall knowingly purchase, receive, or otherwise acquire, within any 30-day period[,] products containing more than a total of 7,500 milligrams of ephedrine or pseudoephedrine," (2) "no person shall knowingly purchase, receive, or otherwise acquire more than 2 targeted packages in a single retail transaction," and (3) "no person shall knowingly purchase, receive, or otherwise acquire more than one convenience package from a retail location other than a pharmacy counter in a 24-hour period."

¶ 88 6. *The Trial Court's Decision Was Harmless Error*

¶ 89 The State's instruction erroneously introduced unnecessary confusion to the jury by setting forth extrinsic restrictions applying to pharmacies—not individuals such as defendant. The State wanted this instruction to support its theory defendant's criminal intent is shown by his conduct to avoid sales restrictions placed on pseudoephedrine. To prevent any "lingering"

confusion among the jury about the 3.6-gram restriction on pharmacies, the State could have published this federal statute to the jury as evidence Presenting the federal restriction as a jury instruction placed too much emphasis on its importance. This federal statute was only germane to the question of defendant's intent and not a principle of law, and introducing it as a jury instruction was error. To assist the jury's understanding of intent, the State or defendant could have used Illinois Pattern Jury Instructions, Criminal, No. 5.01A (4th ed. 2000), which defines intent.

¶ 90 "[I]nstructional errors are deemed harmless if it is demonstrated that the result of the trial would not have been different had the jury been properly instructed." *People v. Washington*, 2012 IL 110283, ¶ 60, 962 N.E.2d 902. Here, the instruction paralleled the State's evidence federal statutes restricted pharmacies to selling an individual up to 3.6 grams of pseudoephedrine in a 24-hour period. To hypothetically remove the instruction, the following would remain for the jury's consideration: (1) the evidence about the 3.6-gram limitation, (2) the evidence of the Litchfield Wal-Mart pharmacy's restrictions on purchasing pseudoephedrine, and (3) Cowell's testimony about defendant's multiple purchases being consistent with methamphetamine manufacture. Also, defendant's instruction No. 2-A would be before the jury, including its information an Illinois statute limits an individual to 7.5 grams of pseudoephedrine in a 30-day period. We have not been called upon to determine the appropriateness of this instruction. Without the instruction, the jury had evidence about the relevant restrictions on pseudoephedrine purchase. It is the jury's function to weigh the evidence and draw reasonable inferences therefrom. *Id.* We have already determined the State presented sufficient evidence of defendant's guilt, and the verdict would not have been different without the State's instruction.

¶ 91 D. Defendant's Ineffective-Assistance-of-Counsel Claim

¶ 92 Defendant asserts his trial counsel was ineffective for failing to disclose potential witnesses and failing to preserve the issue for appeal. Defendant contends "[b]ecause defense counsel did not list the necessary witnesses in his discovery answers, he failed to do the one act that would have allowed him to present the evidence needed to give the jury a reason to think that [defendant] was not guilty of [possession of methamphetamine precursor]." The State responds, (1) defense counsel could have called disclosed witnesses, including defendant's son Kevin, to testify defendant's intent was to purchase pseudoephedrine for "doctoring" colds and allergies, and (2) the record is not sufficient to determine whether listing one sibling in discovery and not another and then calling the nondisclosed sibling was a matter of trial strategy. We agree with the State.

¶ 93 "To make out a claim for ineffective assistance of counsel, a defendant must show that (1) defense counsel's performance was so deficient that it 'fell below an objective standard of reasonableness' and (2) 'there was a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' " *People v. Crenshaw*, 2012 IL App (4th) 110202, ¶ 13, 974 N.E.2d 1002 (quoting *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984)). "To establish deficient performance, the defendant must overcome the strong presumption that counsel's action or inaction was the result of sound trial strategy." *People v. Ramsey*, 239 Ill. 2d 342, 433, 942 N.E.2d 1168, 1218 (2010). A mistake in trial strategy, tactics, or an error in judgment will not render defense counsel's representation constitutionally defective. *People v. Perry*, 224 Ill. 2d 312, 355, 864 N.E.2d 196, 222 (2007). "Only if counsel's trial strategy is so unsound that he entirely fails to conduct meaningful adversarial testing of the

State's case will ineffective assistance of counsel be found." *Id.* at 355-56, 864 N.E.2d at 222. Counsel's effectiveness is determined by the totality of his conduct. *People v. Gapski*, 283 Ill. App. 3d 937, 942, 670 N.E.2d 1116, 1119 (1996).

¶ 94 We have determined the State presented sufficient evidence of defendant's guilt and there is no reasonable probability the verdict's outcome would have been different if Rachelle had been permitted to testify. The jury would not be required to find credible Rachelle's proposed testimony relating to her explanation she, her brother, and defendant all have allergies, defendant is the one responsible for purchasing pseudoephedrine for everyone, and defendant purchased one of his four boxes of pseudoephedrine for her on November 11, 2009. Likewise, the jury would not have to credit Rachelle's testimony based on her initial testimony she did not have photo identification and her later testimony she lost her photo identification for two years, found it four months prior to the trial, but did not have photo identification at the time of trial. The State's questioning about Rachelle's history of purchasing pseudoephedrine would have been more damaging than helpful.

¶ 95 We do not know why counsel decided not to call Kevin Morgan or any of the other disclosed witnesses. If defendant seeks to introduce further evidence outside of the present record to demonstrate ineffective assistance of counsel, he can do so through a proceeding for postconviction relief. See *People v. Millsap*, 374 Ill. App. 3d 857, 863, 873 N.E.2d 396, 403 (2007) (Where "the defendant's ineffective-assistance-of-counsel claims require consideration of matters outside the record on direct appeal, a proceeding for postconviction relief is better suited for addressing defendant's claims because a complete record can be made and the attorney-client privilege no longer applies."). We note the present record shows defense counsel presented a

meaningful testing of the State's case by making numerous objections to evidence, testimony, and jury instructions; arguing several sidebars; aggressively cross-examining the State's witnesses; making a motion for a mistrial; and making several motions for a directed verdict.

¶ 96 III. CONCLUSION

¶ 97 We affirm the trial court's judgment. We award the State its $50 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002(a) (West 2010).

¶ 98 Affirmed.

¶ 99 JUSTICE HARRIS, specially concurring.

¶ 100 I agree with the majority that the trial court's judgment should be affirmed but I write separately as I believe the trial court erred in barring Rachelle Morgan as a defense witness without first exploring less severe alternatives. Our courts have observed that few rights are more fundamental than an accused's sixth amendment right to present witnesses in his own defense. See *People* v. *Scott*, 339 Ill. App. 3d 565, 572, 791 N.E.2d 89, 95 (2003) (citing *Taylor* v. *Illinois,* 484 U.S. 400, 408 (1988)). A trial court's order excluding evidence as a sanction for a discovery violation is appropriate in only the most extreme situations (*People* v. *Houser*, 305 Ill. App. 3d 384, 390, 712 N.E.2d 355, 359 (1999)) and will be closely scrutinized on appeal (*Scott*, 339 Ill. App. 3d at 573, 791 N.E.2d at 95).

¶ 101 Factors which should be considered by the trial court before a witness preclusion sanction is employed to enforce discovery rules are effectiveness of a less severe sanction, the materiality of the testimony to the outcome of the case, prejudice to the other party caused by the testimony, and evidence of bad faith in the violation of the discovery rules. *Scott*, 339 Ill. App. 3d at 573, 791 N.E.2d at 95 (cited with approval by *Ramsey,* 239 Ill. 2d at 430-31, 942 N.E.2d at 1216-17). A trial court should exercise its discretion when imposing sanctions for a discovery violation pursuant to Illinois Supreme Court Rule 415(g) (eff. Oct. 1, 1971). *Houser*, 305 Ill. App. 3d at 392, 712 N.E.2d at 360 ("[T]he trial court failed to properly exercise its discretion when it denied defendant a fundamental right without (a) sufficiently establishing *how* the State was unfairly prejudiced, and (b) considering alternative sanctions.") (Emphasis in original.).

¶ 102 Here, it does not appear the trial court exercised its discretion. Instead, the court simply barred Morgan's testimony, stating: "Doesn't seem that both sides could get a fair trial if

we were to allow witnesses to be called that weren't disclosed." According to the offer of proof at trial, Morgan's testimony could have bolstered the defense theory that at least some of the pseudoephedrine was purchased for medicinal use and not with the intent to manufacture methamphetamine. The defendant's failure to include Morgan on the witness list appears to simply have been an oversight by counsel. As an alternative to barring Morgan's testimony, the court could have considered granting a short continuance to allow the State to interview her.

¶ 103 The trial court should have at least *considered* factors such as those set forth in *Scott* before deciding to bar Morgan as a witness. That said, I do not believe the error constitutes plain error as the evidence in this case was not closely balanced and the error was not so serious that it affected the fairness of the defendant's trial and the integrity of the judicial process. See *Taylor*, 2011 IL 110067, ¶ 30, 956 N.E.2d 431.