SUPREME COURT NO. 17-0118
POLK COUNTY NO. FECR297552

IN THE SUPREME COURT OF IOWA

STATE OF IOWA
Plaintiff-Appellee,

v.

ANTHONY HARRIS
Defendant-Appellant.

ON APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR POLK COUNTY
HONORABLE PAUL SCOTT, DISTRICT COURT JUDGE

BRIEF FOR APPELLANT

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PROOF OF SERVICE & CERTIFICATE OF FILING

On February 3, 2018, I served this brief on the Applicant at his last known address in Des Moines and all other parties by EDMS to their respective counsel:

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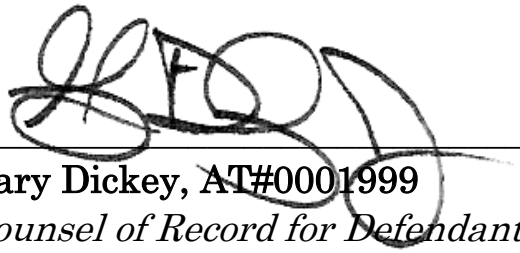
I further certify that I did file this proof brief with the Clerk of the Iowa Supreme Court by EDMS on February 3, 2018.



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ROUTING STATEMENT

Transfer to the court of appeals is appropriate.

STATEMENT OF THE CASE

Following a five day trial, a jury the Iowa District Court for Polk County convicted Anthony Harris of one count of possession of methamphetamines with the intent to deliver in violation of Iowa Code section and two counts of deliver of methamphetamines in violation of Iowa Code section 124.401(1)(c)(6). (App. at 13-17). The district court applied the second or subsequent offender enhancement under Iowa Code section 124.411 and sentenced Harris to three concurrent terms of fifteen years of imprisonment with the requirement that he serve at least one-third of the sentence before he will be eligible for parole. (App. at 20-21). Harris timely filed a notice of appeal. (App. at 25).

STATEMENT OF THE FACTS

On July 29, 2016, two undercover officers from the vice and narcotics division of the Des Moines Police Department, Shawn Herman and Todd Wilshusen, were conducting surveillance in the 1600 block of Oakland Avenue, which is an area known for drug

activity. (11/16/16 Tr. of Herman, Carter, Wilshusen at 15-16). The officers observed two males inside of a silver Buick Rendezvous parked in an apartment complex. (11/16/16 Tr. of Herman, Carter, Wilshusen at 16). Brandon Ganaway was in the driver's seat while Anthony Harris sat in the passenger's seat. (11/16/16 Tr. of Herman, Carter, Wilshusen at 16). At some point during the surveillance, the officers observed a white male named Blitz Tynnush ride up on a bicycle, engage in a "hand-to-hand" transaction[1] through the passenger-side window of the Rendezvous, put something into his pocket, and then ride away.[2] (11/16/16 Tr. of Herman, Carter, Wilshusen at 17). The officers subsequently stopped Tynnush and recovered a quarter gram of

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[1] Officer Herman testified at trial that a hand-to-hand transaction occurs when a person walks up, gives money to a drug dealer who in turn gives them product, and they part ways. (11/16/16 Tr. of Herman, Carter, Wilshusen at 12).

[2] At Harris's preliminary hearing, the officer Herman testified that he observed Harris get out of the Rendezvous to complete the hand-to-hand transaction. (11/16/16 Tr. of Herman, Carter, Wilshusen at 39-41). At trial, Herman conceded that his prior testimony was inaccurate. (11/16/16 Tr. of Herman, Carter, Wilshusen at 73).

methamphetamines from him. (11/16/16 Tr. of Herman, Carter, Wilshusen at 18).

Approximately ten minutes later, the officers observed a white female approach the Rendezvous on foot. (11/16/16 Tr. of Herman, Carter, Wilshusen at 21). Through binoculars, Officer Herman observed the female named Betty Holden engage in a hand-to-hand transaction and walk away. (11/16/16 Tr. of Herman, Carter, Wilshusen at 22). The officers later stopped Holden and recovered a half gram of methamphetamines from her. (11/16/16 Tr. of Herman, Carter, Wilshusen at 22-23).

Thereafter, the officers called for a marked patrol car to initiate a traffic stop of the Rendezvous. (11/16/16 Tr. of Herman, Carter, Wilshusen at 24-25). The officers searched Ganaway and found two and a half grams of methamphetamines on his person. (11/16/16 Tr. of Herman, Carter, Wilshusen at 29). They also searched Harris and found no drugs or any items commonly known to be associated with drug trafficking. (11/16/16 Tr. of Herman, Carter, Wilshusen at 50-51). Officer Herman interrogated Harris, who stated that "he was not the owner of the

drugs, and that he was just doing it to help a friend." (11/16/16 Tr. of Herman, Carter, Wilshusen at 28). Harris further stated that "he did not sell the drugs to the female . . . [but] he had given her the drugs due to the fact that they had previously had an intimate relationship." (11/16/16 Tr. of Herman, Carter, Wilshusen at 28).

On September 6, 2016, the State of Iowa filed a trial information charging Harris and Ganaway with one count of possession with intent to deliver methamphetamines and two counts of delivery of methamphetamines. (App. at 6-9). Both defendants proceeded to trial. On the third day, the district court granted Ganaway's motion for a mistrial on the basis of the officers' testimony about Harris's statement denying ownership of the drugs. (11/17/16 Trial Tr. at 3-11). The jury found Harris guilty on all counts. (11/18/16 Jury Verdict Trial Tr. at 2-3).

ARGUMENT

I. THE DISTRICT COURT ERRED IN ALLOWING THE INTRODUCTION OF INADMISSIBLE HEARSAY FROM ABSENT WITNESSES IMPLYING THAT THEY PURCHASED DRUGS FROM HARRIS

Preservation of Error

Harris preserved error by contemporaneously objecting to the hearsay testimony at trial. (11/16/16 Tr. of Herman, Carter, Wilshusen at 21).

Standard of Review

The standard of review is for errors at law. *State v. Plain*, 898 N.W.2d 801, 810 (Iowa 2017).

Merits

A. Applicable Legal Principles

Hearsay "is a statement, other than one made by the declarant while testifying at . . . trial, . . . offered in evidence to prove the truth of the matter asserted." Iowa R. Evid. 5.801(c). Hearsay is not admissible unless it falls within one of several enumerated exceptions. *Id.* 5.802. Before considering the exemptions and exceptions to the rule against hearsay, an inquiry must first be made to determine if the evidence under

consideration is "a statement . . . offered in evidence to prove the truth of the matter asserted." *Id.* 5.801(c). If not, it is not hearsay and is excluded from the rule by definition. Prejudice is presumed if a hearsay statement is erroneously admitted, unless the contrary is affirmatively established by the State. *State v. Sowder*, 394 N.W.2d 368, 372 (Iowa 1986).

B. Testimony from the officers about that their conversations with Tynnush and Holden confirmed their observations of drug trafficking is implied hearsay

For reasons that are not readily apparent in the record, the prosecutor did not list Tynnush or Holden as a witnesses in the minutes of testimony. (App. at 15). Nor did he call either witness to testify at trial. Accordingly, any statements Tynnush or Holden made to the undercover narcotics officers would be inadmissible at trial as hearsay and a violation of the Confrontation Clauses of the U.S. and Iowa Constitutions. *State v. Tompkins*, 859 N.W.2d 631, 640-43 (Iowa 2015). Thus, the prosecutor faced a dilemma in trying to introduce their statements that they obtained drugs from Harris at trial. To get around this, the prosecutor questioned the

narcotics officers in such a way as to imply that Tynnush and Holden admitted to obtaining drugs from Harris:

> Q. (By Mr. Crisp) Upon observing these individuals in the Rendezvous, what happened next?
> A. We observed a white male [ride] up to the front of the complex on a bicycle. He got off the bicycle, walked up to the passenger's side of the vehicle where Mr. Harris was seated. He was there for a very brief time. And we observed a hand-to-hand, where they reached in the vehicle and then reached back out. He immediately put something into his pocket and returned to his bike and rode away.
>
> * * *
>
> Q. What happened next after the hand-to-hand exchange and the white male getting back on the bicycle?
> A. The individual got on the bike and started driving down the street. We followed him for a distance that we thought would be sufficient so that the two gentlemen in the vehicle wouldn't see us. We approached the male, identified ourselves as police officers. *We had a brief conversation and we recovered a quarter gram of methamphetamine from him.*
>
> * * *
>
> Q. After speaking with Mr. Tynnush, were – would you state and tell the jury, were your observations confirmed?
> A. Yes. Per our encounter with Mr. Tynnush, we knew we had in fact seen –
>
> MS. SAMUELSON: Objection. The witness is about to testify to hearsay.

THE COURT: No. That's overruled. Go ahead.

A. Per our encounter –

MR. RODRIGUEZ: Objection to speculation.

THE COURT: Okay. Just so we're specific here. I'm going to tell you what the question is.

After speaking with Mr. Tynnush, would you tell the jury what you stated, were your observations confirmed?

A. Yes.

* * *

Q. Again, not telling us what Ms. Holden stated, but after speaking with her, were your observations confirmed?

A. Yes.

* * *

Q. Without telling us what Mr. Tynnush said, did the conversation with him corroborate with your previous observations?

A. Yes.

* * *

Q. Without telling the jury what [Holden] said, based upon that conversation, were those observations consisted with what you previously observed?

A. Yes.

* * *

> Q. What role did observing Mr. Harris take place to any of the transactions with these individuals, but locating nothing on his person play in the investigation?
> A. Well, we concluded that he was selling methamphetamine for Mr. Ganaway.
>
> Q. And was that conclusion confirmed or assisted by Mr. Harris' statements to Officer Herman?
> A. Yes. As well as our observations *and the conversations we had with the earlier individuals*.

(11/16/16 Tr. of Herman, Carter, Wilshusen at 17-21, 23, 102, 104-05, 109-10) (emphasis added).[3] Yet, the hearsay rule cannot be manipulated so easily. Iowa has long recognized that testimony

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[3] Defense Counsel objected only to the first series of questions concerning the conversation with Tynnush, which the court overruled. (11/16/16 Tr. of Herman, Carter, Wilshusen at 17-21). Thus, any subsequent objection would have been futile. To the extent that the error is unpreserved with respect to the follow up questions concerning Holden, the Court should analyze it under the ineffective assistance of counsel rubric. *State v. Ondayog*, 722 N.W.2d 778, 784 (Iowa 2006) (recognizing that ineffective assistance of counsel claims are not bound by traditional error preservation rules). The questioning clearly called for hearsay, and there was no strategic reason that would justify counsel's failure to object. *State v. Reynolds*, 746 N.W.2d 837, 845-46 (Iowa 2008) (finding counsel ineffective on direct appeal for failing to object to inadmissible hearsay evidence).

about nonverbal conduct that implies the out-of-court assertion of fact by a non-testifying witness falls within the hearsay rule.

The seminal case is *State v. Dullard*, 668 N.W.2d 585, 590 (Iowa 2003), in which the Iowa Supreme Court considered the admissibility of a notebook found in the defendant's garage containing the following words:

> B—
>
> I had to go inside to pee + calm my nerves somewhat down.
>
> When I came out to go get Brian I looked over to the Street North of here + there sat a black + white w/ the dude out of his car facing our own direction—no one else was with him.

Id. at 588. The State introduced the notebook at trial to tie the defendant to the garage where law enforcement had found other items used for the manufacture of methamphetamines. The court held that the words in the notebook were hearsay because they were "offered solely to show the declarant's belief, implied from the words and the message conveyed, in a fact that the State seeks to prove—Dullard's knowledge and possession of drug lab materials." *Id.* at 591. In other words, even though the notebook

was not being offered for the literal truth of the statements contained therein, the matters the State hoped the jury would imply from the words still constituted hearsay.

Dullard is particularly relevant to this case because the Iowa Supreme Court made clear that the implied hearsay rule applied to testimony concerning nonverbal conduct. To illustrate this point, the Iowa Supreme Court cited to the oft-quoted discussion in *Wright v. Tatham*, 112 Eng. Rep. 388 (Ex. Ch. 1837), of the sea captain, who after examining his ship carefully, left on an ocean voyage with his family aboard. *Dullard*, 668 N.W.2d at 591. Under the holding in *Wright*, the captain's conduct would constitute hearsay if offered to prove that the ship had been seaworthy:

> [*Wright*] used the illustration to show that such nonverbal conduct would nevertheless constitute hearsay because its value as evidence depended on the belief of the actor. This illustration was important in the court's analysis because the main problem sought to be avoided by the rule against hearsay-an inability to cross-examine the declarant-is the same whether or not the assertion is implied from a verbal statement or implied from nonverbal conduct. Thus, *assertions that are relevant only as implying a statement or opinion of the absent declarant on the matter at issue constitute hearsay in the same way the actual statement or*

> *opinion of the absent declarant would be inadmissible hearsay.*

Id. at 591 (emphasis added). The reason for this rule is simple. The dangers associated with hearsay statements are the same whether an assertion is express or implied. *Id.* at 594 ("Implied assertions can be no more reliable than the predicate expressed assertion"). For this reason, evidence of nonverbal conduct offered to imply an assertion of fact is hearsay. *Id.* at 594-95.

Here, the State's witnesses testified that they had conversations with Tynnush and Holden, which "confirmed" their observations. The clear implication is that Tynnush and Holden admitted in the conversations to obtaining drugs from Harris. Such statements, if made directly, clearly would be hearsay. The prosecutor's attempted work-around to circumvent the hearsay rule was too clever by half. Because the officer's testimony falls squarely within the *Dullard* rule for implied hearsay, the district court erred in overruling Harris's objection.

C. Testimony from the State's witness that his conversations with Tynnush and Holden confirmed his observations of drug trafficking is also inadmissible as indirect hearsay

Assuming arguendo that the officer's testimony regarding his conversations with Tynnush and Holden was not implied hearsay under *Dullard*, it was still inadmissible under the "indirect" theories of hearsay. This principle was explained in *State v. Judkins*, 242 N.W.2d 266 (Iowa 1976), in which the Iowa Supreme Court concluded that an expert witness's testimony that his opinion was confirmed by a handwriting expert was inadmissible "indirect" hearsay. *Id.* at 267. As the court observed, "[i]f the apparent purpose of offered testimony is to use an out-of-court statement to evidence the truth of facts stated therein, *the hearsay objection cannot be obviated by eliciting the purport of the statements in indirect form*." *Id.* at 267-68 (quoting *McCormick on Evidence* § 249 at 593-94 (2d ed.)) (emphasis added).

More recently, in *State v. Huser*, 894 N.W.2d 472 (Iowa 2017), the Iowa Supreme Court found the following questioning to be indirect or "backdoor" hearsay:

> Q: I do have a couple of quick questions. Now, without telling me what Mr. Woolheater said, did he ever speak of Lance Morningstar?
> A: Yes
>
> Q: Without telling me what Mr. Woolheater said, did he ever speak of Deb Huser?
> A: Yes.
>
> Q: And, without telling me what Mr. Woolheater said, did he speak of Vern Huser?
> A: Yes.

Id. at 484. The court held that the "don't tell me what he said" line of questioning was designed to encourage the jury to infer the existence of otherwise inadmissible evidence. *Id.* at 496-97. In arriving at its conclusion, the court drew an analogy to *United States v. Check*, 582 F.2d 668 (2d Cir. 1978). In that case, the prosecutor asked an uncover officer to testify about conversations with the defendant. *Id.* at 670. The prosecutor attempted to avoid hearsay by similarly phrasing his questioning as follows: "Without telling us what [the defendant said to you], what did you say to [the defendant]." *Id.* at 671. Through this strategy, the government indirectly introduced into the record extensive evidence that Check was involved in narcotics transactions. *Id.* at 678-79.

From *Judkins*, *Huser,* and *Check*, it follows *a fortiori* that the State's introduction of the "conversations" with Tynnush and Holden to "confirm" the officers' observations that Harris delivered drugs to them was indirect hearsay. While the questioning "did not literally" relate the substance of their conversations, the questioning was "designed to encourage the jury to make the connection." *Huser*, 894 N.W.2d at 497.

D. The district court's erroneous admission of hearsay testimony about an essential element of the criminal charges was not harmless

In *Dullard*, the Iowa Supreme Court concluded that the admission of implied hearsay was not harmless because the evidence "played a pivotal role in establishing the possession element of the crime and Dullard was unable to cross-examine the declarant to overcome this prejudice." *Dullard*, 668 N.W.2d at 596. The court also noted the absence of otherwise overwhelming evidence of guilt. *Id.* This reasoning applies with equal force to this case.

The implication of the officers' testimony about their conversations with Tynnush and Holden is that either Harris or

Ganaway provided them with methamphetamines. That information not only goes to the heart of an essential element of the charges against Harris, it was the State's best evidence. The officers were not close enough to observe what, if anything, was exchanged in the purported hand-to-hand transactions. (11/16/16 Tr. of Herman, Carter, Wilshusen at 116). Furthermore, they testified that the transactions occurred at the passenger-side window, but neither officer testified that Harris personally participated in the hand-to-hand transactions. Their search of Harris not only failed to uncover any drugs on his person, it also failed to uncover an items traditionally associated with drug trafficking like cash, scales, paraphernalia, or packaging. (11/16/16 Tr. of Herman, Carter, Wilshusen at 116-17). Additionally, Harris denied ownership of the drugs and admitted to being there only to help a friend. (11/16/16 Tr. of Herman, Carter, Wilshusen at 27-28). Notably, this alleged admission was made under questionable circumstances. For starters, it came during a custodial interrogation that was not recorded either with a body camera or in-car camera. (11/16/16 Tr. of Herman, Carter,

Wilshusen a5 25-26). And, it was supposedly made to Officer Herman who acknowledged at trial that he provided false testimony during the preliminary hearing about his observations from the surveillance. (11/16/16 Tr. of Herman, Carter, Wilshusen at 73). In short, this Court cannot be certain that the multiple inadmissible hearsay statements implying that Harris was the source of Tynnush and Holden's methamphetamines did not influence the verdict. Consequently, Harris's conviction must be reversed and remanded for a new trial on this ground.

II. HARRIS'S CONVICTIONS MUST BE SET ASIDE BECAUSE THE STATE'S EVIDENCE WAS INSUFFICIENT TO ESTABLISH THAT HE POSSESSED METHAMPHETAMINES

Preservation of Error

Harris preserved error by moving for a judgment of acquittal and filing a post-trial motion for a new trial. (11/17/16 Trial Tr. at 37-40; 12/23/16 Motion for New Trial).

Standard of Review

Sufficiency of the evidence challenges are reviewed for correction of errors at law. *State v. Keeton*, 710 N.W.2d 531, 532 (Iowa 2006). The standard of review for a motion for new trial is

for an abuse of discretion. *State v. Serrato*, 787 N.W.2d 462, 472 (Iowa 2010).

Merits

It is undisputed that no drugs were found on Harris's person. Similarly, the State offered no testimony from anyone who observed drugs directly in Harris's possession. Accordingly, the State's case depended upon proof of constructive possession. *State v. Cashen*, 666 N.W.2d 566, 569 (Iowa 2003).

In cases like this, the State may show possession through other proof, such as

> incriminating statements made by the defendant, incriminating actions of the defendant upon the police's discovery of the controlled substance among or near the defendant's personal belongings, the defendant's fingerprints on the packages containing the controlled substance, and any other circumstances linking the defendant to the controlled substance.

Id. Here, Harris did not own the Rendezvous. (11/16/16 Tr. of Herman, Carter, Wilshusen at 63-64). No drugs were ever found in plain view. Nor were any items commonly associated with drug trafficking found among Harris's personal effects. There is no evidence that Harris made any suspicious movements while being

pulled over. He denied ownership of the drugs. The State offered no forensic evidence to tie Harris to the drugs found on Tynnus, Holden, and Ganaway. No witness testified that the methamphetamines belonged to Harris (except for the inadmissible indirect hearsay statements). The only fact relevant to Harris's control and dominion over the methamphetamines was his proximity to the purported hand-to-hand transactions throught the passenger-side window. Yet, a "defendant's mere proximity to contraband is insufficient to support a finding of constructive possession." *Id.* at 572. The Court cannot "presume possession where the defendant does not own the care and a finding of construction possession cannot rest on mere proximity." *Id.* As a result, the State failed to produce sufficient evidence to establish that Harris possessed the methamphetamines, let alone delivered it to Tynnush or Holden.

CONCLUSION

For the reason set forth above, Anthony Harris requests this Court reverse his convictions.

REQUEST FOR ORAL ARGUMENT

Counsel for Appellant requests to be heard in oral argument.

COST CERTIFICATE

I hereby certify that the costs of printing the Appellant's proof brief was $10.50, and that that amount has been paid in full by me.

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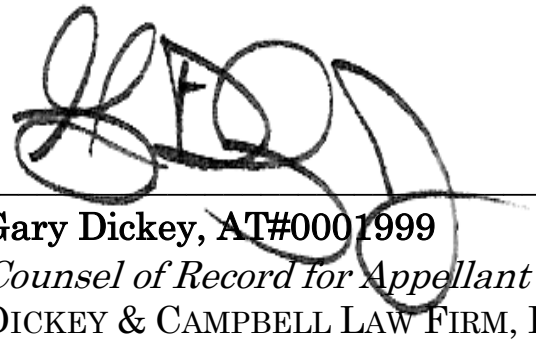

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