IN THE COURT OF APPEALS OF IOWA

No. 1-487 / 10-1053
Filed August 10, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

BRANDON ALEXANDER MEDVED,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Kellyann M. Lekar (suppression) and Jon Fister (trial, sentencing), Judges.

Defendant appeals his conviction and sentence for ongoing criminal conduct and delivery of a controlled substance. **AFFIRMED.**

Thomas P. Graves of Graves Law Firm, P.C., Clive, for appellant.

Thomas J. Miller, Attorney General, Bridget A. Chambers, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Brad Walz, Assistant County Attorney, for appellee.

Considered by Eisenhauer, P.J., and Potterfield and Tabor, JJ.

EISENHAUER, P.J.

On February 4, 2009, police executed a search warrant on Brandon Medved's residence, and he was subsequently charged with drug-related crimes. In June 2009, Medved filed a motion to suppress. After hearing, the district court denied his suppression motion.

In March 2010, a jury found Medved guilty on the two counts submitted: (1) ongoing criminal conduct (delivery of marijuana on two or more occasions with the specific intent of financial gain on a continuing basis) and (2) delivery of a controlled substance (marijuana). By special interrogatory the jury determined the delivery occurred within 1000 feet of a public recreation center on at least one occasion.

Medved appeals arguing: (1) the court erred in overruling his motion to suppress evidence; (2) evidence a drug dog alerted on Medved's car during the February search was improperly admitted; (3) the court should have instructed the jury on accomplice corroboration; (4) insufficient evidence/weight of the evidence does not support his conviction; (5) the court abused its discretion in sentencing him to prison; and (6) his sentence for ongoing criminal conduct is unconstitutional cruel and unusual punishment on its face and as applied. We affirm.[1]

I. Background Facts and Proceedings.

Based on information from confidential informant Joshua Law, on January 7, 2009, the car Medved was driving was stopped in Dallas County and

[1] We find no merit to Medved's assertion he is entitled to a new trial because the jury declined to answer one special interrogatory on the delivery charge.

impounded for a search. Officer Taylor testified a drug dog alerted on Medved's Oldsmobile Bravada.[2] The officers found some marijuana, but not a large quantity, and charged Medved with possession. This charge was dismissed by the State on January 16, 2009.

On Janurary 20, 2009, Cedar Falls Officer Bellis of the Tri-County Drug Enforcement Task force called Cedar Falls Officer Briggs and discussed information received from Officer Taylor. Officer Bellis understood Officer Taylor's information came from a confidential informant (Law) who "had been implicated in a drug investigation that [Officer] Taylor was conducting." Informant Law had stated Medved was transporting marijuana into Iowa and then selling it.

Officer Briggs drove by the house Medved rented in Cedar Falls and noted the parked Bravada and an exhaust fan in the detached garage's wall. Officer Briggs considered the exhaust fan consistent with the making of glass pipes used for smoking marijuana.

On January 28, 2009, Officer Briggs searched the garbage from Medved's house and found mail in the names of Medved's two roommates (Jeffrey Klenske and Matthew Dowell), marijuana, and a "large amount of broken glass and pipes." Officer Briggs checked with the Cedar Falls utility company and learned all three young men paid the utilities and all had the house "listed as their home address."

On February 4, 2009, Officer Briggs again searched the house's garbage and again found marijuana and mail in the name of Jeffrey Klenske. Officer

[2] The car is licensed to Patrick Medved, Brandon's father, but Brandon Medved drove the car and parked it at his residence. We will refer to the Bravada as Brandon Medved's car.

Briggs began preparing a search warrant for the house. When Medved drove away from the house around noon, Officer Head stopped his car for speeding and transported Medved to the police station. Police officers knocked on the door of the house, and when Dowell answered, he was also taken to the police station. During this time, roommate Klenske was at work.

At the station, Officer Briggs told Medved he was drafting a search warrant and asked if the police were going to find any drugs at the house. At first Medved said no, then he stated the police would not find any drugs in his room. Meanwhile, Officer McCallum talked to Dowell, who was currently on probation for operating while intoxicated:

> Q. And what was Mr. Dowell's demeanor at that time? A. His demeanor when he found out why we had detained him and what our investigation was . . . he got angry. . . . He was upset about the fact that we were there to search for marijuana.
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> . . . .
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> [Dowell] made a comment . . . something to the effect that he was concerned, that he'd been living with Brandon for five years and he knew sooner or later something like this was going to happen, that basically officers were going to be there to search for marijuana or make a marijuana arrest.
>
> Q. And when . . . Mr. Dowell made this comment, did he at all use–or make mention of Mr. Klenske? Or did he use the name Brandon? A. No, he was talking about Brandon Medved.
>
> Q. And did Mr. Dowell indicate if you were to obtain a search warrant for marijuana . . . you would be on the right track? A. Yes.

Officer Briggs completed the search warrant application and presented it to the magistrate around 1:00 p.m. The magistrate authorized the warrant.

During the February 4 search, Officer Shock seized a glass bong from the dining room table. Medved, Dowell, and Klenske each had a separate bedroom. Marijuana was found in both Klenske's and Dowell's bedrooms. Officer Shock

testified the marijuana and glass pipes with residue seized from Dowell's bedroom were "consistent with the personal use of marijuana."

Officers Briggs and Herkelman searched Medved's bedroom and found an open safe containing "numerous" pipes used for smoking marijuana. Medved's closet also contained glass pipes for smoking marijuana. Other items discovered in Medved's bedroom included: his billfold, his driver's license, a *High Times* magazine, some fake marijuana leaves, a Red Bull beverage can with a hidden compartment, a digital gram scale, a marijuana grinder, a box of unused plastic sandwich bags, and a multi-drug testing device. At trial, Officer Briggs testified a digital gram scale is "commonly used for weighing narcotics" and the small plastic bags are "common packaging materials for illegal narcotics." Officer Herkelman also testified about the open box of sandwich bags and scale:

> Q. And why would [the sandwich bags have] been seized? A. Because things like this are commonly used in the sale of illegal drugs. The location of [the sandwich bags causes] us to believe . . . that's what it was involved in. If it would have been in the kitchen, it may have been something less [noticeable], but the fact that it was in his bedroom in a TV stand drawer, that struck us as odd.
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> . . . .
>
> Q. And what are those plastic baggies commonly used for? . . . A. . . . For packaging for the sale of, in this case, marijuana.
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> . . . .
>
> Q. And what would be the significance of seizing the digital scale . . . ? A. It's, again, another indicator of the sale of marijuana and the location is consistent with the location of the baggies.
>
> Q. And were the scale and the baggies and these other items found in the same approximate location in the Brandon Medved bedroom? A. Yes, sir.
>
> Q. In your training and experience, what is the use of having a scale for the sale and distribution of marijuana? A. For repackaging from larger quantities to smaller quantities for the sale of marijuana.

Based on his experience, Officer Briggs opined the Red Bull can was for "storing illegal things" and used "for hiding narcotics." Officer Herkelman testified: "In my employment, specifically drug related, we commonly find illegal drugs inside cans like this."

Additionally, the officers found a notebook containing Medved's college papers. Officers Briggs and Herkelman both testified several pages inside the notebook constituted a ledger of drug transactions or "drug notes." Included in the names listed in the drug ledger were Dowell, Pat, Josh, and Jeff. Those four names match the witnesses (Matthew Dowell, Patrick Reilly, Joshua Law, and Jeffrey Klenske) who testified they bought marijuana from Medved. Officer Herkelman explained:

> In my experience, looking at these drug notes, the way that they're written and crossed off and then another number is written and crossed off, in my experience it's somebody that's involved in the sale of marijuana as well as he's involved in fronting the marijuana. These notes indicate that somebody's having to pay off a debt as they go.

During the February search, Officer Herkelman found $8500 in cash in the pocket of a pair of pants located in Medved's bedroom closet. Officer Herkelman testified the cash was seized as "proceeds from the sale of marijuana." Officer Herkelman also found a gallon-sized Ziploc bag containing marijuana residue in Medved's closet.

Officer Galbraith, an expert in drug trafficking, testified:

> Q. And finally there's an entry for Mr. Medved regarding the gallon Ziploc baggie. To you the fact that there was no further marijuana found in Mr. Medved's room, does that do anything to your opinion as far as the items located in that room and what they were used for? . . . A. No, it does not.

> Q. From your training and experience in looking at the items that were located in Mr. Medved's room, based on your expert opinion, do you believe that those items were used for the trafficking and distribution of marijuana or for the personal use of marijuana? . . . A. Yes, the items . . . located in his room . . . are consistent with somebody who is distributing marijuana.
>
> Q. Why is that? A. One, you have drug notes that has a running tally showing of money, drugs that go out and money that would have been received back in return. The gallon Ziploc baggie. That baggie in and of itself. You're not going to see somebody repackage a smaller . . . bag of marijuana inside of a large gallon Ziploc baggie. You also have the repackaging materials, these bags here. . . . [W]e see people repackage an ounce of marijuana in these for redistribution.
>
> Q. [A]nything about the items in Mr. Medved's . . . room that appears solely consistent with personal use when you look at the items in his room as a whole? A. When you look at the items as a whole in his room . . . no, there's not. Other items that if you were to take them separately, it could be associated with personal use, yes.

Officer Briggs described the items found during the search of the detached garage: "Lots and lots and lots of glass, torches, glass-blowing equipment, a lot of marijuana pipes that had been made, kilns, large liquid oxygen tanks. . . ."

Two cellular phones and a glass marijuana pipe were found in Medved's Bravada during the search. Officer Farmer's K9 drug dog examined Medved's car. Officer Farmer's drug dog had been trained to recognize the odor of marijuana, as well as the odor of other illegal drugs. At trial, Officer Farmer testified his drug dog alerted on the car's quarter panel, and explained:

> Q. Based on your experience with [your drug dog] back on February 4, 2009, do you have an expert opinion on whether there was an odor of marijuana in the rear quarter panel area of the Bravada? A. My opinion is that there was odor of a narcotic coming from that area of the vehicle.

The police obtained another search warrant to investigate the data on the seized cell phones. One text message states: "What do [you] have going on

[M]onday or . . . next week. [I] have a fresh oxygen tank and some west coast produce." Another states: "[I'm] back from [O]regon and [I] brought treats. [A]nd [I'll] have a fresh oxy tank monday u and rob should come up and party and pick up some goodies." The text message accompanying a picture of drug paraphernalia states: "Ur new bub unless it blows up in the kiln." Additionally, Officer Bellis testified one phone showed Medved was having cell phone conversations with both Josh Law and Patrick Reilly.

At trial, roommate Klenske, roommate Dowell, friend Patrick Reilly, and informant/friend Law testified to buying marijuana from Medved. Reilly and Law also testified they resold some of the marijuana. Roommate Klenske testified Medved had a workbench in the garage in order to blow glass and make glassware. Medved made everything from jewelry to paperweights to glass marijuana pipes. Klenske admitted he purchased marijuana from Medved approximately ten to twelve times. Klenske would pay Medved about fifty dollars for each purchase and stated he never purchased marijuana from Dowell, their other roommate. Klenske claimed the twenty-two grams of marijuana found in his bedroom was for his own personal use. Klenske saw Medved with a plastic grocery bag, the size of a soccer ball, and believed it held a large quantity of marijuana. Klenske was not charged in connection with the drugs found in his bedroom during the search.

Roommate Dowell testified he went to Waukee High School with both Medved and informant Law. Dowell started living with Medved in the fall of 2004. Dowell stated Medved had "a workbench, glass blowing torch, and a vent fan and a kiln" in the garage to make art and pipes. Dowell explained the police found a

"small quantity" of marijuana in his bedroom during the February 4 search and he was charged with possession of marijuana, pled guilty, and was sentenced. Dowell testified he did not get "any deal" on the possession charge for his Medved trial testimony—it was a "done deal."

Dowell was aware Medved made money by selling marijuana, glassware, glass pipes, and by working at his job. Dowell purchased small quantities of marijuana from Medved on numerous occasions (more than twenty times) over four years. Dowell saw people coming to the house to buy marijuana from Medved. Dowell did not purchase marijuana from roommate Klenske or see Klenske dealing marijuana. Dowell saw Medved sell marijuana to Klenske "more than once" and Klenske and Dowell smoked marijuana together. Dowell testified:

> Q. Earlier, when you said that you were upset and that you knew this day was coming, why . . . did you believe that? . . . A. I legitimately told [Medved] that I felt that it was a bad idea that that was going on in our household and I knew it would come to bite me in the end, and it has [come] to do that.
>
> Q. And after you told Brandon Medved that . . . did this activity—did the activity with Brandon Medved continue? A. Yes.

Patrick Reilly is Medved's friend and would frequently "hang out" at Medved's house. In March 2009, investigators with the Tri-County Drug Enforcement Task Force came to Reilly's residence, told Reilly they were aware he was selling marijuana, found firearms in his residence, and asked him to identify his supplier. Reilly described the March conversation:

> Q. . . . When you told officers [Medved was] your supplier of marijuana, . . . were you given any promises with regards to giving them that information with what . . . would happen to you? A. No.
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> . . . .

> Q. Were you the first person, when talking to the investigators at that time in March of 2009, to tell them that Brandon Medved was your main supplier of marijuana? A. Yes.
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> . . . .
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> Q. You knew at the time the police showed up at your apartment in March and found firearms with a controlled drug buy that you were in trouble; didn't you know that? A. Yes.
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> . . . .
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> Q. Would it be fair to say that you were hoping at the time that if you cooperated that you could get a break on your own situation? A. Absolutely.
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> . . . .
>
> Q. Did the police make it apparent to you that if you told them something worthwhile, that maybe they would give you a break? A. No.
>
> Q. You deny that they ever made that representation to you? A. Specifically what they said is if you cooperate, it might look better on your behalf.
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> . . . .
>
> Q. Wasn't the name Brandon Medved first brought up by the officers at your apartment in March? A. I don't believe so, no.
>
> Q. Would it be fair to say that when the police showed up at your apartment in March, that you knew that there had been a raid on Brandon's house prior to that time? A. Yes.
>
> Q. And you knew that there had been arrests made in connection with that raid in February of 2009? A. Yes.
>
> Q. So with that knowledge you agreed to cooperate with the police and speak with them on May 1 of 2009; is that correct? A. Yes.

In May 2009, Reilly met with the investigators at the Waterloo Police Department and again named Medved as his supplier.

Reilly testified Medved was his primary supplier of marijuana while Reilly himself was selling it during 2007 through early 2009. Reilly stated, on average, he would purchase "ounce quantities" one to two times a month. Reilly testified Medved had glassblowing activities set up in the garage and he saw Medved make pipes. Reilly explained "fronting" marijuana, where Medved would give Reilly some marijuana and expect Reilly to pay for it later. Reilly saw a notebook where Medved tracked his drug debts, and he asked Medved to get rid of the

notebook because "I thought that if he ever was arrested for that, that would be easy evidence against all of us." Reilly, on one occasion, saw Medved keeping marijuana in a closet in a shopping bag. Additionally:

> Q. How much at a time were you purchasing from Brandon Medved? A. I would typically get about an ounce at a time.
>
> Q. And do you remember how much you would pay Brandon Medved for an ounce of marijuana? A. It would vary depending on how much it cost for him to get it. It would vary anywhere from $300 to $400.
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> Q. And when you obtained an ounce of marijuana from [Medved], what would you do with the marijuana that you obtained? A. I would turn around and sell it and then keep some for myself.
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> Q. . . . What was the purpose of you trying to sell marijuana at that time? A. It was mainly to support my own smoking.
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> . . . .
>
> Q. And the information that you testified to today, did you tell officers that information back in March and May of 2009. A. In May, yes, I did.
>
> Q. And was that when you gave them the more-detailed information not just about who your supplier was but the details? A. Yes.
>
> Q. In May of 2009 were any promises made to you about what would happen if you gave the details of the information you had? A. No.
>
> Q. At some point after that . . . were you informed that you would not be charged for the admissions that you made? A. Eventually, yes.

In November 2008, Joshua Law's duplex was raided by the police. Subsequently, Law believed he was facing prison time for possession of marijuana while possessing firearms. The police confronted Law with the fact Brandon Medved's name was on Law's cell phone. Law understood that no charges would be filed against him if he implicated eight individuals. Law testified:

> Q. For a period of time, Mr. Law, then were you treated as a confidential informant? A. True.
>
> Q. And have you fulfilled the requirements of your immunity agreement? A. No.

> Q. What else do you have to do as part of that agreement? A. It's . . . void at this point.
> Q. So have you been charged with what they found in your duplex on November 18, 2008? A. No.

Law testified he became friends with Medved at age thirteen. Law would occasionally go up to UNI to visit Medved. Law learned Medved "was dealing marijuana" about a "year or so after [Medved] had went up to college." Law testified Medved made marijuana pipes in his garage and would keep his marijuana in his bedroom closet. Law purchased high-quality marijuana from Medved and was also dealing marijuana himself. Law testified:

> Q. . . . [W]ere you going to pay Mr. Medved ahead of time or after you sold that marijuana? A. After.
> Q. And is there a term for that that's used in the drug trade? A. Front.
> Q. And does that require you to pay back the person who fronted you the marijuana at some point? . . . A. Yes.

Law testified Medved stated he drove to Oregon and Colorado to get marijuana and stored the marijuana in the quarter panel of the Bravada during his marijuana runs. Law explained Medved "didn't like to ever take it out of the vehicle until he got home." Further:

> Q. At some point did the pace of Mr. Medved's marijuana sales change or increase or decrease? . . . A. Yes.
> Q. And when was that? A. It seemed to me it was over the last year.
> Q. Okay. And what was the change in Mr. Medved's marijuana sales at that point? A. That [Medved would] only deal like ounces and just larger quantities.
> Q. Before that could you purchase smaller quantities such as dime bags and eighth from Mr. Medved? A. I could but it was on a—we'd known each other for a long time, so.
> Q. . . . How do you know that the amounts that Mr. Medved was dealing had changed back in the last couple of years? A. From—we had talked to each other about certain things, and I'd actually seen some.

> Q. And what do you mean . . . ? A. I went to his house and saw two large bags.
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> Q. And what were these large bags of? A. Marijuana.
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> . . . .
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> Q. Have you been present at the Cedar Fall's house when Mr. Medved would deal in marijuana? A. Yes.
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> Q. And can you tell what you would observe? A. Ounces going out to different people.
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> . . . .
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> Q. When you [purchased] an ounce of marijuana from Mr. Medved, how much would you pay for that? . . . A. [H]igher grade stuff it's like 400 bucks.
>
> Q. When you would purchase the eighth of . . . an ounce from Mr. Medved, how much were you . . . paying for that when you purchased from him? A. That's usually $60.
>
> Q. Did Mr. Medved ever advise you how much he was buying the pounds of marijuana for? A. They were anywhere from 35 to 4500.
>
> Q. And in your experience would that be consistent with high-grade marijuana? A. Yes.

The jury returned a verdict finding Medved guilty of ongoing criminal conduct and delivery of a controlled substance (marijuana) within 1000 feet of a public recreation center. This appeal followed.

II. Probable Cause for Issuance of Search Warrant.

Medved argues under the United States and Iowa constitutions, "all evidence obtained via the February 4, 2009 search warrant should have been suppressed because the Court was not informed that information came from a confidential informant, nor, that his information had so far been unreliable."

Our review is de novo. *State v. Bower*, 725 N.W.2d 435, 440 (Iowa 2006). "Due to the preference for warrants, doubts are resolved in favor of their validity." *State v. Weir*, 414 N.W.2d 327, 329 (Iowa 1987) (discussing informant credibility in the context of probable cause). Our duty, as a reviewing court, is to ensure the magistrate had a substantial basis for concluding probable cause existed. *Id*.

(quoting *Illinois v. Gates*, 462 U.S. 213, 238-39, 103 S. Ct. 2317, 2332, 76 L. Ed. 2d 527, 548 (1983)).

The first paragraph of Officer Briggs's affidavit supporting his application for a search warrant provided:

> On 01-20-09 I received information *from Officer Ryan Bellis* of the Tri-County Drug Task Force about possible drug activity at 214 W. 12th St. in Cedar Falls, IA 50613. I was told that Brandon Medved lives at this address with some friends. I was told that he (or he and his roommates drive to California to purchase "Hydro Marijuana" which is supposed to be very high quality. I was told that they pay $10,000 per two pounds of this marijuana and then transport it back to Cedar Falls to sell it. I was told that Medved or his roommates have put on over 55,000 miles this last year in their travels. I was also told that they are manufacturing their own marijuana pipes in their garage behind the residence.

(Emphasis added.) At the suppression hearing, Officer Briggs testified the information *from Officer Ryan Bellis* came from another Des Moines narcotics officer (Taylor) who was talking to a confidential informant. Medved asserts and the State "agrees that the information contained in the first paragraph of the affidavit was provided by an unnamed informant." Search warrant applications utilizing an informant's information are discussed in Iowa Code section 808.3 (2009):

> However, if the grounds for issuance are supplied by an informant, the magistrate shall identify only the peace officer to whom the information was given. The application or sworn testimony supplied in support of the application must establish the credibility of the informant or the credibility of the information given by the informant.

Here, the affidavit's first paragraph contained information supplied by a confidential informant and Medved further alleges the affidavit does not establish the reliability of that information. Even if we accept this position, we still need to

examine the remainder of the warrant application. Under *Franks v. Delaware*, 438 U.S. 154, 155–56, 98 S. Ct. 2674, 2676, 57 L. Ed. 2d 667, 672 (1978), "once a portion of an affidavit is suppressed, the reviewing Court may then decide whether what's left of the affidavit is sufficient to create probable cause for the search." If the first paragraph of the affidavit here is deleted and the remaining contents are insufficient to establish probable cause, the warrant is void and the evidence obtained in the search of Medved's residence must be excluded. *See Franks*, 438 U.S. at 156, 98 S. Ct. at 2676, 57 L. Ed. 2d at 672; *United Sattes v. Swope*, 542 F.3d 609, 614-15 (8th Cir. 2008) (holding "a redaction analysis is the proper test for affidavits containing tainted information"). In *State v. Groff*, 323 N.W.2d 204, 207 (Iowa 1982), the Iowa Supreme Court adopted the *Franks* standard "to provide a unified standard."

The State argues "the balance of the warrant application established probable cause for issuance of the search warrant." *See State v. Poulin*, 620 N.W.2d 287, 289 (Iowa 2000) (ruling the finding of marijuana residue in the trash and other circumstances establish probable cause for the warrant). Medved argues "[t]oday, it cannot be said if [the magistrate] would find probable cause from the trash alone; he had been told other highly prejudicial information which either was not accurate or was not [from] a reliable informant, or both."

In determining the existence of probable cause, we consider "whether a person of reasonable prudence would believe a crime was committed on the premises to be searched or evidence of a crime could be located there." *Weir*, 414 N.W.2d at 330. After our de novo review, we adopt the district court's analysis:

> [T]he *Franks* standards provide that the false statements should be excised from the affidavit and that the presence of probable cause be redetermined based upon that which remains.
>
> . . . .
>
> Even giving [Medved] the benefit of extracting from the warrant application any information that would have come from the confidential informant, the warrant application and resulting warrant can stand on the remaining information. The information obtained from the trash rip combined with the other indicia of residency—registration of utilities, driver's license registration, college registration, vehicle in the driveway—connect Medved to this residence. It is true that no mail or other paperwork belonging to Medved was found in the trash rip, however, that does not negate the other indicia of residency. The marijuana evidence found in the two separate trash rips and the glass and pipes found in the first trash rip cannot be attributed to any particular resident and are just as attributable to Medved as to the other residents. The presence of marijuana in the trash bags is sufficient probable cause for a reasonable person to believe that evidence of the crime could be located at the residence. The possession of marijuana is a criminal activity and the presence of marijuana in the garbage allowing a person of reasonable prudence to believe that marijuana is in the residence or that a crime had been committed. On this basis alone (without the information from the confidential informant), [the magistrate] could have made a practical, common sense decision that probable cause exists.

III. Drug Dog Evidence.

Medved argues the trial court abused its discretion under Iowa Rule of Evidence 5.403 in admitting the testimony of Officer Farmer regarding his drug dog's alert on Medved's car during execution of the February 2009 search warrant. We review evidentiary rulings for abuse of discretion. *State v. Reynolds*, 765 N.W.2d 283, 288 (Iowa 2009).

Iowa Rule of Evidence 5.403 states "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice." Assuming, *arguendo*, Medved can meet this test, we will not reverse his conviction if "such error would be harmless. Prejudice must be shown before any

error requires reversal." *See State v. Boley*, 456 N.W.2d 674, 678 (Iowa 1990).

Officer Taylor testified a drug dog alerted on Medved's car on January 7, 2009, and Medved does not challenge Officer Taylor's testimony. Consequently, even if we *assume* the trial court erred in admitting evidence of the February drug dog alert, any such error is harmless. *See State v. Sowder*, 394 N.W.2d 368, 372 (Iowa 1986) (ruling "where substantially the same evidence is in the record, erroneously admitted evidence will not be considered prejudicial"); *State v. Wixom*, 599 N.W.2d 481, 484 (Iowa Ct. App. 1999) (stating cumulative evidence "cannot be said to injuriously affect the complaining party's rights").

IV. Medved's Proposed Accomplice Instruction.

Medved argues the trial court erred in failing to instruct the jury he could not be convicted on the uncorroborated testimony of four alleged accomplices: Joshua Law, Patrick Reilly, Jeffrey Klenske, and Matthew Dowell. "We review challenges to jury instructions for correction of errors at law." *Reynolds*, 765 at 288. "We review a district court's failure to give a jury instruction for an abuse of discretion." *Id*.

These four witnesses testified to purchasing marijuana from Medved. Medved points out Reilly and Law testified they not only bought marijuana from Medved, but also resold it. Medved requested the court give Iowa Uniform Criminal Jury Instruction 200.4:

> An "accomplice" is a person who knowingly and voluntarily cooperates or aids in the commission of a crime.
>
> A person cannot be convicted only by the testimony of an accomplice. The testimony of an accomplice must be corroborated by other evidence tending to connect the defendant with the crime.
>
> If you find (name of witness) is an accomplice, the defendant cannot be convicted only by that testimony. There must be other

> evidence tending to connect the defendant with the commission of the crime. Such other evidence, if any, is not enough if it just shows a crime was committed. It must be evidence tending to single out the defendant as one of the persons who committed it.

At the time Medved requested the instruction, the following exchange occurred:

> THE COURT: Did . . . Mr. Law and Mr. Medved act together in delivering marijuana to Mr. Klenske or Mr. [Patrick] Reilly or Mr. Dowell?
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> [MEDVED COUNSEL]: I don't believe so.
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> THE COURT: Did Mr. Klenske act with [Medved] to deliver marijuana to Mr. Law, Mr. [Patrick] Reilly, or Mr. Dowell?
>
> [MEDVED COUNSEL]: I don't believe so.
>
> THE COURT: So they didn't ever act together. If they didn't act together, they can't be accomplices. . . .
>
> [MEDVED COUNSEL]: Allegedly, Mr. Klenske and Mr. Dowell, according to their testimony, knew that this had been going on for a while and that makes them accomplices.
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> THE COURT: No, no, knowledge doesn't—they have to participate in the crime. A witness has knowledge of it. . . . They have to be charged with and convicted of the same offense—or could be charged and convicted of the same offense, which would be ongoing criminal conduct or delivery.
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> [MEDVED COUNSEL]: Mr. Dowell testified that he was upset because of what was allegedly going on in the house.
>
> THE COURT: Yes.
>
> [MEDVED COUNSEL]: And that he was an integral part of that activity. I think that makes him an accomplice. . . .
>
> THE COURT: Yeah, he was living in a drug house. They were all using and [Medved] was delivering—providing it to them. That's the evidence I heard. . . .
>
> [MEDVED COUNSEL]: I think with the quantity of marijuana, furthermore, that was found in Mr. Klenske's room, that the jury could find that [he] was also participating in the delivery.
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> THE COURT: But if he was making deliveries to other people than Mr. Medved was, then they weren't acting together.
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> [MEDVED COUNSEL]: I believe also Mr. [Patrick] Reilly testified that he was selling part of what he was buying.
>
> THE COURT: Right.
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> [MEDVED COUNSEL]: That makes him an accomplice too.
>
> THE COURT: No. He was selling for himself. He bought from Mr. Medved. He was Mr. Medved's customer. They weren't in it together.

The State agrees the four witnesses bought marijuana from Medved, but argues "a buyer of controlled substances is not an accomplice to the sale or delivery." *See State v. Hillsman*, 281 N.W.2d 114, 115 (Iowa 1979) (a customer is not guilty of delivery and is not an accomplice). We conclude Medved's roommates, Klenske and Dowell, were only customers of Medved and not accomplices. Therefore, the court did not abuse its discretion in refusing to give the proposed accomplice instruction for Klenske's or Dowell's testimony.

Regarding Reilly and Law, who testified to reselling marijuana purchased from Medved, the State argues the test of an accomplice is not whether the witness could be charged with a violation of the same code section as Medved. Rather, the test is whether the witness could be charged with and convicted of the *specific offense* for which Medved is on trial. *See State v. Harris*, 589 N.W.2d 239, 241 (Iowa 1999). Evidence relating to Reilly's and Law's resale of the marijuana they purchased from Medved could be the foundation for their criminal liability for Medved's sale of marijuana under Iowa Code section 703.2, our joint criminal conduct statute. However, to establish Reilly and Law as accomplices on a theory of joint criminal conduct, the evidence would have to show that the resales by Reilly and Law were in furtherance of the delivery of marijuana by Medved. *Id.* at 242. Medved's sales to Reilly and Law were completed offenses, and the resales by Reilly and Law were separate, subsequent offenses and not joint criminal conduct with Medved. *See State v. Houston*, 211 N.W.2d 598, 600-601 (Iowa 1973).

We conclude the evidence is insufficient to show Law and Reilly united with Medved to commit the specific offenses. *See State v. Douglas*, 675 N.W.2d

567, 571 (Iowa 2004) (stating knowledge or presence does not make one an accomplice, evidence must establish the person was involved in the commission of the crime). Accordingly, Law and Reilly are not accomplices, and the court did not abuse its discretion in declining to give Medved's proposed accomplice instruction.

V. Sufficiency of the Evidence and Weight of the Evidence.

Medved first argues the "evidence was insufficient to convict [him] of these crimes" because it came from accomplices. We review for correction of errors at law. *State v. Leckington*, 713 N.W.2d 208, 212-13 (Iowa 2006). We apply a deferential standard and review the evidence in the light most favorable to the State. *Id*. at 213. No purpose would be served by restating the evidence described in detail above. We have already concluded the four witnesses are not accomplices. Substantial evidence supports Medved's conviction.

Second, Medved argues the verdict is against the weight of the evidence because four of the witnesses are uncorroborated accomplices (whom he believes testified with an expectation of leniency) and the remaining evidence is not sufficiently persuasive to permit conviction.

Under the "weight of the evidence standard," the trial court weighs the evidence and considers credibility as it determines whether "a greater amount of credible evidence supports one side of an issue . . . than the other." *State v. Reeves*, 670 N.W.2d 199, 202 (Iowa 2003). When the evidence is nearly balanced, the district court should not disturb the jury's findings. *Id*. at 203. While trial courts have wide discretion, such discretion must be exercised "carefully and sparingly" to insure the court does not "lessen the role of the jury

as the principal trier of the facts." *State v. Ellis*, 578 N.W.2d 655, 659 (Iowa 1998). The trial court grants a new trial only in the "exceptional case" where "a miscarriage of justice may have resulted." *Reeves*, 670 N.W.2d at 202.

Our appellate review "is limited to a review of the exercise of discretion by the trial court, not of the underlying question of whether the verdict is against the weight of the evidence." *Id*. at 203. We do not "reweigh the evidence" nor "judge the credibility of the witnesses." *Id*. Rather, we determine whether the district court's ruling "is a clear and manifest abuse of discretion." *Id*.

Medved was not convicted on the uncorroborated testimony of four accomplices. We have concluded they were not accomplices. Additionally, Officer Herkelman testified:

> Q. From your training and experience . . . are the items in [Medved's bedroom] consistent with the sale and distribution of marijuana or with solely personal use of marijuana? A. I would say with all the items located; the drug notes, the large sum of cash, the baggies, along with the scale, that it's consistent with someone involved in the sale of marijuana.
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> . . . .
>
> Q. And is that your belief even though you did not find a larger quantity of marijuana in the Medved bedroom? A. Yes.
>
> Q. And is [that] your opinion . . . even without the testimony or information from any of the other informants or people involved in this case, solely upon the evidence from that room? A. Yes.

We find no abuse of discretion.

VI. Sentencing: Prison v. Probation.

Medved was in his mid-twenties at the time of trial and sentencing. Medved had graduated from UNI, was employed, and his prior criminal record consisted of alcohol-related offenses. The presentence investigation report (PSI) recommended a suspended sentence and probation.

The prosecutor recommended Medved be sentenced to twenty-five years in prison for ongoing criminal conduct with a concurrent ten-year prison sentence for delivery within 1000 feet of a public recreation center. The prosecutor noted Medved's offenses are not isolated incidents but, rather, involve drug dealing over months and years. Further, the prosecutor argued Medved dealt in large quantities of high-level marijuana: "[In Medved's] notebook, quantities, talking about thousands of dollars; 1100, 1320, 3000. Large quantities of cash that [Medved] is owed as far as quantities." The State noted the PSI did not recommend a deferred judgment and argued prison is warranted:

> We also strongly believe, just based on the sheer nature, the sheer extent of the criminal activity, the link of it, the quantities, the quality, that some prison sentence is warranted. If the court should at some point decide to reconsider that sentence, the State could . . . understand that. But we do believe that for this type of ongoing criminal activity . . . some time behind bars is justified . . . .

Medved presented nine witnesses who testified in support of his request for a deferred judgment and probation. Medved also presented numerous letters of support. The witnesses and letters discussed Medved's good character, history of involvement in public service activities, and family support. Defense counsel noted Medved had lost his job at Wells Fargo and endured eighteen months of "embarrassment, anxiety, and shame."

The court followed the prosecutor's recommendation and sentenced Medved to concurrent prison terms, twenty-five years for ongoing criminal conduct and ten years for delivery.

On appeal, Medved recognizes: "Because the imposed sentence is not outside the statutory limits, the sentence will be set aside only for an abuse of

discretion." *See State v. Thomas*, 547 N.W.2d 223, 225 (Iowa 1996). Medved also acknowledges: "It is not an abuse of discretion to refuse to grant probation despite a [presentence investigation report] PSI recommendation for probation." *See State v. Taylor*, 490 N.W.2d 536, 539 (Iowa 1992). However, Medved argues he expressed remorse to the PSI investigator and to the court and his "rehabilitation would best be achieved by probation." Medved argues the court abused its discretion in sentencing him to prison.

Our review is for correction of errors at law. Iowa R. App. P. 6.907. Further, "[s]entencing decisions of the district court are cloaked with a strong presumption in their favor." *State v. Thomas*, 547 N.W.2d 223, 225 (Iowa 1996). An abuse of discretion "is found only when the sentencing court exercises its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable." *Id*. Additionally, "a sentencing court need only explain its reasons for selecting the sentence imposed and need not explain its reasons for rejecting a particular sentencing option." *State v. Ayers*, 590 N.W.2d 25, 28 (Iowa 1999).

In sentencing Medved to prison, the court stated:

> I don't know if any of Mr. Medved's family or friends got to sit through any part of the trial . . . but one of the things I was struck by is [the] testimony [of those] who lived with Mr. Medved and who knew him well considered him to be arrogant, considered him to be a know-it-all, a person who was too smart to get caught, too smart to get in trouble, willing to push the envelope. The man to go to if you needed marijuana. If you needed good marijuana, this was the guy to go to. He knew it, everybody knew it. This was a guy who was completely willing to be two-faced to his family and friends and present one view to them and another view to his customers, the people that he was dealing with. And this is what we call in the drug business not a street-level dealer. This is not some poor guy that doesn't have much money and he has to get some drugs and

> sell part of them off to pay for his drugs to support his habit. Mr. Medved is not a user. All these people on the list in his drug notes were people . . . that wanted the drugs and needed the drugs but didn't have the money so he fronted them with the drugs so they went out and spread the drugs further in the community and got paid . . . so they could pay him. And this is what he did for . . . a good number of years. And he's remorseful because he got caught, because he thought he was so smart that he would never get caught and that's what he was remorseful about.
>
> I haven't heard anyone today ever indicate that he ever revealed to them the true involvement that he had in this. He's minimized it; he's covered it up . . . . He says his life has been terrible for the last year and a half. Well that's after he got caught. Before he got caught things were great and he'd still be doing this today if he hadn't got caught. There is no sign of anything that would have changed his behavior. He would have worked his job at Wells Fargo, he would have gone out to the western states [to get] high-grade marijuana and [brought] it back and circulate[d] it through the Cedar Falls College community. He didn't stop this because he had a change of heart . . . . He stopped it because he got caught because an informant ratted him out. And I have great fear that a person who is this devious will return to this as soon as he gets the opportunity. I think he's smart enough to snow the probation officers and make them think he's doing just what he should. And I have no faith in his ability to reform himself without a controlled environment to be in and some programming that's only available through the prison system.

The court also informed Medved of his right to ask for a reconsideration after "he's had some exposure to the programming" available in prison.

We recognize the district court's superior ability to hear the witnesses and evaluate their demeanor and credibility. After reviewing the record and while being mindful of our standard of review, we conclude the district court did not exercise its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable when it imposed a lengthy term of incarceration.

VII. Sentencing: Cruel and Unusual Punishment.

Medved first contends our legislature's authorization of a twenty-five year prison term for ongoing criminal conduct is a violation of the Cruel and Unusual

Punishment Clauses, citing both the federal and Iowa constitutions. Medved argues this sentence is excessively severe. Where, as here, Medved claims the sentence itself is inherently illegal based on our constitutions, "the claim may be brought at any time." *See State v. Bruegger*, 773 N.W.2d 862, 872 (Iowa 2009). We review Medved's constitutional challenges de novo. *See id*. at 869.

> The Eighth Amendment to the United States Constitution and article I, section 17 of the Iowa Constitution prohibit cruel and unusual punishment. Punishment may be cruel and unusual because it inflicts torture, is otherwise barbaric, or is so excessively severe it is disproportionate to the offense charged.

State v. Cronkhite, 613 N.W.2d 664, 669 (Iowa 2000). Our constitutions embrace "a bedrock rule of law that punishment should fit the crime." *Bruegger*, 773 N.W.2d at 872. We recognize, however, "it is within the province of our legislature to determine the most appropriate means of punishing and deterring criminal activity." *Cronkhite*, 613 N.W.2d at 669.

> Generally, a sentence that falls within the parameters of a statutorily prescribed penalty does not constitute cruel and unusual punishment. Only extreme sentences that are "grossly disproportionate" to the crime conceivably violate the Eighth Amendment.
>
> Substantial deference is afforded the legislature in setting the penalty for crimes. Notwithstanding, it is within the court's power to determine whether the term of imprisonment imposed is grossly disproportionate to the crime charged. If it is not, no further analysis is necessary.

Cronkhite, 613 N.W.2d at 669 (citations omitted). "While a sentence to a term of years might be so lengthy as to violate the Cruel and Unusual Punishment Clause, such an occurrence outside the context of capital punishment has been 'exceedingly rare.'" *Bruegger*, 773 N.W.2d at 873 (noting a life sentence for a parking ticket would be "grossly disproportionate to the crime").

To prove ongoing criminal conduct, the State was required to prove Medved made two or more deliveries of marijuana, he delivered the marijuana with the specific intent of financial gain, and he delivered the marijuana on a continuing basis and there was a threat of continuing activity. *See* Iowa Code §§ 706A.1(5), .2(4); *State v. Reed*, 618 N.W.2d 327, 334-35 (Iowa 2000). Our legislature determined Medved's ongoing criminal conduct is a class "B" felony with confinement "for no more than twenty-five years." *See* Iowa Code §§ 706A.4, 902.9(2).

In considering whether a penalty is grossly disproportionate to the offense, the *Bruegger* court instructed:

> Strict proportionality in sentencing, however, is not required, and a reviewing court is not authorized to generally blue pencil criminal sentences to advance judicial perceptions of fairness. "Severe, mandatory penalties may be cruel, but they are not unusual in the constitutional sense . . . ."

Bruegger, 773 N.W.2d at 873 (quoting *Harmelin v. Michigan*, 501 U.S. 957, 994-95, 111 S. Ct. 2680, 2701. 115 L. Ed. 2d 836, 864 (1991)). This is not a mandatory penalty case, rather our legislature established "no more than twenty-five years" as the penalty. *See* Iowa Code §§ 706A.4, 902.9(2). We conclude the twenty-five year *potential* maximum penalty for ongoing criminal conduct is not grossly disproportionate considering the culpability required (*both* continuing activity and a threat of continuing activity) and the "great deference" we afford "legislative determinations of punishment." Accordingly, Medved has not shown the statute is cruel and unusual on its face. *See Bruegger*, 773 N.W.2d at 872-73.

Second, Medved argues his sentence is cruel and unusual under an "as-applied to him" analysis under his "specific facts." The State agrees the Iowa Supreme Court has determined in some "relatively rare cases" the courts should make "an individualized assessment of [whether] the punishment imposed should be permitted." *See id.* at 884 (stating "in some instances, defendants who commit acts of lesser culpability within the scope of broad criminal statues carrying stiff penalties [can] launch an as-applied cruel and unusual punishment challenge").

In *Bruegger*, the Iowa Supreme Court ruled:

> The question is, then, whether this is a *relatively rare case where an individualized assessment of the punishment imposed should be permitted*. We conclude that it is. This case involves an unusual combination of features that converge to generate a high risk of potential gross disproportionality—namely, a broadly framed crime, the permissible use of preteen juvenile adjudications as prior convictions to enhance the crime, and a dramatic sentence enhancement for repeat offenders. Each of these factors, standing alone, has the potential of introducing a degree of disproportionality into a sentence, but *the convergence of these three factors presents a substantial risk that the sentence could be grossly disproportionate as applied*. We thus conclude that Bruegger should be allowed to make an individualized showing that the sentence is cruel and unusual as applied to him.
>
> The first factor, breadth of crime, is an important one.
>
> . . . .
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> The second factor—namely, Bruegger's age as a preteen when the predicate offense was committed—is also material. *If the prior crime occurred while the defendant was an adult, that might yield a different result. Here, however, the prior crime occurred when Bruegger was twelve*. . . . We also note that the legislative policy regarding juvenile offenders is not entirely clear or consistent. . . .
>
> We finally note that the increase in sentence . . . is geometric. The maximum sentence for Bruegger's crime, without enhancement, was ten years, subject to various good time credits. His likely prison term, even if he received the maximum sentence, would have been about four years. Under the enhanced sentencing scheme, Bruegger must serve at least 21.25 years in

> prison, a five hundred percent increase in sentence. This geometric increase in sentence is another factor that contributes to our conclusion that, in this case, Bruegger is entitled to attempt to show that the enhanced sentence, as applied to him, amounts to cruel and unusual punishment.
>
> *Our narrow conclusion* [is] that Bruegger, *in light of the unusual convergence* of a broadly-defined criminal statute, *the use of a juvenile adjudication when he was twelve to enhance his sentence*, and the dramatic increase in his punishment as a result of the enhancement, may bring a cruel and unusual punishment challenge . . . as applied to him.
>
> . . . .
>
> In closing, we note Bruegger has committed a serious crime for which the legislature may impose a serious penalty. . . . Our sole concern here is whether, under the facts and circumstances, a *mandatory* sentence of 21.25 years is "off the charts."

Id. at 884-86 (emphasis added).

After our de novo review, we cannot conclude this is one of the "relatively rare" cases allowing Medved to launch an as-applied challenge. There is not a similar "unusual convergence" here. As noted previously, the court used its discretion in sentencing Medved to twenty-five years, a sentence with no mandatory minimum. *See* Iowa Code § 902.9(2). Further, Medved's sentence did not utilize "a juvenile adjudication" and is not enhanced based upon prior juvenile conduct. Instead, Medved was an adult living on his own and holding down a full-time job while he continued to deliver marijuana to his customers. We conclude Medved has not shown his case is one of the rare cases where an as-applied cruel and unusual punishment challenge can succeed. *See Bruegger*, 773 N.W.2d at 884-86.

AFFIRMED.