IN THE COURT OF APPEALS OF IOWA

No. 2-1065 / 12-0138
Filed February 13, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MICHAEL LINN CROSS,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Gary D. McKenrick, Judge.

Michael Cross appeals from judgments entered upon his convictions of assault on a police officer while using or displaying a dangerous weapon and possession of a controlled substance. **JUDGMENTS VACATED IN PART AND REVERSED IN PART, AND CASE REMANDED.**

Mark C. Smith, State Appellate Defender, and Vidhya K. Reddy, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kyle P. Hanson, Assistant Attorney General, and Michael J. Walton, County Attorney, for appellee.

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

DANILSON, J.

Michael Cross appeals from judgments entered upon his convictions of assault on a police officer while using or displaying a dangerous weapon, in violation of Iowa Code section 708.3A(2) (2011); operating while intoxicated, in violation of section 321J.2(a) and (c); and possession of a controlled substance, in violation of section 124.401(5). He contends the trial court erred in admitting out-of-court statements he objected to on a number of grounds, and that trial counsel was ineffective in several respects. Because we find the court erred in admitting prejudicial out-of-court statements, we vacate and remand for a new trial on the assault charge. We find insufficient evidence of possession to support the drug charge, we therefore reverse and order that chargebe dismissed.

I. Background Facts and Proceedings.

Just after 11 p.m. on August 6, 2011, Davenport police received information about a shot or shots fired by an individual who fled the fairgrounds as a passenger in a white Blazer. Based on that information, police located a white Blazer and, at 12:06 a.m. on August 7, executed a maneuver referred to as a "plain car intervention." Several unmarked police cars "boxed in" a white Blazer at an intersection in Davenport leading to the Centennial Bridge. The Blazer reversed at sufficient speed to create squealing tires and then lurched forward. At the same time, several plain clothes and uniformed police officers got out of their respective vehicles and approached the Blazer with guns drawn. When the Blazer lurched forward, several shots were fired into the driver side of

the Blazer, hitting the driver Michael Cross. The time elapsed from when the unmarked cars surrounded the Blazer to when Cross was removed from the vehicle to the ground was about ten seconds.

Cross was arrested. At the scene Cross admitted, "I'm drunk, sir, I'm sorry, I'm sorry, I'm drunk, I'm sorry." A blood sample collected from Cross tested positive for THC. During a subsequent search of the Blazer, which did not belong to Cross, the police found a small baggie of marijuana inside the console between the driver and passenger seats. Cross was charged with assault on a police officer while displaying a deadly weapon, operating while intoxicated, and possession of marijuana.

Cross filed a motion in limine seeking to preclude the State from referring to the alleged involvement of the Blazer in a shots-fired incident near the fairgrounds, which occurred a half-hour to an hour before Cross's encounter with police near the bridge. The motion in limine was based on claims that the fairgrounds incident was irrelevant, the statements made were hearsay, any relevance of the evidence was outweighed by its prejudicial effect, and the admission of the out-of-court statements would violate the defendant's constitutional confrontation rights. The State resisted, arguing that the fairgrounds incident and the statements made there to officers were not being offered for the truth of the matter, but to explain the officers' subsequent actions. The district court ruled audio and visual recordings from police vehicles would be allowed since they "explain why the officers took the actions they took, both with respect to locate the vehicle, the following of the vehicle operated by the

defendant, and the actions taken upon the stop of the vehicle." The court also stated,

> the credibility of the officers is at issue in connection with the charges against the defendant and so an explanation of the actions that were taken by the officers and why the officers approached the situation in the way they did is relevant to the jury's ultimate credibility determinations regarding what the officers have to testify to with respect to the specific elements of the charges against the defendant.

During the course of the jury trial, Cross pleaded guilty to operating while intoxicated.[1] The jury convicted him of possession of a controlled substance and assault on a police officer while displaying a dangerous weapon.

Cross appeals, contending the district court erred in admitting out-of-court statements regarding an alleged shot-fired incident at the fairgrounds over the defendant's objections on hearsay, Iowa Rule of Evidence 5.403, and confrontation rights grounds. If error was not properly preserved, Cross argues trial counsel was ineffective. Cross contends his trial counsel was ineffective in other respects: (1) in not challenging the sufficiency of the evidence that he (a) "intentionally displayed a dangerous weapon in a threatening manner" with respect to the assault charge and (b) "knowingly possessed" a substance with respect to the possession charge; (2) in failing to raise a "weight of the evidence" challenge on the same two elements noted above; and (3) in failing to challenge an erroneous jury instruction defining possession.

---

[1] Cross raises no issues on appeal with respect to this conviction.

II. Scope and Standard of Review.

"Except in cases of hearsay rulings, trial courts have discretion to admit evidence under a rule of evidence." *State v*. *Jordan*, 663 N.W.2d 877, 879 (Iowa 2003). We review these other evidentiary rulings for an abuse of discretion. *State v*. *Elliott*, 806 N.W.2d 660, 667 (Iowa 2011). "A court abuses its discretion when its discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable." *State v*. *Long*, 814 N.W.2d 572, 576 (Iowa 2012) (internal quotation marks and citation omitted).

"We review hearsay rulings for correction of errors at law 'because admission of hearsay evidence is prejudicial to the nonoffering party unless the contrary is shown.'" *Elliott*, 806 N.W.2d at 667 (quoting *State v*. *Ross*, 573 N.W.2d 906, 910 (Iowa 1998)).

Our review of constitutional issues is de novo. *State v*. *Utter*, 803 N.W.2d 647, 651 (Iowa 2011) (reviewing ineffective-assistance-of-counsel claim); *State v*. *Schaer*, 757 N.W.2d 630, 633 (Iowa 2008) (reviewing a claim based on the Confrontation Clause).

III. Analysis.

A. Assault on a police officer while using or displaying a dangerous weapon. "Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Iowa R. Evid. 5.801(c). "When an out-of-court statement is offered, not to show the truth of the matter asserted but to explain responsive

conduct, it is not regarded as hearsay." *State v. Mitchell*, 450 N.W.2d 828, 832 (Iowa 1990).

Cross acknowledges the admissibility of some general statements that officers had received a report of a shot fired at the fairgrounds and suspected involvement of a white Blazer to explain the officers' conduct in searching for and intercepting the vehicle Cross was driving. Cross argues, however, that the district court erred in declining Cross's request "to limit the State's presentation of evidence relating to the shot-fired complaint to such general descriptions" and allowed the State to elicit testimony from the officers repeating witness complaints about the shots fired incident, as well as the audio recording of those statements. We agree.

In *Elliott*, our supreme court wrote,

> Generally, an investigating officer may explain his or her actions by testifying as to what information he or she had, including its source, regarding the crime and the criminal. Yet, this option is not without restraint. If an investigating officer specifically repeats a victim's complaint of a particular crime, it is likely that the testimony will be construed by the jury as evidence of the facts asserted.

806 N.W.2d at 667 (internal quotation marks, citations, and corrections omitted).

We believe that in this case the testimony allowed, though some of which may have fallen outside the definition of hearsay, went beyond what was necessary to explain the officers' conduct and prejudiced the defendant.

At trial, off-duty police officer Jonathan Tatum testified that on August 6, 2011, he was working as security for the shopping center across from the fairgrounds. He testified he saw a large disturbance at the fairgrounds, then a group of people walked from the fairgrounds to a McDonald's, which prompted

Tatum to ask for a squad car to clear the parking lot. The crowd increased and Tatum called for additional units. While police were moving people along, Tatum testified that at about 11:09 p.m. he saw two cars, a white Chevy Blazer and red Mercury Sable, pull into the main intersection outside of the fairgrounds and all of the occupants of both vehicles got out and it appeared they intended to fight. Tatum testified that when he started running toward the vehicles, he heard what he believed to be a shot from a handgun and saw what he thought was the ricocheting bullet. The red car drove away, but the white Blazer remained.

Tatum continued to describe his interaction with the occupants of the white Blazer and warned them that he would pepper spray them if they did not leave. Tatum testified the white Blazer drove away, but pulled into a nearby parking lot. At the point, Tatum testified he "was approached by a subject in the red car that said, 'Hey, you just let the guys that shot at—.'" Defense counsel made a hearsay objection, which was overruled. Tatum continued to testify as to numerous out-of-court statements, including that a person in a red car approached him and told him, "Hey, MF, you just let the shooter that shot at my son get away." During his testimony, Tatum states at least four times that people told him there was a gun or that he let the shooter get away.

We reject the State's argument that the out-of-court statement to Tatum he "just let the shooter that shot at my son get away" was necessary to explain why police were looking for the white Blazer. Sergeant Greg Behning testified that "Tatum put out information about a white Blazer being involved and shots fired directly across from the fairgrounds." This testimony would adequately

explain the officers' subsequent conduct. But over Cross's objections, the State also played portions of Behning's squad video containing Behning's interview with fairgrounds witnesses at a parking lot approximately ten to fifteen minutes after the report of a shot fired. In addition, Behning testified to the substance of those statements and that Tatum radioed to dispatch that occupants with a handgun in a white Chevy Blazer with Illinois plates were traveling westbound.

Police Officer Kevin Smull testified about his connection with the fairgrounds call and hearing a radio transmission of "an officer talk about subject with a white shirt, African American male with a weapon, and then the second transmission would have been from Officer Tatum about a white Chevy Blazer that supposedly the occupant had a weapon, a handgun." Over continued objections by defense counsel, additional audio transmissions from police officers were played and Smull would repeat or interpret what was stated on the audio transmissions, sometimes identifying who was speaking.

The State observes, "Cross was charged with assaulting officers by driving toward them; he was not charged for any involvement in the shooting at the fairgrounds." This observation, we think, points to the troubling nature of the repetition of the out-of-court statements. The evidence presented focused repeatedly on the shooting at the fairgrounds—an act for which Cross was not charged. Tatum testified about the out-of-court statement "you just let the shooter that shot at my son get away"; when Behning's video recording was played to the jury, the jury heard an officer report that "I know they had two or

three guns in that car," which was repeated by the prosecutor. But Cross was only charged with assault by driving toward police officers.

We agree with Cross that the evidence "is so likely to be misused by the jury as evidence of the fact asserted that it should be excluded as hearsay." *See State v. Doughty*, 359 N.W.2d 439, 442 (Iowa 1984) (internal quotation marks and citation omitted). As presented in this case, "it is likely that the testimony [was] construed by the jury as evidence of the facts asserted." *See Elliott*, 806 N.W.2d at 667. Consequently, even if we allow that limited testimony would be admissible to explain the officers' use of the "plain car intervention,"[2] Cross's objections pursuant to Iowa Rule of Evidence 5.403 should have been granted.

Rule 5.403 provides, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." "Unfair prejudice arises when the evidence would cause the jury to base its decision on something other than the proven facts and applicable law, such as sympathy for one party or a desire to punish a party." *State v. Taylor*, 689 N.W.2d 116, 124 (Iowa 2004); *cf. State v. Redmond*, 803 N.W.2d 112, 124 (Iowa 2011) ("Prejudicial effect is the extent of the risk that the jury may misuse the prior conviction evidence to decide the case on an improper basis."). We conclude that the repeated references to out-of-court statements about the shot fired at the

---

[2] Officer Behning testified about police policy concerning the pursuit of vehicles, the policy that they pursue vehicles involving gun crimes, and the use of plain cars to block vehicles to avoid pursuits.

fairgrounds likely influenced the jury to base its decision on an improper factor, that is, the implicit assertion that Cross had been involved in another crime or bad act, the shooting incident at the fairgrounds. The inadmissible out-of-court statements may have also served to corroborate the testimony of Officer Tatum.

To the credit of the district court, a limiting instruction was given to the jury. The instruction provided that the evidence concerning the events at the fairgrounds could only be used "to explain why the police did what they did." However, a limiting instruction may be inadequate to cure the error. *Elliot*, 806 N.W.2d at 674. Here, the evidence presented had nothing to do with the crime charged and could well have elicited a response from the jury to punish individuals with guns or shooting guns. The amount and level of details provided in the inadmissible testimony lead to the conclusion that the instruction did not cure the prejudice. We also note there was no other admissible evidence that the occupants of the white Blazer had two or three guns. *See State v. Martin*, 587 N.W.2d 606, 610 (Iowa Ct. App 1998) (cited with approval in *Elliot*, 806 N.W.2d at 674 n.4, where the court concluded that a cautionary instruction did not cure the danger of unfair prejudice because no other evidence was admitted establishing the same facts as the inadmissible evidence).

The district court abused its discretion in failing to limit the State's evidence to general statements that officers had received a report of a shot fired at the fairgrounds and suspected involvement of a white Blazer to explain the officers' conduct in searching for and intercepting the vehicle Cross was driving. The error was not harmless. Accordingly, the district court judgment on the

conviction of assault on a police officer while using or displaying a dangerous weapon is vacated, and the case is remanded to the district court for a new trial.[3]

B. Possession of controlled substance. Cross contends the evidence was insufficient to establish that he knowingly or intentionally possessed the baggie of marijuana discovered during the search of the Blazer and that trial counsel was ineffective in failing to raise a sufficiency of the evidence challenge. He also asserts that trial counsel was ineffective in failing to challenge the jury instruction defining possession.

The State argues it presented substantial evidence to support the conviction, relying upon the evidence showing the marijuana "was found next to him in the vehicle he was driving in the center console that is more accessible to the driver"; Cross "attempt[ed] to elude police"; and "his recent marijuana use supports an inference that the marijuana police found also belonged to him."

With respect to the possession charge, the jury was instructed:

> Instruction No. 9
>
> The State must prove both of the following elements of Possession of a Controlled Substance under Count 3 of the Trial Information:
>
> 1. On or about the 7th day of August, 2011, the defendant knowingly or intentionally possessed marijuana.
>
> 2. The defendant knew that the substance he possessed was marijuana.
>
> If the State has proved both of these elements, the defendant is guilty of Possession of a Controlled Substance. If the

[3] With respect to the charge of assault on a police officer while using or displaying a dangerous weapon we vacate here, Cross also argues that his trial attorney was ineffective for not challenging the sufficiency or weight of the evidence to support the conviction. However, in light of the evidence that Cross accelerated and steered his vehicle toward a gap between vehicles, but which gap was occupied by officers, a reasonable jury could infer both an intent to intimidate officers and to seriously injure or kill them.

> State has failed to prove either of the elements, the defendant is not guilty under Count 3.
>
> Instruction No. 11
>
> "Possession" includes actual as well as constructive possession, and also sole as well as joint possession. A person who has direct physical control of something on or around his person is in actual possession of it. A person who is not in actual possession, but who has knowledge of the presence of something and has the authority or right to maintain control of it, either alone or together with someone else, is in constructive possession of it. If something is found in a place which is exclusively accessible to only one person and subject to his or her dominion and control, you may, but are not required to, conclude that that person has constructive possession of it. If one person alone has possession of something, possession is sole. If two or more persons share possession, possession is joint.

1. Actual vs. constructive possession.

In *State v. Kemp*, 688 N.W.2d 785, 789 (Iowa 2004), the court stated that in order to prove unlawful possession of a controlled substance,

> it must be shown that the defendant: (1) exercised dominion and control over the contraband, (2) had knowledge of its presence, and (3) had knowledge that the material was a controlled substance. *State v. Bash,* 670 N.W.2d 135, 137 (Iowa 2003) (citing *State v. Reeves,* 209 N.W.2d 18, 21 (Iowa 1973)). Possession can be either actual or constructive. *Bash,* 670 N.W.2d at 138. "Actual possession occurs when the controlled substance is found *on the defendant's person.* Constructive possession occurs when the defendant has knowledge of the presence of the controlled substance and has the authority or right to maintain control over it." *Id.* (citations omitted).

(Emphasis added.)

Contrary to the applicable law that actual possession occurs when the controlled substance is found "on the defendant's person", Instruction No. 11 states that "[a] person who has direct physical control of something *on or around his person is in actual possession* of it." (Emphases added.)

2. Sufficiency of the evidence of constructive possession.

The marijuana was found in the console of the vehicle Cross did not own, but was driving. Here, as was the case in *Kemp*, "[b]ecause no drugs were found on the defendant's person, this matter concerns constructive possession." 688 N.W.2d at 789; *see also Bash*, 670 N.W.2d 135, 138 (Iowa 2003); *State v. Cashen*, 666 N.W.2d 566, 569 (Iowa 2003). Under these circumstances, knowledge of the presence of the substance may not be inferred. *See Kemp*, 688 N.W.2d at 789.

The *Kemp* court noted that relevant factors to be considered for determining whether a defendant had constructive possession of contraband include: "(1) incriminating statements made by the defendant, (2) incriminating actions of the defendant upon the police's discovery of drugs among or near the defendant's personal belongings, (3) the defendant's fingerprints on the packages containing the drugs, and (4) any other circumstances linking the defendant to the drugs." *Id.*

Here, while Cross admitted he had used marijuana, he did not admit possessing the marijuana in the white Blazer. The marijuana was not discovered "among or near the defendant's personal belongings" and there was no evidence of incriminating actions on Cross's part upon the police's discovery of the marijuana. No fingerprints were found on the packaging. There were other people in the vehicle. *See Cashen*, 666 N.W.2d at 572 ("Because Cashen was not in exclusive possession of the premises, but shared the vehicle with five other people, and because he did not have exclusive access to the place where

the drugs were located, the State was required to prove facts *other* than mere proximity to show his dominion and control of the drugs."). The State offers no authority for its assertion that Cross's recent marijuana use can support an inference that he possessed the marijuana in the vehicle. "Our possession statute does not criminalize mere proximity to contraband." *Id.* at 573.

Generally, ineffective-assistance-of-counsel claims are preserved for possible postconviction proceedings. *State v*. *Shanahan*, 712 N.W.2d 121, 136 (Iowa 2006). However, we will address the claim if the record is adequate to permit a ruling. *Id*. We conclude the record is adequate to reach the issue here.

To prevail on his ineffective-assistance claim, Cross must show counsel failed to perform an essential duty, and prejudice resulted. *Id*. "The claim fails if the defendant is unable to prove either element of this test." *State v*. *Fountain*, 786 N.W.2d 260, 266 (Iowa 2010).

Our supreme court has stated, "To preserve error on a claim of insufficient evidence for appellate review in a criminal case, the defendant must make a motion for judgment of acquittal at trial that identifies the specific grounds raised on appeal." *State v. Truesdell*, 679 N.W.2d 611,615 (Iowa 2004). Here, the motion made by Cross's trial counsel failed to identify any specific grounds and did not preserve error.[4] Because we conclude there was insufficient evidence to support the conviction of possession of marijuana, trial counsel failed to perform an essential duty and prejudice resulted by the conviction.

---

[4] Trial counsel for Cross was asked by the court outside of the presence of the jury if she wanted "to make a motion for judgment of acquittal," to which counsel responded, "Yes your Honor." However, when asked if she had any argument on the motion, counsel stated, "No your honor."

Trial counsel for Cross was ineffective in failing to identify in counsel's motion for acquittal the specific ground of lack of evidence to establish constructive possession where the evidence was insufficient to support th conviction. We also conclude that counsel was ineffective in failing to object to Instruction No. 11, which improperly defined "possession." We therefore vacate the judgment and sentence and remand for a dismissal of the possession of marijuana charge.

IV. Conclusion.

We vacate judgment entered upon the defendant's conviction of assault on a police officer while using or displaying a dangerous weapon, and remand for a new trial on that charge. We reverse the defendant's conviction of possession of marijuana because there is insufficient evidence to sustain the conviction; on remand, this charge must be dismissed.

JUDGMENTS VACATED IN PART AND REVERSED IN PART, AND CASE REMANDED.