IN THE COURT OF APPEALS OF IOWA

No. 2-1156 / 12-0275
Filed February 27, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

BOBBY THOMPSON,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Mark D. Cleve, Judge.

A defendant appeals his judgment and sentence for possession of marijuana and possession of a firearm as a felon. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Patricia Reynolds, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Benjamin M. Parrott, Assistant Attorney General, Michael J. Walton, County Attorney, and Kelly Cunningham, Assistant County Attorney, for appellee.

Considered by Eisenhauer, C.J., and Vogel and Vaitheswaran, JJ.

VAITHESWARAN, J.

Davenport police officers searched a room in the home of Bobby Thompson's stepfather and mother and discovered a gun and marijuana. The State charged Thompson with possession of marijuana and being a felon in possession of a firearm, and a jury found him guilty as charged. On appeal, Thompson argues (1) there is insufficient evidence to support the jury's findings of guilt and (2) his trial attorney was ineffective in failing to object to hearsay evidence and what he characterizes as prior bad acts evidence.

I. Sufficiency of the Evidence

Thompson contends the State presented insufficient evidence to establish that he "possessed" the gun and marijuana. The State counters that Thompson's motion for judgment of acquittal was too general to preserve error on his sufficiency-of-the-evidence challenge and, accordingly, we need not reach the merits. *See State v. Truesdell*, 679 N.W.2d 611, 615 (Iowa 2004) ("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."). We begin with the State's contention.

At trial, Thompson articulated the grounds for his motion for judgment of acquittal as follows:

> Clearly, if there is possession in this case, it has to be constructive possession, as . . . there is nothing that establishes that Bobby had direct possession of any contraband of any kind. There is simply insufficient evidence, including his nexus to the room, for a rational finder of fact to find that he was in possession either of a quantity of marijuana or a weapon which at that point in time he would have not been authorized by law to be in possession of.

This statement was sufficient to inform the district court that Davis was challenging the "possession" element of both crimes and, for that reason, was sufficient to preserve error. Accordingly, we will proceed to the merits, reviewing the jury's findings of guilt for substantial evidence. *State v*. *Hennings*, 791 N.W.2d 828, 832-33 (Iowa 2010).

The jury was instructed that the State would have to prove the following elements of possession of marijuana:

> 1. On or about the 28th day of January, 2011, the defendant knowingly or intentionally possessed marijuana.
> 2. The defendant knew that the substance he possessed was marijuana.

The jury was also instructed that the State would have to prove the following elements of possession of a firearm by a felon:[1]

> 1. On or about the 28th day of January, 2011, the defendant knowingly possessed or received or transported or caused to be transported or had under his dominion and control a firearm.
> 2. At that time the defendant had been previously convicted of a felony.

And the jury received the following instruction on "possession":

> "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.

[1] Thompson stipulated he had a prior felony.

A reasonable juror could have found the following facts. A Davenport police officer stopped a vehicle in which Thompson was a passenger. Thompson provided an Iowa identification card listing his address as the home of his mother and stepfather. The officer confirmed with Thompson that this was still his address. Two days later, officers executed a search warrant at that address, seeking firearms and a cell phone belonging to Thompson. Thompson's stepfather told the officers Thompson stayed at the home the night before. He directed them to a "sitting room" at the top of the stairs. The officers proceeded to that room and discovered a gun beneath a couch cushion, a baggie of marijuana under the couch, and a cell phone belonging to Thompson.

All agree Thompson was not in actual possession of these items, as he was not in the room or, indeed, in the home, when the search warrant was executed. The focus is on whether Thompson had constructive possession of the items. On this question, Thompson notes that he only periodically stayed at the home and he was not the only person who used the sitting room.

The record supports Thompson's assertion that he did not have exclusive access to the sitting room. Specifically, his mother testified that she and her husband let others stay in the room. But the absence of evidence that the room was Thompson's alone simply means we may not draw an inference of constructive possession. *State v*. *Henderson*, 696 N.W.2d 5, 9 (Iowa 2005). Instead, we must consider other factors in determining whether he had constructive possession of the contraband. *State v*. *Maxwell*, 743 N.W.2d 185, 194 (Iowa 2008).

The jury reasonably could have found that Thompson was the last person in the room prior to the search; it is undisputed that Thompson stayed in the room the previous night and it is undisputed that the cell phone found in the room was his. The jury also could have found that the marijuana underneath the couch was within arm's reach of the floor on which Thompson testified he slept and the gun on the couch was not much farther away. This evidence supported the element of possession.

The State also points to other items in the room that appeared to belong to Thompson, and in the State's view, linked him to the contraband. This evidence is more tenuous. For example, even if "urban-wear" found in the closet of the sitting room belonged to Thompson, it could well have been a remnant of his past, as there was evidence that Thompson lived in the home when he was younger and his stepfather testified the closet was used to store "odds and ends" and "miscellaneous stuff." Similarly, bills addressed to Thompson at that address were several months old and some were for services provided at other addresses. Finally, additional contraband found in a size 12 shoe box in the closet was never tied to Thompson; the State did not establish that Thompson wore size 12 shoes or that a partial fingerprint found on one of the items in the shoebox belonged to Thompson.

Contrary to the State's assertion, this evidence detracted from the jury's finding of guilt. *See State v. Serrato*, 787 N.W.2d 462, 465 (Iowa 2010) ("In conducting our review, we consider all the evidence, that which detracts from the verdict, as well as that supporting the verdict."). Nonetheless, viewing the record

in the light most favorable to the State as we must, *see id.*, we conclude the evidence supporting the finding of guilt was substantial.

B. Ineffective Assistance of Counsel.

Thompson argues his trial attorney was ineffective in failing to object to what he characterizes as prejudicial hearsay testimony and prior bad acts evidence. We find the record adequate to address these issues on direct appeal. *See State v. Henderson*, 804 N.W.2d 723, 725 (Iowa 2011). To prevail, Thompson must show that counsel (1) failed to perform an essential duty and (2) prejudice resulted. *See Strickland v*. *Washington*, 466 U.S. 668, 687-88.

The hearsay evidence came from officers who executed the search warrant. They testified they were told Thompson "stayed" in a room upstairs. Even if this evidence was hearsay,[2] it was cumulative of testimony from Thompson as well as his mother and stepfather. For that reason, Thompson cannot establish a reasonable probability that the trial result would have been different had the jury not heard the objectionable testimony. *See State v*. *Schaer*, 757 N.W.2d 630, 638 (Iowa 2008).

We turn to the claimed prior bad acts testimony. Thompson contends the references by three officers and the prosecutor to a search warrant for guns constituted "improperly interjected evidence of an irrelevant and prejudicial prior bad act." *See* Iowa R. Evid. 5.404(b).[3] The problem Thompson faces is that the

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[2] Hearsay "is a statement, other than one made by the declarant while testifying at the trial . . . offered in evidence to prove the truth of the matter asserted." Iowa R. Evid. 5.801(c). The State posits several reasons why the evidence was not hearsay. We find it unnecessary to address these arguments.

[3] The rule states, "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith.

cited evidence did not refer to "other" crimes, but to one of the crimes with which he was charged. Because the challenged evidence did not fall within the ambit of rule 5.404(b), counsel did not breach an essential duty in failing to raise an objection under that rule.

III. Conclusion

We affirm Thompson's judgment and sentence for possession of marijuana and possession of a firearm as a felon.

AFFIRMED.

It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."