

IN THE COURT OF APPEALS OF IOWA

No. 2-1157 / 12-0365
Filed February 13, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

JUAN DENERO HARRIS,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Todd A. Geer,
Judge.

Juan Harris challenges the admission of evidence at trial, and the sufficiency of the evidence to sustain his possession of cocaine base with intent to deliver conviction. **AFFIRMED IN PART, REVERSED AND VACATED IN PART, AND REMANDED FOR RESENTENCING.**

Mark C. Smith, State Appellate Defender, and David A. Adams, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Brad P. Walz, Assistant County Attorney, for appellee.

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

DANILSON, J.

Juan Denero Harris appeals, following a jury trial, from convictions of possession of a controlled substance with intent to deliver—crack cocaine, in violation of Iowa Code section 124.401(1)(b) (2011); possession of a controlled substance with intent to deliver—marijuana, in violation of section 124.401(1)(d); and two drug tax stamp violations pursuant to section 453B.12. Harris contends there is insufficient evidence that he possessed crack cocaine to sustain either the possession with intent to deliver or drug tax stamp convictions.¹ He also contends the district court abused its discretion in admitting pictures taken during the search of the residence on grounds they were irrelevant and unduly prejudicial. We conclude any error in the admission of the pictures was harmless. However, the evidence does not sufficiently connect Harris to the crack cocaine to sustain a finding of constructive possession, and we therefore reverse the convictions of possession with intent to deliver and the drug tax stamp violation related to cocaine and remand for resentencing.

I. Background Facts and Proceedings.

On March 23, 2011, officers executed a search warrant at an apartment in Waterloo leased to Keith Nelson. Harris was present in a “makeshift” bedroom in the apartment separated from the living room by a curtain. In the area surrounding Harris’ bed, officers found a marijuana blunt, a potato chip bag containing nineteen plastic baggies of marijuana, another quantity of marijuana,

¹ Harris was also convicted of a tax stamp violation and possession of marijuana with intent to deliver, but he does not challenge the sufficiency of the evidence to sustain these convictions.

\$1400 in cash in a suitcase of DVD's and CD's (in plastic sleeves, not cases), an additional \$100 found elsewhere, three cell phones, unused plastic baggies, other plastic baggies that appeared to contain residue of marijuana, a piece of mail addressed to Juan Harris at the address being searched, and a piece of mail addressed to Keith Nelson at the same address. None of the drug packages had an Iowa drug tax stamp.

In a box for plastic baggies in an unsecured kitchen drawer and beneath a piece of mail addressed to Nelson, the officers found two bags of crack cocaine knotted together. The amount of crack cocaine in the baggies appeared to one officer to be larger than the typical user would have. There was no tax stamp on either bag.

In Nelson's bedroom, officers found a plastic baggie containing other smaller black baggies, which did not appear to have been used; mail and identification for Nelson; papers with names and phone numbers on them; \$637 in cash; a plastic bin containing thirteen small bags of marijuana and a number of DVD cases inside a T.V. cabinet; and additional baggies. Photographs were taken during the search. In several of the photographs taken in Nelson's room, there can be seen the covers of numerous DVD cases depicting naked women, and female and male genitalia.

A digital scale testing positive for marijuana and cocaine residue was found in Nelson's vehicle. In a later interview, Harris stated he earned money by selling CDs and DVDs. He admitted to police that he was a user of marijuana

and that he had used Nelson's digital scale to weigh marijuana for his personal use.

Harris and Nelson were jointly charged with tax stamp violations and possession with intent to deliver both marijuana and crack cocaine. Nelson pleaded guilty prior to trial but refused to testify against Harris.

At trial, Harris sought to prohibit the State from introducing exhibits A-8, A-9, and A-15; each was an array of four photographs of pictures taken in Nelson's room. On exhibit A-8, one of the four photos showed DVD cases; on exhibit A-9, three of the four photos showed DVD cases; and on exhibit A-15, one of the four photos showed a DVD case. Harris' counsel argued the pictures containing the pornographic DVDs were irrelevant, and even if minimally relevant, the pictures were unduly prejudicial. The court overruled Harris' motions to exclude.

The jury convicted Harris on all charges. The district court sentenced Harris on these convictions, as well as on convictions from a subsequent trial. Harris appeals.

II. Discussion.

A. Evidentiary ruling. We review a trial court's evidentiary ruling for an abuse of discretion. *State v. Wells*, 629 N.W.2d 346, 352 (Iowa 2001). "An abuse of discretion occurs when the trial court exercises its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable." *State v. Rodriguez*, 636 N.W.2d 234, 239 (Iowa 2001) (internal quotation marks and citation omitted).

The trial court admitted the exhibits, finding they were

relevant in light of the defendant's position, statements that he made to officers, and Mr. Rodriguez has already stated that he was in the business of selling DVDs, and there are a number of DVDs that are found, along with the state's position that the two were acting together and conspiring together. This may suggest, may not suggest, I'm sure it could be argued either way, but that both Mr. Nelson and Mr. Harris shared items in the apartment, had joint access throughout the apartment, were working together, and it is relevant, and I cannot determine under [Iowa Rule of Evidence 5.403] that the unfair prejudicial impact substantially outweighs the relevance of the evidence. And so defendant's objections as to A-8, A-9 and A-15 are overruled.

The court observed that the fact that the DVD cases were found in Nelson's bedroom reduced the danger of unfair prejudice to Harris. Harris acknowledges that there was nothing illegal about his co-defendant's possession of the videos. *Cf. State v. Nelson*, 791 N.W.2d 414, 419-23 (Iowa 2010) (discussing the doctrine that allows for admissibility of evidence of other crimes, wrongs, or acts deemed inextricably intertwined with the crime charged). Nonetheless, he argues the "images of the slipcovers for the hard-core videos" were irrelevant to the charges against him and "likely to shock the jury, and were highly prejudicial."² The State responds, and the trial court found, that the admission of the photograph groupings, which depicted evidence found on a T.V. stand shelf in *Nelson's* bedroom (and showed the presence of the packaged marijuana, plastic baggies, and Nelson's identification), was not unfairly prejudicial to *Harris'* defense.

² At trial, defense counsel emphasized that the jury was predominantly women and "[t]his type of evidence, pornographic evidence, particularly the way it's depicted in these pictures, is certainly offensive to women." We doubt the offensiveness of the photographs depends upon the gender of the jurors. In any event, evidence is not inadmissible merely because it is offensive; evidence is inadmissible if it is not relevant, or if its relevance is substantially outweighed by the danger of unfair prejudice. See *Wells*, 629 N.W.2d at 356.

While jurors may have found the images depicted in the photographs offensive, we cannot say that the photographs were of the type that would so provoke the “instinct to punish” that Harris was unfairly prejudiced by the ruling. See *Rodriquez*, 636 N.W.2d at 240 (“Unfairly prejudicial evidence is evidence that ‘appeals to the jury’s sympathies, arouses its sense of horror, provokes its instinct to punish, or triggers other mainsprings of human action [that] may cause a jury to base its decision on something other than the established propositions in the case.’” (citation omitted)). The State did not emphasize or dwell on the graphic nature of the DVD cases in the exhibits. On cross-examination, defense counsel clarified that the photographs were taken in Nelson’s bedroom and that the DVD cases were of a different type than the CDs and DVDs visible in the photographs taken in Harris’ room. In addition, the trial court gave the limiting instruction requested by defense counsel.

Even if we assume it was error for the district court to admit the photographs, “error in an evidentiary ruling that is harmless may not be the basis for relief on appeal.” *State v. Parker*, 747 N.W.2d 196, 209 (Iowa 2008). “[W]e consider a variety of circumstances in determining the existence of harmless error, including the existence of overwhelming evidence of guilt.” *Id.* at 210. Here, we conclude the admission of the photographs constituted harmless error in as much as the evidence of Harris’ possession of marijuana was overwhelming. We address his crack cocaine convictions separately.

B. Sufficiency of the evidence. Challenges to the sufficiency of the evidence supporting a guilty verdict in a criminal case are reviewed for correction

of errors at law. *State v. Acevedo*, 705 N.W.2d 1, 3 (Iowa 2005). A verdict will be sustained if it is supported by substantial evidence. *Id.* Evidence is substantial if it would convince a rational fact finder that the defendant is guilty beyond a reasonable doubt. *Id.* In evaluating a sufficiency of the evidence claim, we review the record in a light most favorable to the State. *Id.* at 4.

To establish possession of the crack cocaine the evidence must show that Harris “(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); see *State v. Reeves*, 209 N.W.2d 18, 21 (Iowa 1973). “Proof of opportunity of access to the place where contraband is found will not, without more, support a finding of unlawful possession.” *Bash*, 670 N.W.2d at 137.

The State argues that the convictions may be upheld on an aiding and abetting theory, but we disagree. Even on an aiding and abetting theory, there is insufficient evidence that Harris had knowledge of the presence of the crack cocaine to sustain the convictions.

Moreover, even if the evidence supports an inference that Harris had knowledge of the presence of the drug based upon his assumed access to the general living area of the apartment, mere knowledge is not sufficient to show possession. See *id.* at 138. We agree with the defendant that “[t]he problem with the State’s case is it did not show that the defendant exercised dominion and control over the drugs.” *State v. Atkinson*, 620 N.W.2d 1, 4 (Iowa 2000).

Constructive possession occurs when the defendant has knowledge of the presence of the controlled substance and has the authority or right to maintain control of it. *State v. Webb*, 648 N.W.2d 72, 81 (Iowa 2002). Constructive possession cannot be inferred by the jury from the defendant's joint control of the premises, but had to be established by other proof. *Id.*

A number of factors may support a finding that a defendant had knowledge of the presence of drugs and the right to exercise control over them as well as access and control of the place and premises where the drugs are found. Such factors include incriminating statements made by the defendant, incriminating actions of the defendant upon the police's discovery of drugs among or near the defendant's personal belongings, the defendant's fingerprints on the packages containing the drugs, and any other circumstances linking the defendant to the drugs."

Id. at 79.

Here, the crack cocaine was not in plain view. It was not with Harris' personal effects or in his room. There was no evidence of incriminating statements or actions of Harris upon discovery of the crack cocaine. Harris' fingerprints were not on the packaging of the crack cocaine. Nothing but Harris' presence in the apartment connects him to the crack cocaine, and presence alone is not sufficient to sustain the convictions. We therefore reverse the convictions of possession of crack cocaine with intent to deliver and no tax stamp, vacate the judgment, and remand for dismissal of those counts and resentencing.

**AFFIRMED IN PART, REVERSED AND VACATED IN PART, AND
REMANDED FOR RESENTENCING.**