IN THE COURT OF APPEALS OF IOWA

No. 2-791 / 11-0776
Filed January 9, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DAERON JOHNSON MERRETT,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Robert A. Hutchison, Judge.

A defendant contends (1) there is insufficient evidence to support the jury's findings of guilt on two counts of delivery of a controlled substance, one count of possession of a controlled substance with intent to deliver, and one count of failure to possess a drug tax stamp; (2) the district court erred in instructing the jury on reasonable doubt; and (3) the district court considered an unproven charge in sentencing him. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

John C. Heinicke of Kragnes & Associates, P.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Elisabeth Reynoldson, Assistant Attorney General, John P. Sarcone, County Attorney, and Stephen Bayens, Assistant County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Potterfield and Bower, JJ.

VAITHESWARAN, P.J.

A drug user who purchased crack cocaine from Daeron Merrett on multiple occasions agreed to serve as a confidential informant. Law enforcement officers set up two controlled drug purchases on the streets of Des Moines and later executed a search warrant on a home that Merrett entered and exited during one of the controlled buys. They found crack cocaine in the garage of the home.

The State filed multiple charges against Merrett. A jury ultimately found him guilty of two counts of delivery of a controlled substance based on the two controlled buys, one count of possession of a controlled substance with intent to deliver based on the cocaine found in the garage of the home, and one count of failure to possess a drug tax stamp, also based on the drugs in the garage. The district court imposed sentence, ordering several sentences to be served consecutively.

On appeal, Merrett asserts (1) there is insufficient evidence to support the jury's findings of guilt, (2) the district court erred in instructing the jury on reasonable doubt, and (3) the district court considered an unproven charge in sentencing him.

I. Sufficiency of the Evidence

A. Delivery of a Controlled Substance

The jury was instructed that the State would have to prove the following elements on the first count of delivery of a controlled substance:

> 1. On or about October 14, 2010, the defendant or someone he aided and abetted delivered a controlled substance.

> 2. The defendant knew the substance delivered was cocaine base "crack."

See Iowa Code § 124.401(1)(c)(3) (2009). The jury received essentially the same instruction on the second delivery charge.[1] The jury was also instructed that "delivery" means "the actual, constructive, or attempted transfer of a substance from one person to another."

Merrett contends the State did not present substantial evidence that he was the person who delivered the crack cocaine to the informant during the two controlled buys. *See State v. Williams*, 695 N.W.2d 23, 27 (Iowa 2005) (setting forth the standard of review for challenges to the sufficiency of the evidence). A reasonable juror could have found otherwise.

One of the officers involved in the controlled buys testified he saw Merrett approach the informant's car and make contact with the informant. During the first buy, Merrett left, returned, "lean[ed] into the cooperator's vehicle," engaged in a "short . . . verbal exchange," and left again. During the second controlled buy, Merrett got into the passenger seat, and the car pulled away. Another officer saw the car park and saw Merrett exit and walk into an alley. Merrett returned on a bicycle, opened the back door of the informant's vehicle, and leaned into the compartment. Then, he rode away. Although the officers did not see the drugs change hands, the informant completed the narrative, testifying that, on both occasions, Merrett gave him crack cocaine in exchange for cash. A reasonable juror could have found from this evidence that Merrett delivered crack cocaine to the informant.

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[1] This instruction set forth a date of October 19, 2010.

We reach this conclusion notwithstanding evidence that Merrett had a twin brother who, Merrett asserts, might have been mistaken for him. The informant testified he knew the brother, the brother was not an identical twin, and he did not do business with the brother. Finally, the informant testified he had been transacting business with Merrett for approximately three years. A reasonable juror could have found that the informant learned to distinguish one brother from the other during this lengthy time period. We affirm the jury's findings of guilt on the two counts of delivery of a controlled substance.

B. Possession with Intent to Deliver and Failure to Affix a Tax Stamp

Merrett next challenges the sufficiency of the evidence supporting the jury's finding of guilt on possession of a controlled substance with intent to deliver. *See* Iowa Code § 124.401(1)(b)(3). He also challenges the drug-tax stamp conviction which is predicated on the possession count. *See id.* §§ 453B.3, .12.

With respect to the possession with intent to deliver count, the jury was instructed that the State would have to prove the following:

> 1. On or about October 21, 2010, the defendant or someone he aided and abetted knowingly possessed cocaine base "crack."
> 2. The defendant knew the substance possessed was cocaine base "crack."
> 3. The defendant or someone he aided and abetted possessed the substance with the specific intent to deliver it.

On the failure to possess a tax stamp count, the jury was instructed that the State would have to prove the following elements:

> 1. On or about October 21, 2010, the defendant or someone he aided and abetted knowingly possessed ten or more dosage units and/or seven or more grams of cocaine base "crack."

> 2. The defendant knew the substance possessed was cocaine base "crack."
> 3. The defendant or someone he aided and abetted possessed the substance and failed to affix a state tax stamp, label or other official indicia to the cocaine base "crack."

Merrett contends the State failed to present substantial evidence that he "possessed" the crack cocaine found in the garage of the home the police searched following the controlled buys.

The jury was instructed the word "possession" "includes actual as well as constructive possession and also sole as well as joint possession." The State concedes that Merrett did not have actual possession of the drugs when the search warrant on the home was executed; the case turns on whether he had constructive possession of the drugs.

The jury was instructed that

> "[a] person who is not in actual possession, but who has knowledge of the presence of something, has the authority or right to maintain control of it either alone or together with someone else, and has the intention to exercise dominion or control over it is in constructive possession of it."

The jury was also instructed that "[a] person's mere presence at a place where something is found cannot alone support a conclusion the person possessed that item, but rather additional evidence is required of the person's knowledge, authority and intention or right to maintain control of that item."

We are obligated to view the evidence in the light most favorable to the State. *See State v. Dewitt*, 811 N.W.2d 460, 477 (Iowa 2012). Even with this principle in mind, we are not convinced substantial evidence supports a finding that Merrett possessed the drugs found in the garage.

We begin by noting that Merrett did not have exclusive access to the home, precluding a rebuttable presumption that he constructively possessed the drugs. *See id.* at 475. When law enforcement officials executed the search warrant, they found three people inside the home: Merrett, his younger brother, and their cousin.[2] Merrett was nowhere near the detached garage where the drugs were found; he was coming down the inside stairs of the home. *See State v*. *Bash*, 670 N.W.2d 135, 139 (Iowa 2003) (finding insufficient evidence of immediate right to control drugs found on the defendant's husband's night stand in a room they shared). The baggie of drugs which he was charged with possessing was not among his belongings, but was found in a dusty blue tote on a table in the garage.[3] *See State v*. *Webb*, 648 N.W.2d 72, 79 (Iowa 2002) (stating the State failed to meet its burden of proof where none of the defendant's personal belonging were found near the drugs). An officer acknowledged that "anybody could have just walked up and opened the Tupperware up." While fingerprints were on the lid of the tote, another officer conceded they were not the type of prints that could lead to a positive identification, and the tote was not submitted for a fingerprint analysis. *See id.* (noting the absence of fingerprint evidence linking the defendant to the controlled substance). Merrett did not act suspiciously and did not make incriminating statements in the course of the search. *See Dewitt*, 811 N.W.2d at 476 (finding constructive possession where, among other factors, the defendant exhibited suspicious behavior around the

[2] The informant testified that Merrett's younger brother delivered drugs to him on more than one occasion.

[3] Our conclusion might be different if the drugs were found in the northwest bedroom housing some of Merrett's belongings, including his cell phone. No drugs were found in the room.

time drugs were discovered). Indeed, he was specifically asked whether he was involved in drug activity, and he denied any involvement. He also did not resist officers during the search. *See id.*

We recognize that the record includes other facts indicative of criminal activity. As we have already found, there is sufficient evidence of recent drug delivery. Additionally, an officer saw Merrett enter and exit the garage prior to the second controlled buy;[4] the informant involved in the controlled buys called Merrett shortly before the search warrant was executed and confirmed that he could obtain more drugs; text messages seen on Merrett's cell phone evinced drug-related activity; and surreptitious recordings of Merrett's post-arrest jailhouse conversations contained references to drugs and money in the basement of the searched home. Some of these facts support the findings of guilt on the delivery crimes and some support the uncontested "intent to deliver" prong of this crime, but none of the facts say anything about the "possession" prong of this crime. Certainly, jurors could infer that Merrett possessed crack cocaine at various times and various locations. But, the crime with which he was charged required a showing that he possessed the baggie of drugs found inside the blue tote in the garage around the time the officers executed the search warrant. Here, possession really was nine-tenths of the law, and possession was not proven.

[4] The officer stated Merrett came out of the garage with a bicycle. The officer did not see him with drugs.

Our conclusion that the State failed to prove possession with intent to deliver necessarily means that the State also failed to prove the drug tax stamp violation.

II. Jury Instruction

Merrett next challenges the jury instruction on reasonable doubt. He argues the court should instead have given a recently-approved model jury instruction on the subject. He concedes the language in the instruction that was given was approved in *State v*. *McFarland*, 287 N.W.2d 162, 163 (Iowa 1980). He also concedes that the court of appeals has addressed this argument and has found it unpersuasive. *See State v*. *Tabor*, No. 10-0475, 2011 WL 238427, at *2–3 (Iowa Ct. App. Jan. 20, 2011); *State v*. *White*, No. 09-1463, 2011 WL 227587, at *4 (Iowa Ct. App. Jan. 20, 2011). We find no reason to deviate from that position.

III. Sentencing

Merrett contends the district court considered an unproven charge in sentencing him to consecutive prison sentences. *See State v*. *Formaro*, 638 N.W.2d 720, 725 (Iowa 2002) ("It is a well-established rule that a sentencing court may not rely upon additional, unproven, and unprosecuted charges unless the defendant admits to the charges or there are facts presented to show the defendant committed the offenses."). He cites the court's statement "that there was a weapon involved in this offense," a statement that is at odds with a jury finding that Merrett was not "in the immediate possession or control of a firearm during the commission of the crime of Possession of a Controlled Substance with

Intent to Deliver." The State agrees with Merrett on this point. Accordingly, we remand for resentencing. *See State v. Messer*, 306 N.W.2d 731, 733 (Iowa 1981) (remanding for resentencing when the court considered additional, unproven charges because the court could not "speculate about the weight [the] trial court mentally assigned this factor, or whether it tipped the scales to [a harsher sentence]").

IV. Disposition

We affirm Merrett's judgment of conviction on the two counts of delivery of a controlled substance. We reverse Merrett's judgment of conviction for possession of a controlled substance with intent to deliver and failure to affix a drug tax stamp. We remand for entry of an order of dismissal on those counts and for resentencing on the two delivery counts.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.