

IN THE COURT OF APPEALS OF IOWA

No. 3-670 / 12-1491
Filed August 7, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

TREMAYNE THOMAS,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Thomas G. Reidel,
Judge.

Tremayne Thomas appeals from his convictions for: possession with
intent to deliver a controlled substance—crack cocaine, possession with intent to
deliver a controlled substance—marijuana, and interference with official acts.

REVERSED IN PART AND REMANDED.

Lauren M. Phelps, Davenport, for appellant.

Thomas J. Miller, Attorney General, Elisabeth S. Reynoldson, Assistant
Attorney General, Michael J. Walton, County Attorney, and Kelly Cunningham,
Assistant County Attorney, for appellee.

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

POTTERFIELD, P.J.

Tremayne Thomas appeals from his convictions for: possession with intent to deliver a controlled substance—crack cocaine, possession with intent to deliver a controlled substance—marijuana, and interference with official acts. He argues substantial evidence does not support his drug convictions, the trial court erred in denying his motion regarding the striking of a potential alternate juror, and his counsel was ineffective in various ways. We reverse in part and remand, finding substantial evidence does not support the verdicts for possession of a controlled substance with intent to deliver. We affirm regarding the last count, finding Thomas's *Batson* challenge is without merit and he was provided with effective assistance of counsel.

I. Facts and proceedings.

On March 1, 2012, two police officers were joining others in the pursuit of a suspect in a Davenport neighborhood. They passed an apartment where they overheard shouting and banging on a window; they asked two individuals standing outside of the apartment whether everything was okay. One of these two individuals was Thomas. They responded everything was fine and went inside. The police attempted to make contact with someone living in the residence, who told them there was no reason to worry and that no one else was inside. The police found this suspicious based on their observations but continued their search. A few minutes later, they walked past the apartment again, and the shouting had begun once more. One of the officers approached a window and heard a female's voice yelling that another occupant should not let police in the door and they were lucky no one went to jail. At this time the officer

observed through a window in the apartment a man named Henderson pull a marijuana blunt from his sweatshirt pocket and begin smoking. Another individual came to the apartment and was let in; when the door opened the officers could smell marijuana. The officers entered the apartment and announced themselves.

As the officers entered, Thomas and Henderson quickly went into a bedroom. Henderson immediately went toward the back left corner of the bedroom, where police later found Henderson's cell phone and medication. Thomas closed the door after entering the bedroom and held it shut as an officer attempted to open it. Once the officer opened the door, he ordered Thomas and Henderson to lie on the ground. Henderson—still in the corner near his phone—immediately complied; Thomas would not, instead commenting to the officers that he did not know why they were there. One of the officers later testified this behavior appeared to be misdirection to distract them from something Thomas wanted to hide. Ultimately, after Thomas's noncompliance, the officer grabbed Thomas and shoved him on the ground. The officers located four individually wrapped one-gram bags of marijuana and four individually wrapped bags of crack cocaine rocks next to where Thomas was standing behind the door, atop a row of the apartment owner's purses. No identifiable finger prints were found on the bags.

The officers kept Thomas and Henderson on the bed in the bedroom. The officers asked both men for identification, Henderson complied. Thomas gave a false name. In their search of Thomas's person, the officers found \$120. Nothing of evidentiary value was found on any of the other occupants. A spoon

with crack cocaine residue was found in the house, along with a marijuana blunt located in the kitchen. Thomas was arrested and charged with possession with intent to deliver crack cocaine, possession with intent to deliver marijuana, drug tax stamp violation, and interference with official acts. The drug tax stamp violation charge was dropped. During the jury trial, Henderson, the two officers, and two other police representatives testified. Henderson stated he did not bring the baggies to the house, though he did bring marijuana. He stated Thomas thought there might have been a warrant out for his arrest, but that he did not know whether the drugs discovered in the bedroom belonged to Thomas. The jury convicted Thomas of all three counts. He appeals.

II. Analysis.

We review challenges to the sufficiency of evidence for the correction of errors at law. *State v. Truesdell*, 679 N.W.2d 611, 615 (Iowa 2004). We review challenges to racially-motivated juror strikes de novo. *State v. Mootz*, 808 N.W.2d 207, 214 (Iowa 2012). Finally, our review of whether a defendant was provided with ineffective assistance of counsel is de novo. *Truesdell*, 679 N.W.2d at 615.

A. Evidence of possession.

Thomas argues on appeal that the State provided insufficient evidence that he possessed the drugs found in the bedroom of the apartment.

The trial court's findings of guilt are binding on appeal if supported by substantial evidence. If a rational trier of fact could conceivably find the defendant guilty beyond a reasonable doubt, the evidence is substantial. The evidence is reviewed in the light most favorable to the State, including all legitimate inferences and presumptions which may be fairly and reasonably deduced from the record. We consider all evidence, not just that of an inculpatory nature.

Evidence that raises only suspicion, speculation, or conjecture is not substantial evidence.

State v. Thomas, 561 N.W.2d 37, 39 (Iowa 1997) (internal citations and quotation marks omitted).

Possession can be either actual or constructive. *State v. Bash*, 670 N.W.2d 135, 138 (Iowa 2003). A defendant actually possesses contraband when police find it on his or her person. *Id.* Because the officers did not find the controlled substances on Thomas's person, we turn to a constructive possession analysis. A person constructively possesses an item when he or she has knowledge of its presence and the authority or right to maintain control of the item. *State v. Nickens*, 644 N.W.2d 38, 41 (Iowa Ct. App. 2002).

In determining whether a defendant constructively possessed a controlled substance, the State must show 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." *Bash*, 670 N.W.2d at 137.

Where authorities find contraband in a location exclusively occupied by the accused, we may infer knowledge of its presence coupled with the ability of the accused to maintain control over the contraband. *State v. Kemp*, 688 N.W.2d 785, 789 (Iowa 2004). Here, in contrast, the police found the drugs at the residence of Raymond Norvell. A female voice yelled at others not to let the police in the apartment. Five other people were present in the apartment; one other person, Henderson, was present in the bedroom where the drugs were

found. The drugs were placed on top of a row of purses and shoes lined up on the floor of the bedroom which were owned by Norvell.

The State argues Thomas's "guilt is demonstrated by his incriminating action of going to the bedroom when the officers entered and holding the door closed." However, Henderson testified Thomas thought (incorrectly) that there was a warrant out for his arrest. Though Thomas and Henderson were in the bedroom when the police entered, the apartment's *resident* was the individual who stacked the purses against the wall, and atop these purses was where the drugs were found.

In joint occupancy cases, we cannot infer the defendant's knowledge of and the ability to maintain control over contraband. "More proof is needed to draw the constructive possession inference." *State v. Kern*, 831 N.W.2d 149, 161 (Iowa 2013). Additional proof may include: (1) incriminating statements, (2) incriminating actions when police discover the contraband among or near the defendant's belongings, (3) fingerprints, or (4) any other circumstances linking the defendant to the contraband. *Id.* The circumstance most strongly suggesting Thomas's knowledge of the drugs is their relatively open position on the floor near where Thomas was standing behind the door and his subsequent behavior.

The drugs were located openly and near the physical position of Thomas such that a fact finder could infer Thomas's knowledge of their presence. However, the State's proof of his authority or right to maintain control over them is still missing. Authority or right to maintain control means more than the "raw physical ability" to reach out and hold the contraband. *See Bash*, 670 N.W.2d at 139. The State must offer proof of "some proprietary interest or an immediate

right to control or reduce the [item] to the defendant's possession." *Id.* (reversing the wife's conviction for possession of marijuana when the substance was in a box on the husband's side of the bed and the State offered no evidence wife "shared any ownership of the box or the marijuana in it, or had any right to control either item"). The prosecution offered no proof Thomas had any interest in or right to control the drugs. The State argues Thomas's behavior—holding the door shut, verbally challenging the officer's request that he get on the floor, and giving a false name—is evidence of constructive possession. Those behaviors might be corroborative of other evidence of possession, but they do not support a finding that Thomas was in constructive possession of the drugs found in another person's apartment and bedroom, on top of another person's purses.

While Thomas was in the closest proximity to the substance and could have reached the bag of drugs, there is no evidence he in fact did so. He also did not share exclusive dominion over the bedroom or the line of shoes and purses. "Mere proximity" is not enough to support a finding of constructive possession. *State v. Cashen*, 666 N.W.2d 566, 572 (Iowa 2003) *see also Thomas*, 561 N.W.2d at 40 (finding that the State had failed to prove the defendant "either was in such close proximity to the substance as to be able to claim immediate dominion over it or maintained or closely shared exclusive dominion over the premises where the substance was found"). Even viewed in the light most favorable to the State, the evidence fell short of generating a jury question on the issue of constructive possession; the district court should have granted Thomas's motion for judgment of acquittal. Accordingly, we reverse the

judgments and sentences on both counts of possession of a controlled substance with intent to deliver.

B. Striking of juror.

A prosecutor cannot use his or her peremptory challenges to engage in purposeful racial discrimination. See *Batson v. Kentucky*, 476 U.S. 79, 100 (1986). A challenge to this behavior is referred to as a *Batson* challenge. See *id.* Because purposeful racial discrimination implicates the Fourteenth Amendment to the Constitution, our review of this issue is de novo. *Mootz*, 808 N.W.2d at 214. In order to determine whether such discrimination is taking place, we use a three-step test:

“[O]nce the opponent of a peremptory challenge has made out a prima facie case of racial discrimination (step one), the burden of production shifts to the proponent of the strike to come forward with a race-neutral explanation (step two). If a race-neutral explanation is tendered, the trial court must then decide (step three) whether the opponent of the strike has proved purposeful racial discrimination.”

Id. (quoting *Puckett v. Elem*, 514 U.S. 765, 767 (1995)). Counsel in the immediate case waived the reporting of jury selection, and the record therefore was reconstructed from the memories of the judge, prosecutor, and defense counsel. Both the judge and the prosecutor remembered the potential alternate juror responding to a question posed during voir dire that he did not trust police. The judge made a note of that response as a red flag. We find this is an adequate race-neutral explanation for the striking of the African-American potential alternate juror, and that Thomas has not proved purposeful discrimination.

C. Ineffective assistance of counsel.

Thomas contends his counsel was ineffective in three ways: in waiving a record of the jury selection process, failing to make a motion for a new trial based on the weight of the evidence, and failing to make a motion for a new trial based on the court's instruction to the jury to return to deliberations when the jury was split regarding its verdict. We must decide both whether Thomas was provided with ineffective assistance and, if so, whether prejudice resulted, which undermines confidence in his guilty verdicts. *State v. Fountain*, 786 N.W.2d 260, 263 (Iowa 2010). "Counsel has no duty to raise an issue that has no merit." *Id.*

1. Record of jury selection.

Thomas argues his counsel should have made a record of the jury selection process to support his *Batson* challenge argument. As we wrote above, the court specifically noted the juror's response regarding officer credibility and made its own notes of the response. Further, even if the juror had been selected as an alternate, no alternate juror was used. Although the juror would have participated in the trial, he would have been excused before deliberations began and could not have affected the process of deliberations. Thomas cannot show prejudice from the failure of his *Batson* challenge, and his ineffective-assistance-of-counsel-argument is without merit. *See id.*

2. Motion for new trial based on weight of evidence.

Because Thomas's argument goes to the evidence presented regarding possession, and because we already reversed those convictions finding insufficient evidence, we do not address this argument.

3. Motion for new trial—jury instruction.

Three-and-one-half hours into deliberation, the jury foreperson passed a note to the court reporting the jury was not unanimous on both drug counts. The court asked whether or not the jury was in a frame of mind conducive to open discussion, and if they had made progress toward reaching an agreement. The foreperson responded yes to both inquiries. The court responded, “At this point, then, I don’t ask you to compromise your individual judgment. I do ask you to continue to engage in open-minded discussion, persuasion, return to your jury room, and continue with the court’s prior instructions.” The court concluded that if the jurors were still at an impasse, they could notify the court again. Thomas argues it was inappropriate for the judge to respond in this manner, and therefore, his counsel should have filed a motion for new trial.¹

Supplemental instructions urging a jury to reach a unanimous verdict have long been sanctioned. The ultimate test in determining the propriety of a verdict-urging instruction is whether the instruction improperly coerced or helped coerce a verdict or merely initiated a new train of real deliberation which terminated the disagreement. The content of this type of instruction is only one factor to consider in determining whether the jury was improperly coerced. The supplemental charge must also be evaluated in its context and under all the circumstances. Factors that might suggest a coercive effect include an inquiry into the jury’s numerical division, a speedy verdict after receiving the supplemental instruction, and language instructing the jury it must make a decision.

State v. Wright, 772 N.W.2d 774, 777–78 (Iowa Ct. App. 2009). The jury was not instructed that it must make a decision, and they deliberated for another hour-

¹ Although Thomas does not argue that counsel should have objected to the supplemental instruction when it was given, we assume his ineffective-assistance-of-counsel claim encompasses that failure to object as well as the failure to file a motion for new trial.

and-one-half before returning a guilty verdict. The court encouraged the jury to engage in further deliberation, and if they still were unable to resolve the issue, they could return with that answer. The court's instruction was not verdict-urging. No prejudice resulted from counsel's failure to file a motion for new trial.

REVERSED IN PART AND REMANDED.