IN THE COURT OF APPEALS OF IOWA

No. 7-954 / 07-443
Filed January 16, 2008

STATE OF IOWA,
Plaintiff-Appellee,

vs.

TERRY ELDON GARMOE,
Defendant-Appellant.

Appeal from the Iowa District Court for Des Moines County, William L. Dowell, Judge.

Terry Garmoe appeals from his conviction and sentence for possession of a controlled substance with the intent to deliver. **AFFIRMED.**

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

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, Patrick C. Jackson, County Attorney, and Tyron Rogers, Assistant County Attorney, for appellee.

Considered by Huitink, P.J., and Miller and Eisenhauer, JJ.

HUITINK, P.J.

Terry Garmoe appeals from his conviction and sentence for possession of a controlled substance with the intent to deliver in violation of Iowa Code section 124.401(1)(d) (2005).[1] We affirm.

I. Background Facts and Proceedings

Garmoe was charged with the foregoing offense based on the following: On March 23, 2006, Southeast Iowa Narcotics Task Force investigators conducting a controlled delivery of seventy pounds of marijuana at Jamie Rourke's residence in Burlington saw Garmoe pull up to the house. Garmoe had received a telephone call from Rourke, his friend, who invited Garmoe over to discuss installing a stereo system in his car. After Garmoe entered the house, Rourke asked Garmoe to take and store a portion of the marijuana that had been delivered. Initially, Garmoe was reluctant but eventually agreed. Rourke gave Garmoe a white garbage bag containing the marijuana with the understanding that Garmoe would hold it until Rourke sought to reclaim it.

Garmoe carried the bag to his car and drove off. A Burlington Police Department officer followed Garmoe and pulled him over for failure to wear a seatbelt. During the traffic stop, Garmoe was nervous and refused a request to search his car. The police officer called for a drug dog. After the drug dog alerted to the presence of drugs, the car was searched. Officers found and seized three individually packaged bricks of marijuana in a white garbage bag on the front passenger side floor and arrested Garmoe.

[1] Garmoe was also convicted and sentenced for failure to affix a tax stamp in violation of sections 453B.1 and 453B.1(2), which is not the subject of this appeal.

At trial, Angela Bonar, a Southeast Iowa Narcotics Task Force investigator, and Dean Salsberry, a Des Moines County deputy sheriff, testified that the substance seized is commonly referred to as Mexican brick pack marijuana. The bricks in total weighed approximately three pounds. Each brick weighed approximately one pound and was packaged in a separate plastic bag. An actual user would possess no more than one-half to one pound of the drug and normally consume a quarter of a gram at a time. The amount of marijuana seized exceeded that which could be used by an individual because the active ingredient (THC) in the drug degrades over time and can mold into a toxic chemical. As such, the amount seized was consistent with distribution, not personal use.

At the end of the State's case-in-chief, Garmoe's counsel moved for a directed verdict because substantial evidence did not exist to show Garmoe intended to deliver the marijuana. The trial court overruled the motion. Counsel did not renew his motion for a directed verdict at the close of all of the evidence. The jury found Garmoe guilty. The trial court accordingly entered a judgment of conviction and sentenced him to a term of imprisonment not to exceed five years.

On appeal, Garmoe claims he was denied effective assistance of counsel when counsel failed to renew his motion for a directed verdict and argue substantial evidence did not exist to show Garmoe intended to deliver the marijuana.

II. Standard of Review and Preservation of Claim

We review an ineffective assistance of counsel claim de novo. *State v. Bergmann*, 600 N.W.2d 311, 313 (Iowa 1999).

In general, we preserve an ineffective assistance of counsel claim for postconviction relief proceedings "where preserving the claim allows the defendant to make a complete record of the claim, allows trial counsel an opportunity to explain his or her actions, and allows the trial court to rule on the claim." *State v. Shanahan*, 712 N.W.2d 121, 136 (Iowa 2006). If, however, the record is adequate to determine that the defendant is not able to establish either prong of an ineffective assistance of counsel claim as a matter of law, we will affirm the defendant's conviction without preserving the ineffective assistance of counsel claim for postconviction relief proceedings. *State v. Taylor*, 689 N.W.2d 116, 134 (Iowa 2004). Because the record is adequate, we will address Garmoe's ineffective assistance of counsel claim.

III. Ineffective Assistance of Counsel

To prevail on an ineffective assistance of counsel claim, the applicant has the burden of proving by a preponderance of the evidence that "(1) counsel failed to perform an essential duty, and (2) prejudice resulted." *Meier v. State*, 337 N.W.2d 204, 207 (Iowa 1983). With regard to the first prong, "the [applicant] must overcome the presumption that counsel was competent and show that counsel's performance was not within the range of normal competency." *State v. Buck*, 510 N.W.2d 850, 853 (Iowa 1994). Counsel is not incompetent for failing to pursue a meritless issue. *State v. Greene*, 592 N.W.2d 24, 29 (Iowa 1999). With regard to the second prong, the applicant must show that "a reasonable probability exists that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Wemark v. State*, 602 N.W.2d 810, 815 (Iowa 1999). "A reasonable probability is a probability sufficient to undermine

confidence in the outcome." *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 698 (1984). We may dispose of an ineffective assistance of counsel claim if an applicant fails to meet either of these prongs. *State v. Cook*, 565 N.W.2d 611, 614 (Iowa 1997).

IV. Motion for Directed Verdict/Substantial Evidence

A jury's verdict is binding on appeal if it is supported by substantial evidence. *State v. LeGear*, 346 N.W.2d 21, 23 (Iowa 1984). Substantial evidence is "such evidence as could convince a rational trier of fact that the defendant is guilty beyond a reasonable doubt." *State v. Gay*, 526 N.W.2d 294, 295 (Iowa 1995). Evidence, however, that only raises "'suspicion, speculation, or conjecture'" does not constitute substantial evidence. *State v. Randle*, 555 N.W.2d 666, 671 (Iowa 1996) (quoting *State v. Barnes*, 204 N.W.2d 827, 829 (Iowa 1972)).

When reviewing challenges to sufficiency of the evidence, we view the evidence "in the light most favorable to the State, including legitimate inferences and presumptions that fairly and reasonably may be deduced from the evidence in the record." *State v. Hoeck*, 547 N.W.2d 852, 859 (Iowa Ct. App. 1996). "Although direct and circumstantial evidence are equally probative, the inferences to be drawn from the proof in a criminal case must 'raise a fair inference of guilt as to each essential element of the crime.'" *State v. Speicher*, 625 N.W.2d 738, 741 (Iowa 2001) (quoting *State v. Casady*, 491 N.W.2d 782, 787 (Iowa 1992)). In addition, we must consider all of the evidence, not just that which supports the jury's verdict. *State v. Conroy*, 604 N.W.2d 636, 638 (Iowa 2000). Finally, "[a] jury is free to believe or disbelieve any testimony as it

chooses and to give as much weight to the evidence as, in its judgment, such evidence should receive." *State v. Liggins*, 557 N.W.2d 263, 269 (Iowa 1996).

The State must prove beyond a reasonable doubt all of the following elements of possession of a controlled substance with the intent to deliver: The defendant (1) knowingly possessed marijuana, (2) knew the substance was marijuana, and (3) had the specific intent to deliver it. Iowa Code § 124.401(1)(d). At issue in this case is the third element.

Because of the difficulty of proving intent to deliver by direct evidence in controlled substance prosecutions, intent "usually consists of circumstantial evidence and the inferences that can be drawn from that evidence." *State v. Adams*, 554 N.W.2d 686, 692 (Iowa 1996). Intent to deliver can be inferred from the manner of packaging drugs and the quantity of the drugs possessed. *State v. See*, 532 N.W.2d 166, 169 (Iowa Ct. App. 1995). Also, opinion testimony by law enforcement personnel experienced in the area of buying and selling drugs may be offered as evidence for purposes of aiding the trier of fact in determining intent." *State v. Grant*, 722 N.W.2d 645, 648 (Iowa 2006); *see also State v. Dinkins*, 553 N.W.2d 339, 341 (Iowa Ct. App. 1996) ("The average juror is normally unaware of the significance of these circumstances, and may not appreciate how they would signify an intent to possess for personal use or for distribution."). In *State v. Olsen*, 315 N.W.2d 1, 6-7 (Iowa 1982), our supreme court stated:

> [W]hile a witness may not testify whether marijuana is held for personal use, *State v. Oppedal*, 232 N.W.2d 517, 524 (Iowa 1975), he may testify on the pattern or modus operandi of a certain offense and compare the facts of the case to it, *State v. Burrell*, 255 N.W.2d 119, 123 (Iowa 1977); *State v. Johnson*, 224 N.W.2d 617,

> 622 (Iowa 1974). The distinction is that, on the one hand, the witness is asked for an opinion based upon certain evidence as it relates to a well-defined modus operandi and on the other, an opinion on the guilt or innocence of the defendant. The former is proper; the latter is not. *State v. Johnson*, 224 N.W.2d at 622-23.

We find counsel was not ineffective for failing to renew the motion for directed verdict and argue substantial evidence did not exist to show Garmoe intended to deliver the marijuana. From Bonar and Salsberry's testimony, the jury could reasonably infer from the packaging and quantity of marijuana seized that Garmoe possessed the marijuana with the intent to deliver it. The jury was free to and did disbelieve Garmoe and Rourke's story that Garmoe was merely holding onto and storing the marijuana for Rourke and that Rourke would later retrieve it. Therefore, counsel did not have a duty to make a meritless renewed motion for a directed verdict based on substantial evidence, and counsel was not ineffective.

AFFIRMED.