IN THE COURT OF APPEALS OF IOWA

No. 3-172 / 11-2089
Filed April 10, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ANTHONY DONTELLO KEYS,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, David F. Staudt, Judge.

Anthony Keys appeals from his jury trial and conviction for possession of cocaine with intent to deliver as a habitual offender and second or subsequent offender. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Rachel C. Regenold, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Teresa Baustian, Assistant Attorney General, and Thomas J. Ferguson, County Attorney, for appellee.

Considered by Vogel, P.J., and Potterfield and Doyle, JJ.

POTTERFIELD, J.

Anthony Keys appeals from his jury trial and convictions for possession of cocaine with intent to deliver as a habitual offender and second or subsequent offender, and driving while license barred.[1] He argues his counsel was ineffective in failing to object to a jury instruction defining possession. We affirm, finding no prejudice in the failure of Keys' counsel to object to the instruction.

I. Facts and Proceedings.

On February 22, 2011, Anthony Keys was pulled over by police in his vehicle. Once he stopped his vehicle, Keys took off running. An officer pursued him on foot. While running behind a building, Keys stopped, reached toward the ground, and took off running again. The pursuing officer witnessed his behavior from approximately fifty to sixty feet away. After the chase ended, the officer retraced the path and found a baggie in a grate at the location where Keys had paused and reached toward the ground. A search of Keys yielded a cell phone, a digital scale with white powder residue on it, and $327 in cash. Police found marijuana in the car Keys was driving. Further drug paraphernalia and cocaine residue was found in the hotel room where Keys was staying.

The State charged Keys with possession of cocaine with intent to deliver as a habitual offender and second or subsequent offender, possession of a controlled substance—marijuana as a third and habitual offender, and driving

[1] Keys makes no argument pertaining to his driving while license barred conviction. We therefore only consider his appeal from the conviction for possession of cocaine with intent to deliver as a habitual offender and second or subsequent offender. *See Aluminum Co. of America v. Musal*, 622 N.W.2d 476, 479 (2009) ("Issues not raised in the appellate briefs cannot be considered by the reviewing court.").

while barred. Trial was held November 10, 2011. Regarding the possession counts, the jury was instructed that:

> "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.
>
> If one person alone has possession of something, possession is sole. If two or more persons share possession, possession is joint.

Defense counsel made no objection to this instruction. The jury found Keys guilty of possession of cocaine with intent to deliver and driving while his license was barred, but acquitted him on the possession of marijuana count. Keys admitted his previous convictions underlying the sentencing enhancements on the possession of cocaine count. Keys appeals, arguing the jury instruction mischaracterized the law on possession, and that his counsel provided ineffective representation when he failed to object to the instruction.

II. Analysis.

We review claims of ineffective assistance of counsel de novo. *State v. Rodriguez*, 804 N.W.2d 844, 848 (Iowa 2011). "To succeed on an ineffective-assistance-of-counsel claim, a defendant must show by a preponderance of the evidence that: (1) counsel failed to perform an essential duty; and (2) prejudice resulted. We can affirm on appeal if either element is absent." *Id.* (internal citations and quotations omitted).

Keys argues his counsel should have objected to the court's proposed jury instruction on possession in favor of the more recent Iowa Criminal Jury Instruction which includes current law that "[a] person has actual possession of a controlled substance when that substance is found on the person" and that "[a] person's mere presence at a place where a thing is found or proximity to the thing is not enough to support a conclusion that the person possessed the thing." *See* Iowa Crim. Jury Instruction 200.47. The more recent instruction would have been more favorable to Keys' defense.

A district court need not use uniform jury instructions. *State v*. *Harrington*, 284 N.W.2d 244, 250 (Iowa 1979). Rather, "the district court may phrase the instructions in its own words as long as the instructions given fully and fairly advise the jury of the issues it is to decide and the applicable law." *State v*. *Scalise*, 660 N.W.2d 58, 64 (Iowa 2003) (internal citations and quotation marks omitted).

"Actual possession may be shown by direct or circumstantial evidence. A person has actual possession of a precursor product when the product is found on the person." *State v*. *Vance*, 790 N.W.2d 775, 784 (Iowa 2010). In *Vance*, the controlled substance was not found on Vance at the time of arrest but the jury concluded that *at one time* Vance had actual possession of the substance with intent to manufacture. *Id.* The circumstantial evidence included Vance's admission, timing from purchase to arrest, methamphetamine in his vehicle, a coffee grinder with methamphetamine residue, and items associated with its manufacture. *Id.* The court concluded that substantial evidence existed to support the jury's finding of possession. *Id.* at 785.

In order for failure to give a jury instruction to constitute reversible error, it must result in prejudice. *Crawford v. Yotty*, __ N.W.2d __, __, 2013 WL 1010562, *3 (Iowa 2013). Refusal to give a party's proposed instruction is not prejudicial where the refusal "did not prevent [the party's] attorney from advancing his theory of the case to the jury in a manner that would allow the jury to reach the merits on the specific aspects of [the party's] claims." *Id.* at *10.

Keys' jury heard testimony from the officers involved in the pursuit, including extensive testimony about Keys' behavior and the baggie of cocaine found in the grate. At closing argument, Keys' attorney spoke at length about Keys' flight from police, his pause, and the subsequent discovery of cocaine in the drain. He argued that the State could not prove beyond a reasonable doubt that Keys had dropped the baggie in the drain. Keys' attorney also argued to the jury at closing that the discovery of a marijuana roach in Keys' vehicle within one foot of the driver's seat did not prove Keys was in possession. The jury acquitted Keys of the possession of marijuana charge, but it found him guilty of possession of cocaine.

Keys was not prejudiced by the definition of possession instruction: he thoroughly presented his theory of the case to the jury such that they could reach the specific aspects of his claim. *See id.* at *10. The jury was adequately instructed as to possession, and counsel's failure to object did not prejudice Keys.

AFFIRMED.