IN THE COURT OF APPEALS OF IOWA

No. 3-247 / 12-0567
Filed April 24, 2013

STATE OF IOWA,
Plaintiff-Appellee,

vs.

KIKO DEMONT SIMMONS,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Scott D. Rosenberg, Judge.

Kiko Demont Simmons appeals from a judgment and 180-year sentence on multiple non-violent drug-related charges. **VACTATED IN PART, AFFIRMED IN PART, AND REMANDED.**

Susan R. Stockdale, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, John Sarcone, County Attorney, and Stephanie L. Cox, Assistant County Attorney, for appellee.

Heard by Doyle, P.J., and Danilson and Mullins, JJ.

MULLINS, J.

Kiko Demont Simmons appeals from a judgment and sentence on jury verdicts finding him guilty of conspiracy to deliver more than ten grams of crack cocaine involving a firearm, possession with intent to deliver ten grams or less of crack cocaine, a drug tax stamp violation (cocaine), possession of a simulated controlled substance (ecstasy) with the intent to deliver, and possession of marijuana. Simmons contends (1) there is insufficient evidence to support his convictions for conspiracy to deliver more than ten grams of crack cocaine and possession of a simulated controlled substance with the intent to deliver, (2) the court erred in admitting testimony about text messages on alleged coconspirator cell phones, (3) the court erred in overruling his objection to mention of "buy money" found with alleged coconspirators, and (4) the application of sentencing enhancements leading to a 180 year prison sentenceconstitutes cruel and unusual punishment. We vacate in part, affirm in part, and remand for resentencing.

I. Background Facts & Proceedings

On May 4, 2011, police officers executed warrants at three residences in Des Moines, Iowa: 1926 Francis Avenue; 1623 Lynn Street; and 2400 Hickman Road, apartment 43.

At 1926 Francis Avenue, police officers located and arrested Matthew Padilla and Latoya Lewis. Police officers seized over twenty-five grams of individually packaged cocaine with bundles of cash totaling approximately $4900. Officers located a rifle hidden in the ceiling, an assault rifle in a case in the

basement, and a handgun above the refrigerator in the kitchen. Officers also found torn plastic baggies, digital scales, and several cell phones. The cell phones contained pictures and text messages that officers later testified were indicative of involvement in the drug trade.

At 1623 Lynn Street, police officers apprehended Simmons and his fiancée, Shaunta Hopkins, in a bedroom and Deangelo McKinney in a bathroom. After securing the residence, police officers located an open box of plastic baggies and a digital scale in the living room. On a shelf in the living room officers noticed a small bag containing a white rock later identified as crack cocaine. Police then found a bag containing individually packaged bags of crack cocaine hidden in the cover of a speaker. There were no drug tax stamps attached to any of the bags containing cocaine.

In the bedroom where Simmons and Hopkins were located, police officers found two bags containing what appeared to be, and was later confirmed as, crack cocaine under a mattress. Police officers also discovered marijuana, a pill grinder, two cell phones, and over $900 cash in the bedroom. In a dresser drawer officers located a large bag containing fifty-one blue and pink stamped pills believed to be ecstasy. Subsequent testing identified the pills as caffeine pills. Police officers also located a bus receipt from Chicago to Des Moines dated May 2, 2011.

During the search Simmons told officers McKinney arrived a day earlier to sell crack cocaine. He then asserted the crack in the living room belonged to McKinney but admitted to helping McKinney package the crack for sale. He also

admitted to smoking marijuana cigarettes laced with crack cocaine. When confronted about the firearms located at 1926 Francis Avenue, he admitted he had seen and handled the firearms. Although he indicated that he and Padilla were friends, he denied selling drugs with Padilla.

Finally, at 2400 Hickman Road, apartment 43, police officers located three individuals—Jessie Williams, Quintalla Zolicoffer, and Keyera Sanders. As officers entered the apartment, a firearm, a magazine containing bullets, crack cocaine, and marijuana were thrown from a window.

II. Prior Proceedings

In October 2011, the State filed an amended trial information charging Simmons with the following six counts: (I) conspiracy to deliver more than ten grams of crack cocaine, (II) possession with the intent to deliver more than ten grams of crack cocaine, (III) a drug tax stamp violation, (IV) conspiracy to deliver a simulated controlled substance (ecstasy), (V) possession of a simulated controlled substance with the intent to deliver, and (VI) possession of marijuana. The State alleged Simmons was a second or subsequent and habitual offender for counts I, II, IV, V, and VI. In regard to count I, the State alleged Simmons was in possession of a firearm.

In January 2012, Simmons was tried by jury. The jury found Simmons guilty of conspiracy to deliver more than ten grams of crack cocaine involving a firearm (count I), possession with intent to deliver ten grams *or less* of crack cocaine (lesser included on count II), failing to affix a drug tax stamp (count III), possession of a simulated controlled substance with the intent to deliver (count

V), and possession of marijuana (count VI). Simmons subsequently admitted to several prior felony drug convictions to establish his habitual offender status.

In February 2012, Simmons filed a motion in arrest of judgment. The district court denied the motion.

In March 2012, the district court sentenced Simmons on these convictions as well as another conviction following a guilty plea to possession of a controlled substance enhanced as a habitual offender (FECR250856) stemming from a separate, unrelated incident. The district court sentenced Simmons as follows: 150 years on count I; five years on count III, forty-five years on count V, and forty-five years on count VI to run concurrently to each other. The district court merged count I with count II. The court then sentenced Simmons to thirty years on FECR250856 to run consecutive to the 150 year sentence for a total of 180 years with a mandatory minimum of sixty years.

Simmons filed a direct appeal challenging the judgment and sentence. We will develop additional facts and circumstances as necessary.

III. Scope and Standard of Review

We review sufficiency-of-the-evidence challenges for correction of errors at law. *State v. Webb*, 648 N.W.2d 72, 75 (Iowa 2002). We will uphold a finding of guilt if substantial evidence supports the verdict. *Id.* "Substantial evidence is that upon which a rational trier of fact could find the defendant guilty beyond a reasonable doubt." *State v. Henderson*, 696 N.W.2d 5, 7 (Iowa 2005) (internal quotation marks and citation omitted). The State carries the burden of "prov[ing] every fact necessary to constitute the crime with which the defendant is

charged." *Webb*, 648 N.W.2d at 76. "The evidence must raise a fair inference of guilt and do more than create speculation, suspicion, or conjecture." *Id.* To determine whether the State has met this burden, "we consider all the evidence in the record, that which is favorable as well as unfavorable to the verdict, and view the evidence in the light most favorable to the State." *State v. Neitzel*, 801 N.W.2d 612, 624 (Iowa Ct. App. 2011).

Generally, appellate review of rulings on the admission of evidence is for abuse of discretion. *State v. Dullard*, 668 N.W.2d 585, 589 (Iowa 2003). Hearsay rulings, however, generate a legal question. *Id.* Thus, our review of hearsay rulings is for correction of errors at law. *Id.*

A defendant may challenge the legality of a sentence at any time. *State v. Bruegger*, 773 N.W.2d 862, 869 (Iowa 2009). We review constitutional challenges to a defendant's sentence de novo. *Id.*

IV. Analysis

A. Sufficiency of the Evidence

Simmons contends the State presented insufficient evidence to support the jury verdict finding him guilty of (1) conspiracy to deliver more than ten grams of crack cocaine under count I and (2) possession of a simulated controlled substance (ecstasy) with the intent to deliver under count V.

1. Conspiracy to Deliver Cocaine

A conspiracy is an "agreement between two or more persons to do or accomplish a criminal or unlawful act, or to do a lawful act in an unlawful manner." *State v. Nickens*, 644 N.W.2d 38, 42 (Iowa Ct. App. 2002) (internal

quotation marks and citation omitted). It is unlawful to "conspire with one or more other persons to manufacture, deliver, or possess with the intent to manufacture or deliver a controlled substance." Iowa Code § 124.401(1).

The jury found Simmons guilty of conspiracy to deliver more than ten, but less than fifty, grams of cocaine. *See id.* § 124.401(1)(b)(3). Police found Simmons in a residence with a bag containing individually packaged cocaine weighing approximately 5.57 grams. The police also located scales, a box of baggies, and cash. Police officers testified that these items are frequently used in drug distribution. Simmons admitted he helped McKinney package the cocaine for sale.

Simmons concedes there is sufficient evidence to convict him of conspiracy to deliver cocaine (found at 1623 Lynn Street), but contends there is insufficient evidence to support the jury's verdict that he conspired to deliver *more* than ten grams of cocaine. The jury could only find that the total amount of cocaine Simmons conspired to deliver was greater than ten grams if they included the cocaine found at 1926 Francis Avenue—the residence in which police found Padilla and Lewis. Simmons admitted he knew Padilla and Lewis. He also admitted to handling guns found at 1926 Francis Avenue. The State presented photographs retrieved from cell phones showing Simmons with Padilla and a quantity of cash. The State also presented text messages found on Padilla's and Lewis's cell phones and testimony from a police officer asserting those text messages were indicative of drug trafficking. Officers matched numbers and street name contacts in each phone to phones found at the other

residences. However, none of the text messages could be directly linked to Simmons nor did they express an agreement to distribute drugs with Simmons. Although the State presented evidence that money used in prior drug investigations was found at 1926 Francis Avenue and 2400 Hickman Road, it did not present such evidence in regard to the residence 1623 Lynn Street where Simmons was found. The opinions of the police officers concerning the assertions contained in the text messages do not constitute substantial evidence that Simmons was linked to the buy money or that he had conspired to distribute any of the drugs found at 1926 Francis Avenue.

When viewed in a light most favorable to the State, we find insufficient evidence to support the jury's verdict that Simmons conspired to deliver more than ten grams of cocaine involving a firearm under the unique facts and circumstances of this case. Thus, we find insufficient evidence from which the jury could find Simmons guilty under section 124.401(1)(b)(3). *See State v. Speicher*, 625 N.W.2d 738, 741–43 (Iowa 2001) ("Without proof of any involvement from which to infer agreement, this essential element of the [conspiracy] offense rests on nothing but conjecture and speculation."). However, we find substantial evidence supports the lesser included offense of conspiracy to deliver ten grams or less of cocaine, a class C felony without the firearm enhancement. *See* Iowa Code § 124.401(1)(c)(3).

2. Possession of Simulated Controlled Substance with Intent to Deliver

Simmons contends there is insufficient evidence to support a conviction for possession of a simulated controlled substance with the intent to deliver. More specifically, Simmons argues there is insufficient evidence of his intent. Although "intent is seldom capable of direct proof", a jury "may infer intent from the normal consequences of one's actions." *State v. Evans*, 671 N.W.2d 720, 724–725 (Iowa 2003) (internal quotation marks and citations omitted).

In this case, police officers found a plastic bag of fifty-one blue and pink pills. Each pill was stamped. The State presented testimony from a police officer that, based on his training and experience, these pills resembled ecstasy—a controlled substance. The pills were later identified as caffeine pills. From the appearance and quantity of the pills, together with the officer's testimony and substantial evidence of drug distribution found at 1623 Lynn Street, a reasonable jury could conclude that Simmons possessed a simulated controlled substance with the intent to deliver.

B. Hearsay and Prior Bad Acts

Simmons argues the district court erred in admitting testimony about text messages from coconspirator cell phones. Simmons further contends the district court erred in admitting "buy money"[1] found with alleged coconspirators at two other residences as evidence of prior bad acts. As previously discussed, notwithstanding the admission of text messages and buy money, we find

[1] Testimony established that "buy money" is money police officers or informants used in prior drug investigations.

insufficient evidence to support the jury's verdict that Simmons conspired to deliver more than ten grams of cocaine involving a firearm. As Simmons concedes there is substantial evidence to support a finding he conspired to deliver less than ten grams of cocaine, we need not reach Simmons's hearsay and prior bad act arguments.

C. Cruel and Unusual Punishment

Simmons contends that a 180-year sentence with a mandatory minimum of sixty years for non-violent drug offenses is cruel and unusual punishment. As an initial matter, we note that the State concedes the district court incorrectly tripled the habitual offender term of fifteen years on count VI for possession of marijuana, and asserts the correct term should be fifteen years. *See* Iowa Code §§ 124.411(3), 124.413(2)(b), 902.8, 902.9(3), (5). We agree with the State's analysis as to count VI. As we find insufficient evidence to support the jury verdict on count I—conspiracy to deliver more than ten grams of cocaine involving a firearm—and remand for resentencing, we do not reach the merits of Simmons's challenge to the sentence.[2]

V. Conclusion

We find insufficient evidence to support the jury's verdict of conspiracy to deliver more than ten grams of crack cocaine involving a firearm. We vacate that portion of the judgment and remand for entry of judgment and sentencing on the lesser included charge of conspiracy to deliver less than ten grams of crack

---

[2] Because the sentencing scheme for this case and Simmons's appeal case number 12-0566 (which includes case number FECR250856) were inextricably entwined, we are remanding that case for re-sentencing as well. *See State v. Simmons*, No. 12-0566 (Iowa Ct. App. Apr. 24, 2013).

cocaine without the firearm enhancement. We direct the district court to merge count I—conspiracy to deliver less than ten grams of crack cocaine—with count II—possession of less than ten grams of crack cocaine. We find substantial evidence supports the jury's verdict that Simmons possessed a simulated controlled substance (ecstasy) with the intent to deliver. We need not reach Simmons's hearsay and prior bad act arguments. As we vacate the judgment on count I and remand for resentencing, we do not reach the merits of Simmons's Eighth Amendment challenge.

VACATED IN PART, AFFIRMED IN PART, AND REMANDED.