IN THE COURT OF APPEALS OF IOWA

No. 9-141 / 07-2066
Filed May 6, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

STEVIE DEWAYNE HARRINGTON,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Bruce B. Zager, Judge.

Stevie Dewayne Harrington appeals from convictions of possession of cocaine base with intent to deliver while in the immediate possession or control of a firearm, two counts of failure to affix a drug tax stamp, possession of an offensive weapon, and possession of cocaine base with intent to deliver within 1000 feet of a public park. **AFFIRMED IN PART, VACATED IN PART, AND REMANDED FOR RESENTENCING.**

Mark C. Smith, State Appellate Defender, and Martha J. Lucey, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Elisabeth S. Reynoldson, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Brad Walz, Assistant County Attorney, for appellee.

Considered by Mahan, P.J., and Miller and Potterfield, JJ.

POTTERFIELD, J.

We filed our opinion in this case on April 8, 2009, but subsequently granted defendant-appellant Stevie Harrington's petition for rehearing. Our April 8, 2009 decision therefore is vacated and this opinion replaces it.

Stevie Dewayne Harrington appeals from judgment and sentences entered upon his convictions of possession of cocaine base with intent to deliver while in the immediate possession or control of a firearm within 1000 feet of a public school, failure to affix a drug tax stamp, and possession of an offensive weapon. He contends trial counsel was ineffective in various respects, that the evidence was insufficient to prove the firearms sentencing enhancement, and that the district court abused its discretion by relying upon an improper factor in determining his sentences. For the following reasons, we affirm in part, vacate in part, and remand for resentencing.

I. BACKGROUND FACTS AND PROCEEDINGS.

The record reveals the following facts. Defendant Stevie Harrington lived with his mother, Sherry Harrington, and grandmother, Henrietta Harrington, at 1049 Linn Street. On January 20, 2007, Waterloo police officers Mark Meyer and Corbin Payne went to 1049 Linn Street looking for Stevie Harrington and his brother Christopher Harrington. Sherry Harrington gave the officers consent to search the premises. Meyer and Payne completed a cursory search of the first and second floors. In the northwest bedroom, Meyer found a box of sandwich baggies and a plate sitting on the dresser; one of the baggies had a corner cut

out of it.[1] Sherry received a telephone call, which Meyer was able to overhear. Meyer was familiar with Stevie Harrington's voice and was able to hear him tell his mother to remove the plate and the crumbs that were on the plate that were sitting on the dresser.[2]

The officers left 1049 Linn Street and went to 424 Lane Street, a mile or so away. Other officers also arrived at that address. Meyer watched from the car as Christopher Harrington and a female got out of a car and walked up the driveway toward the back of this house. Meyer approached Christopher and the woman. An older vehicle was parked in the backyard of the residence, covered in snow. This car did not appear to have been moved in some time, but Sergeant Payne saw footprints in the snow nearby. Payne looked behind the rear tire and underneath the wheel well of that vehicle and located a loaded revolver wrapped in a yellow sweater, and a rusty sawed-off shotgun, and a cigarette box containing twenty-four rocks of crack cocaine wrapped in a towel. Based on the condition of the area and the items, Payne concluded that the items had recently been hidden under the vehicle.

During a second, March 18, 2007 search of the northwest bedroom at 1049 Linn Street, Officer Adam Galbraith found documents addressed to Stevie Harrington in a drawer of the dresser. In that same drawer, a notebook was found. Galbraith testified that the notebook contained a reference to Stevie Harrington's date of birth and entries that referred to selling narcotics. A wood block with the inscription "Lil' Chris" was hanging on the wall of this bedroom.

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[1] At trial, Meyer testified that crack cocaine is packaged in the corner of plastic bags.

[2] Meyer testified that often crack cocaine is cut with a razor blade on a plate and "crumbs" are left behind.

Meyer interviewed Stevie Harrington at the police station after both the January 25, 2007 and March 18, 2007 searches. Both interviews were recorded. During the first interview, Meyer told Harrington his fingerprints were found on a package containing crack cocaine and on the guns located at 424 Lane Street, even though no fingerprints were found on any of the items. Harrington denied having any drugs or weapons during the first interview. He stated that the baggies that the drugs were found in "might have" been one of his bags. Harrington stated that he told his brother that if there was something in the house, to take it out. Harrington said he was concerned about his grandmother. In the second interview, Harrington stated he had the guns a "minute" and said something about the rusty one. Meyer testified that to have something for a "minute" means "for a while" in street parlance. During the second interview, Harrington admitted possessing the package containing eleven rocks of crack cocaine. Meyer asked Harrington whether the dope Chris moved for him that night was only Harrington's or whether some of it was Chris's. Harrington responded that it was "his too . . . . He told you it was his, didn't he?"

On March 28, 2007, the State charged Stevie Harrington with possession of cocaine base with the intent to deliver while in immediate possession of a firearm and/or an offensive weapon within 1000 feet of a public school (Count I); two counts of failure to affix a drug tax stamp (Counts II and VI); unlawful possession of an offensive weapon (Count III); and possession of cocaine base with intent to deliver within 1000 feet of a public park (Count V). Counts V and VI were based on events that occurred on March 18, 2007, the date of the second search and the second interview. Harrington pleaded guilty to those counts prior

to trial. The remaining counts were based on the events of January 20, 2007, as set forth above.

A jury trial began on October 3, 2007. Following the close of the State's evidence, Harrington's counsel moved for judgment of acquittal, arguing there was insufficient evidence that defendant possessed either the drugs or the guns. The State responded there was sufficient evidence to support a finding of constructive possession. The motion was overruled and the jury returned guilty verdicts on Counts I, II, and III.

On November 16, 2007, the district court sentenced Harrington for a period not to exceed thirty years on Count I; for a period not to exceed five years on each of Counts II, III, and VI; and a period not to exceed ten years on Count V. The district court ordered the sentences on Counts I, II, and III to run concurrently; the sentences on Counts V and VI to run concurrently; but the sentences on Counts I and V to be served consecutively.

Harrington appeals. He contends his trial counsel was ineffective in failing to make a sufficient motion for judgment of acquittal and in failing to object to the jury instructions. Harrington argues, in essence, the State failed to present sufficient evidence that he possessed cocaine base while in the immediate possession of a firearm; if his counsel did not adequately preserve that claim, Harrington contends counsel was ineffective. He also contends the district court abused its discretion by relying upon an improper factor in determining his sentence.

II. Discussion.

A. Ineffective Assistance Claim. We review ineffective-assistance-of-counsel claims de novo. *State v. Ondayog*, 722 N.W.2d 778, 783 (Iowa 2006).

> The right to assistance of counsel, under the Sixth Amendment to the United States Constitution and article I, section 10 of the Iowa Constitution, guarantees "effective" assistance of counsel. To prove a claim of ineffective assistance of counsel, [the defendant] must show by a preponderance of the evidence that his trial counsel failed to perform an essential duty and prejudice resulted. [The defendant's] ineffective-assistance claim fails if he is unable to prove either element of this test.

Id. at 784 (internal citations omitted).

Harrington contends trial counsel breached an essential duty by failing to move for judgment of acquittal on grounds that the State had failed to: (1) prove he possessed cocaine base with intent to deliver while in the immediate possession of a firearm or offensive weapon, and (2) present any other evidence to corroborate his admission that he possessed an offensive weapon.

1. Possession or Control of a Firearm While Participating in Offense of Possession with Intent to Deliver. Harrington notes that defense counsel did move for judgment of acquittal, but argues that in the event we find that counsel did not adequately point out specific deficiencies in the evidence, it was due to ineffective assistance. We need not reach the ineffectiveness claim here because we conclude counsel adequately preserved the insufficiency issue for review. Counsel argued, in part:

> I would make motions for judgment of acquittal on the counts we're dealing with in the trial information in that there's been insufficient evidence to generate a jury question that Mr. Harrington possessed these items.
>
> First of all, there's absolutely no evidence that Stevie Harrington ever had any direct physical control over these items,

had them in his hands or in his immediate vicinity in any way. And for constructive possession, it's significant that a person's presence at a place where things are found or their proximity to the thing is not enough to support a conclusion that they possessed it. In other words, if Stevie Harrington had at some point been in the house where these items were, if he'd seen them, knew they were there, that wouldn't necessarily be enough to support a conclusion that he ever possessed them, that he ever had the ability to exercise control over them, or the intention to exercise dominion or control over them.

In this case we have a situation where the items were found underneath the car . . . . So there's no – Stevie Harrington is not anywhere near that address on [Lane] Street when these items were found. There's no evidence he was ever at any point near that address on [Lane] Street. There's nothing in the record to reflect that.

The State is relying upon a notebook that was found in a room a couple of moths later with some writings in it. The writings themselves don't establish a whole lot. A person can write things in first person, write song lyrics in first person, and be writing about things you've never done, never participated in. There's no fingerprints on that notebook. Nothing, again to emphasize that Mr. Harrington is any way confessing to any type of activities. There's just writings in a notebook.

Mark Meyer talks about a couple of interviews that he did with Mr. Harrington. And significantly, the only thing he talks about during the interview in January is contacting his brother and telling him if there's anything at the house to get it out of there. He denies any knowledge of what these things are. He said he didn't have to tell where to look. Chris knew where to look. And he didn't talk about his being the person in control of any guns or any drugs at this time. He just made some general comments to Meyer that he called his brother and told him to get stuff out of the house.

During the interview in March, once again, Mr. Meyer is asking Mr. Harrington about these guns. The only response that Mr. Harrington makes when he's asking him, "Where did they come from? Did you get it from a guy? Did you get it from a friend?" The only thing he says is that they're old . . . .

And then he talks about – he asks him a little bit later on about the dope at the house that night. Once again Mr. Meyer talks about there being 11 pills, and Mr. Harrington's response is, "I don't know, something like that." And once again, that's information he's already been given back in January . . . .

That's not enough under possession. He could know his brother has this stuff. He could be telling his brother, "Hey, get your stuff out of the house. It shouldn't be there. The cops are coming," and not be in possession of it himself. And that is, in fact, what all

> these general statements and the circumstances point to. They point to Christopher Harrington, not to Stevie Harrington.

As noted above, in essence, Harrington argues there was insufficient evidence to prove beyond a reasonable doubt that he was subject to the enhancement for being in immediate possession or control of a firearm or offensive weapon while participating in the offense alleged in Count I. We agree.

Iowa Code section 124.401(1)(e) (2007) provides for an enhanced sentence for certain drug offenses if the person is in the "immediate possession or control of a firearm while participating" in the crime. The term "immediate possession" has a clear meaning. *See State v. Mehner*, 480 N.W.2d 872, 878-79 (Iowa 1992). It refers to actual possession. *Id.* This possession must take place while the person is "participating" in the crime. Iowa Code § 124.401(1)(e). A person is "participating in a public offense,"

> during part or the entire period commencing with the first act done directly toward the commission of the offense and for the purpose of committing that offense, and terminating when the person has been arrested or has withdrawn from the scene of the intended crime and has eluded pursuers, if any there be. A person is "participating in a public offense" during this period whether the person is successful or unsuccessful in committing the offense.

Id. § 702.13.

The court instructed the jury that if it found Harrington guilty on Count I, it then had to determine whether he had a firearm in his immediate possession or control. To prove Harrington was in the immediate possession or control of a firearm while possessing a controlled substance with intent to deliver, the court instructed the jury in Instruction Number 20:

> To have immediate possession of a firearm or offensive weapon means to have actual possession of the firearm on or around one's

> person. To have immediate control of a firearm or offensive weapon means to have the firearm or offensive weapon in close proximity so that the person can reach for it or claim dominion or control over it. In order to prove that the Defendant had immediate possession or control of the firearm or offensive weapon, the State must prove that the Defendant had knowledge of its existence and its general location.

Our supreme court has stated that "the word possession has more than one meaning and can be used interchangeably to describe actual possession and constructive possession." *State v. Eickelberg*, 574 N.W.2d 1, 3 (Iowa 1998). Immediate possession of a firearm means actual possession on one's person. *State v. McDowell*, 622 N.W.2d 305, 307 (Iowa 2001); *Eickelberg*, 574 N.W.2d at 3. Immediate control of a firearm may be established by showing that the defendant was in such close proximity to the weapon as to claim dominion over it. *McDowell*, 622 N.W.2d at 307. To show either immediate possession or immediate control, it must be established that the defendant had knowledge of the presence of the firearm. *Id.* Because the firearm at issue here was not located on Harrington's person this is an immediate-control case rather than an immediate-possession case.

In *Eickelberg* our supreme court found the defendants were in immediate control of the guns located in their bedroom closet because "[w]hile neither defendant had actual possession of the weapons while they were in the bedroom, they were 'in such close proximity to the [weapons] as to claim immediate dominion over them.'" *Eickelberg*, 574 N.W.2d at 5 (quoting *State v. Rudd*, 454 N.W.2d 570, 571 (Iowa 1990)). Here, however, the weapons were found under a vehicle at 424 Lane Street, an address which the State failed to

connect with Stevie Harrington. Thus, Harrington was not in "such close proximity to the weapons as to claim immediate dominion over them." *Id.*

The State seeks to sustain the conviction on the inference that Harrington "possessed the weapons in the same place where he kept his supply of drugs and exerted dominion or control over them by directing their removal." The State contends such an inference provides sufficient nexus between possession of the weapons and possession of the drugs with intent to deliver.

It has been said that "[i]nferences and presumptions are a staple of our adversary system of factfinding." *Ulster County Ct. v. Allen*, 442 U.S. 140, 156, 99 S. Ct. 2213, 2224, 60 L. Ed. 2d 777, 791 (1979). However, we find that the inference asserted by the State is nothing more than speculation and is not sufficient to support the sentence enhancement. *See State v. Lambert*, 612 N.W.2d 810, 813 (Iowa 2000) ("Evidence that only raises suspicion, speculation or conjecture is not substantial.").

In *Fullenwider v. State*, 674 N.W.2d 73, 78 (Iowa 2004), our supreme court discussed the sufficiency of the evidence on possession under the following factual scenario:

> Following police surveillance of an apartment occupied by Brandy Johnson and her daughter, the police executed a search warrant for the apartment. They found a digital scale, crack cocaine, and Fullenwider—in bed with Johnson. The police also found a gun under Fullenwider's side of the bed, although they found no fingerprints on it. The cocaine was in a plastic bag on a chair, still wet, and the bag together with the scale was pushed under a table in the kitchen. LaShawn Williams, who is not involved in this case, was lying on the floor five or six feet from the cocaine. Johnson told the police that she and her daughter were the only people occupying the apartment and that all of the contents of the apartment belonged to her. Fullenwider, however, admitted that a cell phone found on the table immediately above

> the drugs was his. Testimony suggested the cocaine, which was still wet, had been manufactured one and one-half to two hours before the search.
>
> The police surveillance had revealed that Fullenwider was a frequent visitor to the apartment building where Johnson lived. However, the search revealed no evidence that Fullenwider actually lived there. The police found no paperwork to tie him to the apartment and found no items of clothing (except the clothes by his side of the bed) or other personal items belonging to Fullenwider.

Fullenwider, 674 N.W.2d. at 74-75. The court concluded: "Even when the evidence is considered in the light most favorable to the State, we believe the State failed to show the necessary control of the premises or the contraband itself" to establish constructive possession. *Id.* at 78.

We find that the evidence of possession here is even more tenuous than that in *Fullenwider*. The firearms were not found at the defendant's residence or a place over which he had control. Instead, they were found under a vehicle at 424 Lane Street, a location to which Stevie Harrington was not linked. While Harrington did admit having the firearms for a "minute," the State has not established at what point that was or if it was at a time that Harrington also was in possession of controlled substances with intent to deliver.

We conclude there was not sufficient evidence in the record to support the trial court's submission to the jury of the sentence enhancement factor of immediate possession or control of a firearm. Resentencing on Count I is therefore required.

2. Insufficient Corroboration of Confession that Harrington Possessed an Offensive Weapon. Harrington next asserts his conviction on Count III, possession of an offensive weapon, must be set aside because trial counsel was

ineffective in failing to move for judgment of acquittal for lack of corroboration of a confession or to seek a jury instruction relating to corroboration.

As previously noted, in order to establish trial counsel was ineffective, a defendant must show both that trial counsel failed in an essential duty and prejudice resulted. *Ondayog*, 722 N.W.2d at 784. Harrington cannot establish the requisite prejudice on this claim as sufficient corroboration exists.

A defendant cannot be convicted by an out-of-court confession unless accompanied by other proof that the defendant committed the offense. Iowa R. Crim. P. 2.21(4); *see also Opper v. United States*, 348 U.S. 84, 93, 75 S. Ct. 158, 164, 99 L. Ed. 101, 108-09 (1954) (noting defendant's confession requires some independent corroborating evidence in order to serve as basis for conviction). The Iowa Supreme Court has noted that the rule of corroboration, and the court's analysis of that rule, applies "with equal force" to admissions and confessions. *State v. Polly*, 657 N.W.2d 462, 466 n. 1 (Iowa 2003). "Admissions made subsequent to the commission of a crime are treated as though they are confessions replete with the same inherent weaknesses of confessions." *Id*. at 466. The nature of the corroborating evidence required for such admissions is the same as the evidence required to corroborate confessions. *Opper*, 348 U.S. at 91, 75 S. Ct. at 163, 99 L. Ed. at 108.

The State is not required to present evidence to corroborate every element of the weapon charge against defendant. "Corroboration need not be strong nor need it go to the whole case so long as it confirms some material fact connecting the defendant with the crime." *Polly*, 657 N.W.2d at 467 (citation omitted). The "other proof" does not have to prove the offense beyond a

reasonable doubt or even by a preponderance of the evidence. *Id.* Instead, the other proof "merely fortifies the truth of the confession, without independently establishing the crime charged." *Id.* (citation omitted). "'Other proof' 'must support[ ] the essential facts admitted sufficiently to justify a jury inference of their truth.'" *Id.* (citation omitted).

In the case at bar, there is sufficient evidence to corroborate defendant's admissions to Meyer and, therefore, there is sufficient evidence to support defendant's conviction for possession of an offensive weapon. Harrington stated he had the firearms for a "minute" and stated the shotgun was "old." The shotgun found under the vehicle at 424 Lane Street was in rusty condition. Harrington's admission that he possessed the firearm is corroborated by other evidence, thereby justifying a jury inference as to the truth of the statements. Under these circumstances, Harrington cannot establish he was prejudiced by trial counsel's failure to move for judgment of acquittal on the ground of insufficient corroboration. Moreover, Harrington argues his trial counsel was ineffective for failing to request a jury instruction on corroboration. Harrington has not asserted his confession was false or inaccurate. *See id.* at 468. Harrington does not urge and we can find no circumstances present which would indicate the unreliability of his confession. Given these facts, there is no reasonable probability the result would have been different if the jury had received a corroboration instruction. *Id*. In sum, Harrington has not proven the prejudice prong of his ineffective-assistance-of-counsel claim for his attorney's failure to request an instruction on corroboration; therefore his claim with respect to Count III must fail.

3. Failure to Request Limiting Instruction. Harrington next asserts his convictions must be set aside because trial counsel was ineffective in failing to request a limiting instruction on the proper use of the recorded interviews. Harrington contends "Meyer's statements and questions made during the interview are hearsay," which Harrington then asserts trial counsel "had a duty to request an instruction that informed the jury that Meyer's statements and questions were not evidence and should not be considered for their truth and only the defendant's responses are evidence."

Harrington concedes that Meyer's questions and statements were admissible to place Harrington's answers in context. *See* Iowa R. Evid. 5.106. Harrington complains of two specific statements by Meyer: in the first interview, Meyer's statement that Harrington told Chris to go get the guns out of the house; in the second interview, Meyer's statement, "I mean, I know the guns were yours, I knew the dope was yours, that's what I'm saying." Harrington asserts that trial counsel had a duty to request an instruction that informed the jury that Meyer's statements were not evidence and should not be considered for their truth and only the defendant's responses are evidence. Harrington cites Iowa Rule of Evidence 5.105 as authority for such a duty.

Pursuant to Iowa Rule of Evidence 5.105, when evidence is admissible for one purpose, but not for another, the district court shall, upon request, restrict the evidence to its proper scope and give a limiting instruction. The rule itself does not impose the duty Harrington claims. Harrington refers us to an unpublished decision of this court (which is not controlling legal authority, *see* Iowa R. App. P.

6.14(5)) wherein we found error when a trial court refused to give a requested instruction. Nothing in the case establishes the duty Harrington propounds.

A defendant is not entitled to perfect representation, but rather only that which is within the range of normal competency. *State v. Artzer*, 609 N.W.2d 526, 531 (Iowa 2000); *Cuevas v. State*, 415 N.W.2d 630, 632 (Iowa 1987). "Improvident trial strategy, miscalculated tactics, mistake, carelessness or inexperience do not necessarily amount to ineffective counsel." *State v. Aldape*, 307 N.W.2d 32, 42 (Iowa 1981) (quoting *Parsons v. Brewer*, 202 N.W.2d 49, 54 (Iowa 1972)). To warrant a finding of ineffective assistance of counsel, the circumstances must include an affirmative factual basis demonstrating counsel's inadequacy of representation. *Aldape*, 307 N.W.2d at 42.

Even if we would presume that the failure to request a limiting instruction breached an essential duty, Harrington has failed to establish that but for such an error, the result of the proceeding would have been different. *Ondayog*, 722 N.W.2d at 783. "[I]neffective-assistance-of-counsel claims based on failure to preserve error are not to be reviewed on the basis of whether the claimed error would have required reversal if it had been preserved at trial." *State v. Maxwell*, 743 N.W.2d 185, 196 (Iowa 2008). Harrington has not shown how the outcome of the proceeding would have been different had the limiting instruction been requested. Instead, relying upon the previously noted unreported ruling, he simply argues that prejudice should be presumed. We reject the invitation. Harrington has not established he was prejudiced by trial counsel's failure to request a limiting instruction as to the use of Meyer's purported hearsay statements during the interviews.

B. Improper Sentencing Factors. Harrington challenges the imposition of consecutive sentences on Counts I and V on grounds the district court relied upon an improper factor.

"[T]he decision of the district court to impose a particular sentence within the statutory limits is cloaked with a strong presumption in its favor, and will only be overturned for an abuse of discretion or the consideration of inappropriate matters." *State v. Formaro*, 638 N.W.2d 720, 724 (Iowa 2002) (citation omitted). "[A]n abuse of discretion will not be found unless the defendant shows that such discretion was exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable." *State v. Loyd*, 530 N.W.2d 708, 713 (Iowa 1995). A sentencing court's exercise of discretion is demonstrated by its statement of reasons for a particular sentence on the record. *See, e.g.*, Iowa R. Crim. P. 2.23(3)(*d*); *Loyd*, 530 N.W.2d at 714. In order to overcome the strong presumption in favor of sentencing decisions, "there must be an affirmative showing the court relied on [] improper evidence." *State v. Dake*, 545 N.W.2d 895, 897 (Iowa Ct. App. 1996); *see also State v. Jose*, 636 N.W.2d 38, 41-43 (Iowa 2001); *State v. Ayers*, 590 N.W.2d 25, 28-29 (Iowa 1999).

The district court ordered the sentences on Counts I and V to run consecutively. The court stated the following reason for the consecutive sentences:

> Likewise, with the instance that we had in January, I believe I'm correct, and in the instance that we have in March, if my dates are correct, we have two separate and distinct instances where there's significant drugs involved, there's also weapons involved.
>
> . . . .
>
> Also, the Court has to note whether there are weapons or force actually used. Obviously, we don't have the firing of a

> weapon or otherwise; but we do have weapons involved in both of these separate and distinct instances, which could always under the circumstances lead to very negative circumstances.

However, the evidence presented at the guilty plea proceeding included no reference to Harrington possessing a weapon while committing the crimes alleged in Counts V and VI.

The State concedes that resentencing is required because the court erroneously stated that weapons were involved in both Counts I and V.

III. CONCLUSION.

We find there was not sufficient evidence in the record to support the trial court's submission to the jury of the sentence enhancement issue of immediate possession or control of a firearm and, therefore, resentencing on Count I is required. There is sufficient evidence to corroborate defendant's admission of possession of an offensive weapon and Harrington's ineffective assistance claim with respect to Count III consequently fails. Harrington has not established his claim that trial counsel was ineffective in failing to seek a limiting instruction. The district court erroneously stated that weapons were involved in both Counts I and V in imposing consecutive sentences and thus the sentences must be vacated. We remand for resentencing consistent with this opinion.

AFFIRMED IN PART, VACATED IN PART, AND REMANDED FOR RESENTENCING.