

IN THE COURT OF APPEALS OF IOWA

No. 9-524 / 08-1073
Filed August 19, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

MIGUEL TRUJILLO,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Mark D. Cleve,
Judge.

Miguel Trujillo appeals following conviction and sentence for possession of
a controlled substance with intent to deliver and failure to possess a tax stamp.

AFFIRMED.

Murray W. Bell, 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 Sackett, C.J., Mansfield, J., and Huitink, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

HUITINK, S.J.

Miguel Trujillo appeals following conviction and sentence for possession of a controlled substance (more than 500 grams of powder cocaine) with intent to deliver and failure to possess a tax stamp. Trujillo argues (1) the district court erred in failing to grant his motion for judgment of acquittal when there was insufficient evidence to support his conviction on the drug possession charge; (2) the court erred in denying a codefendant's challenge to the jury instructions, and alternatively, that his trial counsel was ineffective in failing to preserve the issue; and (3) the court abused its discretion in overruling his motion for a new trial when the verdict was contrary to the weight of the evidence. We affirm.

I. Background Facts and Proceedings.

This case began when Davenport police learned that a Hispanic male driving a champagne-colored Chevrolet Silverado with California license plates was selling cocaine out of 524 North Lincoln Court, an older home that had been converted to four separate apartments. On February 2, 2008, officers conducted a traffic stop on the Silverado as it left the apartment building. The driver, Miguel Trujillo, matched the description of the Hispanic male and the Silverado was registered in his name. A drug dog conducted an exterior sniff of the Silverado, but did not alert, and Trujillo was allowed to leave. Officers continued to survey the apartment building, but did not see the Silverado again after the stop.¹

Thereafter, officers developed a confidential informant to engage in a controlled buy and provide more information about the drug operation at the apartment building. On February 7, 2008, the confidential informant drove to the

¹ Officers later learned Trujillo began driving his girlfriend's vehicle after the stop.

apartment building to buy cocaine. Officers watched nearby from their vehicles as a male walked down the driveway from the apartment building, approached the confidential informant's vehicle, and sold the informant a one-fourth ounce of cocaine for \$180 of the police department's serialized bills. In order to identify the seller, an undercover officer drove by and made eye contact with him. The officer later identified the seller as codefendant, Jorge Perez.

After the drug deal, Perez walked back in the direction of the apartment building, but entered the building using the back entrance. In order to determine the apartment Perez had come from, officers knocked on the doors of every apartment using the ruse that they were investigating recent car burglaries in the area. No one answered at apartments 1, 2, and 4. Trujillo answered the officers' knocks at apartment 3. When questioned whether he had any vehicles that he wanted the officers to check, Trujillo responded that he did not have any vehicles outside.² Trujillo then went inside the apartment to get Perez to translate for him. The officers observed Trujillo was very nervous, his body was very shaky, and his voice was trembling, and that Perez seemed to be in a hurry and wanted the officers to leave as quickly as possible.

Based on Trujillo's and Perez's behavior, the officers believed there were drugs in the building. After reporting their findings, the officers returned to the apartment building ten to fifteen minutes later to secure the residence and obtain

² Trujillo later revealed to officers that he had been driving a white Ford Explorer that evening which was parked outside the apartment building. Although the officers' drug dog alerted on the Explorer, nothing of evidentiary value was found in the vehicle.

permission to search the apartment.³ Trujillo and Perez allowed the officers into the apartment, and the officers immediately noticed a razor with apparent cocaine residue on the kitchen table. Trujillo and Perez, along with Trujillo's daughter and her boyfriend, Claudia Trujillo and Andres Garcia, were kept inside the apartment until a search warrant was obtained.

With the help of a drug dog, officers eventually discovered more than 500 grams of cocaine in various places inside and outside the apartment: in plastic wrap inside a paper sack lodged in a snowbank on the north side of the building; in numerous plastic bags inside a Fritos bag on the ground near the snowbank; in the snow outside the bedroom door; in small bags above the ceiling tiles in the hallway outside the apartment; and inside several coolers in a storage area in the apartment building. Officers discovered two digital scales with cocaine residue on them, one in the bedroom closet and one hidden under a large package of toilet paper in the bathroom. Officers also found plastic bags, plastic wrap, and a heat sealer consistent with that used to package the drugs found at the apartment building.

Among the occupants' personal property, the officers found multiple cell phones, the memory of one which contained several calls from the number the confidential informant had used to set up the earlier controlled buy. Officers seized \$612 in cash from Trujillo, \$160 in cash from Garcia, and \$378 in cash from Claudia Trujillo. The officers did not uncover the \$180 in serialized bills used in the controlled buy earlier that evening.

³ Due to the language barrier, the officers also secured a search warrant for the apartment building.

The occupants (including Trujillo, Perez, Claudia Trujillo, and Andres Garcia) were arrested and transported to the jail. An officer fluent in Spanish interviewed Trujillo. In the interview, Trujillo stated that he lived in the apartment, was unemployed, came from California, and was at the apartment at the time of the controlled buy. Trujillo's girlfriend later testified that Trujillo travelled back and forth to California often.⁴ Officers later learned that in the month prior to his arrest, Trujillo had kept the average temperature of the apartment at twenty-seven degrees. Officers also discovered Trujillo had entered the United States from Mexico without permission and had wired \$510 to an individual in Mexico in the days leading to his arrest.

On February 15, 2008, Trujillo was charged with possession of a controlled substance with intent to deliver and failure to affix a drug tax stamp. Perez, Claudia Trujillo, and Garcia were similarly charged.⁵ Trujillo pleaded not guilty. Following a jury trial, Trujillo was convicted as charged.⁶ Thereafter, Trujillo filed a motion in arrest of judgment or for a new trial. The court denied the motion and sentenced Trujillo to an indeterminate term of imprisonment not to exceed fifty years for the drug charge and up to five years on the tax stamp charge, to be run concurrently. Trujillo now appeals.

⁴ Trujillo's wife and children reside in California.

⁵ The court later dismissed charges against Claudia Trujillo and Garcia.

⁶ The jury also found Perez convicted as charged. Perez has appealed his conviction and sentence. His appeal is currently before our court in *State v. Perez*, No. 08-0991.

II. Merits.

A. Sufficiency of the Evidence.

The jury was instructed that the State had to establish the following in order to prove Trujillo possessed cocaine with intent to deliver:

1. On or about the 8th day of February, 2008, the defendant knowingly possessed powder cocaine.
2. The defendant knew that the substance possessed was powder cocaine.
3. The defendant possessed the substance with the specific intent to deliver the controlled substance.

The jury was further instructed it could convict Trujillo either as the principal or as an aider and abettor. Trujillo contends the State failed to produce sufficient evidence to prove Trujillo was in possession of the cocaine at issue.

We review a challenge on the sufficiency of the evidence for errors at law. *State v. Button*, 622 N.W.2d 480, 483 (Iowa 2001). The State bears the burden of proving every element of the crime with which Trujillo is charged. *State v. Gibbs*, 239 N.W.2d 866, 867 (Iowa 1976). We consider all of the evidence in the record in the light most favorable to the State and make all reasonable inferences that may fairly be drawn from the evidence. *State v. Keeton*, 710 N.W.2d 531, 532 (Iowa 2006). A jury's verdict is binding on appeal if it is supported by substantial evidence. *Button*, 622 N.W.2d at 483. Evidence is substantial when a reasonable mind would recognize it sufficient to reach the same findings. *State v. Moorehead*, 699 N.W.2d 667, 671 (Iowa 2005). "Evidence that only raises suspicion, speculation or conjecture is not substantial." *State v. Lambert*, 612 N.W.2d 810, 813 (Iowa 2000).

Because no drugs were found on Trujillo's person, the State had to prove Trujillo had constructive possession of the drugs. Possession is constructive when the defendant has knowledge of the presence of the controlled substance and the authority or right to maintain control over it. See *State v. Carter*, 696 N.W.2d 31, 38 (Iowa 2005); *State v. Bash*, 670 N.W.2d 135, 138 (Iowa 2003). The peculiar facts of each case determine whether the defendant had constructive possession of the controlled substance. *State v. Webb*, 648 N.W.2d 72, 79 (Iowa 2002). "Constructive possession cannot rest on mere proximity to the controlled substance." *Carter*, 696 N.W.2d at 40.

[T]he authority or right to maintain control includes something more than the "raw physical ability" to exercise control over the controlled substance. The defendant must have some proprietary interest or an immediate right to control or reduce the controlled substance to the defendant's possession.

State v. Bash, 670 N.W.2d 135, 139 (Iowa 2003). We consider a number of factors in determining whether a defendant had constructive possession, including: (1) the defendant's incriminating statements, (2) the defendant's incriminating actions upon the police's discovery of drugs among or near the defendant's personal belongings, (3) the defendant's fingerprints on packages containing drugs, and (4) any other circumstances linking the defendant to the drugs. *State v. Kemp*, 688 N.W.2d 785, 789 (Iowa 2004).

The record contains substantial evidence that Trujillo had constructive possession of the cocaine found in and around the apartment building. With regard to Trujillo's actions as a principal, officers initially began investigating this case upon receipt of a tip (evidence of which was admitted at trial) that a Hispanic male, driving a champagne-colored Chevrolet Silverado with California

plates, was selling cocaine out of an apartment at 524 North Lincoln Court. Officers conducted a traffic stop on Trujillo as he drove the Silverado from the apartment building. Trujillo matched the description of the drug dealer and the Silverado was registered in his name.

When officers approached apartment 3, Trujillo answered the door and told officers he lived in the apartment. However, he lied and said he did not have any vehicles at the apartment.⁷ He appeared to be very nervous, his body was very shaky, and his voice was trembling. Thereafter, officers found more 500 grams of cocaine in various places inside and outside the apartment building. Officers also found plastic bags, wrap, and a heat sealer consistent with that used to package the drugs found at the apartment; two digital scales and a razor blade with cocaine residue on them; and a cell phone containing the number the confidential informant had used to set up the earlier controlled buy.

In the month prior to his arrest, Trujillo kept the average temperature of the apartment at twenty-seven degrees, suggesting Trujillo used the apartment sporadically and for packaging and distribution of cocaine. Trujillo was unemployed, yet he had \$612 in cash on his person at the time of his arrest and had wired \$510 to an individual in Mexico in the days leading to his arrest. Trujillo's wife and children lived in California, and his girlfriend told officers Trujillo went back and forth to California often.⁸ The evidence was sufficient to show Trujillo acted as a principal.

⁷ False statements to investigating officers may indicate a consciousness of guilt. See, e.g., *State v. Cox*, 500 N.W.2d 23, 25 (Iowa 1993). The jury may infer guilt from such probative circumstantial evidence. *State v. Turner*, 630 N.W.2d 601, 609 (Iowa 2001).

⁸ Officers testified that California is a source state for drugs.

Alternatively, we find substantial evidence supports the finding that Perez was guilty as an aider and abettor. To support a conviction based on the theory of aiding and abetting, the record must show Trujillo assented to or lent countenance and approval to the criminal act either by active participation or by encouraging in some manner prior to the time of its commission. *State v. Smith*, 739 N.W.2d 289, 293 (Iowa 2007). While mere presence at the scene of a crime by itself is insufficient to prove aiding and abetting, it “need not be shown by direct proof. It may be inferred from circumstantial evidence including presence, companionship and conduct before and after the offense is committed.” *Fryer v. State*, 325 N.W.2d 400, 406 (Iowa 1982).

The tip identified Trujillo as the individual selling cocaine out of the apartment building. Officers saw codefendant Perez come out of the apartment, sell one-quarter ounce of cocaine to the confidential informant for \$180 in serialized bills, and reenter the apartment through the back entrance after the drug deal. Perez was then present at Trujillo’s apartment when officers arrived to search the apartment a short time later.

At the apartment, officers found cocaine, a razor blade and digital scale with cocaine residue, and other tools and materials used for drug packaging in and around the apartment building. Although officers did not witness Trujillo *handle* the drugs, Trujillo “not only lent countenance and approval to the delivery of a controlled substance, he made the transaction possible” by supplying and packaging the drugs out of his apartment for the sale. See *State v. Allen*, 633 N.W.2d 752, 757 (Iowa 2001). We conclude the record contains substantial

evidence that Trujillo had constructive possession of cocaine as an aider and abettor. We affirm as to this issue.

B. Jury Instruction.

Trujillo argues the district court erred in denying codefendant Perez's proposal that Jury Instruction No. 15 contain additional language. We review challenges to jury instructions for corrections of errors at law. Iowa R. App. P. 6.4; *State v. Heemstra*, 721 N.W.2d 549, 553 (Iowa 2006). "We review the trial court's instructions 'to determine whether they correctly state the law and are supported by substantial evidence.'" *State v. McCall*, 754 N.W.2d 868, 871 (Iowa Ct. App. 2008).

The State contends Trujillo has failed to preserve error on this claim. We agree. Iowa Rule of Civil Procedure 1.924 (2008) sets forth the rule for error preservation for requested jury instructions as follows:

[A]ll objections to giving or failing to give any instruction must be made in writing or dictated into the record . . . specifying the matter objected to and on what grounds. No other grounds or objections shall be asserted thereafter, or considered on appeal.

At the close of evidence, codefendant Perez proposed the court include additional language to the jury instruction. Trujillo failed to join in Perez's proposal, or object on his own at that time. Trujillo has not preserved error on this issue. See *Bauer v. Cole*, 467 N.W.2d 221, 224 (Iowa 1994) (holding to preserve error for district court's failure to give a requested instruction, party must specify "that part of the instruction which was requested and refused" and "identify the particular points of law or questions of fact on which the court supposedly erred by failing to instruct").

Even if we assume, *arguendo*, that Trujillo has preserved error, we still find his claim to be without merit. We agree with the district court that Jury Instruction No. 15 was a correct statement of the law and was supported by substantial evidence. *McCall*, 754 N.W.2d at 871. Furthermore, Trujillo does not argue he was prejudiced by the court's decision. "Error in giving or refusing to give" a jury instruction does not warrant reversal unless it results in prejudice to the complaining party. *Koenig v. Koenig*, 766 N.W.2d 635, 637 (Iowa 2009). Finding no error, we affirm as to this issue.

C. Ineffective Assistance of Counsel.

Trujillo alternatively argues his trial counsel was ineffective for failing to object to Jury Instruction No. 15. We conduct a de novo review of ineffective assistance of counsel claims. *State v. Maxwell*, 743 N.W.2d 185, 195 (Iowa 2008). To establish a claim of ineffective assistance of counsel, a defendant must prove (1) counsel failed to perform an essential duty and (2) prejudice resulted to the extent it denied the defendant a fair trial. *Id.* Ordinarily, we preserve ineffective assistance of counsel claims for postconviction proceedings to allow the facts to be developed and give the allegedly ineffective attorney an opportunity to explain his or her conduct, strategies, and tactical decisions. See *State v. Bearse*, 748 N.W.2d 211, 214 (Iowa 2008).

As we discussed above, the district court did not err in finding that Jury Instruction No. 15 was a correct statement of the law and was supported by substantial evidence. Trujillo's counsel was therefore not ineffective for failing to preserve the issue or object to the instruction.

D. Motion for New Trial.

Trujillo argues the court abused its discretion in overruling his motion for a new trial when the verdict was contrary to the weight of the evidence. We review the district court's denial of a new trial for correction of errors at law. Iowa R. App. P. 6.4. Ultimately, we determine whether the court abused its discretion in its ruling. *State v. Belt*, 505 N.W.2d 182, 184 (Iowa 1993). Trial courts have wide discretion in deciding motions for new trials. *State v. Ellis*, 578 N.W.2d 655, 659 (Iowa 1998).

A trial court may grant a new trial when the verdict is contrary to the weight of the evidence. Iowa R. Crim. P. 2.24(2)(b)(6); *Ellis*, 578 N.W.2d at 659. A verdict is contrary to the weight of the evidence when one side of the issue is supported by a greater amount of evidence than the other side. *Ellis*, 578 N.W.2d at 658. This standard is broader than the sufficiency of the evidence standard. *State v. Nicher*, 720 N.W.2d 547, 559 (Iowa 2006). For the reasons set forth above, we conclude Trujillo's conviction was not contrary to the weight of the evidence. The district court did not abuse its discretion in denying Trujillo's motion for a new trial. We affirm as to this issue.

III. Conclusion.

Having considered all issues raised on appeal, we affirm.

AFFIRMED.