IN THE COURT OF APPEALS OF IOWA

No. 9-577 / 07-1241
Filed August 19, 2009

STATE OF IOWA,
Plaintiff-Appellee,

vs.

RYAN RICHARD JORGENSEN,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Michael D. Huppert, Judge.

Ryan Jorgensen appeals following conviction and sentence for three counts of possession of a controlled substance with intent to deliver and failure to possess a tax stamp. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Robert P. Ranschau, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sheryl A. Soich, Assistant Attorney General, John P. Sarcone, County Attorney, and Stephanie Cox, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., Potterfield, J., and Huitink, S.J.*

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

HUITINK, S.J.

Ryan Jorgensen appeals following conviction and sentence for one count of possession of a controlled substance (between 100 and 500 grams of cocaine) with intent to deliver; one count of possession of a controlled substance (LSD) with intent to deliver; one count of possession of a controlled substance (ecstasy) with intent to deliver; and three counts of failure to possess a tax stamp. We affirm.

I. Background Facts and Proceedings.

After participating in two controlled buys of cocaine from Ryan Jorgensen, officers executed a search warrant at his apartment and uncovered several types of drugs, materials used to package drugs, and other dealing paraphernalia. Specifically, officers found individually wrapped plastic bags containing a white powder (later determined to be cocaine salt hydrochloride) weighing approximately a half ounce each; ecstasy pills; a sheet containing eighteen "hits" of LSD; marijuana; a mirror; scissors; vials; rolling papers; a glass pipe; a digital scale; cornstarch (a common cutting agent for cocaine); nearly $2000 in cash; two cell phones; and handwritten notes listing dollar amounts, dates, amounts, weights, and names. Most of these items were found neatly organized in a shoe box in Jorgensen's bedroom closet.

After a jury trial, Jorgensen was convicted and sentenced for one count of possession of a controlled substance (between 100 and 500 grams of cocaine) with intent to deliver; one count of possession of a controlled substance (LSD) with intent to deliver; one count of possession of a controlled substance (ecstasy) with intent to deliver; and three counts of failure to possess a tax stamp.

Jorgensen now appeals, arguing (1) the district court erred in allowing the State to amend the trial information and (2) there was insufficient evidence to support his conviction for possession of ecstasy with intent to deliver.

II. Merits.

A. Amendment of Trial Information.

Pursuant to Iowa Rule of Criminal Procedure 2.4(8)(*a*), a court may order the trial information amended to correct errors or omissions in matters of form or substance, unless (1) substantial rights of the defendant are prejudiced by the amendment or (2) a wholly new or different offense is charged. The first part of the rule is discretionary, and our review up to that point is for abuse of discretion. *State v. Maghee*, 573 N.W.2d 1, 5 (Iowa 1997). An abuse of discretion occurs when the trial court exercises its discretion "on grounds or for reasons clearly untenable or to an extent clearly unreasonable." *State v. Parker*, 747 N.W.2d 196, 203 (Iowa 2008). The second part of the rule limits the court's discretion, and therefore, our review for that part of the rule is for correction of errors at law. *Maghee*, 573 N.W.2d at 5.

Jorgensen contends the court's decision to allow the State to amend the trial information to include an additional alternative of Iowa Code section 124.401(1)(b) (2007) resulted in a wholly new and different charge against him, and that he was prejudiced by the amendment. The State originally charged Jorgensen with violating section 124.401(1)(b)(2)(b), which prohibits possession of between 100 and 500 grams of "cocaine, its salts, optical and geometric isomers, and salts of isomers" with the intent to deliver. At trial, however, the court granted the State's request to amend the trial information to include the

"catchall" provision of section 124.401(1)(b)(2)(d), which prohibits the possession of any substance containing a detectable amount of cocaine.

Upon our careful review of the record, we find Jorgensen's argument to be without merit. First, the amendment did not result in a wholly new and different charge against Jorgensen, because different alternatives to drug offenses are treated as the same crime. *See, e.g.*, *Maghee*, 573 N.W.2d at 5. Second, Jorgensen was not prejudiced by the amendment. He was not, as he argues, unfairly surprised by the allegation that the cocaine was not pure. A common cutting agent for cocaine (cornstarch) was found along with the drugs in Jorgensen's apartment, and the first witness called by Jorgensen was a criminalist who could not determine the cocaine level of the substance found at Jorgensen's apartment because he had not performed a purity analysis on it. The amendment did not change Jorgensen's defense strategy, and his counsel did not request a continuance. *See id*. (noting that counsel's failure to request the traditionally appropriate remedy for a defendant's claim of surprise—a continuance—indicates counsel appeared ready to defend against the amended charge). The district court did not err in allowing the amendment, and we affirm as to this issue.

B. Sufficiency of the Evidence.

Jorgensen argues there was insufficient evidence to support his conviction for possession of ecstasy with intent to deliver because the circumstantial evidence relied upon by the State failed to establish he intended to deliver the ecstasy found in his apartment. We review challenges to the sufficiency of the evidence for the correction of errors of law. Iowa R. App. P. 6.4; *State v. Keeton*,

710 N.W.2d 531, 532 (Iowa 2006). In reviewing challenges to the sufficiency of the evidence supporting a guilty verdict, 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. *Keeton*, 710 N.W.2d at 532.

Jorgensen contends the circumstantial evidence in this case supports the theory that he did not sell ecstasy; but rather, that the ecstasy pills found in his apartment were for his own personal use. We disagree.[1] Officers found seventeen ecstasy pills in the same shoebox in Jorgensen's closet as his other carefully organized drugs and dealing paraphernalia. Jorgensen's testimony indicated he worked in a club as a disc jockey, but that he made most of his living as a drug dealer. He also testified that ecstasy is a "club drug" due to the location it is usually sold.

Furthermore, the history on Jorgensen's cell phone showed text messages sent to and from Jorgensen in the days before his arrest containing references to ecstasy. Several texts asked whether Jorgensen had any "disco biscuits" or "E," to which Jorgensen replied, "Nope. The stuff in town is bunk. If you do find some, don't buy if they're yellow or green. They're no good." Although Jorgensen denied having "pills," or ecstasy, "right offhand," he promised to "try a couple of people" to find some.

---

[1] We note that "direct and circumstantial are equally probative" in proving guilt beyond a reasonable doubt. *State v. Bentley*, 757 N.W.2d 257, 262 (Iowa 2008). "Circumstantial evidence is particularly valuable when proving a mental state like intent which is seldom susceptible to proof by direct evidence." *State v. Clarke*, 475 N.W.2d 193, 197 (Iowa 1991). In evaluating circumstantial evidence to prove intent in drug cases, we consider the "manner of packaging the substance; the presence of weighing devices; and existence of other paraphernalia commonly used in drug dealing." *State v. Luter*, 346 N.W.2d 802, 809 (Iowa 1984), *superseded by statute*, Iowa Code § 808.3 (Supp. 1985).

Considering the evidence in the record in the light most favorable to the State and making all reasonable inferences that may fairly be drawn, we find the circumstantial evidence in this case substantially supports the jury's finding that Jorgensen did possess ecstasy with the intent to deliver it. Finding no error, we affirm.

AFFIRMED.