IN THE COURT OF APPEALS OF IOWA

No. 0-160 / 09-0067
Filed April 21, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

SHAWN DESHAY HOOSMAN,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Jon Fister (motion to suppress) and Bruce Zager (trial and sentencing), Judges.

Shawn Hoosman appeals from his convictions and sentences for possession of a controlled substance (more than ten grams of cocaine base) with intent to deliver, possession of a controlled substance (marijuana) with intent to deliver, failure to affix a drug tax stamp, and driving while barred. **AFFIRMED.**

Clemens A. Erdahl of Nidey, Wenzel, Erdahl, Tindal & Fisher, P.L.C., Williamsburg, and Rachel Antonuccio of Cole & Vondra, L.L.P., Iowa City, for appellant.

Thomas J. Miller, Attorney General, Kyle Hanson, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Brad Walz, Assistant County Attorney, for appellee.

Heard by Sackett, C.J., and Doyle and Danilson, JJ.

DANILSON, J.

Shawn Hoosman appeals following convictions and sentences for possession of more than ten grams of cocaine base with intent to deliver in violation of Iowa Code section 124.401(1)(b) (2007); possession of marijuana with intent to deliver in violation of section 124.401(1)(d); failure to affix a drug tax stamp in violation of section 453B.12; and driving while barred in violation of sections 321.560 and 321.561. On appeal, Hoosman asserts the district court erred in: (1) admitting evidence resulting from a search under "disputed consent"; (2) denying Hoosman's motion for mistrial during opening argument; (3) finding Hoosman had constructive possession of the controlled substances at issue; (4) limiting evidence of the controlled buys; (5) admitting the investigator's "loaded questions" in a videotaped interview with Hoosman; and (6) not allowing reputation evidence of the investigator. We affirm.

I. Background Facts and Proceedings.

In early 2006, Sergeant Mark Meyer of the Tri-County Drug Task Force learned from four separate confidential informants that Hoosman was selling crack cocaine out of a Waterloo apartment. According to Hoosman, he lived in Chicago, but traveled back and forth to Waterloo to sell drugs out of apartment #213 at 1306 West Donald Street, which was rented by his girlfriend, La'Tia Campbell. Hoosman provided drugs for dealers and users, and had a pager for his customers to call to set up sales. Upon some preliminary investigation in the week prior to March 17, 2006, officers observed a brown Buick Lucerne that Hoosman had rented in Chicago, and a white Chevy Caprice owned by Hoosman's father parked outside the apartment. Based on this information, at

11:15 p.m. on March 17, 2006,[1] a magistrate issued a warrant for officers to search the apartment, the vehicles, and Hoosman's person for crack cocaine and associated equipment, moneys, and records.

Investigators Kristin Hoelscher and Lionel Braun were assigned to stop and search Hoosman's white Chevy. At around midnight after the search warrant was issued, the investigators drove to several bars in the area to look for the vehicle after realizing it was no longer parked outside the apartment. They discovered the vehicle parked unoccupied outside the New World Lounge, and waited approximately fifteen minutes until two males came out of the bar and got into the vehicle. One of the men, matching Hoosman's description, drove the vehicle out of the parking lot. Knowing Hoosman's license was suspended, the investigators requested the help of a marked patrol car to stop the vehicle.

The investigators confirmed the driver was Hoosman, and identified the passenger as Desmond Cage. Both men were searched and taken to the Waterloo Police Department for questioning. Cage told Investigator Hoelscher that Hoosman lived in Chicago. Hoosman said he had just come from his parents' house before going to the New World Lounge. Hoosman stated he was unemployed. Officers found $168 in his pockets and asked where he got the money. Hoosman responded that the question "insulted his intelligence." Officers also found two cell phones and a pager on Hoosman.

[1] Investigator Richard Gehrke of the Tri-County Drug Task Force also viewed the white Chevy earlier in the day on March 17, 2006, driving downtown to the Three Kings Bar. Investigator Gehrke watched as two people approached the vehicle, but discontinued his surveillance of the vehicle to prepare the warrant application.

In the meantime, Sergeant Meyer, with the help of several other investigators, executed a search warrant on the apartment. Two women, La'Tia Campbell and Chantal Bishop, and an infant were inside the apartment. In the kitchen, investigators discovered a small digital scale in a cupboard; $340 in a cereal box; and a false can of soda in the refrigerator containing a pill of MDMA (ecstasy), a bag of powder cocaine, and nine bags of crack cocaine each weighing between two and three grams. In the living room, investigators discovered fourteen individually wrapped bags of marijuana, inconsistent with personal use, in a CD case that opened into a secret compartment. In a bedroom closet, investigators discovered: a second digital scale; a size 78 leather coat consistent with Hoosman's size; and a box for a Motorola cell phone with a phone number matching one of the phones on Hoosman's person when he was arrested that night. In the trash, investigators found several plastic bags with the corners cut off, consistent with drug packaging. In the apartment building's laundry room, investigators discovered a bag of powder cocaine hidden in a ball of lint under a counter, and a plastic bag consistent with those containing the crack cocaine found in the apartment.

The substances discovered at the apartment subsequently tested positive for MDMA, marijuana, and cocaine base. The total weight of crack cocaine in the nine bags found at the apartment was 25.52 grams. The total weight of the cocaine powder found in the bags at the apartment laundry area was 25.08

grams.[2] No fingerprints were detected on any of the evidence seized, and none of the drugs contained a tax stamp.

After completing the search of the apartment, Sergeant Meyer returned to the police department to speak with Hoosman in a video-recorded interview. Hoosman admitted the drugs found at La'Tia Campbell's apartment were his, and stated that Campbell was not involved. Hoosman indicated that he sold drugs in the hallway of the apartment building, and that he had started with a "four-four split"—four ounces of crack and four ounces of powder cocaine. Hoosman stated that he lived in Chicago, but traveled back and forth to Waterloo to visit his parents, who lived at 323 Quincy Street. He said he did not keep anything at his parent's house and denied Sergeant Meyer's request for consent to search the house. Hoosman became irritated and the interview ended.

Investigators decided to visit Hoosman's parents' house, and Sergeant Meyer called ahead to advise Hoosman's parents, Emmit and Marjorie Hoosman, because it was so late. When investigators arrived at the home, the Hoosmans answered the front door and allowed them inside. Investigators explained that their son had been arrested. Marjorie Hoosman told officers that after their son moved out, they began using his room for storing sewing supplies and seasonal clothing. Investigators asked for permission to search the room and the Hoosmans agreed, signed a written consent form, and led investigators to the upstairs bedroom.

The room appeared to be used mainly for storage consistent with Marjorie Hoosman's description. The room contained a bed, dresser, desk, sewing

[2] Hoosman was not charged with possession of cocaine powder.

supplies, boxes of Marjorie's clothing, and plastic bins containing men's clothing and shoes. Investigators did find several items, however, that linked Hoosman to the room in the past, including: rental car receipts from February and March 2006 made out to Hoosman; two boxes of unused checkbooks—one listing his address as 323 Quincy and the other listing an Illinois address; and a $2000 deposit receipt for Hoosman's bank account dated January 2006. Investigators also discovered two bags of crack cocaine in a dresser drawer, each containing one sixteenth of an ounce; two possible drug notes listing names and addresses; several bundles of cash totaling $9695 (the approximate value of a "four-four split" Hoosman had admitted purchasing and selling) hidden behind a ledge on a shelf above the desk; and several small bags of marijuana in a black duffel bag on the bed.

The drugs discovered at the Hoosman house tested positive for psilocin (a type of hallucinogenic mushroom),[3] marijuana, and cocaine base. The total weight of crack cocaine in the two bags found at the house was 3.3 grams. Again, no fingerprints were detected on any of the evidence seized, and none of the drugs contained a tax stamp.

On March 20, 2006, Hoosman was charged with possession of a controlled substance (more than ten grams of cocaine base) with the intent to deliver (Count I); possession of a controlled substance (psilocybin mushrooms) with the intent to deliver (Count II); possession of a controlled substance

[3] The mushrooms were also found in the small bags containing the marijuana.

(marijuana) with the intent to deliver (Count III); a drug tax stamp violation (Count IV); and driving while license barred (Count V).[4]

Hoosman pled not guilty and elected a jury trial. On February 9, 2007, Hoosman filed a motion to suppress. Following a hearing, the district court denied the motion on May 23, 2007. Hoosman's jury trial began on June 24, 2008. On July 2, 2008, the jury entered verdicts finding Hoosman guilty on all counts except for Count II (possession of psilocybin mushrooms with intent to deliver). On December 1, 2008, following a separate enhancement trial, a jury found that Hoosman was a habitual offender and subject to sentence enhancement. On December 11, 2008, the court sentenced Hoosman to terms of imprisonment not to exceed forty-five years on Count I, fifteen years on Counts III and IV, and two years on Count V, to be run concurrently.[5] Hoosman now appeals.

II. Consent to Search.

Hoosman argues the district court erred in admitting evidence seized in a search of his childhood bedroom in his parent's house at 323 Quincy Street. He contends he had an expectation of privacy in the bedroom, and the evidence was obtained illegally as a result of a warrantless search under disputed consent. Specifically, Hoosman alleges that because he denied police permission to search his parents' house prior to the search, his privacy interest was violated when the police later searched the house under his parents' permission.

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[4] Count I was later amended to a habitual offender charge. (In 1996, Hoosman was convicted of terrorism in Black Hawk County, Iowa; and in 2003, Hoosman was convicted of possession of marijuana in Marion County, Texas.)

[5] The court imposed a mandatory minimum of fifteen years on the forty-five-year sentence, and three years on each of the fifteen-year sentences.

The Fourth Amendment of the United States Constitution protects against unreasonable searches and seizures. *State v. Shanahan*, 712 N.W.2d 121, 131 (Iowa 2006). The Fourth Amendment is applicable to the states through the Fourteenth Amendment. *Id.* Iowa's counterpart to the Fourth Amendment (article one, section eight of the Iowa Constitution) also protects against unreasonable searches and seizures. *See* Iowa Const. art. I, § 8; *State v. Jones*, 666 N.W.2d 142, 145 (Iowa 2003).

We conduct a de novo review of a district court's ruling on suppression issues arising from alleged constitutional violations. *See State v. Turner*, 630 N.W.2d 601, 606 (Iowa 2001). We make an independent evaluation of the totality of the circumstances as shown by the entire record. *Id.*; *State v. Howard*, 509 N.W.2d 764, 767 (Iowa 1993). We give deference to the district court's fact findings due to its opportunity to assess the credibility of witnesses, but we are not bound by those findings. *See Turner*, 630 N.W.2d at 606; *State v. Gravenish*, 511 N.W.2d 379, 381 (Iowa 1994).

When ruling on a motion to suppress evidence seized without a warrant, the court uses a two-part test to determine whether the police action was unreasonable and in violation of the Fourth Amendment. *State v. Lovig*, 675 N.W.2d 557, 562 (Iowa 2004). First, the court must determine whether the person challenging the warrantless search has a legitimate expectation of privacy in the premises searched. *Id.* at 562-63. This expectation of privacy must be shown to exist both subjectively and objectively. *Id.* at 563. As our supreme court has stated:

> The determination of whether a person has a legitimate expectation of privacy concerning a specific area is made on a case-by-case basis, considering the unique facts of each situation. In considering each case, we do not ask whether the individual has chosen to conceal some private activity but whether the government's intrusion infringes upon the personal and societal values protected by the Fourth Amendment.

Id. (citations omitted).

A person's home is covered by the protections of the Fourth Amendment. *See* U.S. Const. amend. IV*;* Iowa Const. art I, § 8. These protections have been extended to cover overnight guests in their host's home. *Minnesota v. Olson*, 495 U.S. 91, 99-100, 119 S. Ct. 1684, 1689, 90, 142 L. Ed. 2d 85, 94-95 (1990).

It is undisputed that 323 Quincy Street was owned by Hoosman's parents and Hoosman had no ownership interest in the property. To support his claim that he was an overnight guest in the house, Hoosman points to the fact that officers discovered his black duffel bag, several recent rental car receipts, and unused checkbooks (some listing his address as 323 Quincy Street and some listing a Chicago address) in the bedroom. Hoosman also points to the fact that the March 17, 2006 warrant application requesting authorization for officers to search Campbell's apartment, Hoosman's vehicles, and Hoosman's person identified his address as 323 Quincy Street.[6] The warrant application also recited that an informant gave Hoosman's address as 323 Quincy Street.

When Hoosman was arrested on March 17, 2006, however, he informed police officers that he lived in Chicago. Hoosman stated that when he visited Waterloo, he spent most nights at his girlfriend's apartment, and some nights

[6] Hoosman was arrested on an unrelated matter in the fall of 2005, and informed officers at that time that his address was 323 Quincy Street.

with other people around Waterloo. The other man arrested with Hoosman, Desmond Cage, also told officers that Hoosman lived in Chicago.

When police arrived at 323 Quincy Street, Hoosman's parents told officers that Hoosman had moved out of the family home, and that they now used his childhood bedroom for storage. The parents agreed to let the officers search the bedroom, and signed a written consent form. Officers searched the room and found sewing supplies and female clothing, as well as storage bins of male clothing as if Hoosman had moved away but left some belongings behind.

Under the circumstances in this case, we are unable to find that Hoosman had an expectation of privacy in his childhood bedroom at 323 Quincy Street. *See State v. Naujeks*, 637 N.W.2d 101, 106 (Iowa 2001) (noting that whether a person had a legitimate expectation of privacy is determined on a case-by-case basis). The facts in this case reflect that although the Emmit and Marjorie Hoosman still lived in the home where their children had grown up, the children had since moved away. Marjorie Hoosman now used Hoosman's old bedroom as a place to store seasonal clothing and sewing supplies. From both a subjective and objective perspective, Hoosman could not be considered any more than a guest at his parents' home after he had moved away and maintained a residence elsewhere. *See Lovig*, 675 N.W.2d at 563 (stating that the expectation of privacy must be shown to exist both subjectively and objectively). Additionally, the evidence does not reflect when Hoosman was last an overnight guest of his parents' residence.

Even assuming, *arguendo*, that Hoosman was able to prove he had a privacy interest in his parents' house, we must still find that the State

unreasonably invaded that protected interest in order to find the officers' search to be unreasonable and in violation of Hoosman's constitutional rights. *See id.* at 562 (setting forth the second step of the two-part test in determining whether the police action was unreasonable and in violation of the Fourth Amendment). Warrantless searches and seizures are per se unreasonable and prohibited unless the State proves by a preponderance of the evidence that officers acted reasonably under one of the recognized exceptions to the warrant requirement. *Id*. at 563. The exceptions include searches based on consent, plain view, exigent circumstances, and searches incident to arrest. *Howard*, 509 N.W.2d at 767. The only one of these exceptions at issue in this case is consent.

Hoosman's parents consented to the search of the bedroom and clearly had authority to consent. Where an overnight guest has a legitimate expectation of privacy in his or her host's home, that expectation does not vitiate the homeowner's ability to consent to a search of his or her home. *See, e.g.*, *Olson*, 495 U.S. at 99-100, 110 S. Ct. at 1689, 109 L. Ed. 2d at 94-95; *State v. Grant*, 614 N.W.2d 848, 852-53 (Iowa Ct. App. 2000). Furthermore, even if officers were mistaken in their belief that Hoosman's parents had authority to consent to the search of the house or bedroom, the officers reasonably relied upon their consent and the search was lawful. *See Illinois v. Rodriguez,* 497 U.S. 177, 188-89, 110 S. Ct. 2793, 2801, 111 L. Ed. 2d 148, 161 (1990). The officers' belief was reasonable as Emmit and Marjorie Hoosman resided at the home and owned it. *See id.*

Hoosman contends the search was unlawful because it took place under disputed consent. To support his contention, Hoosman points to the United

States Supreme Court's decision in *Georgia v. Randolph*, 547 U.S. 103, 106-07, 126 S. Ct. 1515, 1519, 164 L. Ed. 2d, 208, 217-18 (2006), in which the Court found a warrantless search of a home was unreasonable where a co-tenant consented to the search but the defendant who was present at the home refused consent.

We distinguish *Georgia v. Randolph* from the instant case, and find that any privacy interest Hoosman may claim in the house is not such an interest as would allow his objection to the search to trump his parents' permission.[7] Hoosman held no interest in the property. Emmit and Marjorie Hoosman, as owners and residents of the property, had superior control. *See State v. Reinier*, 628 N.W.2d 460, 464-65 (Iowa 2004).

Hoosman's reliance on *Georgia v. Randolph* is also misplaced because the defendant co-tenant in *Georgia* was present at the home when consent was refused by the defendant but granted by the other co-tenant. *See Randolph*, 547 U.S. at 107, 126, 126 S. Ct. at 1519, 1530, 164 L. Ed. 2d at 217-18, 229-30. Here, Hoosman refused consent to the search while he was at the police station. He did not accompany the officers to 323 Quincy Street. When officers arrived to 323 Quincy Street, Hoosman's parents allowed them into their home, agreed to their search of the bedroom, and signed a written consent form.

Hoosman's status as a co-tenant or joint occupant of 323 Quincy Street is highly suspect. The facts reflect that he was an occasional overnight houseguest. The room he used was at best used in common with his mother in

[7] We take note that the Supreme Court's decision in *Georgia v. Randolph* did not come down until March 22, 2006—four days after the search in the instant case—so law enforcement would not have had the benefit of the guidance provided in *Georgia*.

light of her statements to law enforcement that she kept clothing and sewing supplies in the room. Even if Hoosman had common authority over the room, a co-occupant assumes the risk that another co-occupant will consent to a search. *U.S. v. Matlock*, 415 U.S. 164, 169-71, 94 S. Ct. 988, 992-93, 30 L. Ed. 2d 242, 248-50 (1974). The notable exception is where both co-occupants are present and one consents to the search and the other refuses. In that situation, the decision in *Randolph* provides that the refusal to consent to search is dispositive. *Randolph*, 547 U.S. at 122-23, 126 S. Ct. at 1527-28, 164 L. Ed. 2d at 227-28. However, these facts are more akin to *Matlock* where the defendant co-tenant was nearby in a squad car. *Matlock*, 415 U.S. at 166-67, 94 S. Ct. at 990-91, 30 L. Ed. 2d at 246-48 (co-tenant's consent is sufficient to admit police where the non-consenting resident is absent). There is also no evidence that law enforcement removed Hoosman from 323 Quincy Street to aid in obtaining the consent to search from other co-occupants, a concern noted in *Randolph*, 547 U.S. at 121-22, 126 S. Ct. at 1527-28, 164 L. Ed. 2d at 226-27.

Under these circumstances, we find that Hoosman's parents' consent to search was sufficient.[8] *See id.* at 126, 126 S. Ct. at 1530, 164 L. Ed. 2d at 229-30 (Breyer, J., concurring) ("The Court's opinion does not apply where the objector is not present 'and objecting.'"); *see also U.S. v. Hudspeth*, 518 F.3d

[8] We also find it important to note that *even if* the court should have suppressed the evidence seized at 323 Quincy Street, any error in the court's failure to do so was harmless. Hoosman was found guilty of possession of more than ten grams of cocaine base. In excess of twenty-five grams of cocaine base were seized from Campbell's apartment (which Hoosman does not contend was illegally seized), whereas only 3.3 grams of cocaine base were found at 323 Quincy Street. Therefore, the evidence of cocaine base seized from 323 Quincy Street had little effect on Hoosman's conviction for that charge. *See State v. Hensley*, 534 N.W.2d 379, 382 (Iowa 1995).

954, 955 (8th Cir. 2008) (interpreting *Georgia v. Randolph* to require the objector to the search to be present at the home while objecting).

III. Motion for Mistrial.

Hoosman argues the State's opening statement contained hearsay evidence regarding his control of his childhood bedroom at 323 Quincy Street where drugs were found. He contends that due to the prejudicial nature of the statement, the district court erred in denying his motion for mistrial.

Generally, we review the denial of motion for mistrial for abuse of discretion. *State v. Piper*, 663 N.W.2d 894, 901 (Iowa 2003). "A mistrial is appropriate when 'an impartial verdict cannot be reached' or the verdict 'would have to be reversed on appeal due to an obvious procedural error in the trial.'" *Id.* at 902 (citations omitted). The district court has considerable discretion to declare a mistrial, and we will not reverse that decision absent a showing that the court's discretion was exercised on grounds clearly untenable or clearly unreasonable. *Id.* An "untenable" reason is one that lacks substantial evidentiary support or rests on an erroneous application of the law. *Id*. When a constitutional challenge is raised, our review is de novo. *Fryer v. State*, 325 N.W.2d 400, 407 (Iowa 1982).

Hoosman argues that he was entitled to a mistrial due to the prosecutor's reference to inadmissible hearsay during opening statements. Our supreme court has stated that "[t]he scope of opening statements lies within the discretion of the trial court; we review for abuse of discretion." *State v. Veal*, 564 N.W.2d 797, 803 (Iowa 1997), *overruled on other grounds by State v. Hallum*, 585

N.W.2d 249, 253-54 (1998). Counsel may only refer to evidence that he or she believes has a good faith belief will be offered and admitted. *Id.* at 797.

During the State's opening statement, the following exchange took place:

> STATE: . . . And when speaking to the defendant's parents, [the investigators are] told that the defendant still has a room there, so to speak, but that the defendant has been moved out, doesn't live there—
>
> DEFENSE COUNSEL: Objection, Your Honor. Could we approach please?
>
> (A discussion was held at the bench.)
>
> STATE: There is the eventual search of the room that the defendant had. You will see that in the search of the room, there's some items found. . . .

After the jury was excused for the day, the parties made a further record on the issue. Defense counsel contended that the statements referred to whether Hoosman's parents told officers that the bedroom belonged to Hoosman, and any such statements from the parents would be hearsay because Marjorie and Emmit were not witnesses in the case. Defense counsel argued that a mistrial was needed to avoid prejudice, or alternatively, that a cautionary instruction should be given.

The State resisted the motion for mistrial and request for cautionary instruction. The State argued that the statements were not offered to prove the truth of the matter asserted, but rather, as "an explanation as to why the officers were there, and why they were entering the room, and why they were getting consent from the Hoosmans to enter that room." The State further alleged that Hoosman was not prejudiced by the statements.

The court thereafter denied the motion for mistrial and the request for a cautionary instruction, stating in part:

> The Court is going to, again, deny the motion for mistrial at this time. Likewise, the Court is going to deny the request by counsel of—that an additional cautionary instruction be provided. Again, during the course of the opening statement, I believe that counsel was making a statement which really did go to the heart, I assume, of the motion to suppress by whether or not there was ultimately consent to enter the house and ultimately a specific room in the home belonging to, I guess it's Marjorie and Emmit Hoosman.
>
> And I think I agree with what [the State] has indicated, that I do think that was more of an explanation that officers didn't just show up there and then go in there but did, in fact, obtain consent from the owners to go ahead and enter the—not only the house, but also the room there. The Court has already cautioned the jury as well that anything that counsel say during the course of opening and/or closing is not evidence and is not to be considered by them to be evidence in this case.
>
> . . . .
>
> Likewise, in this trial any comment by accident or inadvertence by [the State] with regard to how the officers or why the officers were allowed into the house and specifically into that room, again, I don't believe that has, in fact, violated the rights of this defendant to his confrontational rights or otherwise. Certainly nothing leading up to this point has overly prejudiced him in any way in the presentation of his case by the comment that, I believe, was an open-ended statement. For those reasons, that's why I'm going to deny not only the motion for mistrial but also the request for a cautionary instruction . . . .

Upon our review, we find no abuse of discretion in the district court's decision to deny the motion for mistrial. As our supreme court has stated:

> Although the statements made by the prosecutor were objectionable, prosecutorial misconduct is not, standing alone, a due process violation. As noted above, only when the prosecutor's conduct deprives the defendant of a fair trial is the right to procedural due process denied. We conclude based on our review of the entire record the defendant was not denied a fair trial. The evidence against the defendant was strong, the comments did not go to a central issue in the case, and the improper statements by the prosecutor were isolated. In addition, the jurors were instructed they were to decide the defendant's guilt or innocence "from the evidence and the law in these instructions," and that evidence did not include "[s]tatements, arguments, and comments by the lawyers."

State v. Musser, 721 N.W.2d 734, 756 (Iowa 2006) (internal citation omitted).

In this case, the State's comments were brief, isolated, not linked to a central issue of trial, and not made in bad faith. Further, even if the statements could be considered inadmissible hearsay, they were not prejudicial to Hoosman, due to the fact that over ten grams of cocaine base were found at Campbell's apartment and the prosecutor's statements related to Hoosman's parent's residence.[9] *See State v. Hildreth*, 582 N.W.2d 167, 170 (Iowa 1998) (noting the hearsay was cumulative to other testimony); *State v. Rice*, 543 N.W.2d 884, 887 (Iowa 1996) (finding no prejudice where similar evidence was in the record without objection and evidence of guilt was strong). We also note that opening statements are not evidence, and the jury was so instructed. Iowa R. Crim. P. 2.19. The jury is presumed to follow the law in the instructions and there is no evidence indicating the jury did not follow the court's instruction in this case. *See State v. Ondayog*, 722 N.W.2d 778, 784 n.2 (Iowa 2006). The court did not error in denying the motion for mistrial. We therefore affirm as to this issue.

IV. Sufficiency of the Evidence.

Hoosman argues there was insufficient evidence to support his conviction on the cocaine base (crack cocaine) possession charge. Therefore, he contends district court erred in failing to grant his motion for a directed verdict, as well as his motion for a new trial.

We review challenges to sufficiency of the evidence for corrections of errors at law. Iowa R. App. P. 6.907; *State v. Hansen*, 750 N.W.2d 111, 112

[9] We further note that, throughout the remainder of the trial, the State did not offer the alleged hearsay statements in its examination of the officers that conducted the search of 323 Quincy Street.

(Iowa 2008). 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). The district court's findings of guilt are binding on appeal if supported by substantial evidence. *Hansen*, 750 N.W.2d at 112. Evidence is substantial when a reasonable mind would recognize it sufficient to reach the same findings. *Id*.

To prove unlawful possession of a controlled substance, the State must prove that Hoosman (1) exercised dominion and control [i.e., possession] over the contraband, (2) had knowledge of its presence, and (3) had knowledge that the material was a controlled substance. *State v. Carter*, 696 N.W.2d 31, 38 (Iowa 2005). Proof of opportunity of access to the place where contraband is found will not, without more, support a finding of unlawful possession. *Id*. Hoosman contends there was insufficient evidence to prove that he had possession of the cocaine.

Possession can be actual or constructive. *State v. Maxwell*, 743 N.W.2d 185, 193 (Iowa 2008). Possession is actual when the controlled substance is found on the defendant's person, and 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 Carter*, 696 N.W.2d at 38; *State v. Bash*, 670 N.W.2d 135, 138 (Iowa 2003). It is undisputed that Hoosman did not have actual possession of the controlled substance because it was not found on his person. Therefore, the question here is whether Hoosman had constructive possession.

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). Inferences are also often used to establish constructive possession. *Id*. at 76-79. If the controlled substance was found in premises exclusively within the defendant's control, the defendant's knowledge of its presence and the defendant's ability to maintain control over it can be inferred. *State v. Reeves*, 209 N.W.2d 18, 23 (Iowa 1973). If the premises are not exclusively within the defendant's possession, however, no inferences can be made and constructive possession must be proven. *Id*. Constructive possession can be proven by (1) the defendant's incriminating statements, (2) the defendant's incriminating actions upon discovery of the controlled substance, (3) the defendant's fingerprints on the packaging of the controlled substance, and (4) any other circumstances linking the defendant to the controlled substance. *State v. Kemp*, 688 N.W.2d 785, 789 (Iowa 2004); *State v. Cashen*, 666 N.W.2d 566, 571 (Iowa 2003).

Upon our review, we find there is substantial evidence to support a finding of Hoosman's constructive possession of the crack cocaine found in Campbell's apartment. To prove that charge, the State was required to show that Hoosman possessed more than ten grams of cocaine base. The record shows that officers found 25.52 grams of cocaine base in La'Tia Campbell's apartment where Hoosman frequently stayed overnight. Hoosman's incriminating videotaped interview with Sergeant Meyer after his arrest is most critical to this point. *See, e.g.*, *Turner*, 630 N.W.2d at 609-11 (recognizing the defendant's incriminating

statements as sufficient evidence to support a finding of constructive possession over contraband).

In the interview with Sergeant Meyer, Hoosman effectively confessed to being caught red-handed to having drugs at the apartment. He explained in detail how and why he had gotten started selling drugs, but stated that officers could not blame him for all the short term traffic at the apartment. Among various other incriminating statements, Hoosman admitted, "Anything in that apartment, yeah, that's me." He asked what kind of punishment he was facing and said, "I can't do nothin' but accept it."

Additional evidence in the record corroborates Hoosman's confession. Several hours before the warrant was served, officers observed Hoosman's vehicle parked outside the apartment, and upon his arrest, Hoosman admitted that he stayed most nights at the apartment when he was in Waterloo.

Hoosman emphasizes that he did not admit to possessing the substances found in the apartment's laundry room. However, the only drugs found in the laundry room were powder cocaine and Hoosman was not charged with possession of powder cocaine. Hoosman also contends that nothing connected him to the drugs found at 323 Quincy Street. However, only 3.3 grams of crack cocaine were found at 323 Quincy Street, whereas 25.52 grams were found at the apartment—the jury could easily have convicted him of possession of more than ten grams of crack cocaine regardless of whether the drugs found at 323 Quincy Street were determined to be in his possession. We find substantial evidence supports the verdict in this case. Accordingly, we affirm as to this issue.

V. Evidence of Controlled Buys.

Hoosman argues the district court erred by admitting evidence of controlled buys which had not been timely disclosed to the defense and which represented a contradiction of Sergeant Meyer's previous testimony. The State contends we should reject Hoosman's argument because the evidence of controlled buys was never admitted at trial. In his reply brief, Hoosman alleges that the thrust of his argument does not hinge on whether the evidence was actually admitted, but rather, that the court's ruling that the evidence would be admissible if defense counsel opened the door amounted to a constitutional deprivation of Hoosman's right to present a defense.

To that point, Hoosman contends that a major element of his defense was the fact that no evidence of controlled buys and marked money had been disclosed during discovery. Hoosman also intended to show that officers conducted a poor investigation by failing to use marked money and controlled buys.

During cross-examination of Sergeant Meyer on the second day of trial, defense counsel highlighted that the normal practice of officers is to use controlled buys and marked money as a tool to help trace and determine if someone is selling drugs. Sergeant Meyer acknowledged that he generally used marked money and controlled buys in drug investigations. We note that no further testimony was given with regard to controlled buys or marked money being used in Hoosman's case.

At the close of the record that day, shortly after Sergeant Meyer's examination, the State informed the court that it had just discovered that some of

the money found in Hoosman's possession was marked from prior controlled buys with confidential informants. Defense counsel objected to the late disclosure of the evidence. The court ruled that neither party could delve into the issue of the controlled buys and marked monies, so long as defense counsel did "not open the door further" to the issue. As the court stated:

> I'm not going to allow the State at this time to introduce evidence—and I think that's where [defense counsel was] possible going with that—with Sergeant Meyer that—particularly when [defense counsel] was going through all the various techniques of investigation that drug enforcement people can use, sort of implying, then, that they didn't do what they should have done in this case; and then you were going to come back with that information that, in fact, now we do have that information, that so because of the lateness of the disclosure of the evidence here, you're not asking that counsel for the defendant waive the right to do discovery if we do end up getting into that issue.
>
> But at least at this time, then, we are not going to get into the issue, nor is the State in its case in chief going to get into the existence of money or the part of the $9,600 being from a controlled buy. But as I also cautioned [defense counsel], that if, in fact, he starts—because he raised the issue that he still may want to raise that as part of closing argument or otherwise, and I'm not going to allow him to do that either, as they talk about your allegations—your against—they did a poor job of investigating, or didn't take photographs, or all the various things we talked about with Sergeant Meyer. That is not going to be an area he's going to be able to get into in closing arguments, nor is he going to be able to get into that issue or argue that point prior to closing argument either in the defense case in chief, if there is any.

We review the district court's rulings on admissibility of evidence for abuse of discretion. *State v. Helmers*, 453 N.W.2d 565, 567 (Iowa 2008). Such abuse of discretion can be found when the court exercised its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable. *Id*.

Upon our review, we find no abuse of discretion in the court's decision regarding the admissibility of evidence of the controlled buys or marked monies.

See id. The court "prohibited" both parties from discussing the topics of controlled buys and marked monies in any further examinations of witnesses or closing arguments. However, Hoosman could "open the door" and present such evidence, but if he did, the State was permitted to present the newly discovered evidence as rebuttal evidence. Thus, Hoosman was not actually "prohibited" from presenting his defense, but rather, could not complain about the State's rebuttal evidence if Hoosman "opened the door." Additionally, Hoosman had the option of opening the door and attempting to discredit Sergeant Meyer for his inconsistent or erroneous testimony that there were no controlled buys.[10] We therefore conclude that under the circumstances in this case, Hoosman was not unfairly prejudiced by the court's decision in regard to admission of this evidence. *See, e.g.*, *State v. Kukowski*, 704 N.W.2d 687, 993-94 (Iowa 2005); *State v. Rodriquez*, 636 N.W.2d 234, 244 (Iowa 2001); *State v. Crone*, 545 N.W.2d 267, 273 (Iowa 1996). We affirm as to this issue.

VI. Questions by Officer in Videotaped Interview.

Hoosman argues the district court erred in admitting hearsay evidence from portions of an interview where Sergeant Meyer's questions included inculpatory evidence that could not be confronted. Specifically, Hoosman contends that a portion of Hoosman's videotaped interview with Sergeant Meyer contained "loaded questions" regarding confidential informants who have "given reliable information defendant is selling drugs." He alleges the court erred in allowing the questions to stay in the State's exhibit and also by not forcing the

[10] There may have been a sufficient basis to allow the State to use the evidence as rebuttal evidence after defense counsel's cross-examination of Sergeant Meyer regarding the officers' investigation tactics in Hoosman's case.

State to provide the identities of the confidential informants to which Sergeant Meyer refers.

On the second day of trial, outside of the presence of the jury, defense counsel argued to the court that the video-taped interview of Hoosman should be kept out and objected to its admissibility as hearsay. To support this contention, defense counsel pointed to several questions or statements by Sergeant Meyer, including: "We know you've been selling out there, Shawn" and "Well, Shawn, we've had you implicated by a lot of different people. A lot of different people have told us what you've been doing out there."

Upon our review, we conclude that Sergeant Meyer's statements in the video were not hearsay, because they were not offered to prove the truth of the matter asserted. *See* Iowa R. Evid. 5.801(*c*). Further, without the questions included in the video, Hoosman's responses would not be in proper context or easily understood by the jury.

We also find that, even if the statements could be considered hearsay, admission of the statements did not unfairly prejudice Hoosman. *See Rice*, 543 N.W.2d at 887. First, immediately after the video was shown to the jury, the court instructed:

> Ladies and gentlemen, during the interview you just watched, Sergeant Meyer made certain statements, references, and assertions to Mr. Hoosman. Any such statements, references, and assertions by Sergeant Meyer are not evidence and shall not be considered by you in reaching your decision. However, Mr. Hoosman's statements and comments are evidence in this case and may be used by your for whatever purpose you deem appropriate in reaching your decisions.

The jury is presumed to follow the instructions of the court, and there is no evidence indicating the jury did not follow the court's instruction in this case. *See Ondayog*, 722 N.W.2d at 784 n.2.

Second, the video contained numerous additional incriminating statements by Hoosman other than those that were elicited by Sergeant Meyer's remarks set forth above. *See Hildreth*, 582 N.W.2d at 170 (noting the hearsay was cumulative to other testimony). Under the circumstances in this case, we find no error in the court's decision to allow the statements. *See State v. Newell*, 710 N.W.2d 6, 18 (Iowa 2006) (noting that our standard of review on the district court's rulings on the admissibility of hearsay is for errors at law). We affirm as to this issue.

VII. Reputation Evidence.

Hoosman contends that the district court abused its discretion by refusing to allow one of his witnesses, Reverend Orlando Dial, to testify concerning Sergeant Meyer's alleged reputation for untruthfulness. He argues that the court's ruling "failed to take into account the suspect, inconsistent actions and the dubious testimony of the State's key witness."

The admissibility of reputation evidence falls within the district court's sound discretion. *State v. Caldwell*, 529 N.W.2d 282, 285 (Iowa 1995). We will reverse the court's ruling only if there was an abuse of that discretion and prejudice. *State v. Hartsfield*, 681 N.W.2d 626, 633 (Iowa 2004). The test of prejudice is whether it sufficiently appears from the record that the rights of the complaining party have been injuriously affected or that the party has suffered a miscarriage of justice. *Kukowski*, 704 N.W.2d at 994.

Evidence relating to a witness's truth and veracity is governed by Iowa Rule of Evidence 5.608. In order to introduce reputation testimony bearing on the credibility of a witness, strict foundational requirements must be met. *Caldwell*, 529 N.W.2d at 286. The offering party must establish that the comments on the witness's reputation do not derive from a limited group such as a family, but rather, must be from a general cross-section of the community where the witness lives or works. *See id*. The offering party must also establish when and how long a period of time the comments have been made. *See id*.

We begin by noting that Hoosman failed to timely disclose the fact that he planned to call Reverend Dial as a witness—giving the State only one day notice. *See* Iowa R. Crim. P. 2.13(4) (requiring nine days' notice for witnesses being called at trial when the defendant has taken depositions under rule 2.13(1)). Where insufficient notice is given, Iowa Rule of Criminal Procedure 2.13(4) permits the court to require discovery of the witness, grant a continuance or if necessary, exclude the testimony of the witness. Because the trial was nearing its close, there was little time for the State to combat the unexpected reputation evidence. Thus, any other relief would not have protected the State from undue influence. *See* Iowa R. Crim. P. 2.13(4). For this reason alone, the district court did not abuse its discretion by refusing to allow Reverend Dial's testimony.

Even assuming that testimony should not have been excluded on procedural grounds, the testimony fails to meet the strict foundational requirements to be admitted as reputation testimony. We note that our supreme court has previously addressed a similar issue in *State v. Caldwell*, where it determined that the district court abused its discretion in failing to allow Reverend

Dial[11] to testify as to Sergeant Meyer's reputation. *Caldwell*, 529 N.W.2d at 285-88. However, several important facts distinguish the instant case from *Caldwell*.

The supreme court's decision in *Caldwell* was published in 1995, and the crimes the defendant in *Caldwell* was charged with occurred in 1992. Here, the crimes for which Hoosman was charged occurred in 2006, and his trial took place in 2008. The offer of proof in the record in this case indicates that Reverend Dial's knowledge of Sergeant Meyer's reputation came primarily from his 1987-1992 tenure with the National Association for the Advancement of Colored People (NAACP), when he took complaints from people who had been arrested.

We conclude that Reverend Dial's reputation testimony came from outdated sources. As we mentioned, Reverend Dial's tenure with the NAACP ended in 1992—sixteen years before Hoosman's trial at which Sergeant Meyer testified. Although Reverend Dial's reputation testimony may have been relevant in 1992 at the trial in *Caldwell*, it is no longer relevant or reliable in this case. As such, Hoosman has failed to sufficiently show when and how long a period of time Reverend Dial's reputation testimony was established. *See id*. In particular, there was insufficient foundation laid in the offer of proof that Dial has recent information concerning Sergeant Meyer's reputation. For these reasons, we affirm as to this issue.

VIII. Conclusion.

Having considered all issues raised on appeal, we affirm.

AFFIRMED.

[11] "Reverend Dial" in the instant case is the same person as witness "Ray Dial" in *Caldwell*.