IN THE COURT OF APPEALS OF IOWA

No. 0-506 / 09-1702
Filed August 11, 2010

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DAVID ALLEN CLUFF II,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, James D. Coil, Judge.

A defendant appeals his judgment and sentence for possession of marijuana, claiming that insufficient evidence exists to show that he had possession of the contraband. **REVERSED AND REMANDED.**

Mark C. Smith, State Appellate Defender, and Dennis D. Hendrickson, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, Eric McBurney, Student Legal Intern, Thomas J. Ferguson, County Attorney, and Brian Williams, Assistant County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Eisenhauer and Danilson, JJ. Tabor, J., takes no part.

VAITHESWARAN, P.J.

A jury found David Allen Cluff II guilty of possession of marijuana. On appeal, Cluff contends the jury's finding of guilt is not supported by sufficient evidence. We must determine whether there is substantial evidence in the record to support the finding. *State v. Bass*, 349 N.W.2d 498, 500 (Iowa 1984).

The jury was instructed that the State would have to prove the following elements of the crime:

> 1. On or about the 12th day of October 2008, the defendant, David Cluff II, knowingly or intentionally possessed marijuana.
> 2. The defendant knew that the substance he possessed was marijuana.

The key question on appeal is whether there was substantial evidence to support a finding that Cluff "possessed" marijuana. On this question, the jury was instructed that "[p]osession includes actual as well as constructive possession." The jury was also advised:

> A person who is not in actual possession but who has knowledge of the presence of something and has the authority or right to maintain control of it, either alone or together with someone else, is in constructive possession of it.

There is no dispute that this case involves a claim of constructive rather than actual possession of marijuana. Therefore, we must decide "whether all of the facts and circumstances . . . allow a reasonable inference that the defendant knew of the drugs' presence and had control and dominion over the contraband." *State v. Cashen*, 666 N.W.2d 566, 571 (Iowa 2003).

The record reveals that Waterloo police officers stopped a vehicle for operating with a non-working brake light. The vehicle was occupied by five individuals—three of whom were in the back seat.

Before making the stop, one of the officers "observed some movement" by the passengers. The officer testified he was "[n]ot sure what kind of movement. You could just see people moving around the vehicle." On cross-examination, he stated, "there was five subjects in the vehicle moving around. It's kind of hard to tell exactly what they're doing."

Following the stop, officers used a police dog to detect the presence of drugs in the vehicle. They subsequently searched the vehicle and discovered a bag of marijuana in a hole designed for an audio speaker situated on the rear passenger side of the car. Cluff was seated on that side of the car in the back seat. After the drugs were discovered by police, Cluff was detained and placed in a patrol car.

An officer testified that he overheard Cluff say, "I should have smoked it all," while the defendant was seated in the back of the patrol car. When Cluff was asked to explain this statement, he testified that the officer told him he was under arrest for possession of marijuana and he sarcastically responded, "Well, I guess I should of smoked it then." Cluff denied seeing the baggie of marijuana or inserting or extracting it from the hole. No fingerprints were taken from the baggie. No illegal substances or drug paraphernalia were found on Cluff's person or in plain view in the vehicle.[1]

[1] Marijuana was found in Cluff's mother's bra. She was seated in the front of the vehicle.

Viewing the evidence in the light most favorable to the State, as we must,[2] we are nonetheless persuaded that the State failed to prove constructive possession.

In reaching this conclusion, we have considered the State's argument that "furtive" movements observed by the officer prior to the stop reflected Cluff's knowledge of the presence of the drug. *Cf. Cashen*, 666 N.W.2d at 572 (noting there were no suspicious or furtive movements to conceal drugs from officers). The problem with this argument is that the officer specifically declined to characterize the movements as furtive, noting that the number of occupants in the vehicle prevented him from being more descriptive. Moreover, there is no evidence that Cluff was the person making the movements, furtive or otherwise. Finally, there was no evidence indicating that, if Cluff was moving, he was doing so to conceal the drugs. *See State v. Atkinson*, 620 N.W.2d 1, 5–6 (Iowa 2000) (stating similar argument was based on "pure speculation").

We have also considered the State's argument that Cluff's statement in the patrol car indicated his knowledge of the presence of the drugs. We agree that a reasonable fact-finder could ascribe knowledge to Cluff based on this statement. *See Cashen*, 666 N.W.2d at 571 (noting defendant's statement that marijuana belonged to his girlfriend could show knowledge of presence of marijuana). However, as noted, knowledge is not enough; the State also had to show Cluff's authority or right to maintain control of the substance. *See id.* at 569.

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[2] *State v. Robinson*, 288 N.W.2d 337, 340 (Iowa 1980).

The State failed to make this showing. While it correctly points out that Cluff was closest to the speaker hole, proximity to the drug is not sufficient to establish control. *See id.* at 572 ("Simply because a person can reach out and grasp something does not mean he or she has control or dominion over the object."). Here, there was no indication that the other two rear-seat occupants were unable to reach the hole from their positions in the two-door vehicle.

We recognize that Cluff admitted to stashing beer cans and a hot-dog wrapper in the hole. *See id.* (stating one factor is whether the contraband is found among the defendant's personal belongings). However, even if the hole was immediately accessible to Cluff for garbage disposal purposes, there is no indication it was exclusively accessible to him for this purpose or for the purpose of concealing illicit drugs. *See id.*

We also note that, unlike his mother, who was seated in the front of the vehicle, Cluff did not have drugs or drug paraphernalia on his person, a factor that might lead to the inference that the drugs in the hole were his. *Cf. id.* at 571 (declining to infer from fact that the defendant had rolling paper and lighter that he "had authority or the ability to exercise unfettered influence over these drugs"). For these reasons, we are not persuaded by the State's "proximity" argument.

Finally, we are not persuaded by the State's efforts to distinguish *Cashen* and *Atkinson* on the ground that, in those cases, persons other than the defendants were claiming ownership of the drugs. *See id.* at 572; *Atkinson*, 620 N.W.2d at 2. In our view, this fact was not the basis for the supreme court's refusal to find constructive possession in those cases.

We conclude the jury's finding of guilt and, in particular, its finding that Cluff constructively possessed marijuana, is not supported by substantial evidence. Accordingly, we reverse and remand for dismissal. *See Atkinson*, 620 N.W.2d at 6.

REVERSED AND REMANDED.