IN THE COURT OF APPEALS OF IOWA

No. 1-347 / 10-0988
Filed June 15, 2011

STATE OF IOWA,
Plaintiff-Appellee,

vs.

DUVALMETRISE LAROYDEANGELO BROWN,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Robert A. Hutchison, Judge.

Duvalmetrise Brown appeals his conviction for possession of a controlled substance with intent to deliver. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Nan Jennisch, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, John P. Sarcone, County Attorney, and Joseph D. Crisp, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Doyle and Danilson, JJ. Tabor, J., takes no part.

DANILSON, J.

Duvalmetrise Brown appeals from his conviction for possession of a controlled substance with intent to deliver in violation of Iowa Code section 124.401(1)(c)(3) (2009). After a jury trial, the jury found Brown guilty of possession of crack cocaine with intent to deliver. Brown contends there was insufficient evidence to support the conviction. Upon our review, we find Brown's statements to the police regarding the location of the crack cocaine, testimony from Brown's friend that she saw him in possession of crack cocaine, as well as other circumstantial evidence sufficient to prove beyond a reasonable doubt he had control and dominion over the controlled substance or aided and abetted the criminal offense. We affirm Brown's conviction and sentence.

I. Background Facts and Proceedings.

At approximately 7:45 p.m. on October 15, 2009, Des Moines narcotics officers arrived at Apartment No. 2 at 1065 21st Street in Des Moines to execute a search warrant targeting the leaseholder, Brown's half-sister, Kashandra Wilson. They anticipated finding evidence of drug activity. After knocking on the front door and announcing their presence, the officers did not receive a response. The officers rammed the door, which was blocked on the inside by a two-by-four resting in metal brackets.

Once inside, the officers found brothers Dantaye and Diamonde Burton in the living room. The officers found Brown and a female friend, Britney Jackson, in the bathroom. Brown later admitted he had flushed a little bit of marijuana

down the toilet. Jackson testified she did not see what he flushed down the toilet but that they had been smoking marijuana when the police arrived.

Officers found seven rocks of crack cocaine behind the couch in the living room. Brown stated he did not know "who threw that crack behind the couch" before being informed where the officers found the crack cocaine.

The officers found some paperwork belonging to the leaseholder, Wilson, but only found male clothing in the apartment. Brown admitted four items of clothing in the apartment were his. Brown claimed to be unemployed and homeless, but officers found that he had keys to the apartment, $250 in his pockets, and had recently paid for hotel rooms.

Jackson testified she and Brown spent the night at Apartment No. 2 between five and ten times shortly before October 15. She also testified Brown referred to Apartment No. 2 as "his house" and she saw Brown place crack cocaine on the table that evening. The officers found a drawer full of plastic bags in the Apartment No. 2 kitchen, but did not find any crack cocaine paraphernalia.

Diamonde Burton told officers that Wilson had been staying with him in Apartment No. 3, next door to Apartment No. 2. Diamonde consented to a search of his apartment. He stated that if anything illegal was found in Apartment No. 3, it belonged to Wilson. Diamonde informed the officers as to the location of Wilson's personal items in Apartment No. 3. The officer's search of Apartment No. 3 revealed fifteen rocks of crack cocaine, one plastic bag of powdered cocaine, female undergarments and toiletries, a credit card in Wilson's name, and bills addressed to Wilson.

Narcotics officers explained that because of the extremely addictive nature of crack cocaine, it is unlikely a user would have a large quantity on their person. According to the officers, users are more likely to exhaust whatever amount they have in a relatively short amount of time and are also likely to carry drug paraphernalia, like a pipe for smoking the crack cocaine, and less likely to have large amounts of cash. The officers also explained it is common for dealers to have an abundance of plastic bags because that is their method of packaging and distributing the controlled substance in smaller amounts.

The State charged Brown by trial information with possession of a controlled substance with intent to deliver, both as a second or subsequent offender and as a habitual offender.[1] The jury trial began on March 29, 2010. The court denied Brown's motion for a directed verdict challenging the State's proof with regards to the elements of possession and intent to deliver. The jury found Brown guilty of possession of a controlled substance with intent to deliver. Following imposition of judgment and sentence, Brown appeals.

II. Scope and Standard of Review.

Challenges to the sufficiency of the evidence are reviewed for corrections of errors at law. Iowa R. App. P. 6.907; *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 be fairly drawn from the evidence. *Keeton*, 710 N.W.2d at 532. A jury's verdict is

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[1] The Burton brothers and Jackson were not charged as a result of the October 15 incident.

binding on appeal if it is supported by substantial evidence. *State v. Hutchison*, 721 N.W.2d 776, 780 (Iowa 2006). Evidence is substantial when a reasonable mind would recognize it as sufficient to reach the same findings. *State v. Moorehead*, 699 N.W.2d 667, 671 (Iowa 2005). Evidence must raise a fair inference of guilt and more than suspicion or speculation to be considered sufficient. *State v. Casady*, 491 N.W.2d 782, 787 (Iowa 1992).

III. Merits.

A. *Applicable Legal Principles*. Brown argues there was insufficient evidence to support his conviction. To prove he committed the crime, the State was required to prove beyond a reasonable doubt Brown "(1) exercised dominion and control over the contraband, (2) had knowledge of its presence, and (3) had knowledge that the material was a controlled substance." *State v. Bash*, 670 N.W.2d 135, 137 (Iowa 2003) (citing *State v. Reeves*, 209 N.W.2d 18, 21 (Iowa 1973)). The jury was also instructed that if defendant "knowingly aided and abetted another person(s) in the commission of the crime," a guilty verdict should be entered. *See* Jury Instruction No. 13. Brown preserved error on the sufficiency of the evidence issue by requesting a directed verdict.

Possession of a controlled substance may be actual or constructive. *Bash*, 670 N.W.2d at 138. A defendant has actual possession of a controlled substance if he or she has "direct physical control" over it. *State v. Cashen*, 666 N.W.2d 566, 569 (Iowa 2003). To have constructive possession, a defendant must have knowledge of the presence of the controlled substance and the authority to maintain control over it. *Bash*, 670 N.W.2d at 138.

We apply a number of factors to determine if a defendant had constructive possession, including: incriminating statements made by the defendant; incriminating actions of the defendant upon the police's discovery of contraband among or near his or her personal belongings; the defendant's fingerprints on the packaging of the controlled substance; and any other circumstances linking the defendant to the contraband. *Cashen*, 666 N.W.2d at 571. Even if some of these factors exist, we must ultimately determine if the circumstances and facts of the case support a reasonable inference that the defendant knew of the presence of the controlled substance and had dominion and control over it. *Id.*; *State v. Webb*, 648 N.W.2d 72, 79 (Iowa 2002) (examining the specific circumstances and facts of each individual case to determine if defendant had constructive possession). The State does not meet its burden by merely proving defendant's proximity to the contraband. *State v. Atkinson*, 620 N.W.2d 1, 4 (Iowa 2000).

Constructive possession may result from a reasonable inference when the controlled substance is found in a location immediately and exclusively available to the defendant. *Reeves*, 209 N.W.2d at 23. When the defendant is in joint possession of the premises, knowledge of the presence of the controlled substance and the ability to maintain control over it will not be inferred and must be established by evidence. *Id.*

B. *Analysis*. Brown argues there was insufficient evidence to prove that he exercised dominion and control over the crack cocaine found behind the couch in Apartment No. 2. In this case, Brown did not have direct physical

control of the crack cocaine at the time the narcotics officers entered the apartment.[2] This appeal focuses on constructive possession.

Brown was in the apartment, along with three other people, at the time the search warrant was executed. However, simply having access to the place where the controlled substance is found is not enough to establish possession. *Atkinson*, 620 N.W.2d at 4; *Reeves*, 209 N.W.2d at 22. It was the State's responsibility to prove Brown had knowledge of the crack cocaine and had the authority to maintain control over it. *Reeves*, 209 N.W.2d at 23. Because Brown was not in exclusive possession of the premises, his knowledge of the presence of the crack cocaine and right to maintain control over it cannot be automatically inferred. *Cashen*, 666 N.W.2d at 571; *Reeves*, 209 N.W.2d at 23.

Upon our review, we find the circumstances of the arrest support a finding that Brown had knowledge of the presence of the crack cocaine. Brown was in the living room, where the crack cocaine was found, seconds before the police came through the door. We find Brown's comment that he did not know "who threw that crack behind the couch" to be particularly incriminating because the officers had not yet informed Brown where they had discovered the drugs. *See Cashen*, 666 N.W.2d at 571.

Brown contends that even if the testimony of two arresting officers may support a finding he had knowledge of the presence of crack cocaine, this evidence is insufficient to prove dominion and right to control the contraband.

[2] The State argues that a jury could reasonably infer that Brown had actual possession a few hours earlier, according to Jackson's testimony. *See State v. Vance*, 790 N.W.2d 775, 784 (Iowa 2010). Because we focus our analysis on whether Brown had constructive possession of the controlled substances, we find it unnecessary to address that contention.

Bash, 670 N.W.2d at 138. To support his contention, Brown emphasizes he did not live at Apartment No. 2 because Wilson was the leaseholder, he was not the target of the investigation, and he was not in close proximity to the controlled substance when the police arrived. Brown further argues that his fingerprints were not found on the crack cocaine and his personal belongings were nowhere near the contraband.

The State relies upon Jackson's testimony that she saw Brown place crack cocaine on a table in the living room earlier that evening and Brown called Apartment No. 2 "his house" to support the conclusion Brown had the authority to maintain control over the contraband. Indeed, the evidence in the record shows Brown had keys to the apartment, he kept clothing in the apartment, and he had recently spent a number of nights there. Wilson was living next door in Apartment No. 3.

Significantly, there was no indication any of the three other people present (Jackson and Dantaye and Diamonde Burton) had a connection to the apartment or the crack cocaine. Brown was the only one observed to be in possession of crack cocaine before the police arrived. When the police found the contraband, Brown changed his story multiple times regarding his involvement with the apartment and Wilson. *See Cashen*, 666 N.W.2d at 571 (observing that incriminating statements made by the defendant support a finding that defendant had constructive possession). Brown only admitted knowing Wilson when the police told him they found crack cocaine in the apartment, and testimony indicated Brown called Apartment No. 2 "his house."

Although there were no fingerprints linking Brown to the crack cocaine, the testimony of Jackson connects him to the substance that same day. Brown was found in the bathroom when the law enforcement entered, but it took the officers about fifteen seconds to gain entry into the residence, providing sufficient time for Brown to try to hide the crack cocaine. Brown also admitted flushing some marijuana down the toilet, an action the jury could view as a similar attempt to evade being caught in possession. Other significant facts included that the door was barricaded; the apartment contained a large quantity of plastic bags; and Brown's cash was folded and comprised of bills consistent with denominations a dealer would receive from purchases. These facts together indicate commonalities in the sale and possession of controlled substances. The State offered substantial evidence connecting the substance found behind the couch to Brown. *But see State v. Herron*, No. 09-1408 (Iowa Ct. App. Dec. 8, 2010) (finding evidence against defendant was insufficient to prove constructive possession of a controlled substance found in his girlfriend's apartment when other people had recently been present at the apartment; defendant lied to police about the circumstances; but no evidence linked defendant to the controlled substance found). In this case, Brown's own incriminating statements, Jackson's testimony that Brown had crack cocaine in his possession that evening, and the other circumstantial evidence linking him to distribution of crack cocaine from the apartment prove beyond a reasonable doubt Brown had constructive possession of the controlled substance found at Apartment No. 2.

We also observe that the jury was entitled to enter its guilty verdict premised upon Brown aiding and abetting another in the possession of crack cocaine with the intent to distribute. Iowa Code section 703.1 sets forth Iowa's law on aiding and abetting, and provides:

> All persons concerned in the commission of a public offense, whether they directly commit the act constituting the offense or aid and abet its commission, shall be charged, tried and punished as principals. The guilt of a person who aids and abets the commission of a crime must be determined upon the facts which show the part the person had in it, and does not depend upon the degree of another person's guilt.

Aiding and abetting requires proof the accused "assented to or lent countenance and approval to the criminal act either by active participation in it or by some manner encouraging it prior to or at the time of its commission." *State v. Lott,* 255 N.W.2d 105, 107 (Iowa 1977), *overruled on other grounds by State v. Allen,* 633 N.W.2d 752 (Iowa 2001).

Here, the jury reasonably could have concluded Wilson was in constructive possession because she was the named tenant of the apartment. Nonetheless, the evidence of Brown's access to the apartment, knowledge of the existence of the crack cocaine in the apartment, and manner in which the apartment door was barricaded in Wilson's absence reflects his assent and encouragement of the criminal act. Thus, there was substantial evidence of Brown's aiding and abetting the crime if the jury reached its verdict based upon this theory of the crime.

IV. Conclusion.

Upon our review, we conclude the facts of this case are sufficient to find that Brown was in possession, or aided and abetted one who was in possession,

of a controlled substance with intent to deliver. Brown's statements to arresting officers demonstrated his knowledge of the presence of the crack cocaine, and Jackson's testimony and other circumstantial evidence demonstrated his right to maintain dominion and control over it, or his countenance and aid of the criminal act. We therefore affirm Brown's conviction and sentence.

AFFIRMED.

Doyle, J., concurs; Sackett, C.J., concurs specially.

SACKETT, C.J. (concurring specially)

I concur with the majority opinion in all respects except I give no consideration to the fact a large number of plastic bags were found in the search. Plastic bags are frequently sold in boxes of fifty or more and are purchased by the general population for a large number of legitimate purposes.