IN THE COURT OF APPEALS OF IOWA

No. 1-931 / 11-0263
Filed March 14, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ANGELA HEIDEMAN,
Defendant-Appellant.

Appeal from the Iowa District Court for Sioux County, John D. Ackerman, Judge.

Angela Heideman appeals her convictions for possession of marijuana, third offense, and failure to affix a drug tax stamp. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Rachel C. Regenold, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Benjamin M. Parrott, Assistant Attorney General, and Coleman McAllister, County Attorney, for appellee.

Considered by Danilson, P.J., and Tabor and Mullins, JJ.

MULLINS, J.

Angela Heideman appeals the judgment and sentence entered upon jury verdicts finding her guilty of possession of marijuana, third offense, in violation of Iowa Code section 124.401(5), and failure to affix a drug tax stamp in violation of Iowa Code section 453B.12 (2009). Heideman argues there is insufficient evidence to sustain her convictions. She further argues her trial counsel was ineffective for failing to object to the jury instruction defining "possession," and for failing to challenge the admission of certain hearsay testimony. We find the jury's verdict is supported by substantial evidence, and that the district court did not err in instructing the jury. However, in order to provide defense counsel an opportunity to explain his trial strategy, we preserve the claim regarding the admission of hearsay evidence for possible postconviction relief proceedings.

I. Background Facts and Proceedings.

The following facts were presented during the jury trial: On the afternoon of March 27, 2010, Trooper Dave Driesen, a seventeen-year veteran with the Iowa State Patrol, observed a two-door Mercury Cougar with excessive window tint traveling northbound on Highway 60. Trooper Driesen initiated a traffic stop, and the vehicle was slow to pull over. The stop and the subsequent events were recorded with Trooper Driesen's dashboard camera.

As Trooper Driesen approached the vehicle, the driver opened his door. Trooper Driesen identified the driver as Donnie White, the front seat passenger as Jason Whitcanack, and the sole back seat passenger as Angela Heideman. Trooper Driesen noticed a strong smell of alcohol coming from the vehicle. He

also observed a brown paper sack on the front passenger floor and a plastic bag on the back seat floor that appeared consistent with the purchase of alcohol. Trooper Driesen confirmed that the windows had excessive tint, and asked White to step back to his patrol car.

When Trooper Driesen asked White if he had any weapons on him, White produced a marijuana pipe from his front right pocket. White was placed under arrest, and a search of his person yielded a small plastic bag with marijuana residue. White was placed in the front passenger seat of the patrol car.

Trooper Driesen informed White of his *Miranda* rights, and questioned if there were any additional drugs in the vehicle. White admitted that there were, and although hesitant, White stated they were in the glove box and under the seat. Trooper Driesen asked if the passengers would try to hide the drugs, and White stated he didn't know, but he didn't think so.

Trooper Driesen spoke briefly with dispatch and then returned to speak with the passengers in the vehicle. Trooper Driesen first requested Whitcanack, the front seat passenger, to step out of the vehicle. As Whitcanack exited the vehicle, Trooper Driesen could hear clanging noises. Trooper Driesen also observed that the brown paper bag previously on the front floorboard, was now in the back seat at Heideman's feet. Upon questioning, Whitcanack admitted that he had an open container of alcohol in the car and a pocket knife in his pocket, but denied that there were any drugs in the vehicle. Trooper Driesen told Whitcanack go stand by a nearby road sign.

Trooper Driesen then asked Heideman to get out of the vehicle. As Heideman folded the front seat over to exit the vehicle, an open can of beer was knocked over on the floor of the front seat. After Heideman exited, Trooper Driesen questioned her about the brown paper sack with an opened bottle of beer visible on the floor of the backseat. Heideman stated that it belonged to Whitcanack, but admitted that she had an opened beer in a plastic bag on the floor behind the driver's seat. Heideman was told to go stand near Whitcanack by the road sign.

Trooper Driesen began to search the front passenger area, and immediately observed in plain view a clear plastic bag containing compressed marijuana sticking out from under the front seat near the passenger side door. Trooper Driesen placed Whitcanack under arrest, but continued to have him stand near the road sign. Trooper Driesen then returned to his patrol car.

In the patrol car, Trooper Driesen asked White if he had just purchased the marijuana that day. White answered, "Yeah." White further admitted that he had purchased a quarter-pound of marijuana for $500. Although Trooper Driesen asked if they had purchased the marijuana together, the sound of a passing vehicle makes White's response inaudible on the video. Trooper Driesen testified at trial that White responded, "Yes."

Trooper Driesen then returned to the vehicle to speak with Heideman. Heideman stated she was "just along for the ride," and that she was Whitcanack's girlfriend. She further stated that she had gone with them to look for a bird at Earl May. Heideman denied having any knowledge of the marijuana

and stated she was unaware if any additional marijuana was in the vehicle. Trooper Driesen described Heideman as "extremely nervous."

Trooper Driesen then continued the search of the vehicle, and testified that the odor of marijuana was very strong in the vehicle. On the back seat floorboard where Heideman's feet would have been, Trooper Driesen found several chunks of marijuana that appeared to have spilled out of a clear plastic bag under the backseat. The bag under the back seat contained compressed marijuana in the same type and size bag as the bag of marijuana found under the front passenger seat.

Trooper Driesen confronted Heideman with the information that there was marijuana all over the back floor, and asked if she had tried to hide it under the backseat. Heideman denied doing so stating, "I didn't. I didn't even look down. I swear to you, I'm already in enough trouble the way it is."

State Trooper Steve Hilt then arrived on the scene and placed Heideman under arrest. Although Heideman initially denied that she had anything on her, she later informed Trooper Hilt that she had a marijuana pipe in her bra. The pipe was confiscated at the jail, and was found to contain some unburned marijuana.

Trooper Driesen completed the search of the vehicle, where he found two marijuana pipes, a small bag of screens, and a package of rolling papers under the backseat. Each of the bags of marijuana weighed approximately fifty-four grams, and neither had drug tax stamps affixed.

Heideman was subsequently charged with possession of marijuana, third offense, and failure to affix a drug tax stamp. Her case came to a jury trial on November 23, 2010. Prior to Heideman's trial, White and Whitcanack both pled guilty to the same charges alleged against Heideman.

Troopers Driesen and Hilt both testified to their respective roles in the stop. In addition, the video of the stop was played for the jury in its entirety. At trial, Trooper Driesen testified, without objection, to the conversations he had with White after White had been arrested. This testimony included the following about the purchasing of the marijuana:

> Q. So you went back and talked to Mr. White and your purpose was to do what? A. Continue to build my case.
>
> Q. So what did you talk about? A. I asked them about their specific purpose for that day and asked if they had just gone to Sioux City or Le Mars to purchase marijuana.
>
> Q. What did he tell you? A. He hesitated at first. And then I explained how I found the one bag with the hard piece of compressed marijuana in the car. And then I asked, "Did you just go buy this today?" And he stated, "Yeah."
>
> Q. What happened next? A. I asked him how much he had bought and he stated a Q.
>
> Q. What does that mean? A. It's just slang for the quantity, what they purchased.
>
> Q. Did you know what he meant when he said a Q? A. I have heard it used for a–Q for a quarter. It's short for a quarter. It could have been quarter-ounce, quarter-pound. I wasn't sure yet at that point.
>
> Q. What did you do next? A. My next question to him was–I asked, "What about him?" And I was referring to Mr. Whitcanack who he had just saw me take into custody. And he stated, "No, that's it," referring to the amount of marijuana that they purchased."
>
> Q. A Q? A. A Q.
>
> Q. So what did you do then? A. I–If that was it. My next question was, "was that altogether? You purchased that altogether as a group?" And he said, "Yes."

Towards the end of Trooper Driesen's testimony, the following conversation was held outside of the presence of the jury:

> THE COURT: Okay. And I note there were no objections to those questions and answers as to what these other–what this officer or trooper asked these other defendants. Clearly hearsay, clearly a *Crawford* problem.
>
> DEFENSE COUNSEL: Yeah, because we are going to use the tape.
>
> THE COURT: Okay. I just want to make sure I'm on the same page.
>
> DEFENSE COUNSEL: Yeah. We are going to use the tape.

Defense counsel did not ask any questions to Trooper Driesen on cross examination, nor did he call any witnesses to testify. In closing arguments, defense counsel focused on the video and tried to draw distinctions between it and the in-court testimony:

> [T]he whole case is based on exaggeration, stretching the truth, stretching facts. Let's start with the first one. Don't forget Trooper Driesen testified yesterday. He claimed that Donnie White, the driver, told him that all of them went to buy marijuana. Okay. I nearly jumped out of my seat. But I tried to bite my tongue. Why? The entire video proceeding was captured on tape. Today you have seen the tape. You will have the opportunity again to watch it. I want you to pay attention to that.
>
> Officer Driesen was talking to Donnie White, asked him how much marijuana he bought. He came clean. He told him. Okay. But then when officer testified, suddenly he claimed that Donnie said all of them. That was not in the video. Again, stretching the facts.
>
> But the question now is is he a liar or trying to—what is the goal of trying to misstate the fact that is on the tape? The issue is the state of mind.

Defense counsel proceeded to argue that Trooper Driesen wanted to believe that everyone in the car was involved, and that was why Trooper Driesen unintentionally misled the jury. Defense counsel further argued that all the

evidence in the case pointed to Donnie White possessing the marijuana found in his vehicle.

The jury found Heideman guilty as charged. Heideman was sentenced to five years of incarceration on the drug tax stamp violation, suspended for three years of probation, and one year incarceration on the possession charge with all but 140 days suspended. The district court also imposed the applicable fines and surcharges. Heideman appeals.

II. Sufficiency of the Evidence.

We review challenges to the sufficiency of the evidence for the correction of errors at law, and will uphold a jury's verdict if it is supported by substantial evidence. *State v. Soboroff*, 798 N.W.2d 1, 5 (Iowa 2011). Substantial evidence is evidence that would convince a rational trier of fact the defendant is guilty beyond a reasonable doubt. *Id*. We view the evidence in the light most favorable to the State, including all legitimate inferences and presumptions that may fairly and reasonably be deduced from the record. *Id*. The evidence must at least raise a fair inference of guilt and do more than raise mere suspicions, speculation, or conjecture. *Id*. at 6.

Heideman argues there is insufficient evidence to show she possessed the marijuana. 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. *State v. Carter*, 696 N.W.2d 31, 38 (Iowa 2005).

If the controlled substance was found in a place 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*.

In determining constructive possession, we look to the following factors:

> (1) incriminating statements made by the person; (2) incriminating actions of the person upon the police's discovery of a controlled substance among or near the person's personal belongings; (3) the person's fingerprints on the packages containing the controlled substance; and (4) any other circumstances linking the person to the controlled substance.

Maxwell, 743 N.W.2d at 194. When contraband is found in a vehicle occupied by more than one person, we also consider the following additional factors:

> (1) was the contraband in plain view, (2) was it with defendant's personal effects, (3) was it found on the same side of the car seat as the defendant or immediately next to him, (4) was the defendant the owner of the vehicle, and (5) was there suspicious activity by the defendant.

State v. Atkinson, 620 N.W.2d 1, 4 (Iowa 2000). Even if some factors are present, the court is still required to determine whether all the facts and circumstances create a reasonable inference that the person knew of the presence of the controlled substance and had control and dominion over it. *Maxwell*, 743 N.W.2d at 194.

The record shows that Heideman was the sole backseat passenger. Chunks of marijuana were found directly under her feet and a package of marijuana was found directly under her seat. *Cf. State v. Cashen*, 666 N.W.2d 566, 571 (Iowa 2003) (refusing to infer possession because defendant was one of four people in the backseat, and thus did not have exclusive access to the place where the drugs were found). The marijuana on the floor under her feet was in plain view and had apparently spilled out of the plastic bag that was stored directly under where she was sitting. *See Maxwell*, 743 N.W.2d at 194 (finding the drugs were in plain view as a factor for constructive possession). A bottle of beer initially seen in the front seat at the time of the stop was found in the back seat after White was placed under arrest; thus, showing Heideman and Whitcanack were moving items in the vehicle. Concealed in her bra, Heideman possessed a marijuana pipe containing some unsmoked marijuana. Both Troopers testified that the smell of marijuana in the vehicle was strong. Trooper Driesen's testimony regarding White's statements that they bought the marijuana as a group was unrebutted evidence that Heideman was a party to joint possession of the marijuana.

Viewing the evidence in the light most favorable to the State, there is substantial evidence supporting the jury's determination that Heideman was in possession of the marijuana.

III. Ineffective Assistance of Counsel.

Heideman also argues her trial counsel was ineffective for two reasons: (1) by failing to challenge the jury instruction defining "possession," and (2) by

failing to challenge the admissibility of Trooper Driesen's testimony recounting statements made by White after being arrested as hearsay or on Confrontation Clause grounds. We review claims of ineffective assistance of counsel de novo. *State v. Rodriguez*, 804 N.W.2d 844, 848 (Iowa 2011). To succeed on her claim, Heideman must show by a preponderance of the evidence: (1) her counsel failed to perform an essential duty, and (2) prejudice resulted. *See id*. Failure to prove either element is fatal to the claim. *Lado v. State*, 804 N.W.2d 248, 251 (Iowa 2011).

Generally, we preserve ineffective assistance of counsel claims for postconviction relief proceedings. *State v. Biddle*, 652 N.W.2d 191, 203 (Iowa 2002). We do this so an adequate record of the claim can be developed and the attorney charged with providing ineffective assistance may have an opportunity to respond to defendant's claims. *Id*. However, if we determine the record is adequate, we may resolve the claims on direct appeal. *State v. Johnson*, 784 N.W.2d 192, 198 (Iowa 2010). We find the record is adequate to address Heideman's jury instruction claim.

A. Jury Instruction on Possession. The jury instruction on possession provided in this case stated:

> "Possession" includes actual as well as constructive possession, and also sole as well as joint possession.
>
> A person who has direct physical control of something on or around her person is in actual possession of it.
>
> 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.
>
> If something is found in a place which is exclusively accessible to only one person and subject to his or her dominion

> and control, you may, but are not required to, conclude that that person has constructive possession of it.
>
> If one person alone has possession of something, possession is sole. If two or more persons share possession, possession is joint.

This instruction corresponds verbatim with the former version of the uniform jury instruction on possession. *See* I Iowa Crim. Jury Instruction 200.47 (Jan. 2003). However, this jury instruction was revised in July 2005, and the current instruction provides:

> The law recognizes several kinds of possession. A person may have actual possession or constructive possession. A person may have sole or joint possession.
>
> A person who has direct physical control over a thing on [his] [her] person is in actual possession of it.
>
> A person who, although not in actual possession, has both the power and the intention at a given time to exercise dominion or control over a thing, either directly or through another person or persons, is in constructive possession of it. A person's mere presence at a place where a thing is found or proximity to the thing is not enough to support a conclusion that the person possessed the thing.
>
> If one person alone has actual or constructive possession of a thing, possession is sole. If two or more persons share actual or constructive possession of a thing, possession is joint.
>
> Whenever the word "possession" has been used in these instructions, it includes actual as well as constructive possession and sole as well as joint possession.

See I Iowa Crim. Jury Instruction 200.47.

Heideman points to two differences between the former and current uniform jury instructions to argue error in this case. First, Heideman argues that the former instruction misstates the law because it allows actual possession when a person has direct physical control of something "around" them. Second, Heideman argues the former instruction does not include the second sentence in paragraph three providing, "A person's mere presence at a place where a thing is

found or proximity to the thing is not enough to support a conclusion that the person possessed the thing."

The district court is not required to use uniform jury instructions. *State v. Harrington*, 284 N.W.2d 244, 250 (Iowa 1979); *State v. Holtz*, 548 N.W.2d 162, 164 (Iowa Ct. App. 1996). Rather, "the district court may phrase the instructions in its own words as long as the instructions given fully and fairly advise the jury of the issues it is to decide and the applicable law." *State v. Scalise*, 660 N.W.2d 58, 64 (Iowa 2003).

The jury was adequately instructed as to possession. As stated above, there was sufficient evidence for the jury to determine that Heideman had possession of the marijuana. *See State v. Vance*, 790 N.W.2d 775, 784 (Iowa 2010) (stating actual possession may be shown by circumstantial evidence showing that a person at one time had actual possession of the contraband). Trooper Driesen's testimony as to White's admissions was also unrebutted evidence of joint possession.

B. Hearsay. The State concedes that Trooper Driesen's testimony regarding the statements made by White while under arrest could have been found inadmissible as hearsay or as a violation of the Confrontation Clause. However, the State contends we should nonetheless affirm because trial counsel clearly made a strategic decision in allowing in the testimony.

> The fact that a particular decision was made for tactical reasons does not, however, automatically immunize the decision from a Sixth Amendment challenge. That decision must still satisfy the ultimate test: whether under the entire record and totality of circumstances counsel performed competently.

State v. Ondayog, 722 N.W.2d 778, 786 (Iowa 2006) (quotations omitted). "Because '[i]mprovident trial strategy, miscalculated tactics, and mistakes in judgment do not necessarily amount to ineffective assistance of counsel,' postconviction proceedings are often necessary to discern the difference between improvident trial strategy and ineffective assistance." *Id*. (quoting *State v. McKettrick*, 480 N.W.2d 52, 55 (Iowa 1992)). We believe this issue should be preserved for possible postconviction relief proceedings where the record can be more fully developed.

IV. Conclusion.

We find the district court did not err in its jury instruction defining "possession," and that substantial evidence supports the jury's finding that Heideman possessed the marijuana found in the vehicle. Accordingly, we affirm Heideman's convictions and sentence. However, we preserve for possible postconviction relief proceedings defendant's claim that counsel was ineffective for failing to object to certain hearsay evidence.

AFFIRMED.

Tabor, J., concurs; Danilson, P.J., concurs specially.

DANILSON, P.J. (concurring specially)

I agree with the majority in all respects except one. I specially concur because I believe the instruction given to the jury that defines actual and constructive possession misstates the current state of law. Specifically, the instruction muddles the distinction between actual and constructive possession and permitted the jury to conclude Heideman had actual possession simply because the marijuana was "around her person." Actual possession requires the substance to be found *on* the defendant's person. *See State v. Maxwell*, 743 N.W.2d 185, 193 (Iowa 2008). The instruction also did not explain that "constructive possession cannot rest simply on proximity to the controlled substance." *Id*. at 194.

However, Heideman has not shown that she was prejudiced. *See Foster v. State*, 378 N.W.2d 713, 721 (Iowa Ct. App. 1985) (noting that even when a jury instruction incorrectly states the law, the defendant must still prove prejudice to prevail on a claim of ineffective assistance counsel). Here, counsel's failure to object to the erroneous jury instruction does not undermine my confidence in the outcome of the case. Heideman had a marijuana pipe in her bra, marijuana near her feet as she sat in the backseat alone, marijuana under her seat, the smell of marijuana all around her in the vehicle, a nervous appearance, and video evidence against her that portrayed her as one of the purchasers of a quarter pound of marijuana. These facts support constructive possession under the current state of the law. *See Maxwell*, 743 N.W.2d at 193 (reciting factors to consider to determine constructive possession in a vehicle); *State v. Cashen*,

666 N.W.2d 566, 569 (Iowa 2003) (observing constructive possession exists where the defendant has knowledge of the presence of the drugs and had dominion and control over them). Accordingly, I too would affirm.