**IN THE COURT OF APPEALS OF IOWA**

No. 2-259 / 11-0868
Filed May 9, 2012

**STATE OF IOWA,**
Plaintiff-Appellee,

**vs.**

**DARRELL RASEAN RATLIFF,**
Defendant-Appellant.

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Appeal from the Iowa District Court for Scott County, Nancy S. Tabor, Judge.

Darrell Ratliff appeals his convictions of possession with intent to deliver (Ecstasy), possession with intent to deliver (crack cocaine), and two counts of failure to affix a drug tax stamp. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Stephan J. Japuntich, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Martha E. Trout, Assistant Attorney General, Michael J. Walton, County Attorney, and Kelly G. Cunningham, Assistant County Attorney, for appellee.

Considered by Vogel, P.J., and Potterfield and Doyle, JJ. Tabor, J., takes no part.

**VOGEL, P.J.**

Darrell Ratliff appeals his convictions of possession with intent to deliver (Ecstasy), possession with intent to deliver (crack cocaine), and two counts of failure to affix a drug tax stamp. Because we agree with the district court that the State presented sufficient evidence to deny Ratliff's motion for judgment of acquittal and that the jury's findings are supported by substantial evidence in the record, we affirm. Further, Ratliff failed to prove trial counsel was ineffective.

## I. Background Facts and Proceedings

On April 9, 2010, two Davenport police officers in an unmarked vehicle, with the windows down, drove onto Beiderbecke Drive, then into a public parking area. As they passed a maroon Oldsmobile, the officers detected an order of burning marijuana. The officers exited their vehicle and initiated contact with Darrel Ratliff and Clifton Hare,[1] who were standing at the rear of the Oldsmobile. Ratliff was then observed walking toward the front of the car, kneeling down, bending forward, and making a motion that indicated he was discarding something. Recovered from the ground underneath the front, passenger-side bumper of the vehicle were a clear plastic bag containing twenty-five colored pills and another clear plastic bag—inside the first—containing a white, rock-like substance.

On May 19, 2010, Ratliff was charged by trial information with Count 1: possession with intent to deliver a schedule one controlled substance (Ecstasy)[2]

[1] As there was a passenger, Rickey Hare, with the same last name as Clifton Hare, we will refer to each by their first names.

[2] Defined by Iowa Code section 124.204(4)(z) as "3.4-methylenedioxymethamphetamine (MMDA)."

in violation of Iowa Code sections 124.401(1)(c)(8), 124.204(4)(z),[3] and 703.1 (2009); Count 2: possession with intent to deliver a schedule two controlled substance (crack cocaine) in violation of Iowa Code sections 124.401(1)(c)(3), 124.206(2)(d), and 703.1; Count 3: failure to affix a drug tax stamp (as to the Ecstasy) in violation of Iowa Code sections 453B.1(3)(d), 453B.3, 453B.7(4), 453B.12, and 703.1; and Count 4: failure to affix a drug tax stamp (as to the crack cocaine) in violation of Iowa Code sections 453B.1(3)(d), 453B.3, 453B.7(4), 453B.12, and 703.1. A trial was held April 4 to 6, 2011. Ratliff moved for judgment of acquittal, which was denied. The jury returned guilty verdicts on all counts. Ratliff appeals.

## II. Standard of Review

We review sufficiency-of-the-evidence claims for correction of errors at law. *State v. Brubaker*, 805 N.W.2d 164, 171 (Iowa 2011).

> We will uphold a verdict if it is supported by substantial evidence. When a rational fact finder is convinced by the evidence that the defendant is guilty beyond a reasonable doubt, the evidence is substantial. The evidence is reviewed in the light most favorable to the State, and all of the evidence presented at trial, not just evidence that supports the verdict, is considered. However, it is the State's burden to prove every fact necessary to constitute the crime with which the defendant is charged, and the evidence presented must raise a fair inference of guilt and do more than create speculation, suspicion, or conjecture.

*Id.* (internal citation omitted). "In assessing the sufficiency of the evidence, we find circumstantial evidence equally as probative as direct." *State v. Meyers*, 799 N.W.2d 132, 138 (Iowa 2011).

[3] This was amended at trial from Iowa Code section 124.401(4)(z) to Iowa Code section 124.204(4)(z).

Our review of a claim of ineffective assistance of counsel is de novo. *Brubaker*, 805 N.W.2d at 171.

### III. Sufficiency of the Evidence

Ratliff asserts the district court erred in overruling his motion for judgment of acquittal, as the evidence failed to prove he was in knowing possession of the contraband. He further claims the State's failure to test ten or more dosage units of the pills undermines the State's theories of possession with intent to deliver and drug tax stamp violations.[4]

#### A. Possession of Controlled Substances

The State has the burden of proving "every fact necessary to constitute the crime with which the defendant is charged, and the evidence presented must raise a fair inference of guilt and do more than create speculation, suspicion, or conjecture." *Id.* "Because it is difficult to prove intent by direct evidence, proof of

[4] The State claims Ratliff only preserved error as to the drug tax stamp violation as it pertained to the Ecstasy. In order to preserve error for appellate review, a motion for judgment of acquittal must "make reference to the specific elements of the crime on which the evidence was claimed to be insufficient." *State v. Williams*, 695 N.W.2d 23, 27 (Iowa 2005). An exception to this general error-preservation rule is that error is preserved "when the record indicates the grounds for a motion were obvious and understood by the trial court and counsel." *Id.* at 27–28.

Ratliff specifically stated possession was not proven with respect to the charge of possession with intent to deliver the Ecstasy. This claim was therefore preserved. The State is correct that Ratliff's possession with intent to deliver charge as it pertained to crack cocaine did not reference any specific element of the crime charged. One of the fighting issues in this case, however, was whether Ratliff possessed the crack cocaine. Under the exception to the general error-preservation rule, we find error was preserved because the State addressed the elements of possession in response to the motion for judgment of acquittal—demonstrating an understanding that this element was challenged as not being supported by sufficient evidence. Additionally, the district court ruled that there was sufficient evidence to support a conviction for possession with intent to deliver—also indicating an understanding that possession was at issue. Because the record indicates the grounds for the motion were "obvious and understood by the trial court and counsel," as they pertained to possession of the crack cocaine, we conclude error was preserved on this charge. *Id.* at 27.

intent usually consists of circumstantial evidence and the inferences that can be drawn from that evidence." *State v. Adams*, 554 N.W.2d 686, 692 (Iowa 1996).

A person has constructive possession of a controlled substance when the person "has knowledge of the presence of the controlled substance and has authority or right to maintain control of it." *State v. Maxwell*, 743 N.W.2d 185, 193 (Iowa 2008). "Constructive possession is recognized by inferences," but "cannot rest simply on proximity to the controlled substance." *Id.* at 193–94 (internal citation omitted).

> When a person has not been in exclusive possession of the premises where the drugs were located, several factors are considered when determining whether the person had constructive possession of the controlled substance. These factors include: (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. . . . 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.

*Id.* at 194 (internal citation omitted).

At trial, Davenport Police Officer Nicholas Shorten testified that he was on duty the night of April 9, 2010, with Corporal Andrew Harris, who was driving their unmarked squad car. Shorten recalled the windows in their squad car were down and as they proceeded down Biederbecke Drive, there were several cars parked in the public parking lot that borders a playground area. A maroon Oldsmobile was among the cars parked in the lot. Shorten explained that as he and Harris drove through the parking lot, where two individuals were standing

next to the rear bumper of the Oldsmobile, he noticed an odor of burnt marijuana and told Harris to stop the vehicle.

Before Shorten got out of the squad car, the two men had already started to walk away. When Shorten told the two men he needed to talk to them and asked the men to come toward the squad car, both men continued to walk away. Shorten again asked them to stop. At that time, Clifton turned back toward Shorten and asked what Shorten wanted and what his probable cause was. Clifton remained stationary, just outside the driver's-side passenger door. Shorten explained that Ratliff, however, turned to round the front of the Oldsmobile and once he was there, Ratliff "knelt slightly and bent forward and did a motion like this, but I could not see his hands, so I could not see if anything came out of it or not." Shorten testified, however, that he believed Ratliff had discarded something under the car.

At that point, Shorten moved close to Ratliff, took control of Ratliff's right arm, and led Ratliff to the rear of the squad car. Shorten further testified that no one else was in front of the Oldsmobile when he observed Ratliff move to the front of the vehicle, bend over, and engage in a tossing motion. Shorten performed a pat down search based on the detection of marijuana odor, but found no weapons or contraband on Ratliff. As Shorten dealt with Ratliff, Harris tended to Clifton.

Meanwhile, the passenger in the front seat of the Oldsmobile, Rickey Hare, got out of the vehicle. Shorten explained that with Rickey in full sight, he began walking toward Rickey, telling him to get back in the vehicle. Rickey, however, had stepped around to the side of the door, which was still open; at that

point, Shorten testified that he "caught up with [Rickey] and stopped him." Upon making contact with Rickey, Shorten observed Rickey was intoxicated and placed him under arrest for public intoxication. Rickey was then escorted to the back of the squad car. Shorten explained that Ratliff remained at the rear of the squad car while he addressed the situation with Rickey. After back-up assistance arrived, the two females, who were in the backseat of the Oldsmobile, were escorted out of and away from the vehicle.

With all five individuals removed from the vehicle and the surrounding area, Shorten searched the interior of the vehicle while Harris searched the exterior. Shorten found a can of malt liquor and a bottle of alcohol inside the vehicle. Under the front, passenger-side bumper of the vehicle, Harris observed a clear plastic bag containing pills of different colors and another clear plastic bag—inside the first—containing a white, rock-like substance. When Harris informed Shorten of his discovery, Shorten told Harris about his observations of Ratliff's movements when they first encountered him. Shorten also observed the clear plastic bag and its contents on the ground under the passenger-side bumper.

Shorten testified that throughout the duration of his and Harris's encounter with the five individuals, no one but Ratliff had been in front of the Oldsmobile. Shorten also explained that although Rickey had exited the front passenger door, Rickey would not have been able to throw the clear plastic bag to the location where it was found under the vehicle because the tire would have blocked it. Shorten further opined that the quantity of cocaine seized was consistent with a quantity for delivery, not personal use.

Once the interior and exterior searches of the Oldsmobile were completed and the evidence collected, Shorten advised Ratliff he was under arrest for possession with intent to deliver. Shorten recalled that when he advised Ratliff that he was under arrest, Ratliff commented that "it wasn't his and nobody saw [him] throw it there."

Corporal Harris testified that once he stopped the squad car in the parking lot after he and Shorten detected an odor of burning marijuana, he and Shorten exited the squad car and moved toward Ratliff and Clifton. He testified Clifton stopped near the rear quarter panel of the driver's side, but Ratliff continued toward the front of the Oldsmobile. From that point forward, Harris stated he focused his attention on Clifton, while Shorten followed Ratliff, especially noting hand movements,

> because in training, from the first day of the academy, we're instilled on us that the hands are—to control the hands and make sure we can observe what [is] in their hands at all times because their hands can hurt us.

Harris explained that in watching Clifton, Clifton never made any motions with his hands, never threw anything, and never bent over and tossed anything under the vehicle. Harris also explained that when Rickey exited the vehicle, Shorten prevented him from proceeding towards the front of the vehicle.

With respect to the exterior search of the vehicle, Harris stated, "It's been my experience as a police officer for several years that at times people involved have discarded contraband underneath the vehicle or around the vehicle." Harris further explained, "Due to Mr. Ratliff's behavior from the time that we initially made contact with him, the way that he continued moving towards the front of the

bumper, absolutely I wanted to check that area and the whole exterior around the vehicles to make sure that nothing was discarded." Upon finding the clear plastic bag on the ground beneath the front, passenger-side bumper of the Oldsmobile, Harris immediately notified Shorten of his discovery.

Kelli Bodwell, a criminalist with the Iowa Division of Criminal Investigation Laboratory, performed laboratory testing on the contents of the seized bag. Bodwell testified that of the twenty-five pills submitted for testing, eight were orange with a rabbit logo, seven were blue with a transformer logo, seven were pink with a logo of two people sitting back-to-back, and three were green with a partially-bitten apple logo. Bodwell stated that based on her experience, a visual inspection indicated that the pills were consistent with Ecstasy pills. Bodwell then described the three tests she performed on four of the pills—one from each color grouping—and stated the results of each test matched the standard for Ecstasy. Bodwell also weighed the white "rock substance," which had a net weight of 4.02 grams. Bodwell explained the four tests she used to test the substance, which she determined was crack cocaine.

Sergeant Kevin Smull of the Davenport Police Department's vice and narcotics unit testified that people involved in the distribution of Ecstasy would have multiple pills—seven to fifteen for a low-level dealer. He stated that there were twenty-five Ecstasy pills recovered in this case and that the "sheer number is not user weight. It is for distribution." He also stated that 4.02 grams of crack cocaine was recovered, which could be broken down into approximately forty rocks of about one-tenth to two-tenths of a gram each, and would cost about

twenty-dollars each. Smull concluded that the sheer weight of the crack cocaine recovered was also indicative of distribution.

At the close of the State's evidence, Ratliff moved for judgment of acquittal. The district court overruled the motion, finding there was sufficient evidence for the jury to convict Ratliff of possession with intent to deliver, and that testing of the Ecstasy comported with "customary and regular practice in the industry" and that a directed verdict on the drug stamp tax violation would not be granted. On our review, we find the evidence clearly placed only Ratliff in close proximity to the contraband that was found. Coupled with his observed body movements, indicating the discarding of some object under the car, and all other evidence in the record, we conclude the factors needed to prove constructive possession were met. There was substantial evidence in the record to support Ratliff had "knowledge of the presence of the controlled substance" and "authority or right to maintain control of [the controlled substance]." *See Maxwell*, 743 N.W.2d 185, 193 (Iowa 2008). For these reasons, Ratliff's motion for judgment of acquittal was appropriately denied and the jury's findings were supported by substantial evidence. *See State v. Enderle*, 745 N.W.2d 438, 443 (Iowa 2007) (stating when jury's findings are binding on appeal); *see also Meyers*, 799 N.W.2d at 138 (explaining "circumstantial evidence is equally as probative as direct"). We therefore affirm as to this issue.

**B. Drug Tax Stamp**

Ratliff further alleges the State failed to prove he was in possession of ten or more dosage units of Ecstasy for purposes of the drug tax stamp charge (Count 3). Ratliff contends that Bodwell's testing of only four of the twenty-five

pills did not amount to proof beyond a reasonable doubt. The State responds it proved the pills were in fact Ecstasy based on testing a representative sample—one pill of each color. Our supreme court has recognized that, "for a person to be convicted of a drug offense, the State is not required to test the purported drug. The finder of fact is free to use circumstantial evidence to find that the substance is an illegal drug." *Brubaker*, 805 N.W.2d at 172 (internal citation omitted).

Bodwell testified regarding the appearance of the pills as consistent with Ecstasy and that four of the twenty-five pills tested—one from each of the four color groupings—yielded test results consistent with Ecstasy. Based on the record, it appears the four pills tested were selected at random once divided into groupings based on color. Four of the four pills tested—or one-hundred percent—were consistent with Ecstasy. Based on this direct evidence, the jury could have concluded that at least six of the remaining twenty-one pills that were untested would have been consistent with the four pills that were tested—and therefore would have produced consistent test results for Ecstasy in ten dosage units, as required under Iowa Code section 435B.1(3)(d). We therefore conclude that based on the direct evidence presented by the State, the jury could have concluded that at least ten of the twenty-five pills were Ecstasy. We affirm as to this issue.

**IV. Ineffective Assistance of Counsel**

Ratliff contends trial counsel was ineffective for failing to request a corroboration instruction for his statement to Shorten "that it wasn't his and

nobody saw him throw it there."[5] To prove ineffective assistance of counsel Ratliff must establish his counsel (1) failed to perform an essential duty and (2) prejudice resulted from such failure. *See State v. Utter*, 803 N.W.2d 647, 652 (Iowa 2011) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984)). Ratliff must prove both elements by a preponderance of the evidence. *See id.* (Iowa 2011). A claim of ineffective assistance of counsel may be disposed of if the defendant fails to prove either prong. *State v. Stewart*, 691 N.W.2d 747, 750 (Iowa Ct. App. 2004).

"To establish prejudice, a defendant must prove a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *State v. Lyman*, 776 N.W.2d 865, 878 (Iowa 2010). To establish a "reasonable probability that the result would have been different," Ratliff "need only show that the probability of a different result is sufficient to undermine confidence in the outcome." *Id.* Ratliff asserts that Shorten's observation of Ratliff bending down in front of the car was insufficient to corroborate Ratliff's admission and that he "would have been acquitted had the appropriate instruction been given." Ratliff's claim must fail because he has not proven by a preponderance of the evidence that had trial counsel requested a corroborating instruction, there was a reasonable probability that the result of the proceeding would have been different. *See id.* Instead, he makes a blanket assertion that he would have been acquitted. This is not enough to demonstrate

[5] Although on appeal the State questions whether this was a "confession" requiring "other proof" under Iowa Rule of Criminal Procedure 2.21(4), it rightly concedes that it was characterized by the State at trial as an "admission", a "recognition," and an "acknowledge[ment]" of what Ratliff had done.

prejudice. Moreover, in division III of this opinion, we recognized evidence from which the jury could have found that Ratliff tossed the clear plastic bag containing contraband underneath the car. Given this evidence, we think there is no reasonable probability that the result of the proceedings would have been different had the district court given a corroboration instruction. We therefore conclude Ratliff has failed to prove the prejudice prong of his ineffective-assistance-of-counsel claim. Because the claim lacks the necessary prejudice, "we can decide the case on the prejudice prong of the test without deciding whether the attorney performed deficiently." *See Maxwell*, 743 N.W.2d at 196. For this reason, Ratliff's ineffective-assistance-of-counsel claim must fail.

**AFFIRMED.**