

IN THE COURT OF APPEALS OF IOWA

No. 2-796 / 11-1620
Filed October 31, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ROBERT OWEN HUGHES III,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, James C. Bauch, Judge.

Robert Hughes appeals his conviction for possession of a controlled substance. **AFFIRMED.**

Patricia M. Hulting, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Elisabeth S. Reynoldson, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Brian J. Williams, Assistant County Attorney, for appellee.

Considered by Eisenhauer, C.J., and Doyle and Tabor, JJ.

TABOR, J.

Robert Hughes appeals from his conviction for possessing cocaine as an habitual offender. He claims insufficient proof of his dominion and control over the crack pipe containing the controlled substance. He also contends trial counsel was ineffective in allowing peace officers to testify he did not deny ownership of the pipe.

On the question of substantial evidence, a reasonable jury could find credible support in the record for Hughes's constructive possession of the pipe. On the ineffective-assistance-of-counsel claim, Hughes cannot show a reasonable probability he would have been acquitted if counsel had successfully objected to comments about his postarrest silence. Accordingly, we affirm.

I. Background Facts and Proceedings.

In the early morning hours of March 30, 2011, police officers arrived at a Waterloo home to serve an arrest warrant on Hughes. Hughes's girlfriend, Linda Phillips, answered the door and led the officers to the bedroom where Hughes was sleeping. No one else was in the bedroom.

While waiting for Hughes to put on some clothes, the officers noticed an ashtray on the dresser—within a couple feet of the bed. Inside the ashtray, the officers saw a glass pipe of the sort used to smoke crack cocaine. Subsequent testing revealed the presence of cocaine residue in the pipe.

The officers arrested Hughes for possession of crack cocaine. He was already on probation for possession of a controlled substance, second offense. Phillips testified Hughes had used the pipe to smoke crack in the bedroom earlier

on the evening of his arrest. Phillips denied smoking crack cocaine herself and testified that a drug conviction would endanger her long-time employment as a child-care provider.

At trial, the prosecutor asked Officer Joe Zubak if Hughes denied ownership of the pipe. Officer Zubak stated, “No.” On cross-examination, Hughes’s attorney asked the officer if Hughes had claimed ownership of the pipe, and Officer Zubak testified: “[H]e never said, ‘This is mine.’”

Officer Matt McGeough testified that while being transported to the jail, Hughes asked if they could just “forget about” finding the crack pipe. On cross-examination, the following exchange took place:

Q. Okay, he didn’t say anything, “Well, that’s not mine anyways?” A. No. He—as far as from my perspective, it was pretty clear it was his. He wasn’t denying it. He wanted us to overlook it. There was no, “Hey, that’s not mine. There’s no reason to talk to you, because it was not mine,” anything like that you see.

Hughes moved for judgment of acquittal, arguing there was insufficient evidence to prove he was in constructive possession of the crack pipe. The district court denied the motion, finding sufficient evidence existed to present a jury question. Hughes did not testify.

During closing arguments, the prosecutor summarized the evidence for the jury, including the officers’ testimony that Hughes did not deny the crack pipe was his, instead asking the officers: “Can’t you just forget it? Can’t you overlook finding this crack pipe?” In the defense closing, counsel questioned the Officer McGeough’s testimony that he believed the crack pipe belonged to Hughes based on “his lack of denial”—accusing the officer of “selective hearing.”

The jury found Hughes guilty of possession of a controlled substance, crack base, in violation of Iowa Code section 124.401 (2011). In a separate hearing, Hughes stipulated it was his third offense, in violation of section 124.401(5), and he was an habitual offender, in violation of sections 902.8 and 902.9. The court denied Hughes's post trial motions and sentenced him to an indeterminate fifteen-year sentence. Hughes filed a timely notice of appeal.

II. Sufficiency of the Evidence.

Hughes contends the State failed to offer sufficient evidence to convict him of possession of a controlled substance. Proof of possession means showing the defendant exercised dominion and control over the contraband, had knowledge of its presence, and had knowledge of its nature. *State v. Maxwell*, 743 N.W.2d 185, 193 (Iowa 2008).

We review sufficiency challenges for corrections of errors at law. *State v. Meyers*, 799 N.W.2d 132, 138 (Iowa 2011). In reviewing the sufficiency of the evidence, we draw all fair and reasonable inferences that may be deduced from the evidence and view the proof in the light most favorable to the verdict. *Id.* Evidence is substantial if it would convince a rational fact finder the defendant is guilty beyond a reasonable doubt. *Id.*

The fighting issue in this appeal is whether Hughes constructively possessed the pipe found on the dresser. Because Hughes was not in exclusive control of the premises, we cannot infer possession. See *State v. Dewitt*, 811 N.W.2d 460, 474 (Iowa 2012).

We consider several factors in determining whether a person has constructive possession of a controlled substance:

(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. Proximity to the drugs, while relevant, is not sufficient standing alone to prove constructive possession. See *id.* at 193-94.

Here, the jury heard testimony Hughes was found sleeping in a bedroom with the crack pipe in plain sight on top of a dresser several feet from the bed. The critical testimony came from Phillips, who told the jury Hughes was smoking crack from the pipe the same evening as his arrest. She denied using the crack pipe herself. Lab testing revealed the presence of cocaine residue in the pipe.

Hughes argues Phillips had a motive to lie about his drug use. Phillips worked at a daycare for twenty years and could have lost her job if convicted of possession of a controlled substance. He points out she jointly possessed the bedroom. Hughes argues police testimony regarding his failure to deny possession of the pipe improperly bolstered Phillips's credibility.

Except in circumstances where a witness's testimony is absurd, impossible, or self-contradictory, witness credibility is for the fact finder to decide. *State v. Neitzel*, 801 N.W.2d 612, 624 (Iowa 2011). The jury is free to believe or disbelieve a witness's testimony and to gauge how much weight the evidence deserves. *State v. Hunt*, 801 N.W.2d 366, 377 (Iowa 2011). The jury was entitled to believe Phillips's testimony linking Hughes to the crack pipe. The jury

also could infer Hughes possessed the pipe from his request that the officers “overlook” its presence. On this record, we will not disturb the guilty verdict.

III. Ineffective Assistance of Counsel.

Hughes also contends his trial counsel provided ineffective assistance. We review such constitutional claims de novo. *State v. Rodriguez*, 804 N.W.2d 844, 848 (Iowa 2011). To succeed, Hughes must show by a preponderance of the evidence that counsel failed to perform an essential duty, and prejudice resulted. *See id.* We can affirm if Hughes fails to prove either element. *See id.* Although we often preserve claims of ineffective assistance of counsel for postconviction relief proceedings, we will consider these claims on direct appeal when the record is adequate. *State v. Henderson*, 804 N.W.2d 723, 725 (Iowa 2011).

On the duty prong, Hughes must show his attorney committed errors so serious that he was not functioning as “counsel” guaranteed by the Sixth Amendment. *See State v. Lyman*, 776 N.W.2d 865, 878 (Iowa 2010). Counsel’s performance is measured objectively, considering all the circumstances, to determine if it was reasonable under prevailing professional norms. *Id.* “[T]here is a strong presumption that trial counsel’s conduct fell within the wide range of reasonable professional assistance.” *Id.*

“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.’” *Id.* (quoting *Strickland v. Washington*, 466 U.S. 668, 694

(1984)). The defendant must show the probability of a different result is sufficient to undermine confidence in the outcome. *Id.*

In this case, Hughes targets his trial counsel's failure to object to testimony from Officer Zubak that Hughes did not deny ownership of the pipe. He also highlights cross-examination testimony from Officer McGeough that Hughes "wasn't denying it." On appeal, Hughes asserts the testimony qualifies as impermissible comment on his postarrest silence.¹

"The right of an accused to remain silent without fear of being chided at trial for doing so is clearly a fundamental right." *State v. Porter*, 283 N.W.2d 351, 352-53 (Iowa 1979). It is grounded in the Fifth Amendment, which applies to the states through the Fourteenth Amendment of the United States Constitution. *Id.* at 352. The Fifth Amendment's guarantee against self-incrimination prohibits impeachment on the basis of a defendant's silence after receipt of *Miranda* warnings. *Doyle v. Ohio*, 426 U.S. 610, 618 (1976). Commenting on a defendant's postarrest, post-*Miranda* silence at trial is fundamentally unfair and violates due process. *Id.* "A statement is deemed to be an impermissible reference to defendant's silence if either (1) the prosecutor manifestly intended to refer to the defendant's silence, or (2) the jury would 'naturally and necessarily' interpret the statement to be a reference to the defendant's silence." *State v. Hutchinson*, 341 N.W.2d 33, 39 (Iowa 1983).

¹ It is not stated on the record that the officers advised Hughes of his right to remain silent under *Miranda v. Arizona*, 384 U.S. 436 (1966). Accordingly, it is not clear that the comments highlighted Hughes's post-*Miranda* silence.

Defense counsel did not object when the prosecutor elicited testimony from Officer Zubak that Hughes did not disclaim the pipe containing the residue. In cross-examining Officer McGeough, counsel also solicited testimony that Hughes never denied ownership of the pipe. Counsel mentioned this testimony in the defense closing argument.

The State posits defense counsel may have had strategic reasons for his conduct: “Defense counsel could have reasonably determined that objecting would plant in the jurors’ minds the notion that there was more to Hughes’ silence than met the eye.” Improvident trial strategy, miscalculated tactics, and mistakes in judgment do not necessarily amount to ineffective assistance of counsel. *State v. Ondayog*, 722 N.W.2d 778, 786 (Iowa 2006). To discern the difference between improvident trial strategy and ineffective assistance of counsel, postconviction proceedings are often necessary to develop the record. *Id.*

But even assuming counsel’s performance was deficient, Hughes has not shown a reasonable probability the jurors would have voted to acquit had they not heard the comments on his silence. As discussed above, the State presented persuasive evidence from Phillips that the pipe belonged to Hughes. The case turned on the jury’s assessment of her credibility. References in the record that Hughes neither denied possession of the pipe nor outright claimed ownership of it did not loom large in the overall case against him. Because Hughes is unable to show he was prejudiced by counsel’s performance, we affirm.

AFFIRMED.