IN THE COURT OF APPEALS OF IOWA

No. 6-316 / 05-1102
Filed June 14, 2006

STATE OF IOWA,
Plaintiff-Appellee,

vs.

LEE ALLEN EMERY,
Defendant-Appellant.

Appeal from the Iowa District Court for Warren County, Darrell Goodhue, Judge.

Lee Allen Emery appeals his conviction and sentence for conspiracy to deliver marijuana and drug tax stamp violation. **CONVICTIONS AFFIRMED; SENTENCE VACATED IN PART.**

Linda Del Gallo, State Appellate Defender, and Theresa R. Wilson, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, Gary Kendell, County Attorney, and Douglas A. Eichholz, Assistant County Attorney, for appellee.

Considered by Mahan, P.J., and Hecht and Eisenhauer, JJ.

MAHAN, P.J.

Lee Allen Emery appeals his conviction and sentence for conspiracy to delivery marijuana, in violation of Iowa Code sections 124.401(1)(d) and 124.411 (2003), and drug tax stamp violation, in violation of sections 453B.3 and 453B.12. We affirm the convictions and vacate a surcharge imposed as a part of the sentence.

I. Background Facts and Proceedings

In January 2005 Michael Belieu made two controlled buys of marijuana from Doug Jensen at Jensen's residence, under the supervision of Detective Dan Defenbaugh of the Mid-Iowa Narcotics Enforcement and Drug Task Force.[1] On January 31 the detective had Belieu arrange a third controlled buy of five pounds of marijuana from Jensen. Belieu called Jensen and asked if he could get the marijuana; Jensen told Belieu he thought he could. Shortly thereafter, Jensen and his friend Jimmy Johnson spoke on the phone; Jensen asked if Johnson could provide the marijuana.

Defendant Lee Emery and Johnson had spent the afternoon together, and Johnson had used Emery's cell phone during the day. Emery was with Johnson during the initial phone conversation between Jensen and Johnson. Johnson kept Emery's cell phone when Emery left to run errands in the late afternoon. When Emery realized he did not have his phone with him, he called the number. Johnson answered, and Emery told Johnson he would be by to pick up the phone.

[1] In exchange for his cooperation and testimony, Belieu received sentencing concessions on pending drug charges.

At approximately 6:00 p.m., Jensen called Johnson to check the status of the marijuana delivery. Johnson told Jensen he would bring the marijuana to Jensen's house in half an hour. When Jensen told Johnson not to bring anyone with him, Johnson replied that Emery would be with him. Jensen told Belieu that Johnson and Emery would be bringing the marijuana. Detective Defenbaugh ordered the execution of a search warrant for Jensen's residence upon the arrival of persons delivering the marijuana.

Johnson and Emery arrived at Jensen's house at approximately 6:30 p.m. Johnson carried a large clear plastic bag containing several smaller bags of marijuana to the door. Jensen quickly ushered Johnson inside, and Johnson waved at Emery, who entered about thirty seconds later. Johnson and Jensen went to the pool room in the basement, where Jensen placed the bag of marijuana on the floor in a corner. Emery went upstairs with Jensen's wife to get an antacid and then went downstairs to the pool room.

Less than five minutes after Johnson and Emery arrived, officers entered Jensen's home with a search warrant. The officers encountered Jensen first, then found Emery and Johnson and the large bag of marijuana in the basement.[2] The detective could smell the bag of marijuana and noticed a strong odor of marijuana throughout the house. Jensen told the detective he had intended to sell the marijuana to Belieu and that Johnson and Emery had delivered it. Johnson later told the detective that Emery had nothing to do with the delivery.

[2] Testing later determined the bags contained more than 42.5 grams of marijuana. There was no drug tax stamp attached.

Officers searched Emery's car and found hand scales and a pair of pliers with residue, items associated with marijuana use, in the driver's door pocket. A drug dog indicated the presence of drugs along the front passenger seat of Emery's car. Officers arrested Emery, Johnson, and Doug and April Jensen.

The State filed a joint trial information charging Emery, Johnson and Doug and April Jensen with conspiracy to deliver less than fifty kilograms of marijuana, in violation of Iowa Code section 124.401(d), and a drug tax stamp violation, in violation of sections 453B.3 and 453B.12. At Emery's trial, the State amended its trial information to include an enhancement as a second or subsequent offender in violation of section 124.411.

Emery's jury trial commenced in April 2005. According to the defense, Emery had no knowledge of or involvement in the marijuana deal; he was merely giving Johnson a ride, as he had done many times in the past. Emery and Johnson have been friends since high school, seven or eight years ago, and they talk every day. Johnson has no driver's license and no car and lives with his sister approximately six blocks from Jensen's residence. Johnson often uses Emery's cell phone because his sister does not have a telephone at her house.

Johnson and Emery testified that Emery did not hear Johnson's conversation with Jensen on the day of the arrests. Johnson testified he placed the clear plastic bag of marijuana in the back seat of Emery's car so Emery would not see it. According to Johnson, the bag did not smell like marijuana.

Johnson further testified he never discussed the marijuana deal with Emery because he did not want Emery to know what was happening. Johnson knew Emery was on parole and wanted to keep Emery from getting into trouble.

Johnson did not think Emery would have given him a ride if he had known about the drugs. Johnson testified the State withdrew a plea agreement offer because he refused to testify against Emery.

Emery testified he did not speak with Jensen about marijuana and that Johnson did not mention he was delivering marijuana to Jensen. He realized Johnson still had his cell phone while picking up his children. It was not the first time Johnson had kept his phone. Emery was in a hurry when he returned to pick up his cell phone from Johnson, but agreed to give him a quick ride. He denied seeing or smelling the bag of marijuana at any time before the police carried it out of the Jensen's house. He did not remember Johnson putting anything in or getting anything out of the backseat of the car. He had just gone downstairs to tell Johnson he was leaving when officers arrived. He had no idea why the drug dog had indicated on the front seat of his car and denied knowing the scales were in his car.

The jury found Emery guilty of both charges. Emery stipulated to his status as a second or subsequent offender. The district court overruled Emery's motion for new trial and sentenced him to indeterminate terms of imprisonment not to exceed five years on each count and ordered the sentences to run consecutively. The court ordered Emery to pay fines and surcharges, including a ten-dollar drug abuse resistance education (DARE) surcharge for each count, and suspended his license for 180 days.

Emery appeals, arguing his counsel was ineffective for (1) failing to properly challenge the sufficiency of the evidence at trial and (2) admitting evidence of his prior drug conviction. He also contends the district court applied

an incorrect standard when overruling his motion for new trial. Finally, Emery argues the district court imposed an illegal sentence when it levied the ten-dollar DARE surcharge for failure to affix a drug tax stamp.

II. Ineffective Assistance of Counsel

We review claims of ineffective assistance of counsel de novo. *State v. Philo*, 697 N.W.2d 481, 485 (Iowa 2005). To establish a claim of ineffective assistance of counsel, a defendant must prove by a preponderance of the evidence that (1) counsel failed to perform an essential duty and (2) prejudice resulted therefrom. *State v. Biddle*, 652 N.W.2d 191, 203 (Iowa 2002). Failure to demonstrate either element is fatal to a claim of ineffective assistance. *State v. Polly*, 657 N.W.2d 462, 465 (Iowa 2003).

There is "a strong presumption that trial counsel's conduct fell within the wide range of reasonable professional assistance." *DeVoss v. State*, 648 N.W.2d 56, 64 (Iowa 2002). An ineffective-assistance claim "is more likely to prevail when counsel lacked diligence as opposed to the exercise of judgment." *Polly*, 657 N.W.2d at 465.

In order to show prejudice, a defendant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *DeVoss*, 648 N.W.2d at 64 (quoting *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L. Ed. 2d 674, 698 (1984)). A "reasonable probability" is "a probability sufficient to undermine confidence in the outcome" of defendant's trial. *Id.*

We generally preserve ineffective-assistance-of-counsel claims for postconviction relief proceedings "to afford the defendant an evidentiary hearing

and thereby permit development of a more complete record." *State v. Reynolds*, 670 N.W.2d 405, 411 (Iowa 2003). However, we will resolve such claims on direct appeal "where the record is adequate to determine as a matter of law that the defendant will be unable to establish one or both of the elements of his ineffective-assistance claim." *Id.* Under such circumstances, we affirm the defendant's conviction without preserving the ineffective-assistance claims. *Id.*

A. Sufficiency of the Evidence

Emery claims his trial counsel breached an essential duty and prejudiced his case by failing to move for judgment of acquittal to challenge the sufficiency of the evidence at trial. *See* Iowa R. Crim. P. 2.19(8); *State v. Abbas*, 561 N.W.2d 72, 73, (Iowa 1997). With regard to the conspiracy charge, Emery argues the State failed to present sufficient evidence showing he agreed to participate in the delivery of marijuana. As it relates to the drug tax stamp charge, Emery contends the State failed to present sufficient evidence he knowingly possessed or transported the marijuana at issue.

A jury's guilty verdict will be upheld on appeal unless the record lacks substantial evidence to support the charge. *State v. Liggins*, 557 N.W.2d 263, 269 (Iowa 1996). Substantial evidence means evidence that could "convince a rational fact finder that the defendant is guilty beyond a reasonable doubt." *State v. Biddle*, 652 N.W.2d 191, 197 (Iowa 2002). In reviewing a challenge to the sufficiency of the evidence supporting a guilty verdict, the court considers all the record evidence in the light most favorable to the State and draws all reasonable inferences in the State's favor. *State v. Williams*, 695 N.W.2d 23, 28 (Iowa 2005). The court does not pass upon the credibility of witnesses or resolve

conflicts in the evidence, as "such matters are for the jury." *Id.* (citation omitted). "A jury is free to believe or disbelieve any testimony as it chooses and to give as much weight to the evidence as, in its judgment, such evidence should receive." *Liggins*, 557 N.W.2d at 269. The existence of evidence which might support a different verdict does not negate the existence of substantial evidence sufficient to support the jury's verdict in the case. *State v. Frake*, 450 N.W.2d 817, 818-19 (Iowa 1990).

1. Conspiracy

To establish Emery's guilt on the conspiracy charge, the State was required to prove, among other things, that Emery agreed with Johnson or Jensen to deliver or attempt to deliver marijuana. Iowa Code § 124.401(1). "A conspiracy is a combination or agreement between two or more persons to do or accomplish a criminal or unlawful act, or to do a lawful act in an unlawful manner." *State v. Ross*, 573 N.W.2d 906, 914 (Iowa 1998). An agreement may be established by either direct or circumstantial evidence. *Id.* "A tacit understanding—one 'inherent in and inferred from the circumstances'—is sufficient to sustain a conspiracy conviction." *State v. Speicher*, 625 N.W.2d 738, 742 (Iowa 2001) (citations omitted).

The jury could reasonably have inferred from the circumstances an agreement between Emery and Johnson to deliver marijuana. Emery and Johnson are close friends who see each other and talk daily. Emery was with Johnson when Jensen first asked about obtaining five pounds of marijuana. Johnson used Emery's cell phone to set up the deal, and told Jensen that Emery would be coming with him to deliver the marijuana. The large bag of marijuana

gave off a strong, distinct odor. A drug dog alerted to the presence of drugs on the front seat of Emery's car, and police found items associated with marijuana use in the driver's door pocket of the car. Emery followed Johnson into Jensen's house instead of simply dropping him off, and police found Emery in the basement with Johnson when they entered Jensen's house. "Although the jury could have concluded the defendant was simply in the wrong place at the wrong time," it was not required to do so in light of the foregoing evidence. *State v. Corsi*, 686 N.W.2d 215, 220 (Iowa 2004).

2. Drug Tax Stamp

To find Emery guilty of the drug tax stamp violation, the jury was required to find Emery knowingly possessed or distributed marijuana, a taxable substance. Iowa Code § 453B.3. Iowa's Uniform Jury Instructions define knowledge to mean the defendant had a "conscious awareness" of the element requiring knowledge. Iowa Crim. Jury Inst. 200.3 (2005).

For the same reasons as outlined previously, the jury reasonably could have concluded Emery had a conscious awareness that he possessed or transported marijuana, a taxable substance.

Emery suffered no prejudice from trial counsel's failure to challenge the sufficiency of the evidence at trial because substantial evidence supports the jury's verdict on both counts. Therefore, his ineffective-assistance-of-counsel claim must fail.

B. Admission of Evidence - Prior Drug Conviction

During the State's cross-examination of Johnson, the prosecutor asked, without objection, whether Johnson was aware Emery was on parole and should

not be around drugs or drug users. Johnson admitted he knew of Emery's parole status and explained he did not tell Emery what was going on because he would have been "pissed," and might not have given him a ride to Jensen's house.

During trial counsel's direct examination of Emery, immediately after Johnson's testimony, counsel asked Emery about his prior conviction. Emery admitted he was on parole for a 1999 charge of "possession with intent to deliver methamphetamine while carrying a firearm." He testified he spent three years and ten months in prison and had been out on parole for two years. He further testified he was enrolled in college, saw his parole officer monthly, and had worked at three different places since he had been on parole. He talked about his girlfriend, her son, and his two children.

Emery argues trial counsel was ineffective in having him testify regarding his prior drug conviction on direct examination. We conclude the record before us is insufficient to resolve Emery's ineffective-assistance claim on direct appeal. Accordingly, we preserve this issue for possible postconviction proceedings.

III. Motion for New Trial

Emery argues the trial court erred in denying his motion for new trial pursuant to Iowa Rule of Criminal Procedure 2.24(2)(*b*)(6). He contends the court applied the wrong standard in denying the motion.

Rule 2.24(2)(*b*)(6) provides that the court may grant a new trial "[w]hen the verdict is contrary to law or evidence." "Contrary to . . . evidence" means "contrary to the weight of the evidence." *State v. Ellis*, 578 N.W.2d 655, 659 (Iowa 1998). The "weight of the evidence" refers to a determination by the trier of fact "that a greater amount of credible evidence supports one side of an issue or

cause than the other." *Id.* at 658 (citation omitted). On a motion for new trial, the court "may weigh the evidence and consider the credibility of witnesses." *Id.* (citation omitted). "If the court reaches the conclusion that the verdict is contrary to the weight of the evidence and that a miscarriage of justice may have resulted, the verdict may be set aside and a new trial granted." *Id.* at 658-59 (citation omitted).

Emery's trial counsel cited to rule 2.24(2)(*b*)(6) in the written motion for new trial, but the motion otherwise focused on the sufficiency of the evidence. At the hearing on the motion, Emery's counsel referred exclusively to the sufficiency of the evidence, rather than the weight of the evidence or the credibility of the witnesses. The district court overruled the motion, finding there was "substantial circumstantial evidence within the record" to support the jury's finding of guilt. Thus, the motion was presented and argued as though it were a sufficiency-of-the-evidence challenge, rather than a challenge to the verdict as contrary to the weight of the evidence. Emery made no request for a ruling based on the weight of the evidence. Accordingly, we conclude Emery did not preserve any alleged error on this issue and there is nothing for us to review. *See State v. Manna*, 534 N.W.2d 642, 644 (Iowa 1995) ("Our preservation rule requires that issues must be presented to and passed upon by the district court before they can be raised and decided on appeal.").

However, Emery argues in the alternative that to the extent his trial counsel improperly presented the motion for new trial, counsel was ineffective. We therefore address Emery's challenge to the denial of his motion for new trial in the context of an ineffective assistance claim.

Emery argues his counsel was ineffective for failing to argue the verdict was contrary to the weight of the evidence under rule 2.24(2)(*b*)(6). To support his contention the verdict was contrary to the weight of the evidence presented at trial, he points to the witnesses' denial of any conversations or agreements with him regarding the marijuana. In particular, he cites Johnson's refusal to accept a plea offer that would have required him to implicate Emery in the conspiracy to deliver marijuana, and his adamant denial that Emery knew anything about the delivery of marijuana to Jensen.

While Emery and Johnson maintained that Emery had no knowledge of or involvement in the marijuana deal, other credible evidence, outlined previously, supports the jury's verdict. Therefore, it is not reasonably probable the trial court would have granted a more specific motion under rule 2.24(2)(*b*)(6). We conclude Emery was not prejudiced by counsel's failure to specifically challenge the verdict as contrary to the weight of the evidence and thus was not denied his right to effective assistance of counsel.

IV. Sentencing: DARE Surcharge

The district court imposed a ten-dollar DARE surcharge on Emery's drug tax stamp conviction. Emery argues the surcharge is not authorized by law because Iowa Code section 911.2 does not permit imposition of the surcharge for a violation of Iowa Code chapter 453B.

Our review of challenges to the legality of a sentence is for correction of errors at law. *Tindell v. State*, 629 N.W.2d 357, 359 (Iowa 2001). An "illegal" sentence is one not authorized by statute. *Id.*

Iowa Code section 911.2 provides the district court with authority to enter a ten-dollar DARE surcharge "if the violation arose out of a violation of an offense provided for in chapter 321J or chapter 124, division IV." The State argues that because a violation of chapter 453B is necessarily based on the possession, distribution, or sale of a "taxable substance," which includes marijuana and other controlled substances under chapter 124, division IV, it is reasonable to conclude Emery's conviction under chapter 453B "arises out of a violation" of chapter 124 and therefore triggers the DARE surcharge. We conclude the State's strained construction of the statute is unnecessary here, where the language of the statute is clear and unambiguous. *See Cubit v. Mahaska County*, 677 N.W.2d 777, 781-82 (Iowa 2004) (citation omitted) ("We do not search for meaning beyond the express terms of a statute when the statute is plain and its meaning is clear.").

Section 453B.3 is not included in the crimes listed in section 911.2 as being subject to a DARE surcharge. Therefore, the court imposed a surcharge not provided for by law. We conclude the DARE surcharge imposed on the drug tax stamp conviction must be vacated.

V. Conclusion

We preserve for possible postconviction proceedings Emery's claim of ineffective assistance of trial counsel as it relates to the evidence of Emery's prior drug conviction. We conclude Emery was not prejudiced by the other alleged errors he raises on appeal and thus was not denied his right to effective

assistance of counsel. We vacate the ten-dollar DARE surcharge imposed on the drug tax stamp conviction.

CONVICTIONS AFFIRMED; SENTENCE VACATED IN PART.