

IN THE COURT OF APPEALS OF IOWA

No. 8-155 / 07-0826
Filed March 26, 2008

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ZREDIRICK JEROME ABRAMS,
Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, Patrick J. Madden,
Judge.

Defendant appeals from his convictions and sentences for possession of
cocaine with intent to deliver and possession of marijuana. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Theresa R. Wilson, Assistant
State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Robert P. Ewald, Assistant Attorney
General, Michael Walton, Scott County Attorney, and Kelly G. Cunningham,
Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Vogel and Vaitheswaran, JJ.

SACKETT, C.J.

Zredirick Abrams appeals from his convictions, following a jury trial, and sentences for possession of cocaine with intent to deliver and possession of marijuana. He contends there was insufficient evidence of intent, the court abused its discretion in considering unproven offenses in sentencing, and trial counsel was ineffective in not raising an objection under Iowa Rule of Evidence 5.404(b) to evidence of surveillance of a house and car. We affirm.

I. Background and Proceedings.

While conducting surveillance on a house over several weeks, police observed a black BMW car parked by the house during times of activity that suggested drug sales. When the BMW was not at the house, the activity stopped. Twice police saw a man resembling defendant drive away in the BMW. The third time this person drove away, police followed the car and stopped it because the driver was not wearing a seat belt. The driver was defendant, Zredirick Abrams. During a consent search of the vehicle, police found cocaine powder, crack cocaine, a marijuana blunt, and drug paraphernalia. When defendant was searched, police found a digital scale containing cocaine residue, more than \$1000.00 in cash, two butane lighters, and 3.74 grams of cocaine.

Defendant filed a motion in limine to exclude evidence including prior surveillance of the black BMW and possible drug-related activity correlating to the presence of the BMW. The district court denied the motion except to exclude evidence of defendant's past criminal convictions. Objections at trial based on the reasons stated in the motion in limine, hearsay, and relevance were overruled. Defendant's theory of defense at trial was that the drugs found in his possession

were for personal use only, so he was guilty of possession, but not possession with intent to deliver. The jury found defendant guilty on all counts.

At sentencing, the court cited the presentence investigation report, noting the numerous times defendant failed to appear in court and his extensive record of driving violations as indicative of defendant's attitude toward the law. The court also noted the defendant's age, his failure to pay back child support, his failure to tell the truth about his criminal record, and his failure to take responsibility for his actions. The court imposed two terms of up to ten years to run consecutively and a six-month term to run concurrently. The court waived the mandatory minimum based on defendant's lack of a significant felony history.

II. Scope and Standards of Review.

We review challenges to the sufficiency of the evidence for correction of errors at law. See *State v. Bower*, 725 N.W.2d 435, 440-41 (Iowa 2006). We will uphold a guilty verdict if substantial evidence supports the verdict. See *State v. Nitcher*, 720 N.W.2d 547, 556 (Iowa 2006). "Evidence is substantial if, in the light most favorable to the State, the evidence can convince a rational jury the defendant is guilty of the charged crime beyond a reasonable doubt." *State v. Smith*, 739 N.W.2d 289, 293 (Iowa 2007). We review a sentence in a criminal case for correction of errors at law when consideration of improper factors is alleged. See *State v. Formaro*, 638 N.W.2d 720, 724 (Iowa 2002). We review ineffective assistance of counsel claims de novo. See *State v. Elston*, 735 N.W.2d 196, 198 (Iowa 2007). To establish an ineffective assistance of counsel claim a defendant must show (1) counsel failed to perform an essential duty, and (2) prejudice resulted. *Strickland v. Washington*, 466 U.S. 668, 697, 104 S. Ct. 2052, 2064, 80 L.

Ed. 2d 674, 693 (1984). To establish breach of duty, a defendant must overcome the presumption counsel was competent and prove counsel's performance was not within the range of normal competency. *State v. Buck*, 510 N.W.2d 850, 853 (Iowa 1994). To prove prejudice, a defendant must establish a reasonable probability that, but for counsel's claimed errors, the result of the proceeding would have been different. *Id.* at 695, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698. We may dispose of ineffective assistance claims if a defendant fails to prove either prong. *State v. Query*, 594 N.W.2d 438, 445 (Iowa Ct. App. 1999).

III. Discussion.

A. Insufficient evidence. The district court denied defendant's motion for directed findings on the issue of intent made at the close of the State's evidence. Defendant concedes the State made a prima facie showing he possessed the drugs, but argues there was insufficient evidence of intent to deliver, a required element to prove a violation of Iowa Code section 124.401(1)(c) (2005). See *State v. Adams*, 554 N.W.2d 686, 692 (Iowa 1996).

Because it is difficult to prove intent by direct evidence, proof of intent usually consists of circumstantial evidence and the inferences that can be drawn from that evidence. We have also recognized that in controlled-substance prosecutions opinion testimony by law enforcement personnel experienced in the area of buying and selling drugs may be offered as evidence for purposes of aiding the trier of fact in determining intent. . . . We have also recognized that the intent to deliver a controlled substance may be inferred from the manner of packaging drugs, large amounts of unexplained cash, and the quantity of drugs possessed.

State v. Grant, 722 N.W.2d 645, 647-48 (Iowa 2006) (citations and quotations omitted).

Defendant was found with a substantial amount of drugs, several kinds of drugs, a scale for weighing drugs, and a large amount of cash. A reasonable fact

finder could conclude defendant possessed the drugs with the intent to deliver them. See *State v. Olsen*, 315 N.W.2d 1, 6-7 (Iowa 1982); see also *State v. Adams*, 554 N.W.2d 686, 691-92 (Iowa 1996). We recognize the defendant offered alternative explanations for some of the evidence, but the fact finder weighs the evidence and determines credibility of the witnesses, and is free to believe or disbelieve defendant's version of the evidence. See *State v. Shanahan*, 712 N.W.2d 121, 135 (Iowa 2006); *State v. Thornton*, 498 N.W.2d 670, 673 (Iowa 1993). "It is not the province of the court, . . . to resolve conflicts in the evidence, to pass upon the credibility of witnesses, to determine the plausibility of explanations, or to weigh the evidence; such matters are for the jury." *State v. Williams*, 695 N.W.2d 23, 28 (Iowa 2005) (citation omitted).

We conclude substantial evidence supports the jury's finding that defendant possessed the drugs with the intent to deliver them, in violation of Iowa Code section 124.401(1)(c). The State proved all the required elements of the offenses charged. Accordingly, we affirm the defendant's convictions.

B. Ineffective Assistance. Defendant contends defense counsel was ineffective in failing "to object to prejudicial prior bad acts evidence." Counsel moved in limine to exclude evidence about the presence of the black BMW during times of suspicious activity at the house under surveillance and about the defendant being identified as the driver. The court overruled the motion and counsel's related relevance and hearsay objections at trial. Defendant now contends counsel should have simultaneously challenged the evidence as "prejudicial prior bad acts" under Iowa Rule of Evidence 5.404(b) and also should have requested a cautionary instruction. He does not challenge "the theoretical relevancy of evidence of his own

prior drug-related activity,” but contends “the State did not present the ‘clear proof’ necessary to submit the claims to the jury.”

In assessing whether there is clear proof of prior misconduct, it is not required that the prior act be established beyond a reasonable doubt, nor is corroboration necessary. . . . There simply needs to be sufficient proof to prevent the jury from engaging in speculation or drawing inferences based on mere suspicion.

State v. Newell, 710 N.W.2d 6, 23 (Iowa 2006) (citations and internal quotations omitted). However, the evaluation of clear proof is one factor considered in balancing the probative value of the evidence against its prejudicial effect. See *State v. Taylor*, 689 N.W.2d 116, 124 (Iowa 2004).

In determining whether unfair prejudice generated by evidence of a defendant's other misconduct substantially outweighs the probative value of the evidence, the court should consider the need for the evidence in light of the issues and the other evidence available to the prosecution, whether there is clear proof the defendant committed the prior bad acts, the strength or weakness of the evidence on the relevant issue, and the degree to which the fact finder will be prompted to decide the case on an improper basis.

Id. (citing *State v. Rodriguez*, 636 N.W.2d 234, 240 (Iowa 2001)). As discussed above, there is ample evidence in the record from the date of defendant's arrest alone from which a reasonable fact finder could find defendant guilty of possession with intent to deliver. Even if counsel had successfully made the objections defendant contends should have been made, we see no reasonable probability the result of the trial would have been different. See *Strickland*, 466 U.S. at 695, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698. The same reasoning applies to defendant's cautionary-instruction argument. Given the strength of the State's case against the defendant, even excluding the challenged prior-bad-acts evidence, we conclude defendant cannot demonstrate prejudice, so his ineffective-assistance claim must fail. See *State v. Query*, 594 N.W.2d 438, 445 (Iowa Ct. App. 1999).

C. Improper Factors in Sentencing. Defendant contends the court abused its discretion in sentencing “when it relied upon unproven offenses” by considering his numerous failures to appear cited in the presentence investigation report. See *State v. Witham*, 583 N.W.2d 677, 678 (Iowa 1998) (“A court may not consider an unproven or unprosecuted offense when sentencing a defendant unless (1) the facts before the court show the accused committed the offense, or (2) the defendant admits it.”). The State contends the court properly relied on the information in the report because it was not challenged by defendant when he was given the opportunity to do so. See *State v. Grandberry*, 619 N.W.2d 399, 400 (Iowa 2000) (“In determining a defendant’s sentence, a district court is free to consider portions of a presentence investigation report that are not challenged by the defendant.”). If we determine a district court abused its discretion in sentencing, the remedy is to vacate the sentence and remand for resentencing. *State v. Formaro*, 638 N.W.2d 720, 725 (Iowa 2002).

The State argues the notations concerning failure to appear in the presentence investigation report “do not purport to show convictions . . . [but] merely indicate that Abrams did not show up in court at the scheduled time.” From our review of the report, we agree. The “failed to appear” notations are records of defendant’s actions relating to charged offenses or citations. They are not shown as separate offenses. The district court did not improperly consider unproven charges or convictions. Rather, the court correctly considered the defendant’s repeated disregard for authority when required to appear in court as an indication of defendant’s attitude toward the law—a “scofflaw”—“somebody who just doesn’t care

about the law. They just do whatever they want.” We find no abuse of discretion and affirm the sentences imposed by the district court.

AFFIRMED.