IN THE COURT OF APPEALS OF IOWA

No. 8-211 / 06-1975
Filed April 30, 2008

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ERNEST NMN HOWARD,
Defendant-Appellant.

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

Ernest Howard appeals from his convictions for possession of a controlled substance with the intent to deliver, failure to affix a drug tax stamp, and bribery. **AFFIRMED.**

Duane M. Huffer of Huffer Law Office, Story City, for appellant.

Thomas J. Miller, Attorney General, Cristen Douglass, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Bard Walz, Assistant County Attorney, for appellee.

Considered by Huitink, P.J., and Zimmer and Miller, JJ.

HUITINK, P.J.

Ernest Howard appeals from his convictions for possession of a controlled substance with the intent to deliver in violation of Iowa Code section 124.401(1)(c), failure to affix a drug tax stamp in violation of section 453B.12, and bribery in violation of section 722.1 (2005). We affirm.

I. Background Facts and Proceedings

Earnest Howard was charged with the foregoing crimes based on an incident that occurred on November 8, 2005. According to the State's version of the events, Officer Kevin Boyland went to Howard's residence to follow-up on a traffic accident. Boyland noticed a car idling in the driveway. Boyland knocked on the door to the residence, but no one answered. Boyland waited in his squad car until Howard exited the house and walked toward the car. Boyland saw Howard throw something into his neighbor's yard. Boyland asked Howard to place his hands on the squad car and asked him questions about the accident. Boyland walked to the neighbor's yard and discovered a plastic bag of cocaine on the ground. Howard was put in handcuffs, and Boyland informed him that he was arrested for possession of cocaine.

Howard told Boyland "he didn't want to bring any shame on his church or on his wife or anything like that" and offered Boyland a couple hundred dollars so the cocaine would disappear. Boyland declined, and Howard offered to take Boyland inside his house "because he said there was something that he wanted to show [him]" in a further attempt to bribe him. When all attempts failed, Howard stated, "You got me." No other incriminating evidence was found on or near

Howard. Howard was put in the squad car, further attempted to bribe Boyland, and was transported to the station where he was read his *Miranda* warnings.

According to Howard's version of the events, Howard was smoking a cigar filled with marijuana when he came out of the house and dropped it on the ground. Boyland had Howard put his hands on the squad car and asked him questions regarding the accident. Boyland handcuffed Howard, took twenty-four dollars out of his pockets, and asked if it was all he had. Howard told Boyland he had a couple hundred more dollars in his house, and Boyland put him in the squad car. Boyland found the cocaine in the neighbor's yard and asked Howard if it was his. Howard initially denied it was his, claiming he was a Christian who goes to church. Ultimately, Howard stated it must be his. When the police searched his residence, only marijuana and paraphernalia related to marijuana use was found. The police found no cocaine, plastic bags, scales, lists of customers, or large amounts of cash in the home or the car. Also, the police did not check Howard's cellular phone records or fingerprint the plastic bag of cocaine.

Before trial, Howard filed a motion to suppress the statements he made to Boyland. The trial court denied the motion. Although the trial court found Howard was in custody when he was placed in handcuffs, it found Howard was not subject to custodial interrogation. The trial court specifically found Boyland credible and Howard not credible. Therefore, the trial court concluded *Miranda* warnings were not required and Howard's Fifth Amendment right under the United States Constitution against self-incrimination was not violated.

At trial, Howard moved for judgment of acquittal on all counts. The trial court denied the motion. The jury found Howard guilty of all counts. Howard filed a motion for new trial and a motion in arrest of judgment on the possession charge. The trial court also denied these motions. Howard was sentenced to a ten-year prison term on the possession charge and five-year prison terms on the other charges to run concurrently.

On appeal, Howard claims the trial court erred (1) in finding the statements prior to the *Miranda* warning were admissible during trial, (2) in finding the evidence sufficient to sustain his convictions for possession of a controlled substance with the intent to deliver and bribery, and (3) by not ordering a new trial or entering judgment of acquittal. Finally, Howard claims his trial counsel was ineffective. Under his second argument, Howard also claims his residence was unsecured and chain of custody of the cocaine was broken.

II. Motion to Suppress

We review constitutional claims do novo, examining the totality of the circumstances a shown by the entire record. *State v. Seager*, 571 N.W.2d 204, 207 (Iowa 1997). We are not bound by the trial court's factual findings, but we give deference to its credibility determinations. *State v. Turner*, 630 N.W.2d 601, 606 (Iowa 2001). In reviewing the trial court's ruling, we consider both the evidence presented at the suppression hearing and at the trial. *Id.*

The Fifth Amendment provides "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. The Due Process Clause of the Fourteenth Amendment extends the privilege against self-incrimination to the states. *State v. Miranda*, 672 N.W.2d 753, 758 (Iowa 2003).

In *Miranda v. Arizona*, the United States Supreme Court held a defendant taken into custody or otherwise significantly deprived of his or her freedom must, before questioning begins, be advised, among other things, he or she has the right to remain silent. *Miranda v. Arizona*, 384 U.S. 436, 478-79, 86 S. Ct. 1602, 1630, 16 L. Ed. 2d 694, 726 (1966). Once these warnings are given, the defendant may knowingly and intelligently waive these rights, answer questions, and make a statement. *Id.* at 479, 86 S. Ct. at 1630, 16 L. Ed. 2d at 726. No evidence obtained as a result of interrogation may be used against a defendant unless and until the warnings and waiver are proven by the State at trial. *Id.* However, *Miranda*'s protections do not attach unless there is both custody and interrogation. *Miranda*, 672 N.W.2d at 759.

The parties disagree whether Howard was in custody when he was handcuffed. Assuming, without deciding, Howard was in custody at that time, we find he was not subject to custodial interrogation. In *Miranda*, "custodial interrogation" was defined as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Miranda*, 384 U.S. at 444, 86 S. Ct. at 1612, 16 L. Ed. 2d at 706. In *Rhode Island v. Innis*, interrogation was further defined:

> We conclude that the *Miranda* safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term "interrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.

Rhode Island v. Innis, 446 U.S. 291, 300-01, 100 S. Ct. 1682, 1689-90, 64 L. Ed. 2d 297, 307-08 (1980). Moreover, volunteered or spontaneous statements do not constitute interrogation and are not barred by the Fifth Amendment. *Id.* at 300, 100 S. Ct. at 1689, 64 L. Ed. 2d at 307.

We, like the trial court, find Howard was not subject to custodial interrogation and adopt its credibility determinations. Boyland's statement of the possession charge against Howard was attendant to his arrest and custody. Furthermore, Howard's statements made after he was arrested were voluntary and spontaneous. Therefore, we conclude *Miranda* warnings were not required and Howard's Fifth Amendment right against self-incrimination was not violated.

III. Sufficiency of Evidence

We review challenges to sufficiency of the evidence for correction of errors at law. *State v. Thomas*, 561 N.W.2d 37, 39 (Iowa 1997).

A jury's verdict is binding on appeal if it is supported by substantial evidence. *State v. LeGear*, 346 N.W.2d 21, 23 (Iowa 1984). Substantial evidence is "such evidence as could convince a rational trier of fact that the defendant is guilty beyond a reasonable doubt." *State v. Gay*, 526 N.W.2d 294, 295 (Iowa 1995). Evidence, however, that only raises "'suspicion, speculation, or conjecture'" does not constitute substantial evidence. *State v. Randle*, 555 N.W.2d 666, 671 (Iowa 1996) (quoting *State v. Barnes*, 204 N.W.2d 827, 829 (Iowa 1972)).

When reviewing challenges to sufficiency of the evidence, we view the evidence "in the light most favorable to the State, including legitimate inferences and presumptions that fairly and reasonably may be deduced from the evidence

in the record." *State v. Hoeck*, 547 N.W.2d 852, 859 (Iowa Ct. App. 1996). "Although direct and circumstantial evidence are equally probative, the inferences to be drawn from the proof in a criminal case must 'raise a fair inference of guilt as to each essential element of the crime.'" *State v. Speicher*, 625 N.W.2d 738, 741 (Iowa 2001) (quoting *State v. Casady*, 491 N.W.2d 782, 787 (Iowa 1992)). In addition, we must consider all of the evidence, not just that which supports the jury's verdict. *State v. Conroy*, 604 N.W.2d 636, 638 (Iowa 2000). Finally, "[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." *State v. Liggins*, 557 N.W.2d 263, 269 (Iowa 1996).

A. Possession Charge

The State must prove beyond a reasonable doubt all of the following elements of possession of a controlled substance with the intent to deliver: The defendant (1) knowingly possessed a controlled substance, (2) knew the substance was a controlled substance, and (3) had the specific intent to deliver it. Iowa Code § 124.401(1)(c). At issue in this case is the first element.

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. *State v. Carter*, 696 N.W.2d 31, 38 (Iowa 2005). Possession is constructive "when the defendant has knowledge of the presence of the controlled substance and has the authority or right to maintain control of it." *State v. Bash*, 670 N.W.2d 135, 138 (Iowa 2003).

"The existence of constructive possession turns on the peculiar facts of each case." *State v. Webb*, 648 N.W.2d 72, 79 (Iowa 2002). Notwithstanding

this fact-intensive inquiry, inferences are often used to establish constructive possession. *Id.* at 76-79. If the premises where the controlled substance was found are exclusively within the defendant's possession, knowledge of its presence on the premises coupled with the ability to maintain control over it can be inferred. *State v. Reeves*, 209 N.W.2d 18, 23 (Iowa 1973). On the other hand, if the premises are not exclusively within the defendant's possession, no inferences can be made, and constructive possession must be proven. *Id.* Such proof can consist of (1) the defendant's incriminating statements, (2) the defendant's incriminating actions upon discovery of the controlled substance, (3) the defendant's fingerprints on the packaging of the controlled substance, and (4) any other circumstances linking in the defendant to the controlled substance. *State v. Kemp*, 688 N.W.2d 785, 789 (Iowa 2004).

Contrary to Howard's assertions, we find substantial evidence supports the finding that Howard either actually or constructively possessed the cocaine, as evidenced by Howard's actions in throwing the cocaine in his neighbor's yard and by the incriminating statements he made thereafter. The jury was presented with two very different versions of what occurred and was free to accept all, part, or none of the conflicting evidence. *See State v. Anderson*, 517 N.W.2d 208, 211 (Iowa 1994), *overruled on other grounds by State v. Heemstra*, 721 N.W.2d 549, 558 (Iowa 2006). The fact that the jury disbelieved Howard's version of events does not mean the State's evidence indicating Howard actually or constructively possessed cocaine was insubstantial. *See State v. Thornton*, 498 N.W.2d 670, 673 (Iowa 1993).

Howard also argues insufficient evidence exists regarding the drug tax stamp offense. We will not consider this argument because it was made for the first time in a reply brief. *See Sun Valley Iowa Lake Ass'n v. Anderson*, 551 N.W.2d 621, 642 (Iowa 1996).

B. Bribery Charge

The State must prove beyond a reasonable doubt all of the following elements of bribery: (1) The defendant offered or promised anything of value (2) to a police officer (3) pursuant to an agreement or an arrangement or with the understanding that the promise or thing of value would influence the act, judgment, decision, or exercise of discretion of the officer in his or her capacity. Iowa Code § 722.1.

Contrary to Howard's assertions, we find substantial evidence exists regarding all of these elements, as evidenced by Boyland's testimony. As we stated above, the jury was presented with two very different versions of what occurred and was free to accept all, part, or none of the conflicting evidence concerning these events. *See Anderson*, 517 N.W.2d at 211. The fact that the jury disbelieved Howard's version of events does not mean the State's evidence indicating Howard bribed Boyland was insubstantial. *See Thornton*, 498 N.W.2d at 673.

C. Unsecured Residence and Chain of Custody

We initially address the State's argument that Howard's complaints regarding the unsecured residence and chain of custody of the cocaine were not preserved. We agree. At no time during the trial did Howard object to or make arguments about this evidence; therefore, these issues have not been preserved

for our review. *See DeVoss v. State*, 648 N.W.2d 56, 63 (Iowa 2002) (stating we will not consider an issue for the first time on appeal).

IV. Motion for New Trial/Judgment of Acquittal

The trial court has broad but not unlimited discretion in ruling on a new trial motion. Iowa R. App. P. 6.14(6)(*c*). We, therefore, review the denial of a new trial motion for abuse of discretion. *State v. Reeves*, 670 N.W.2d 199, 202 (Iowa 2003). Abuse of discretion means the trial court exercised its discretion "'on grounds or for reasons clearly untenable or to an extent clearly unreasonable.'" *State v. Axiotis*, 569 N.W.2d 813, 815 (Iowa 1997) (quoting *State v. Blackwell*, 238 N.W.2d 131, 138 (Iowa 1976) (citations omitted)). We are "slower to interfere with the grant of a new trial than with its denial." Iowa R. App. P. 6.14(6)(*d*).

A trial court may grant a new trial "[w]hen the verdict is contrary to law or evidence." Iowa R. Crim. P. 2.24(2)(*b*)(6). "Contrary to . . . [the] evidence" means "contrary to the weight of the evidence." *State v. Ellis*, 578 N.W.2d 655, 659 (Iowa 1998). A verdict is contrary to the weight of the evidence where "'a greater amount of the evidence supports one side of an issue or cause than the other.'" *Id.* at 658 (quoting *Tibbs v. Florida*, 457 U.S. 31, 38, 102 S. Ct. 2211, 2216, 72 L. Ed. 2d 652, 658 (1982)). The weight of evidence standard is distinguishable from the sufficiency of the evidence standard in that it is broader. *State v. Nicher*, 720 N.W.2d 547, 559 (Iowa 2006).

Although the possession charge was argued in the motion for new trial, the drug tax stamp and bribery charges were not, and, therefore, are not preserved for our review. *See DeVoss*, 648 N.W.2d at 63. We note Howard

argues insufficient evidence exists regarding the possession charge. He does not argue the verdict was contrary to the weight of the evidence. We decline to reach the merits of this issue because we would be required to assume a partisan role and undertake Howard's research and advocacy. *See Inghram v. Dairyland Mut. Ins. Co.*, 215 N.W.2d 239, 240 (Iowa 1974).

V. Ineffective Assistance of Counsel

We review ineffective assistance of counsel claims de novo. *State v. Bergmann*, 600 N.W.2d 311, 313 (Iowa 1999).

Howard argues he was denied effective assistance of trial counsel because his first trial counsel failed to preserve the videotape of the stop and arrest and his second trial counsel failed to request a spoliation jury instruction. Ordinarily, we preserve ineffective assistance of counsel claims for postconviction proceedings to enable full development of the record and to afford trial counsel an opportunity to respond. *Berryhill v. State*, 603 N.W.2d 243, 245 (Iowa 1999). Because we find the record is insufficient to address Howard's ineffective assistance of counsel claims on direct appeal, we preserve them for possible postconviction relief proceedings.

We accordingly affirm Howard's convictions and preserve his ineffective assistance of counsel claims for possible postconviction relief proceedings.

AFFIRMED.