STATE OF IOWA, Plaintiff-Appellee, vs. RICARLESS L. LIPSEY, Defendant-Appellant.

2014 | Cited 0 times | Court of Appeals of Iowa | August 13, 2014

IN THE COURT OF APPEALS OF IOWA

No. 13-1062 Filed August 13, 2014

STATE OF IOWA, Plaintiff-Appellee,

vs.

RICARLESS L. LIPSEY, Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, George L. Stigler, Judge.

A defendant appeals from his judgment and sentence. AFFIRMED.

Joel Walker of Law Offices of Joel Walker, of the Law Offices of Joel Walker, Davenport, for appellant.

Thomas J. Miller, Attorney General, Mary A. Triick, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Brad P. Walz, Assistant County Attorney, for appellee.

Considered by Vaitheswaran, P.J., and Doyle and McDonald, JJ. VAITHESWARAN, P.J.

Ricarless Lipsey appeals his judgment and sentence for possession of marijuana with intent to distribute, as a second and habitual offender, and eluding as an habitual offender. He contends (1) there was insufficient evidence to

(2) the district court abused its discretion in allowing the State to amend its trial information on the first day of trial, and in denying his request for a continuance in light of the amendment; (3) the district court erred in admitting hearsay evidence; and (4) the district court did not follow the proper procedure in enhancing his sentence.

I. Sufficiency of the Evidence

The jury was instructed that the State would have to prove the following elements of possession of a controlled substance, marijuana, with intent to deliver:

1. On or about the 23rd day of September, 2012, the defendant knowingly possessed a controlled substance; Marijuana. 2. The defendant knew that the substance he possessed was a controlled substance; Marijuana. 3. The defendant possessed the substance with the intent to deliver.

Lipsey does not dispute the first and second elements. Focusing on the third element, he There were no eye witnesses to a drug transaction. The cell phone evidence Our review is for substantial evidence. State v. Bass, 349 N.W.2d 498, 500 (Iowa 1984). The evidence does not include the cell phone records cited by Lipsey.

Therefore, we will not consider those records.

From the duly admitted evidence, a reasonable juror could have found the following facts. Waterloo police officers chased a speeding vehicle until it crashed. They found Lipsey inside. They also found four loose baggies of green

material and additional loose, clean baggies. Later testing confirmed the green material was marijuana weighing between .5 and .6 grams per baggie.

Police officers testified that, in their experience, people possessing marijuana for personal use kept rather than in multiple baggies. In the view of law enforcement, the fact the filled baggies contained equal amounts of the drug was also inconsistent with personal use. One of the officers opined that the packaging of the marijuana was consistent with sale and distribution. See State v. Grant, 722 N.W.2d 645, 648 (Iowa 2006) (stating intent to deliver a controlled substance could be inferred from the manner of packaging drugs). As for the empty baggies, an officer testified that in drug distribution cases because sellers rather than buyers usually provided the packaging for the drugs.

ver assertion that he purchased marijuana from a dealer, who placed the drug in a balled up tissue because he did not have bags, forcing Lipsey to buy baggies, which were only available in packs. See id. (stating opinion testimony from law enforcement personnel experienced in the area of drug sales could be offered to aid the jury in determining intent); see also State v. Arne, 579 N.W.2d

jury . A reasonable juror also could have found the division of the marijuana into personal use. Substantial evidence supports -of- marijuana-with-intent-to-deliver charge.

II. Amendment of Trial Information/Motion to Continue

On the day trial was to begin, the State moved to amend the trial

information to include a count of possession of marijuana, third offense as a

habitual offender, a lesser included offense of possession of marijuana with

intent to deliver. According to the prosecutor, his proposed amendment, which

with a third offense

and habitual felon status enhancement if he were found guilty of the lesser

included offense. Lipsey objected to the motion. He conceded the

proposed amendment did not necessarily affect[] the factual issues that we are

potentials and the dynamics of the way the [S]tate is proceeding forward with the

requested a continuance. The district court

granted the motion to amend and denied the motion for a continuance. Lipsey

contends both rulings were in error.

Iowa Rule of Criminal Procedure 2.4(8) governs amendments to trial

informations, and provides in part:

> The court may, on motion of the state, either before or during the trial, order the indictment amended so as to correct errors or omissions in matters of form or substance. Amendment is not allowed if substantial rights of the defendant are prejudiced by the amendment, or if a wholly new or different offense is charged.

Iowa R. Crim. P. 2.4(8)(a). Lipsey focuses on the second part of the rule

1

We review a ruling on this aspect of the rule for errors of law. State v. Maghee,

573 N.W.2d 1, 5 (Iowa 1997).

In State v. Brothern, 832 N.W.2d 187, 196 (Iowa 2013), the Iowa Supreme

Court held that if the defendant had no prior

Lipsey had prior notice of the proposed

amendment. First, he was only entitled to notice of the greater offense. See

Iowa lesser included offenses, the latter should not be charged, and it is sufficient to

nd Iowa R. Crim. P.

the commission of which is necessarily included in that with which the defendant

Lipsey knew of pursue sentencing

enhancements because the original trial information charged Lipsey he minutes of testimony identified a State

witness who would be available to prove up his prior convictions. We discern no

error in

1 Because Lipsey was on notice of the amendment, the district court did not

See State v.

Schertz, 330 N.W.2d 1, 3 Steinkuehler v. State, 507 N.W.2d 716, 723

(Iowa Ct. App. 1993) (holding defendant not prejudiced by failure of counsel to

request continuance following amendment of trial information).

III. Hearsay Evidence

During trial, the prosecutor asserted he had a list of text messages

pursuant to a search warrant, obtained from a phone seized from Lipsey during

his arrest. The prosecutor stated he would not seek admission of the evidence in

-examination of

Lipsey, should he testify, or on rebuttal. Lipsey resisted, claiming surprise and

prejudice.

As noted, Lipsey did indeed testify, and the prosecutor raised one of the

outgoing messages during cross-examination. Lipsey confirmed the phone was

his and he was the person who sent the message.

On appeal, Lipsey cell phone records without the proper found as noted, the district

court did not admit the cell phone records. Although the prosecutor asked about

one outgoing message, he did not offer the underlying record. Additionally,

Lipsey himself established a foundation for that message. See Iowa R. Evid.

5.901(a) is satisfied by evidence sufficient to

).

Finally, the outgoing message was not hearsay but an admission of a party opponent. See State v. Simpson, No. 10-1554, 2011 WL 3117888, at *2 n.2

(Iowa Ct. App. July 27, 2011). For these reasons, we are unpersuaded by

IV. Procedure for Imposing Sentencing Enhancement

Lipsey contends the district court failed to comply with the proper

procedure to prove up his prior convictions. Lipsey failed to preserve error because he did not object to the procedure. 2

We

bypass this error preservation concern and proceed to the merits. See State v.

Taylor, 596 N.W.2d 55, 56 (Iowa 1999).

In State v. Kukowski, 704 N.W.2d 687, 692 (Iowa 2005), the Iowa

Supreme Court stated that or convictions necessarily serve as an admission to support the imposition of an enhanced

penalty . . . . The court has a duty to conduct a further inquiry similar to the

colloquy required under rule 2.8(2), prior to sentencing to ensure that the

See Iowa R. Crim. P. 2.8(2)(b)(1)-(5)

(requiring court to discuss certain matters with defendant prior to accepting guilty

plea). While the district court did not conduct the full colloquy contemplated by

Kukowski, Lipsey cannot show prejudice because he had notice of the

convictions on which the State intended to rely, the minutes of testimony listed

the clerk of court as a witness and set forth the prior felony convictions, and

Lipsey testified to his prior convictions. See State v. McBride, 625 N.W.2d 372,

375 (Iowa Ct. App. 2001) (finding absence of prejudice based on disclosure in

2 Lipsey does not raise the issue under an ineffective-assistance-of-counsel rubric. State v. Vesey, 482 N.W.2d

165, 168 (Iowa Ct. App. 1991) (finding admitted to what the state was ready and able to prove. . . . The State had the

Accordingly, this issue does not entitle Lipsey to reversal.

AFFIRMED.