IN THE SUPREME COURT OF IOWA

STATE OF IOWA, Plaintiff-Appellee, v. CLAYTON CURTIS BROWN, Defendant-Appellant.	SUPREME COURT NO. 23-0055

APPEAL FROM THE IOWA DISTRICT COURT
FOR BOONE COUNTY
THE HONORABLE DEREK JOHNSON, JUDGE (TRIAL AND POST-TRIAL) AND THE HONORABLE JOHN R. FLYNN, JUDGE (SENTENCING)

APPELLANT'S BRIEF AND ARGUMENT AND REQUEST FOR ORAL ARGUMENT

MARTHA J. LUCEY
State Appellate Defender

JOSH IRWIN
Assistant Appellate Defender
jirwin@spd.state.ia.us
appellatedefender@spd.state.ia.us

STATE APPELLATE DEFENDER'S OFFICE
Fourth Floor Lucas Building
Des Moines, Iowa 50319
(515) 281-8841 / (515) 281-7281 FAX
ATTORNEYS FOR DEFENDANT-APPELLANT

FINAL

CERTIFICATE OF SERVICE

On the 24th day of August, 2023, the undersigned certifies that a true copy of the foregoing instrument was served upon Defendant-Appellant by placing one copy thereof in the United States mail, proper postage attached, addressed to Clayton Brown, No. 6636851, North Central Correctional Facility, 313 Lanedale, Rockwell City, IA 50579-7470.

APPELLATE DEFENDER'S OFFICE

Josh Irwin
Assistant Appellate Defender
Appellate Defender Office
Lucas Bldg., 4th Floor
321 E. 12th Street
Des Moines, IA 50319
(515) 281-8841
jirwin@spd.state.ia.us
appellatedefender@spd.state.ia.us

JI/ls/8/23

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes and Court Rules:

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. The district court erred by denying Brown's motion for mistrial after an officer, prompted by the prosecutor, testified he had a criminal history beyond that included in the stipulation.

Authorities

State v. Gibb, 303 N.W.2d 673, 678 (Iowa 1981)

State v. Garrison, No. 04-0141, 2006 WL 138280, at *10 (Iowa Ct. App. Jan. 19, 2006) (unpublished table decision)

State v. Castaneda, 621 N.W.2d 435, 440 (Iowa 2001)

State v. Brown, 397 N.W.2d 689, 699 (Iowa 1986)

Iowa R. Evid. 5.401(a)–(b)

Iowa R. Evid. 5.402

Iowa R. Evid. 5.403

Iowa R. Evid. 5.404(b)(1)–(2)

State v. Rodriquez, 636 N.W.2d 234, 239 (Iowa 2001)

State v. Kidd, No. 12-1917, 2014 WL 3749365, at *3 (Iowa Ct. App. July 30, 2014) (unpublished table decision)

State v. Putman, 848 N.W.2d 1, 9–10 (Iowa 2014)

State v. Mitchell, 633 N.W.2d 295, 298–99 (Iowa 2001)

Iowa Code § 321.555

State v. Johnson, No. 19-0579, 2020 WL 5650731, at *2 (Iowa Ct. App. Sept. 23, 2020) (unpublished table decision)

State v. Brewer, 247 N.W.2d 205, 211 (Iowa 1976)

State v. Jirak, 491 N.W.2d 794, 796 (Iowa Ct. App. 1986)

II. The evidence was insufficient to establish the identity element of any offense of conviction.

Authorities

State v. Crawford, 972 N.W.2d 189, 202 (Iowa 2022)

State v. Folkers, 941 N.W.2d 337, 338 (Iowa 2020)

Iowa R. App. P. 6.904(3)(a)

State v. Dalton, 674 N.W.2d 111, 116 (Iowa 2004)

State v. Hamilton, 309 N.W.2d 471, 479 (Iowa 1981)

State v. Chatman, No. 19-0856, 2020 WL 7021709, at *6–7 (Iowa Ct. App. Nov. 30, 2020) (unpublished table decision)

State v. Jensen, 216 N.W.2d 369, 374 (Iowa 1974)

State v. Despenas, No. 21-1775, 2023 WL 2396460, at *4 (unpublished table decision)

State v. Akers, No. 17-0577, 2018 WL 1182616, at *2–3 (Iowa Ct. App. March 7, 2018) (unpublished table decision)

Stovall v. Denno, 388 U.S. 293, 302 (1967) (abrogated on unrelated grounds by U.S. v. Johnson, 457 U.S. 537 (1982)

III. The evidence was insufficient to establish Brown knowingly possessed a firearm.

Authorities

State v. Crawford, 972 N.W.2d 189, 202 (Iowa 2022)

State v. Folkers, 941 N.W.2d 337, 338 (Iowa 2020)

Iowa R. App. P. 6.904(3)(a)

State v. Dalton, 674 N.W.2d 111, 116 (Iowa 2004)

State v. Hamilton, 309 N.W.2d 471, 479 (Iowa 1981)

Iowa Code § 724.26(1)

State v. Reed, 875 N.W.2d 693, 705 (Iowa 2016)

State v. Thomas, 847 N.W.2d 438, 442 (Iowa 2014)

State v. Vance, 790 N.W.2d 775, 784 (Iowa 2010)

State v. Maxwell, 743 N.W.2d 185, 193 (Iowa 2008)

State v. Cashen, 666 N.W.2d 566, 572 (Iowa 2003)

State v. Kern, 831 N.W.2d 149, 161 (Iowa 2013)

State v. Kemp, 688 N.W.2d 785, 789 (Iowa 2004)

State v. Atkinson, 620 N.W.2d 1, 4 (Iowa 2000)

State v. Truesdell, 679 N.W.2d 611, 618 (Iowa 2004) (abrogated on unrelated grounds by Crawford, 972 N.W.2d 189)

ROUTING STATEMENT

This case should be transferred to the Court of Appeals because the issues raised involve the application of existing legal principles. Iowa R. App. P. 6.903(2)(d) and 6.1101(3)(a).

STATEMENT OF THE CASE

Nature of the Case

The defendant-appellant, Clayton Brown, appeals from his conviction, judgment, and sentence for possession of a firearm by a felon, a class D felony, in violation of Iowa Code section 724.26(1), eluding while exceeding the speed limit by 25 miles per hour or more and while committing a felony, a class D felony, in violation of Iowa Code section 321.279(3), and driving while barred, an aggravated misdemeanor, in violation of Iowa Code sections 321.560 and 321.561.

Course of Proceedings

The State charged Brown with possession of a firearm by a felon in violation of Iowa Code section 724.26(1), eluding while exceeding the speed limit by 25 miles per hour or more

and while committing a felony in violation of 321.279(3), and driving while barred in violation of Iowa Code sections 321.560 and 321.561 by trial information filed October 19, 2021. (Trial Information) (App. pp. 4-6). Brown filed a written arraignment, plea of not guilty, and waiver of his 90-day speedy trial right on November 1. (Written Arraignment) (App. p. 7).

The case proceeded to trial on September 20, 2022. Brown stipulated that on the date of the alleged offenses, September 29, 2021, his license was barred as a habitual offender and he had previously been convicted of a felony. (9/20/2022 Trial Tr. p. 16 L. 7–12; Stipulation) (App. p. 17).

After a police officer testified he was concerned about finding a firearm in the car because Brown had "convictions on his record," defense counsel moved for mistrial, arguing the word "convictions" impermissibly informed the jury that Brown had multiple prior convictions. (9/20/2022 Trial Tr. p. 32 L. 5–p. 33 L. 17). Counsel also argued the parties had

stipulated that Brown had a felony conviction and his license was barred to avoid exactly this sort of testimony. (9/20/2022 Trial Tr. p. 33 L. 4–8). The State countered that because Brown stipulated his license was barred and he was a felon, the jury was already aware he had multiple prior convictions. (9/20/2022 Trial Tr. p. 33 L. 20–p. 34 L. 18). The district court agreed with the State and denied the motion for mistrial. (9/20/2022 Trial Tr. p. 34 L. 19–p. 35 L. 4).

At the close of the State's case, Brown moved for judgment of acquittal on each count, arguing the State had not proved Brown was driving the vehicle, and that even if it had the State had not proved he knowingly possessed a firearm which was found beneath the driver's seat when the vehicle was found unoccupied. (9/20/2022 Trial Tr. p. 69 L. 22–p. 72 L. 23). The district court denied the motion. (9/20/2022 Trial Tr. p. 75 L. 14–19). Brown renewed the motion when the defense rested, and was denied again. (9/22/2022 Trial Tr. p. 78 L. 21–p. 79 L. 22).

On September 21, the jury returned guilty verdicts on all counts. (9/21/2022 Trial Tr. p. 4 L. 5–16; Verdict) (App. pp. 18-20).

Sentencing occurred on January 9, 2023. The State requested that sentences of incarceration be imposed in all three counts, that they run concurrently to one another, but that they run consecutively to sentences imposed in two other counties. (Sentencing Tr. p. 18 L. 4–14). Brown requested suspended sentences and placement in a community-based correctional facility. (Sentencing Tr. p. 19 L. 16–p. 21 L. 10). The district court imposed concurrent sentences of incarceration in each count, but ordered that they run consecutively to sentences imposed in the other counties. (Sentencing Tr. p. 26 L. 8–13). All fines were suspended. (Sentencing Tr. p. 27 L. 2–3). The court filed an order of disposition on January 10. (Order of Disposition) (App. pp. 21-29).

Brown filed a notice of appeal through counsel on January 11. (Amended Notice of Appeal) (App. pp. 30-31).

Facts

Boone Police Officer (later Sergeant) Joseph Slight was on patrol in a marked vehicle on September 29, 2021, when he observed "an individual not wearing a seat belt while operating on a public roadway." (9/20/2022 Trial Tr. p. 19 L. 3–p. 20 L. 6). He said "[i]t was a male," and identified Brown in court as the person he had seen. (9/20/2022 Trial Tr. p. 20 L. 7–18). Brown initiated a traffic stop, turning on his overhead lights and shortly thereafter his siren. (9/20/2022 Trial Tr. p. 20 L. 19–p. 21 L. 24). The car drove away evasively, eventually running through a stop sign and quickly accelerating. (9/20/2022 Trial Tr. p. 22 L. 5–p. 23 L. 7). Slight testified the speed limit in that area was "20 miles an hour," and estimated the car reached "upwards of 80 miles an hour." (9/20/2022 Trial Tr. p. 23 L. 18–20, p. 25 L. 19–22).

Slight decided not to pursue the vehicle further. (9/20/2022 Trial Tr. p. 26 L. 2).

Around 40 minutes later, Slight found the car parked with no occupants. (9/20/2022 Trial Tr. p. 28 L. 3–11). He obtained a search warrant, and searched the vehicle the following day. (9/20/2022 Trial Tr. p. 29 L. 13–20). He found a debit card and leather belt, both with Brown's name on them, a firearm tucked under the driver's seat, a pill bottle containing ammunition in the center console, and loose ammunition under the passenger seat. (9/20/2022 Trial Tr. p. 29 L. 21–p. 31 L. 15, p. 49 L. 10–15).

During cross-examination, Slight claimed he saw Brown's face during the chase, but was unable to identify him at that time. (9/20/2022 Trial Tr. p. 54 L. 3–10). He acknowledged that he "thought it was somebody else during the pursuit," knew what that person looked like, and had identified that person to dispatch. (9/20/2022 Trial Tr. p. 54 L. 19–p. 55 L. 22, p. 63 L. 7–13). He acknowledged that during the search

of the vehicle, the firearm and ammunition were not in plain sight. (9/20/2022 Trial Tr. p. 58 L. 16–23). He acknowledged Brown was not the registered owner of the vehicle; it belonged to a person Slight believed to be Brown's girlfriend. (9/20/2022 Trial Tr. p. 59 L. 13–17, p. 61 L. 4–11).

Additional details will be discussed below as necessary.

ARGUMENT

I. The district court erred by denying Brown's motion for mistrial after an officer, prompted by the prosecutor, testified he had a criminal history beyond that included in the stipulation.

Preservation of Error

The prosecutor asked Slight why it was relevant that a firearm was found in the car, and Slight answered "there was convictions on [Brown's] record that he should not --" and was interrupted by an objection and motion to strike, which were sustained.[1] (9/20/2022 Trial Tr. p. 32 L. 3–9). The

[1] Although the court seemingly sustained both the objection and the motion to strike, it did not instruct the jury to

prosecutor then asked "[f]rom your check, did you learn that he had at least a prior felony?" (9/20/2022 Trial Tr. p. 32 L. 10–12). Slight answered "yes." (9/20/2022 Trial Tr. p. 32 L. 13). Defense counsel asked that the jury be excused, then requested a mistrial, arguing the parties had agreed to a stipulation in order to avoid any testimony about Brown's criminal history being necessary, and that Slight's use of the word "convictions" told the jury Brown had more than the single felony conviction contained in that stipulation. (9/20/2022 Trial Tr. p. 32 L. 14–p. 33 L. 17). As a result, counsel argued Brown could not "get a fair trial . . . ." (Sentencing Tr. p. 33 L. 15–17). The district court denied the motion, saying Brown was not prejudiced because he had "stipulated to basically two convictions." (9/20/2022 Trial Tr. p. 34 L. 22–24). Error was preserved. See State v. Gibb, 303 N.W.2d 673, 678 (Iowa 1981) (citations omitted) (motion for

---

disregard Slight's improper testimony.

mistrial made when grounds "first become apparent" preserves error).

Standard of Review

Review of a district court's denial of a motion for mistrial due to erroneously-admitted evidence is for abuse of discretion. State v. Garrison, No. 04-0141, 2006 WL 138280, at *10 (Iowa Ct. App. Jan. 19, 2006) (unpublished table decision) (citing State v. Castaneda, 621 N.W.2d 435, 440 (Iowa 2001); State v. Brown, 397 N.W.2d 689, 699 (Iowa 1986)).

Discussion

The parties entered an agreed-upon stipulation that "[o]n September 29, 2021, the defendant's driver's license was barred as a habitual offender" and that Brown "had previously been convicted of a felony." (9/20/2022 Trial Tr. p. 16 L. 7–12; Stipulation) (App. p. 17). Even though this stipulation relieved the State of the requirement to submit evidence Brown had been convicted of a felony, the prosecutor pursued

a line of questioning which could only have been intended to elicit testimony on that subject. The prosecutor asked if Slight had "the capability of understanding and finding out a person's criminal history" and Slight answered "[y]es." (9/20/2022 Trial Tr. p. 31 L. 22–24). The prosecutor asked if Slight had "identified the defendant's name at the point [Slight] did the search warrant," and Slight responded "[y]es." (9/20/2022 Trial Tr. p. 31 L. 25–p. 32 L. 2). The prosecutor then asked "[a]nd so why was the gun important or relevant to you through the course of this," and Slight said "[b]ecause there was convictions on his record that he should not --" before he was interrupted by an objection and motion to strike which were granted. (9/20/2022 Trial Tr. p. 32 L. 3–9). Despite that warning, the prosecutor continued, asking "[l]et me clarify. From your check, did you learn that he had at least a prior felony," and Slight responded "[y]es." (9/20/2022 Trial Tr. p. 32 L. 10–13). Brown's request for mistrial following these events should have been sustained,

because Slight's testimony was either irrelevant or substantially more prejudicial than probative, and resulted in prejudice to Brown.

Evidence is relevant if "[i]t has any tendency to make a fact more or less probable than it would be without the evidence" and "[t]he fact is of consequence in determining the action." Iowa R. Evid. 5.401(a)–(b). "Irrelevant evidence is not admissible." Iowa R. Evid. 5.402. Relevant evidence may be excluded "if its probative value is substantially outweighed by a danger of . . . unfair prejudice . . . or needlessly presenting cumulative evidence." Iowa R. Evid. 5.403. "Evidence of any other crime, wrong, or act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character" but "may be admissible for another purpose such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Iowa R. Evid. 5.404(b)(1)–(2). "[R]ule 404(b) seeks to exclude

evidence that serves no purpose except to show the defendant is a bad person, from which the jury is likely to infer he or she committed the crime in question." State v. Rodriquez, 636 N.W.2d 234, 239 (citing Castaneda, 621 N.W.2d at 439–40).

Application of a relevance and prior-bad-acts analysis involves three inquiries: "(1) whether 'the evidence is relevant to a legitimate, disputed factual issue,' (2) whether there is "clear proof the individual against whom the evidence is offered committed the bad act or crime,' and (3) whether the evidence's 'probative value is substantially outweighed by the danger of unfair prejudice to the defendant.'" State v. Kidd, No. 12-1917, 2014 WL 3749365, at *3 (Iowa Ct. App. July 30, 2014) (unpublished table decision) (quoting State v. Putman, 848 N.W.2d 1, 9–10 (Iowa 2014)).

The evidence at issue here fails at step one, because evidence of Brown's criminal history beyond that contained in the stipulation was not relevant to a legitimate, disputed factual issue. Eliminating any dispute over his relevant

criminal history was the entire point of the stipulation; it was done so the prosecutor would not have to elicit testimony on the subject (and in the process risk presenting improper evidence). In light of this purpose, the prosecutor's assertion the State was free to submit criminal history evidence despite Brown's stipulation is troubling, and the district court was correct to respond with skepticism.[2] See (9/20/2022 Trial Tr. p. 34 L. 3–5, L. 19–22). Defendants do the State a favor by stipulating to criminal history, in exchange for reduced risk that trial will be tainted by improper evidence. If the State will not honor that obligation, defendants would be well-advised never to stipulate, which in turn would needlessly consume judicial resources. Brown's stipulation meant his

[2] The prosecutor did not stop there; he also asserted he was allowed to enter evidence of Brown's criminal history because the defense had not moved in limine to exclude it. (9/20/2022 Trial Tr. p. 34 L. 10–15). The prosecutor's peculiar arguments, along with his questioning which elicited Slight's testimony, are difficult to square with his claim he had not intended to elicit the improper testimony.

status as a felon was not a disputed fact at issue. As a result, additional evidence about his criminal history was irrelevant.

If this Court disagrees and believes Slight's testimony was relevant to a disputed issue, its probative value was still substantially outweighed by the danger of unfair prejudice. Brown's stipulation meant the prior felony element of possession of a firearm while a felon and the barred element of driving while barred were already met; further testimony on the subject therefore carried at most miniscule probative value. But one of the principles underlying rule 5.404(b) is that the jury's awareness of prior criminal offenses by the defendant is extremely prejudicial; that is why it permits exclusion of relevant, otherwise-admissible evidence. See State v. Mitchell, 633 N.W.2d 295, 298–99 (Iowa 2001) (citations omitted).

The district court denied the motion for mistrial, concluding the testimony was not prejudicial because Brown had "stipulated to basically two convictions." (9/20/2022

Trial Tr. p. 34 L. 23–24). The court further noted "I don't believe the witness testified to multiple felony convictions. I think he just said 'convictions' plural." (9/20/2022 Trial Tr. p. 34 L. 25–p. 35 L. 3). The court's belief Brown had stipulated to two convictions was incorrect, and the fact Slight did not specify he meant felony convictions makes the situation worse, not better.

Brown's stipulation, on its face, only admitted to one criminal conviction. He stipulated he "had previously been convicted of a felony." (Stipulation) (App. p. 17). His stipulation that his license was barred referred to his licensing status; it did not expressly admit to or reference any criminal conviction. Even making the vast intellectual leap necessary to assume the jurors knew each circumstance which could result in a person's license being barred, those circumstances include scheduled violations of the traffic code as well as various misdemeanors—convictions of no relevance in the present case. See Iowa Code § 321.555. This is why the

court's observation Slight had not specified he meant felony convictions was misplaced. Because Brown did not testify, no criminal conviction could be relevant or admissible aside from the conviction underlying Brown's status as a felon. The possibility Slight's testimony could cause the jury to imagine misdemeanors takes things even further outside the realm of relevance. The district court's finding the improper testimony was not prejudicial because Brown had already stipulated to multiple convictions is unsupported by the evidence, and thus was an abuse of discretion. See State v. Johnson, No. 19-0579, 2020 WL 5650731, at *2 (Iowa Ct. App. Sept. 23, 2020) (unpublished table decision) (citing State v. Brewer, 247 N.W.2d 205, 211 (Iowa 1976); State v. Jirak, 491 N.W.2d 794, 796 (Iowa Ct. App. 1986)).

Finally, this cannot be construed as harmless error. As discussed above, prior criminal convictions are among the most prejudicial sort of evidence that exists, a danger made even more pressing here because the court did not instruct the

jury it could only consider Brown's status as a felon for purposes of that element of the felon in possession charge.[3] Additionally, the State's case was weak. As argued below, it relied on Slight's claim he identified Brown with certainty during the chase (despite the video evidence casting doubt on that claim and the officer's belief it was someone else at the time), and on an inference of Brown's knowledge of the firearm which is not supported by the evidence. This is not a case where improper prejudice was outweighed by an insurmountable mountain of evidence establishing guilt. Quite the opposite—because the State's evidence was so lacking, the guilty verdicts indicate the jury was influenced by

[3] This is not the same as the remedial instruction Brown decided he did not want following Slight's improper testimony. See (9/20/2022 Trial Tr. p. 35 L. 22–p. 36 L. 2). A remedial instruction would have told the jury not to consider that testimony for any purpose; that is not the same as an instruction limiting consideration of Brown's status as a felon to a particular purpose. Brown's wish that the jury not be reminded about Slight's improper testimony via an instruction should not be interpreted as an admission it was not prejudicial. See (9/20/2022 Trial Tr. p. 35 L. 5–7).

something other than the properly-admitted evidence. The State cannot establish this error was harmless.

Slight's testimony informed the jury Brown had a criminal history beyond that contained in the stipulation. The district court was incorrect in concluding otherwise. There was no relevance to that information, and even if it carried probative value it was substantially outweighed by the danger of unfair prejudice.

Conclusion

The district court abused its discretion in overruling Brown's motion for mistrial. His convictions should be vacated and the case remanded for new trial, subject to any limitations resulting from the determination of other issues raised in this brief.

II. The evidence was insufficient to establish the identity element of any offense of conviction.

Preservation of Error

"A defendant's trial and the imposition of sentence following a guilty verdict are sufficient to preserve error with

respect to any challenge to the sufficiency of the evidence raised on direct appeal." State v. Crawford, 972 N.W.2d 189, 202 (Iowa 2022).

Standard of Review

Challenges to the sufficiency of evidence are reviewed for errors at law. State v. Folkers, 941 N.W.2d 337, 338 (Iowa 2020). The jury's verdict is binding if supported by substantial evidence. Id.; Iowa R. App. P. 6.904(3)(a). "Substantial evidence means such evidence as could convince a rational trier of fact the defendant is guilty beyond a reasonable doubt." State v. Dalton, 674 N.W.2d 111, 116 (Iowa 2004). The evidence is viewed in the light most favorable to the State, but the appellate court "must consider all the record evidence, not just the evidence supporting guilt." Id. The evidence "must raise a fair inference of guilt and do more than create speculation, suspicion, or conjecture." State v. Hamilton, 309 N.W.2d 471, 479 (Iowa 1981).

Discussion

"Identity is an element of a criminal offense which the State must prove beyond a reasonable doubt." State v. Chatman, No. 19-0856, 2020 WL 7021709, at *6–7 (Iowa Ct. App. Nov. 30, 2020) (unpublished table decision) (quoting State v. Jensen, 216 N.W.2d 369, 374 (Iowa 1974)). The evidence presented at trial was insufficient to establish Brown committed these offenses.

Slight testified his attention was drawn to the vehicle because, viewing it from behind, he could tell the driver was not wearing a seatbelt. (9/20/2022 Trial Tr. p. 20 L. 5–6, p. 52 L. 21–23). He turned on his lights and eventually his siren; the vehicle did not stop, and Slight briefly pursued it. (Exhibit 30 Dashcam[4] at 00:31–01:45). He was behind the vehicle until it sped away.

[4] The digital exhibit labeled "Exhibit 30" contains two folders. In the folder labeled "VIDEO_TS" there are several video files; only the file labeled "VTS_01_1" contains any video.

Slight testified he identified Brown as the driver "[a]fter the fact." (9/20/2022 Trial Tr. p. 54 L. 3–5). Slight claimed he "had seen his face" but "did not know who he was at the time." (9/20/2022 Trial Tr. p. 54 L. 9–10). Slight acknowledged he "thought it was somebody else during the pursuit," and called that person's name into dispatch as the person being pursued. (9/20/2022 Trial Tr. p. 54 L. 19–22, p. 55 L. 8–22).

When the vehicle was located and searched, Slight found a debit card and a belt with Brown's name on them. (9/20/2022 Trial Tr. p. 30 L. 21–p. 30 L. 2). He learned the owner of the vehicle was Brown's girlfriend, but he was unsure how he knew about their relationship. (9/20/2022 Trial Tr. p. 61 L. 4–11, p. 64 L. 9–21). He reviewed Brown's driver's license record, and upon seeing that photo decided Brown was the person he had seen driving. (9/20/2022 Trial Tr. p. 64 L. 22–p. 65 L. 14).

This evidence was insufficient to convince a rational juror beyond a reasonable doubt that Brown was the driver. Slight claimed he saw Brown's face during the pursuit, but the video contradicts that claim, showing Slight behind the vehicle the entire time and never close enough to see the driver's face well enough to make a positive identification. (Exhibit 30 Dashcam at 00:01–01:45); see State v. Despenas, No. 21-1775, 2023 WL 2396460, at *4 (unpublished table decision) ("[O]ur confidence in an officer's observations is determined by the totality of circumstances."); State v. Akers, No. 17-0577, 2018 WL 1182616, at *2–3 (Iowa Ct. App. March 7, 2018) (unpublished table decision) (assessing officer's credibility by comparing his testimony to video of the encounter). During the pursuit, Slight believed a different person was driving, and knew what that person looked like. (9/20/2022 Trial Tr. p. 54 L. 19–22, p. 55 L. 8–22, p. 63 L. 7–13). Only after he located items with Brown's name on them in the car and viewed Brown's photo did he decide Brown had been the

driver. (9/20/2022 Trial Tr. p. 64 L. 22–p. 65 L. 14). This circumstance is troublingly similar to a single-person show up of the sort condemned by the United States Supreme Court over 50 years ago. See Stovall v. Denno, 388 U.S. 293, 302 (1967) (abrogated on unrelated grounds by U.S. v. Johnson, 457 U.S. 537 (1982)) ("The practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned."). The fact Brown had property in the car is unsurprising since it apparently belonged to his girlfriend, and is not enough to establish beyond a reasonable doubt that he was driving on this occasion.

The evidence was insufficient to establish Brown was the driver of the vehicle. The video demonstrates Slight's claim he identified Brown with certainty was not credible, especially when coupled with the fact Slight identified someone else as the driver at the time, and only decided Brown was driving after viewing a picture of him. The jury could only have

concluded Brown was the driver through speculation, suspicion, or conjecture. See Hamilton, 309 N.W.2d at 479. Brown's convictions are therefore not supported by sufficient evidence.

Conclusion

The evidence was insufficient to establish the identity element of any offense of conviction. Brown's convictions should be vacated and the case remanded for dismissal of all counts.

III. The evidence was insufficient to establish Brown knowingly possessed a firearm.

Preservation of Error

"A defendant's trial and the imposition of sentence following a guilty verdict are sufficient to preserve error with respect to any challenge to the sufficiency of the evidence raised on direct appeal." Crawford, 972 N.W.2d at 202.

Standard of Review

Challenges to the sufficiency of evidence are reviewed for errors at law. Folkers, 941 N.W.2d at 338. The jury's verdict

is binding if supported by substantial evidence. Id.; Iowa R. App. P. 6.904(3)(a). "Substantial evidence means such evidence as could convince a rational trier of fact the defendant is guilty beyond a reasonable doubt." Dalton, 674 N.W.2d at 116. The evidence is viewed in the light most favorable to the State, but the appellate court "must consider all the record evidence, not just the evidence supporting guilt." Id. The evidence "must raise a fair inference of guilt and do more than create speculation, suspicion, or conjecture." Hamilton, 309 N.W.2d at 479.

Discussion

During a search of the vehicle, Slight located a handgun tucked beneath the driver's seat.[5] (9/20/2022 Trial Tr. p. 30 L. 4–21; Exhibit 18 Gun Under Seat) (Ex. App. p. 9). The

[5] The State also presented evidence that ammunition was located in a pill bottle in the closed center console and beneath the passenger seat. (9/20/2022 Trial Tr. p. 31 L. 11–15, p. 49 L. 10–15). Iowa Code section 724.26(1) does not criminalize possession of ammunition, and the jury was instructed conviction required proof Brown possessed a firearm, not ammunition. Iowa Code § 724.26(1); (Jury Inst. No. 16 Felon in Possession Marshalling) (App. p. 12).

firearm was not visible in plain sight. (9/20/2022 Trial Tr. p. 58 L. 16–18, p. 62 L. 15–17). Slight acknowledged he did not see the driver handling the firearm during the pursuit, did not know how the firearm got beneath the seat, and never saw the driver looking under the seat. (9/20/2022 Trial Tr. p. 62 L. 4–14, L. 18–21).

"Possession may be actual or constructive." State v. Reed, 875 N.W.2d 693, 705 (Iowa 2016). Actual possession requires proof the contraband item was on the suspect's person at some time. Id. at 705 n. 5 (citing State v. Thomas, 847 N.W.2d 438, 442 (Iowa 2014); State v. Vance, 790 N.W.2d 775, 784 (Iowa 2010). "Constructive possession exists when the evidence shows the defendant 'has knowledge of the presence of the [contraband] and has the authority or right to maintain control of it.'" Reed, 875 N.W.2d at 705 (quoting State v. Maxwell, 743 N.W.2d 185, 193 (Iowa 2008)); (Jury Inst. No. 20 Possession) (App. pp. 13-14). "[P]roximity to the [contraband], though pertinent, is not enough to show control

and dominion." Id. (quoting State v. Cashen, 666 N.W.2d 566, 572 (Iowa 2003)) (alterations in original); (Jury Inst. No. 20 Possession) (App. pp. 13-14). "Constructive possession may be inferred when [contraband is] found on property in the defendant's exclusive possession," but when the property is not in the defendant's exclusive possession "additional proof is needed." Id. (citing State v. Kern, 831 N.W.2d 149, 161 (Iowa 2013)).

The Court has identified factors for determining whether constructive possession exists: "(1) incriminating statements made by a person; (2) incriminating actions of the person upon the police's discovery of [contraband] among or near the person's personal belongings; (3) the person's fingerprints on the [contraband]; and (4) any other circumstances linking the person to the [contraband]." Id. (quoting Kern, 831 N.W.2d at 161). In cases involving a motor vehicle, the Court has identified additional factors: "(1) was the contraband in plain view, (2) was it with the defendant's personal effects, (3) was it

found on the same side of the car seat or next to the defendant, (4) was the defendant the owner of the vehicle, and (5) was there suspicious activity by the defendant." State v. Kemp, 688 N.W.2d 785, 789 (Iowa 2004) (citing State v. Atkinson, 620 N.W.2d 1, 4 (Iowa 2000)). These factors are intended as guideposts, but no factor (or even the presence of all factors) is dispositive, and the ultimate question remains "whether all of the facts and circumstances . . . allow a reasonable inference that the defendant knew of the drugs' presence and had control and dominion over the contraband." Cashen, 666 N.W.2d at 571.

Brown was not in actual possession of the firearm at the time it was discovered, and there was no evidence he ever had it on his person. Apparently recognizing this, the State focused on constructive possession at trial. But the evidence was also insufficient to establish constructive possession. The vehicle did not belong to Brown, it belonged to his girlfriend. (9/20/2022 Trial Tr. p. 61 L. 4–11). No evidence

was introduced that Brown excluded her (or anyone else) from using the vehicle. Thus, even assuming he was the driver, Brown did not have exclusive possession of the car.

Because the firearm was discovered in the unoccupied vehicle, there were no incriminating statements or actions by Brown upon its discovery. No fingerprints were located on the firearm (or the ammunition). Although items belonging to Brown were found in the car, none were found in the same place where the firearm or ammunition were located, or in an area indicating Brown would have seen them—the debit card was found in a wallet in the cupholder, and the belt was draped over the passenger seat. (9/20/2022 Trial Tr. p. 46 L. 11–15; Exhibit 9 Passenger Seat; Exhibit 10 Wallet in Cupholder) (Ex. App. pp. 6-7). The presence of Brown's property in these locations within the car is not enough to convince a rational juror beyond a reasonable doubt, even by inference, that Brown was aware of the firearm beneath the driver's seat. See Reed, 875 N.W.2d at 708–10 (presence of

firearm in a room containing defendant's property, but not located in close proximity to that property, is insufficient prove constructive possession). And while it is true the driver fled, that does not establish knowledge of the gun. A person might run from police for any number of reasons, and Brown's barred license status—if one assumes he was the driver—is a concrete reason supported by the evidence. Because the flight could give rise to multiple inferences, it is sheer speculation to infer it was because of knowledge of the firearm. See State v. Truesdell, 679 N.W.2d 611, 618 (Iowa 2004) (abrogated on unrelated grounds by Crawford, 972 N.W.2d 189).

In sum, the driver did not have exclusive possession of the vehicle; there were no incriminating statements; neither the firearm nor the ammunition were in plain sight, or had Brown's fingerprints on them; and the fact the driver fled and presence of Brown's property do not constitute substantial

evidence sufficient to establish knowledge of the firearm tucked deep underneath the driver's seat.

Because the evidence was insufficient to convict Brown of possession of a firearm as a felon, it was also insufficient to establish that element of the eluding count. See (Jury Inst. No. 17 Eluding Marshalling) (App. pp. 12-13). As a result, Brown's conviction for the D felony offense of eluding while participating in the public offense of felon in possession of a firearm also cannot stand.

Conclusion

The evidence was insufficient to support Brown's conviction for possession of a firearm by a felon, and in turn was also insufficient to support Brown's conviction for eluding while participating in a felony. Those convictions should be vacated and the case remanded for dismissal of the felon in possession count, and resentencing as an aggravated misdemeanor on the eluding count.

REQUEST FOR ORAL ARGUMENT

Counsel requests to be heard in oral argument.

ATTORNEY'S COST CERTIFICATE

The undersigned, hereby certifies that the true cost of producing the necessary copies of the foregoing Brief and Argument was $5.07, and that amount has been paid in full by the Office of the Appellate Defender.

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION FOR BRIEFS

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) because:

> [X] this brief has been prepared in a proportionally spaced typeface Bookman Old Style, font 14 point and contains 5,229 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

Dated: 08/24/23

Josh Irwin
Assistant Appellate Defender
Appellate Defender Office
Lucas Bldg., 4th Floor
321 E. 12th Street
Des Moines, IA 50319
(515) 281-8841
jirwin@spd.state.ia.us
appellatedefender@spd.state.ia.us