IN THE COURT OF APPEALS OF IOWA

No. 23-0055
Filed October 25, 2023

STATE OF IOWA,
Plaintiff-Appellee,

vs.

CLAYTON CURTIS BROWN,
Defendant-Appellant.

Appeal from the Iowa District Court for Boone County, Derek J. Johnson, Judge.

The defendant appeals his convictions for possession of a firearm by a felon, aggravated eluding, and driving while barred. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Martha J. Lucey, State Appellate Defender, and Josh Irwin, Assistant Appellate Defender, for appellant.

Brenna Bird, Attorney General, and Timothy M. Hau, Assistant Attorney General, for appellee.

Considered by Bower, C.J., Chicchelly, J., and Potterfield, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2023).

POTTERFIELD, Senior Judge.

Clayton Brown appeals his convictions for possession of a firearm as a felon; eluding while exceeding the speed limit by twenty-five miles per hour (mph) and participating in a felony (i.e. being a felon in possession of a firearm, which is a class "D" felony); and driving while barred as an habitual offender. Brown argues (1) the district court should have granted his motion for mistrial after an officer testified in front of the jury that Brown had "convictions on his record"; (2) there is not substantial evidence to support the jury's finding he was the person driving the car that eluded the officer; and (3) even if there was substantial evidence Brown was the driver, there was insufficient evidence he knowingly possessed the firearm that was later found tucked underneath the driver's seat in the car.

I. Background Facts and Proceedings.

On September 29, 2021, Officer Joseph Slight was on duty and in his patrol car in the city of Boone when he saw a driver who was not wearing his seatbelt. Officer Slight turned on his emergency lights to initiate a stop, but the driver kept going. After using an alley, cutting through a parking lot, and driving through at least one stop sign, the driver accelerated to approximately 80 mph. Officer Slight decided not to pursue.

About forty minutes later, Officer Slight located the car, which was parked without anyone in it. He checked to see if the car had been reported stolen and learned it had not. Officer Slight then sealed the car and had it towed so he could search it after obtaining a search warrant.

When he searched the vehicle the next day, Officer Slight found a wallet in the cupholder, which held Brown's debit card. Slung over the front passenger seat

was also a leather belt with Brown's name handwritten on it. Officer Slight also found a loaded handgun under the driver's seat, some loose ammunition in the car, and a pill bottle in the center console that was also holding ammunition. At some point, Officer Slight used Brown's name to look up his driver's license photo. Although he originally called a different person's name into dispatch during the initial encounter, upon seeing Brown's photo, Officer Slight recognized it had been Brown driving the car during the chase. He also learned that Brown's girlfriend was the owner of the vehicle.

Brown was charged with possession of a firearm by a felon (count I), eluding while exceeding the speed limit by more than twenty-five mph and committing a felony (count II), and driving while barred as an habitual offender (count III). Brown entered pleas of not guilty.

Before the start of his jury trial, Brown stipulated that on September 29, 2021, his "driver's license was barred as an habitual offender" and he "had previously been convicted of a felony." The stipulation was read to the jury before the State's only witness—Officer Slight—testified. During the officer's testimony, the prosecutor asked him why finding the gun in the vehicle was "important or relevant to [him] through the course of this." Then the following occurred:

> OFFICER SLIGHT: Because there was convictions on his record that he should not—
>
> DEFENSE COUNSEL: Objection, Judge. Move to strike.
>
> THE COURT: Sustained.
>
> PROSECUTOR: Let me clarify. From your check, did you learn that he had at least a prior felony?
>
> OFFICER SLIGHT: Yes.
>
> DEFENSE COUNSEL: Judge, I'd like to take a matter outside the presence of the jury.

Brown then moved for a mistrial, which the district court denied. After Officer Slight completed his testimony and Brown rested without presenting any evidence on defense, the jury found Brown guilty as charged on all three counts.

Brown was later sentenced to terms of incarceration for five years on count I, five years on count II, and two years on count III. The court ordered Brown to serve the three sentences concurrently to each other but consecutively to his sentences in two other cases.

Brown appeals.

II. Discussion.

A. Motion for Mistrial.

Brown challenges the district court's denial of his motion for mistrial. "Trial courts have considerable discretion in ruling upon motions for mistrial, since they are present throughout the trial and are in a better position than the reviewing court to gauge the effect of the matter in question on the jury." *State v. Jirak*, 491 N.W.2d 794, 796 (Iowa Ct. App. 1992). "The trial court's ruling on such a motion will not be set aside except upon a clear showing of abuse of discretion." *Id.* "Ordinarily, abuse of discretion is found upon the denial of a mistrial only where there is no support in the record for the trial court's determination." *Id.*

Here, after Officer Slight testified "there was convictions on [Brown's] record," Brown objected and ultimately moved for a mistrial, arguing:

> The parties have carefully crafted a stipulation to prevent this type of information from the—from the jury hearing. While one letter is important, they're supposed to know about one conviction and that's his felony. The officer clearly said "convictions." You can't unring that, Judge. So now every juror knows my client has a greater criminal record than what we agreed to or what they should know about. The only time they should know about his convictions is if he

> testifies and they fall under Rule 609. So I don't think we can unring this. I don't think my client can get a fair trial, and I believe a mistrial has to be declared.

The State resisted, noting the court sustained Brown's objection to the testimony and could instruct the jury to not consider Officer Slight's answer. Additionally, the prosecutor argued that, based on the stipulation, the jury was already aware Brown had both a felony conviction and his license was barred as an habitual offender and "[t]here [was] an implication within that stipulation" of multiple convictions, so Brown was not prejudiced by Officer Slight's use of "convictions."

The court denied Brown's motion for mistrial, concluding Brown "stipulated to basically two convictions" and the court did not "believe that the evidence as it came in [was] so prejudicial that it would warrant a mistrial." Brown disagreed with the court's characterization of the stipulation, arguing "[t]he second stipulation is he's barred. That's a DOT sanction. That is not a conviction." The court maintained its decision to deny the motion for mistrial; it asked Brown if he "want[ed] the court to address this with the jury any further or [did he] fear that [would] bring more attention to it." After speaking with his attorney, Brown told the court he did not.

On appeal, Brown first argues Officer Slight's mention of multiple convictions was irrelevant and substantially more prejudicial than probative—in light of Brown's prior stipulation that he was a convicted felon on the date in question. *See* Iowa R. Evid. 5.401 (providing when evidence is relevant). In other words, while the State had the burden to prove every element of felon in possession of a firearm, which required proof Brown was previously convicted of a felony as of September 29, 2021, he argues because his stipulation was

sufficient to prove that element, any other evidence of his prior convictions was irrelevant and unduly prejudicial. He also argues the mention of his "convictions" violated the prohibition on using prior-bad-acts evidence to prove his character and show he was acting in accordance with it. *See* Iowa R. Evid. 5.404(b). But Brown did not make these arguments to the district court when moving for mistrial. He also did not reference any of these rules or arguments when objecting to Officer Slight's testimony immediately before he moved for mistrial.[1] So we do not consider these specific arguments further, as they were not preserved.[2] *See Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) ("It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal.").

We confine our review to the arguments actually made to the district court and its ruling on them in determining whether the court abused its discretion. The court concluded Brown's right to a fair trial was not violated when Officer Slight mentioned "convictions" because Brown had stipulated to both a felony conviction and that his "driver's license was barred as an habitual offender." Brown claims

[1] In fact, Brown did not provide any reason for his objection; he simply stated he objected, and the district court sustained it.

[2] In his reply brief on appeal, Brown argues that his "motion for mistrial was based on the State's violation of rules 5.401, 5.403, and 5.404(b). The parties and the court treated it as such—it was obvious the discussion centered around prior bad acts evidence, even though that phrase was not specifically uttered." We disagree with Brown's contention; it is not at all obvious to us that Brown, the court, or the State were specifically referencing the rules of evidence Brown now relies upon. *See State v. Taylor*, 310 N.W.2d 174, 177 (Iowa 1981) ("It is incumbent upon the objecting party to lodge specific objections, . . . so the trial court is not left to speculate whether the evidence is in fact subject to some infirmity that the objection does not identify. Every ground of exception that is not particularly specified is considered abandoned." (citations omitted)).

that his stipulation his driver's license was barred as an habitual offender is not admitting a criminal conviction; instead, it is just a "refer[ence] to his licensing status." But this distinction is without merit. Brown admitted he was barred as an habitual offender, which is defined by Iowa Code section 321.555. Under section 321.55, "habitual offender"

> means any person who has accumulated *convictions for separate and distinct offenses* described in subsection 1, 2, or 3, committed after July 1, 1974, *for which final convictions have been rendered*, as follows:
>
> 1. *Three or more of the following offenses,* either singularly or in combination, within a six-year period:
>
> a. Manslaughter resulting from the operation of a motor vehicle.
>
> b. Operating a motor vehicle in violation of section 321J.2 or its predecessor statute.
>
> c. Driving a motor vehicle while the person's driver's license is suspended, denied, revoked, or barred.
>
> d. Perjury or the making of a false affidavit or statement under oath to the department of public safety.
>
> e. An offense punishable as a felony under the motor vehicle laws of Iowa or any felony in the commission of which a motor vehicle is used.
>
> f. Failure to stop and leave information, to render aid, or to otherwise comply with sections 321.261 and 321.263.
>
> g. Eluding or attempting to elude a pursuing law enforcement vehicle in violation of section 321.279.
>
> h. Serious injury by a vehicle in violation of section 707.6A, subsection 4.
>
> 2. *Six or more of any separate and distinct offenses within a two-year period in the operation of a motor vehicle*, which are required to be reported to the department by section 321.491 or chapter 321C, except equipment violations, parking violations as defined in section 321.210, violations of registration laws, violations of sections 321.445 and 321.446, violations of section 321.276, operating a vehicle with an expired license or permit, failure to appear, weights and measures violations and speeding violations of less than fifteen miles per hour over the legal speed limit.
>
> 3. The offenses included in subsections 1 and 2 shall be deemed to include offenses under any valid town, city or county ordinance paralleling and substantially conforming to the provisions of the Code concerning such offenses.

(Emphasis added.) So, contrary to Brown's argument, the district court was not wrong in its statement that Brown had already stipulated to multiple convictions.

Officer Slight's statement that Brown had "convictions" was merely cumulative to evidence already presented to the jury. And the single, quick reference made by the officer when asked to explain why finding a gun in the vehicle mattered was unlikely to improperly prejudice the jury against Brown. *See State v. Anderson*, 448 N.W.2d 32, 34 (Iowa 1989) ("It is of significance that the incident was isolated."). Plus, the court sustained Brown's objection, which stopped Officer Slight's testimony. The court also sustained Brown's motion to strike and, although it did not tell the jury that Officer Slight's statement was stricken from evidence before Brown asked to speak to the court outside the presence of the jury, offered to address the jury on the issue once it returned. Brown elected not to have the issue addressed again. With these facts, we cannot say the district court abused its discretion in denying Brown's request for a mistrial. *See State v. Newell*, 710 N.W.2d 6, 32 (Iowa 2006) ("A mistrial is appropriate when 'an impartial verdict cannot be reached' or the verdict 'would have to be reversed on appeal due to an obvious procedural error in the trial.'" (citation omitted)).

B. Sufficiency of the Evidence

Brown challenges the sufficiency of the evidence supporting his convictions. Our review is for correction of errors at law. *State v. Ortiz*, 905 N.W.2d 174, 179 (Iowa 2017). "We view the evidence 'in the light most favorable to the State, including all reasonable inferences that may be fairly drawn from the evidence.'" *Id.* at 180 (citation omitted). "We uphold the verdict if substantial evidence in the record supports it." *Id.* "Evidence is . . . substantial if, when viewed in the light

most favorable to the State, it can convince a rational jury that the defendant is guilty beyond a reasonable doubt." *Id.* (citation omitted).

1. Identity.

Brown argues the State failed to prove he was the perpetrator of the three crimes. *See State v. Jensen*, 216 N.W.2d 369, 374 (Iowa 1974) ("Identity is an element of a criminal offense which the State must prove beyond a reasonable doubt."). He focuses on the fact Officer Slight first believed the driver was someone other than Brown and claims the video from the officer's dash cam shows that Officer Slight was never at a vantage point where he could see the driver's face to make an identification. But Officer Slight was not always directly behind the car—the car was on a road perpendicular to the one Officer Slight was on when the driver first turned in front of the officer's car. And, in evaluating sufficiency of the evidence, "[i]t 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; [instead,] such matters are for the jury." *State v. Musser*, 721 N.W.2d 758, 761 (Iowa 2006) (quoting *State v. Williams*, 695 N.W.2d 23, 28 (Iowa 2005)).

Officer Slight testified that after seeing Brown's driver's license picture, he recognized Brown as the person he saw driving the car. And he made an in-court identification that Brown was the same person he saw driving the vehicle. Evidence that Brown's girlfriend owned the vehicle and that Brown's personal items—his debit card and belt—were found in the vehicle about forty minutes after the chase supported Officer Slight's identification of Brown as the driver.

Substantial evidence supports the jury's determination Brown was the driver of the vehicle.

2. Knowingly Possessed Firearm.

Alternatively, Brown maintains the State failed to prove he knowingly possessed the handgun. Brown argues that even if he was the person driving the vehicle, there is not sufficient evidence he knowingly possessed the handgun because the gun was tucked under the seat—out of the driver's line of sight—and Officer Slight did not see the driver reach for or handle the gun.

We go a step further and note the record is devoid of any evidence that the gun was even in the vehicle at the time Brown was driving it. The State's evidence clearly established that the gun was under the driver's seat of the vehicle when Officer Slight located the car about forty minutes after he last saw Brown driving it. But there was no evidence regarding who had access to the vehicle during those forty minutes. Plus, Brown was not in or around the car at the time it was located, and the doors were unlocked.

Still, we consider additional factors to determine if the State provided substantial proof of possession:

> (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 packages containing the controlled substance; and (4) any other circumstances linking the person to the controlled substance.

Reed, 875 N.W.2d at 706. And because the "'premises' involve a motor vehicle," we also

> consider these additional factors: (1) was the contraband in plain view, (2) was it with the accused's personal effects, (3) was it found

> on the same side of the car seat as the accused or immediately next to him, (4) was the accused the owner of the vehicle, and (5) was there suspicious activity by the accused.

State v. Carter, 696 N.W.2d 31, 39 (Iowa 2005).

Here, Brown made no incriminating statements and was not present when Officer Slight located the handgun in the car. There was no evidence of Brown's fingerprints or DNA being on the handgun. While Brown's debit card and belt were in the vehicle and he was seen driving it a short time before Officer Slight located and secured the vehicle, these facts point to him as the driver who eluded Officer Slight; they do not necessarily suggest knowledge of a gun that may or may not have been in the vehicle at the time he was driving. When we consider the "additional factors," we note that the handgun was not in the driver's line of sight—even if it was in the vehicle while Brown was driving, he could have been unaware of it. And Brown's debit card and belt were in the vehicle, but they were in a different area—not stashed with the gun under the seat. And while the handgun was found under the seat where Brown was previously sitting, forty minutes elapsed between when he was last seen in the seat and the securing of the handgun and, as we already stated, the record is silent as to what took place during that forty-minute window. Brown did not own the vehicle. Finally, the State suggests we should infer Brown knew the gun was in the vehicle at the time he refused to stop for Officer Slight because his action of fleeing showed consciousness of guilt. *See State v. Wilson*, 878 N.W.2d 203, 211 (Iowa 2016) ("It is well-settled law that the act of avoiding law enforcement after a crime has been committed may constitute circumstantial evidence of consciousness of guilt that is probative of guilt itself."). But Brown's guilty conscience or concern about police

interactions could have been related to driving while barred as an habitual offender—he had reason for a guilty conscience even without knowingly possessing the handgun. *See id.* at 215 (recognizing that consciousness of guilt "does not inevitably constitute evidence of actual guilt concerning every element" of charged offenses).

After reviewing the factors, all we can say the State established was that Brown was driving the vehicle at about 12:20 p.m., purposely evading Officer Slight when he tried to initiate a stop, and that a handgun was in the vehicle under the driver's seat at approximately 1:00 p.m. when Officer Slight located and secured the vehicle. These two facts only allow speculation or conjecture that the gun was both in the vehicle at 12:20 p.m. and that Brown knew the gun was stashed under the seat. And "[e]vidence which merely raises suspicion, speculation, or conjecture is insufficient." *State v. West Vangen*, 975 N.W.2d 344, 349 (Iowa 2022) (citation omitted); *see also State v. Williams*, 674 N.W.2d 69, 71 (Iowa 2004) ("The State's evidence must 'raise a fair inference of guilt and do more than create speculation, suspicion, or conjecture.'" (citation omitted)).

For these reasons, we conclude there is insufficient evidence Brown knowingly possessed a firearm, so he should have been acquitted of possession of a firearm by a felon (count I). And, because eluding while exceeding the speed limit by twenty-five mph and participating in a felony required the State to establish that Brown was "participating in a public offense of felon in possession of a firearm" as the fourth element of the crime, he also should have been acquitted of count II. We reverse Brown's convictions on both of these charges. *See State v. Dullard*, 668 N.W.2d 585, 597 (Iowa 2003) (providing that Double Jeopardy principles

prohibit a retrial "when the defendant's conviction is reversed on grounds that the evidence was insufficient to sustain the conviction"). That said, we note that the jury was instructed on a lesser-included charge for count II, whereby it could find Brown guilty of eluding in excess of twenty-five mph if the State failed to prove the fourth element of being a felon in possession of handgun; we remand for further proceedings on count II. *See State v. Tyler*, 873 N.W.2d 741, 746 n.3 (Iowa 2016), *superseded by statute on other grounds as recognized in State v. Brimmer*, 983 N.W.2d 247, 259–60 (Iowa 2022). We do not disturb Brown's conviction on count III—driving while barred as an habitual offender.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

IOWA APPELLATE COURTS

State of Iowa Courts

Case Number	**Case Title**
23-0055	State v. Brown

Electronically signed on 2023-10-25 08:14:31