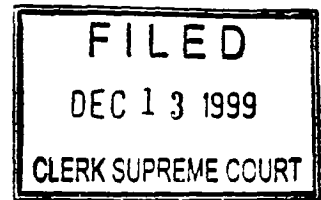


IN THE COURT OF APPEALS OF IOWA

No. 1999-386 (9-639) / 98-2178
Filed December 13, 1999



STATE OF IOWA,
Plaintiff-Appellee,

vs.

CARL ELLIS WATERS,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, Stephen C. Clarke, Judge.

The defendant appeals his conviction, following a jury trial, on one count each of distribution of crack cocaine to a person under age eighteen and delivery of crack cocaine. **AFFIRMED.**

Alfredo Parrish and Andrew J. Dunn of Parrish, Kruidenier, Moss, Dunn & Montgomery, L.L.P., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Kimberly A. Griffith, Assistant County Attorney, for appellee.

Heard by Huitink, P.J., and Mahan and Hecht, JJ.

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HUITINK, P.J.***I. Background Facts and Proceedings.***

Waters was charged with one count of delivery of crack cocaine to a person under eighteen years of age in violation of Iowa Code section 124.406 and one count of delivery of crack cocaine in violation of Iowa Code section 124.401(1)(c) based on allegations he sold controlled substances to Mitchell Howell and Brandon Fintel, a minor. The State's evidence indicates Mitchell Howell and Brand Fintel drove to Sullivan Park in Waterloo to purchase crack cocaine. At the park they were approached by a man on a bicycle, later identified as the defendant, Carl Waters. Howell and Fintel purchased six rocks of crack cocaine for about one hundred dollars. Waters gave the crack to Fintel, who received the money from Howell. These activities were observed by Leon Mosely, a neighborhood activist who had arrived at the park in order to tape record various drug-related activities. Mosely was approximately fifty feet away from the transactions while filming. When Howell and Fintel observed Mosely with his camcorder, they fled. They were ultimately apprehended by the police following a high-speed chase. Before they were apprehended, Fintel swallowed the six rocks of cocaine. Following their arrest, both Howell and Fintel were taken to the hospital, where they were administered laxatives to recover the crack cocaine. Two rocks were recovered from Fintel.

At trial the State introduced Mosely's testimony and the contents of his videotape. He testified the activities he observed were consistent with similar activities he has observed in the park. Howell and Fintel, in exchange for reduced sentences on other charges, agreed to testify against Waters. Officer Mark Meyer testified Sullivan Park is known for illicit drug sales, particularly crack cocaine. Over Waters's objection, Meyer also testified:

Q. --do you recall the individual on the bike? Well, that individual that was on the bike, did you -- or was that activity that you saw consistent with one selling? A. Yes.

Q. And the actions you saw in the video tape -- or activity that you saw on the video tape in regards to the truck, the black truck, was that consistent with the purchasing of crack cocaine. A. Yes.

Over Waters's objections, the State was permitted to question Howell concerning a pretrial statement he gave Waters's attorney denying Waters's involvement in the sale of any drugs Howell purchased.

At the conclusion of the State's evidence Waters moved for a judgment of acquittal on Count I citing the absence of proof that Waters delivered crack cocaine to Howell. The district court rejected Waters's argument that the State's evidence showed Waters's only delivery was made to Fintel and Fintel passed the drugs on to Howell.

As part of his defense, Waters sought to attack Mosely's credibility by calling Alan and Sue Brases to testify concerning false allegations of drug dealing Mosely allegedly made against them. The court sustained the State's objection to their

testimony because it was inadmissible extrinsic evidence of a witness's prior specific instance of conduct. See Iowa R. Evid. 608(b).

Under Waters's theory, Fintel should have been considered Waters's accomplice because he, like Waters, delivered drugs by passing the drugs on to Howell after receiving them from Waters. Waters accordingly requested the district court instruct the jury on the permissible uses of accomplice testimony and requisite corroboration. The district court declined to instruct the jury on the issue because, in the court's opinion, Fintel was not an accomplice as a matter of law.

The jury found Waters guilty as charged. Waters filed a motion in arrest of judgment, which the district court denied. He was sentenced by the district court on the distribution conviction to an indeterminate term of imprisonment not to exceed twenty-five years, and fifteen years for delivery, to be served concurrently. Waters was ordered to serve a minimum of ten years before being eligible for parole. He was additionally fined \$1000 plus costs and fees.

On appeal Waters contends there was insufficient evidence to support his convictions. Waters next argues Officer Meyer's testimony was improper because it provided expert opinion without factual basis. Waters next maintains his trial counsel was ineffective for failing to properly conduct cross-examination of the State's witnesses and failing to introduce exculpatory testimony. He next claims the district court erred in refusing to allow the testimony of Alan and Sue Brase, who claimed Mosely filed similar false charges against them. Waters additionally argues section

124.406 is overinclusive and violates his constitutional rights because the statute encompasses people under the age of eighteen who actually live adult lives. Waters also maintains he was entitled to a requested jury instruction requiring corroboration of accomplice testimony. Waters next argues the district court erred in allowing the State to question Howell regarding a prior inconsistent statement on direct examination.

Waters also maintains the district court erred in denying his motion for change of venue and that trial counsel was ineffective for failing to pursue it. Waters further contends the cumulative effect of the district court's evidentiary and constitutional errors denied him a fair trial. Waters lastly argues his conviction violates the Double Jeopardy Clause, since there was only one act of delivery to Fintel.

II. Sufficiency of the Evidence.

We review a challenge to the sufficiency of the evidence for errors of law. Iowa R. App. P. 4.

We initially note the State's assertion that Waters failed to preserve error on this issue because the grounds cited on appeal differ from those raised below. We nevertheless address Waters's claim on the merits because, preserved or not, we reach the same result. In any event, an analysis of the strength of the State's evidence will aid in determining whether Waters's ineffective assistance of counsel claims are supported by the requisite prejudice. This analysis will also aid in determining whether any evidentiary errors were harmless.

Where a defendant challenges the sufficiency of the evidence supporting a jury verdict, our standard of review is that the verdict will be upheld if there is substantial evidence to support it. *State v. Conyers*, 506 N.W.2d 442, 444 (Iowa 1993). Evidence is substantial if it would have convinced a rational fact finder the defendant is guilty of the crime charged beyond a reasonable doubt. *State v. Constable*, 505 N.W.2d 473, 478 (Iowa 1993). When considering sufficiency of the evidence challenges, we examine the evidence in a light most favorable to the State. *State v. Robinson*, 288 N.W.2d 337, 340 (Iowa 1980). We consider all evidence presented at trial, not just the evidence supporting the verdict. *Id.* All legitimate inferences and presumptions that can fairly and reasonably be deduced from the evidence are resolved in favor of the State. *State v. Blair*, 347 N.W.2d 416, 418-19 (Iowa 1984).

Waters argues the inconsistent testimony of two convicted felons is insufficient to convict him and no other testimony offered substantiates or corroborates their testimony such that a rational jury could find guilt beyond a reasonable doubt. Applying the appropriate standard of review and viewing the evidence presented to the jury in the light most favorable to the State, we disagree.

At trial, the State presented evidence which, if believed, would allow a rational juror to conclude Waters delivered crack cocaine. Specifically, witness Leon Mosley witnessed what he believed to be a drug transaction between two white males in a pickup and a black male on a bicycle. His observations were corroborated by the videotape he made.

Expert witness Mark Meyer is an officer in Waterloo with over twenty-two years of experience. In addition, he has observed hundreds of cocaine sales. He testified Sullivan Park was an area known for illegal drug sales. He also testified the activity observed on the videotape made by Mosley was “consistent” with narcotic trafficking.

Based upon this testimony, a rational juror could conclude Waters delivered crack cocaine. The district court correctly concluded:

It appears to me that the State has presented sufficient evidence to present both charges to the jury contained in Counts I and II as they are different crimes with different elements, and so I am going to find that there’s sufficient evidence to submit the question to the jury.

We find Waters’s conviction is supported by sufficient evidence.

III. Officer Meyer’s Testimony.

Issues involving the admission of expert testimony are generally within the trial court’s discretion. We review for errors of law, and the trial court’s decision will not be overturned unless there has been an abuse of discretion. *State v. Rains*, 574 N.W.2d 904, 916 (Iowa 1998).

Expert testimony is admissible if it is reliable and “will assist the trier of fact in resolving an issue.” *State v. Brown*, 470 N.W.2d 30, 32 (Iowa 1991). **A properly qualified witness may testify to the customs and practices of those who use or deal in narcotics.** *State v. Vesey*, 482 N.W.2d 165, 167 (Iowa App. 1991). **These basic precepts, however, do not permit a witness to express a direct opinion on the guilt or innocence of the defendant.** *State v. Smith*, 522 N.W.2d 591, 593 (Iowa 1994).

Determining guilt or innocence is the exclusive function of the finder of fact and, consequently, is an improper subject of expert testimony. *State v. Oppedal*, 232 N.W.2d 517, 524 (Iowa 1975). The proponent of expert testimony bears the burden of showing it will aid the trier of fact. *State v. Nelson*, 480 N.W.2d 900, 903 (Iowa App. 1991).

The testimony of Officer Meyer did not constitute an opinion of guilt of the defendant or whether the defendant possessed drugs with an intent to sell. The line of questioning did not specifically relate to the defendant. The questions were based only on the evidence bearing on the activities of drug dealers. The answers given were based on the witness's experience and special knowledge. *State v. Dinkins*, 553 N.W.2d 339, 342 (Iowa App. 1996). Even if we were to conclude otherwise, the probative force of the State's evidence against Waters renders any error in the admission of Meyer's testimony harmless. *State v. Hensley*, 534 N.W.2d 379, 384 (Iowa 1995).

IV. Admissibility of Brases' Testimony.

Waters argues the district court's refusal to allow Brases to testify denied him his right to put on a defense in violation of the Sixth and Fourteenth Amendments of the United States Constitution and article one, sections nine and ten of the Iowa Constitution.

Issues not raised before the district court, including constitutional issues, cannot be raised for the first time on appeal. *State v. McCright*, 569 N.W.2d 605, 607

(Iowa 1997). Because Waters does not challenge the district court's rule-based decision excluding this testimony and did not raise this constitutional issue in the district court, any error has not been preserved, and there is nothing for us to review.

V. Constitutionality of Iowa Code section 124.406.

Waters was charged for one count of distribution of crack to a person under age eighteen in violation of Iowa Code section 124.406(1)(a). Waters contends that Iowa Code section 124.406 is overinclusive and violates Waters's equal protection rights under the Fourteenth Amendment of the United States Constitution and article one, section six of the Iowa Constitution. Waters's counsel did not raise this issue of the constitutionality until sentencing. As noted earlier, a party who fails to raise a constitutional issue cannot later rely on that issue to seek reversal on appeal. We hold Waters failed to preserve error on his contention Iowa Code section 124.406 is unconstitutional.

VI. Howell's Testimony.

Our review on this issue is for an abuse of discretion. *State v. Greene*, 592 N.W.2d 24, 27 (Iowa 1999). At trial Howell testified Waters delivered crack cocaine to Fintel in the manner described earlier. Over Waters's objection, the State was allowed to question Howell concerning a statement made one week before trial implicating someone other than Waters as the person who delivered crack cocaine to Fintel. Howell recanted this statement on direct examination.

Waters argues the State was allowed to improperly impeach Howell with his inconsistent statement concerning the identity of the person who delivered the crack cocaine. As a result, Waters argues the State unfairly preempted his opportunity to impeach Howell with Howell's pretrial recantation.

In *State v. Turecek*, 456 N.W.2d 219, 225 (Iowa 1990), the court held:

The right given to the State to impeach its own witnesses under Iowa Rule of Evidence 607 and our decision in *State v. Trost*, 244 N.W.2d 556, 559-60 (Iowa 1976), is to be used as a shield and not as a sword. The State is not entitled under rule 607 to place a witness on the stand who is expected to give unfavorable testimony and then, in the guise of impeachment, offer evidence which is otherwise inadmissible. To permit such bootstrapping frustrates the intended application of the exclusionary rules which rendered such evidence inadmissible on the State's case in chief.

As opposed to *Turecek*, the State in this case had every expectation the witness would testify consistently with his previous statements and the State's theory of prosecution. Thus, the State was not expecting its witness to give unfavorable testimony until only moments before testifying:

THE STATE: Your Honor, I believe I have the right to bring this up. I just learned of it prior to — there were prior discovery orders entered in this case, and I don't agree with Mr. Scheetz. This has come up very quickly. He disclosed it just about 15 minutes ago, over a half an hour, whenever we took that first break, and I talked to Mr. Howell, and that came to light at that point in time.

I think I'm entitled to bring that up in the State's case in chief, and I should be allowed to ask the witness about that. I think Mr. Scheetz — I'm not even going to go into what I think on that matter, Your Honor, but there's no prejudice to the defendant on this issue because they already know about it. There's no prejudice to them . . .

...

COURT: Well, I understand what you're saying, Mr. Scheetz, but it appears to me that the defendant is not prejudiced by this line of

questioning at this time, and it's going to come out one way or another, and, frankly, I don't think the State, under the circumstances of the timing of this, is out of line in bringing this matter out at this time.

Under the circumstances, we find that in offering the evidence first, the State was not trying to offer inadmissible substantive evidence. The State was simply trying to “blunt the sword” of anticipated impeachment after finding out only minutes before its witness would offer an inconsistent statement. For these reasons, we affirm the district court. *See e.g., United States v. Marroquin*, 885 F.2d 1240, 1247 (5th Cir. 1989); *United States v. Borchardt*, 698 F.2d 697, 701 (5th Cir. 1983).

VII. Jury Instruction on Accomplice Testimony.

Our review on this issue is for errors of law. Iowa R. App. P. 4.

Waters's claim that Fintel was an accomplice is premised on Fintel's purchase of the drugs Waters was accused of delivering and in turn delivering them to Howell. A customer cannot be convicted of delivery of a controlled substance for purchasing crack cocaine from defendant. *State v. Hillsman*, 281 N.W.2d 114, 115 (Iowa 1979) (holding a customer is not guilty of delivery under section 204.401(1) thus the customer was not an accomplice to defendant's crime). Fintel was not, as a matter of law, an accomplice, and the district court properly declined to give the requested instruction. **We affirm on this issue.**

VIII. Change of Venue.

A. Standard of Review. Our review of a refusal to grant a motion for change of venue is de novo. *State v. Escobedo*, 573 N.W.2d 271, 275 (Iowa App. 1997). We

recognize, however, the decision to grant or refuse a change of venue primarily rests in the discretion of the trial court, and we will reverse that decision only when the discretion has been abused. *Id.*

B. Change of Venue. In *State v. Siemer*, 454 N.W.2d 857, 860 (Iowa 1990), the court recited the standards relevant to Waters's motion for a change of venue:

Iowa Rule of Criminal Procedure 10(10)(b) provides that upon motion of the defendant, the trial court may transfer venue to another county.

[i]f the court is satisfied . . . that such degree of prejudice exists in the county in which the trial is to be had that there is a substantial likelihood a fair and impartial trial cannot be preserved with a jury selected from that county

This right to a fair trial by impartial jurors has its underpinnings in our state and federal constitutions. *Irvin v. Dowd*, 366 U.S. 717, 721, 81 S. Ct. 1639, 1642, 6 L. Ed. 2d 751, 755 (1961); *State v. Walters*, 426 N.W.2d 136, 138 (Iowa 1988). Accordingly, we review de novo the record made for purposes of challenging the denial of a motion for change of venue. *State v. Gavin*, 360 N.W.2d 817, 818 (Iowa 1985). Reversal is warranted only where the trial court's decision demonstrates an abuse of discretion. *State v. Harris*, 436 N.W.2d 364, 367 (Iowa 1989); *Walters*, 426 N.W.2d at 138; *State v. Robinson*, 389 N.W.2d 401, 403 (Iowa 1986).

A defendant relying on jury prejudice as a ground for reversal must show (1) publicity attending the trial that is so pervasive and inflammatory that prejudice must be presumed, or (2) actual prejudice on the part of the jury. *State v. Spargo*, 364 N.W.2d 203, 207 (Iowa 1985).

...

To sustain a claim of presumptive prejudice, the defendant must prove that the publicity attending the case was "pervasive and inflammatory." *Harris*, 436 N.W.2d at 367. Whether publicity rises to the level of being presumptively prejudicial depends on the following factors: the nature, tone, and accuracy of the articles; their timing in relocation to the trial; and the impact of the publicity on the jurors as revealed through voir dire. *Walters*, 426 N.W.2d at 139.

Waters argues the district court abused its discretion in denying him a change of venue. He wanted a change of venue because of the high name recognition of the State's primary witness, Black Hawk County Supervisor Leon Mosley. We disagree.

The district court ruled in its pretrial order that

The Defendant's Motion for Change of Venue is denied because there was no evidence that actual prejudice exists against this defendant in Black Hawk County, as a result of pre-trial publicity or otherwise, which would prevent him from receiving a fair trial. Defendant may renew this motion during jury selection if appropriate based upon the responses received from prospective jurors.

As required by case law, Waters failed to challenge the publicity in this case as being inflammatory and pervasive. Because Waters failed to show presumptive prejudice, the merits of his motion for change of venue turn on evidence of actual prejudice. In making this determination, we would usually consider the record made during selection of the jury impaneled in this case. However, no record of voir dire exists. We conclude on these facts Waters failed to show presumptive or actual prejudice and the district court did not abuse its discretion in reaching the same conclusion. We affirm the district court on this issue.

IX. Double Jeopardy.

A. Standard of Review. We review Waters's constitutional claim de novo. *State v. Perez*, 563 N.W.2d 625, 627 (Iowa 1997).

B. Merits. Our supreme court has recognized our merger statute, Iowa Code section 701.9, codifies the protection from cumulative punishment secured by the

Double Jeopardy Clause of the United States Constitution. *State v. Anderson*, 565

N.W.2d 340, 344 (Iowa 1997). This statute provides:

No person shall be convicted of a public offense which is necessarily included in another public offense of which the person is convicted. If the jury returns a verdict of guilty of more than one offense and such verdict conflicts with this section, the court shall enter judgment of guilty of the greater of the offenses only.

Iowa Code § 701.9. The Double Jeopardy Clause prohibits successive prosecutions for the same offense and does not directly apply to multiple convictions and punishments in the same prosecution. *Perez*, 563 N.W.2d at 627.

The United States Supreme Court held in *Blockburger* the following:

The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not. "A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other."

Blockburger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 182, 76 L. Ed. 306, 307 (1932) (citations omitted).

Waters was charged with one count of distribution of crack to a person under age ~~eighteen~~ in violation of Iowa Code section 124.406(1)(a) and one count of delivery of crack in violation of Iowa Code section 124.401(1)(c). Waters asserts there was only one act of delivery when he allegedly gave the cocaine to Fintel. Thus, he argues he is being punished twice for the same offense. We disagree.

Each of the offenses created requires proof of a different element. The elements for Iowa Code section 124.406(1)(a) include:

1. A person who is eighteen years of age or older who:
 - (a) Unlawfully distributes or possesses with intent to distribute a substance listed in schedule I or II to a person *under eighteen years of age* commits a class "B" felony and shall serve a minimum of five years. . . . (emphasis added).

Iowa Code section 124.401(1)(c) provides:

1. Except as authorized by this chapter, it is unlawful for any person to manufacture, deliver, or possess with the intent to manufacture or deliver, a controlled substance, a counterfeit substance, or a simulated controlled substance, or to act with, enter into a common scheme or design with, or conspire with one or more other persons to manufacture, deliver, or possess with the intent to manufacture or deliver a controlled substance a counterfeit substance, or a simulated controlled substance.

c. Violation of this subsection with respect to the following controlled substances, counterfeit substances, or simulated controlled substances is a class "C" felony, and in addition to the provisions of section 902.9, subsection 3, shall be punished by a fine of not less than one thousand dollars nor more than fifty thousand dollars: . . .

The single act of delivery of cocaine violated both statutes because each statute requires proof of an additional fact which the other does not. *Blockburger*, 284 U.S. at 304, 52 S. Ct. at 182, 76 L. Ed. at 307. As a result, a conviction under either statute or both does not exempt the defendant from prosecution and punishment under the other. Accordingly, we affirm the district court on this issue.

X. Cumulative Error.

We have found no errors in connection with the foregoing issues. Accordingly, there is no merit to Waters's cumulative error argument. *State v. Veal*, 564 N.W.2d 797, 812-13 (Iowa 1997).

XI. Ineffective Assistance of Counsel.

We review claims of ineffective assistance of counsel de novo. *State v. Allison*, 576 N.W.2d 371, 373 (Iowa 1998). Generally, ineffective assistance of counsel claims are preserved for postconviction to allow trial counsel an opportunity to defend the charge. *State v. Mulder*, 313 N.W.2d 885, 890 (Iowa 1981); *State v. Nebinger*, 412 N.W.2d 180, 191-92 (Iowa App. 1987). We depart from this preference if the record on direct appeal is sufficient to evaluate the merits of a defendant's ineffective assistance of counsel claim. *Id.* If not, we preserve the claim for postconviction proceedings so the facts may be developed. *State v. Koenighain*, 356 N.W.2d 237, 238 (Iowa App. 1984). This also gives the allegedly ineffective attorney the opportunity to explain his or her conduct. *State v. Coil*, 264 N.W.2d 293, 296 (Iowa 1978).

To demonstrate ineffective assistance of counsel, one must show that "under the entire record and totality of the circumstances" his attorney's performance was not "within the normal range of competence." *State v. Miles*, 344 N.W.2d 231, 233-34 (Iowa 1984). One must show his lawyer failed to perform an essential duty and that failure resulted in prejudice. *State v. Morgan*, 559 N.W.2d 603, 612 (Iowa 1997).

In order to meet the first test, one must overcome the “strong presumption” that his attorney’s actions were reasonable under the circumstances and fell within the normal range of competency. *State v. Shumpert*, 554 N.W.2d 250, 254 (Iowa 1996). To succeed on the second test he must show that, but for counsel’s error, the result of the proceedings would have been different. *State v. Buck*, 510 N.W.2d 850, 858 (Iowa 1994). It is not necessary to determine whether counsel’s performance was deficient before examining the prejudice component of an ineffective assistance claim. *Taylor v. State*, 352 N.W.2d 683, 685 (Iowa 1984).

A. Counsel’s Failed Attempt to Impeach Mosely’s Credibility. Waters claims counsel was ineffective because “counsel wanted to attack the credibility of State witness Sean Mosely but did not know the proper method.” Even if counsel’s failed impeachment efforts were a breach of an essential duty, Waters cannot establish the requisite prejudice. In view of the formidable evidence of guilt discussed earlier, there is no reasonable probability of a different result had Mosely been successfully impeached.

B. Iowa Code section 124.406. Waters contends his trial counsel was ineffective for failing to challenge the constitutionality of section 124.406. Specifically, Waters argues Iowa Code section 124.406 is overinclusive and violates his equal protection rights under the Fourteenth Amendment of the United States Constitution and article one, section six of the Iowa Constitution. We disagree.

The State correctly argues when considering a challenge to the validity of a statute, the statute is presumed constitutional and is given any reasonable construction necessary to uphold it. *State v. Hunter*, 550 N.W.2d 460, 462 (Iowa 1996). The challenger has the burden to demonstrate the statute is unconstitutional by negating every reasonable basis for supporting the validity of the statute. *State v. Osmundson*, 546 N.W.2d 907, 909 (Iowa 1996). To be found unconstitutional, a statute must clearly, palpably and without doubt infringe upon the Constitution. *State v. Bell*, 572 N.W.2d 910, 911 (Iowa 1997).

Waters asserts that Fintel's status as a minor does not render Waters, as a seller of drugs to a minor, a member of a suspect class or involve an issue of a fundamental right; therefore, his equal protection claims are examined under a rational basis analysis. *Glowacki v. State Bd. of Med. Exam'rs*, 501 N.W.2d 539, 541 (Iowa 1993). Under this analysis, a statute is constitutional "unless it is patently arbitrary and bears no rational relationship to a legitimate governmental interest." *Bell*, 572 N.W.2d at 911. Under the rational basis test, (1) the statute must serve a legitimate governmental interest, and (2) the means employed by the statute must bear a rational relationship to that interest. *Id.*

The legislature has determined that individuals who deliver controlled substances to minors deserve to be punished more severely than those who deal to adults. The power to define criminal conduct and to establish the legal components of criminal liability is vested in the legislature. *State v. Nicholson*, 402 N.W.2d 463,

464-65 (Iowa App. 1987). The legislature has the power to proscribe certain acts as crimes and to provide penalties for the violation of the same. *State v. Ronek*, 176 N.W.2d 153, 155 (Iowa 1970).

We find is nothing unconstitutional in punishing an individual differently who delivered controlled substances to a minor. Since the statute addresses legitimate state interests through rational legislation, the statute is constitutionally acceptable. Defense counsel breached no duty in failing to assert a meritless challenge to a constitutional statute.

C. Reporting of Voir Dire. Waters argues his counsel was ineffective for not having voir dire reported and not renewing his motion for change of venue once voir dire was completed. We disagree. After the parties exercised their strikes, defense counsel specifically requested making a record of voir dire concerning a *Batson* challenge to the racial composition of the jury. The court granted this request. Thus, Waters has not shown a breach of duty or resulting prejudice in connection with counsel's decision not to request a complete record of voir dire. *State v. Smith*, 573 N.W.2d 14, 21 (Iowa 1997) (holding Smith had not shown a breach of duty or resulting prejudice in connection with counsel's decision not to request a record of voir dire or closing statements because the record showed counsel's decision not to challenge those jurors was strategic). For the foregoing reasons, we find Waters failed to demonstrate he suffered prejudice as a result of his claim of ineffective assistance.

Waters has failed to demonstrate he suffered prejudice as a result of his claims of ineffective assistance. Even if his counsel breached an essential duty on any of the claims, Waters cannot demonstrate a reasonable probability that the outcome of his trial would have resulted in an acquittal on any charged offense.

We do not preserve any claims raised by Waters for postconviction relief proceedings. Those claims for which an adequate record exists were either decided adversely to Waters on their merits or for want of prejudice under the *Strickland* analysis. We affirm Waters's conviction and sentence.

AFFIRMED.