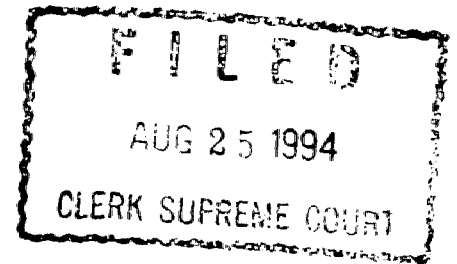


IN THE COURT OF APPEALS OF IOWA

No. 4-245 / 93-996



STATE OF IOWA,

Appellee,

vs.

DAVID LEE SIMPSON,

Appellant.

Appeal from the Iowa District Court for Poweshiek County, James D. Jenkins, Judge.

Defendant appeals from judgment and sentence, following jury trial, entered upon his convictions of possession of marijuana with intent to manufacture, possession of marijuana with intent to deliver, and failure to affix a drug tax stamp. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Shari Barron, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Martha E. Boesen, Assistant Attorney General, and Michael W. Mahaffey, County Attorney, for appellee.

Considered by Donielson, C.J., and Habhab and Huitink, JJ.

HUITINK, J.

David Simpson appeals his conviction of possession of marijuana with intent to deliver, possession of marijuana with intent to manufacture, and failure to affix a drug tax stamp pursuant to Iowa Code sections 204.401(1)(d) and 421A.12. We affirm.

Simpson made a written request to discontinue water service to a residential property he formerly occupied with his brother. A water company employee observed several marijuana plants growing near the home's exterior foundation while on the property to accommodate Simpson's request. He notified the Montezuma police department, and two officers were sent to Simpson's residence to investigate. These officers informed Fred Oster, an officer of the multi-county drug task force, who also observed the marijuana plants from an adjoining neighbor's window. Oster, based on these observations and information he received from the two Montezuma police officers, applied for a search warrant.

Oster's search warrant application included a statement that the Montezuma police officers told him "they had received information in the past about both Simpson brothers useing/dealing [sic] marijuana and that they possibly started the seedlings of the plants in the basement." The magistrate issued a search warrant authorizing the search of "604 South 2nd Street, Montezuma, Iowa 50171, a one story grey house with the front door

facing east and the rear of the building facing west." The subsequent search of the residence yielded two pill bottles containing marijuana cigarette butts, sixteen plastic bags of marijuana, marijuana pipes, and marijuana plants. Simpson was subsequently charged and convicted of the foregoing offenses.

We first consider Simpson's claim that the district court erred in denying his motion to suppress the evidence seized pursuant to the warrant. Because a constitutional issue is raised, our review is de novo. Nichol v. State, 309 N.W.2d 468, 470 (Iowa 1981). In weighing suppression evidence we give deference to the district court's findings on witness credibility. State v. Weir, 414 N.W.2d 327, 330 (Iowa 1987).

Simpson's first argument is that Oster's statements to the magistrate contained false and misleading information. He must therefore prove Oster (1) was purposely untruthful with regard to a material fact in his application for the warrant or (2) acted with a reckless disregard for the truth. State v. Niehaus, 452 N.W.2d 184, 187 (Iowa 1990).

Simpson relies on the conflicting testimony of the officers involved in the investigation with the statements and testimony given by Oster. The officers denied they told Oster that Simpson had a prior criminal drug history or that he started the plants in his basement. Oster testified that the officers had in fact furnished him with this information.

We do not believe the mere existence of conflicting testimony is sufficient to establish a purposefully untruthful misrepresentation or a reckless disregard of the truth of the information conveyed to the magistrate. Oster was acting on information he recalled receiving from the Montezuma police officers, and he had no reason to doubt its accuracy. The trial court was aware of the contradiction, and as this was a matter of credibility, we defer to the judgment of the trial court because of its proximity to the witnesses. See Iowa R. App. P. 14(f)(7). Simpson has failed to make the required showing, and we will not reverse the district court on this claim.

We also disagree with Simpson's claim that the search warrant was issued without probable cause. The relevant test is whether a reasonable person would believe a crime was committed on the premises or that evidence of a crime could be located there. State v. Todd, 468 N.W.2d 462, 466 (Iowa 1991). A magistrate's determination of probable cause should be paid great deference by reviewing courts. State v. Bishop, 387 N.W.2d 554, 558 (Iowa 1986). The magistrate's probable cause determination is adequately supported by facts and circumstances indicating marijuana was present on the property to be searched and its former occupants had a history of using and dealing in marijuana.

Simpson also claims the officers' prewarrant entry onto his backyard was an unlawful search of the curtilage of his home. This issue was not raised below. It will not be

considered on appeal. See State v. Taylor, 310 N.W.2d 174, 178 (Iowa 1981). The district court's order denying Simpson's motion to suppress is therefore affirmed.

Simpson also contends the district court erred by refusing to specifically instruct the jury that it could not find the defendant to be in possession of marijuana from the fact that he merely shared dominion and control over the residence in which it was found. Our scope of review is for errors at law. Iowa R. App. P. 14.

Jury instructions are designed to explain the applicable law to jurors so the law may be applied to the facts proven at trial. State v. Freeman, 267 N.W.2d 69, 71 (Iowa 1978). The trial court has a duty to insure the jury understands the law it must apply. Sanders v. Ghrist, 421 N.W.2d 520, 522 (Iowa 1988). All of the instructions should be read together, not piecemeal or in artificial isolation. Id.

The jury was instructed on the required element of possession. The instructions included both the definitions and descriptions of actual and constructive possession. The jury was separately instructed that the defendant was required to have knowledge of the presence of the marijuana to have constructive possession of it.

After reading all of the instructions together, we conclude the district court adequately instructed the jury on the applicable law. Although the requested instruction is a correct statement of the law, the trial court's

separate instruction on knowledge obviated the need for its inclusion. See State v. Rudd, 454 N.W.2d 570, 573 (Iowa 1990). We therefore affirm on this issue.

We finally consider Simpson's claim his convictions were not supported by substantial evidence. Our standard of review is well established. We will uphold a verdict where there is substantial evidence in the record tending to support the offense charged. State v. Aldape, 307 N.W.2d 32, 39 (Iowa 1981).

The evidence must be considered in the light most favorable to the State, including all legitimate inferences and presumptions that fairly and reasonably may be deduced from the evidence in the record. State v. Hall, 371 N.W.2d 187, 188 (Iowa App. 1985); State v. Bass, 349 N.W.2d 498, 500 (Iowa 1984). All of the evidence is considered, not just the evidence supporting the verdict, to determine whether there is substantial evidence to support the offense charged. Hall, 371 N.W.2d at 188; Bass, 349 N.W.2d at 500. Substantial evidence means evidence which would convince a rational fact finder the defendant is guilty beyond a reasonable doubt. Hall, 371 N.W.2d at 188; State v. LeGear, 346 N.W.2d 21, 23 (Iowa 1984).

Simpson argues the State failed to prove he knowingly possessed marijuana or that he had the required intent to support his convictions. We disagree. Thirteen of the sixteen bags of marijuana were found in a box containing mail addressed to the defendant and books with his name

written on them. The evidence also included testimony regarding the maturity of the marijuana plants and evidence of their cultivation. There is evidence indicating the marijuana did not have the required tax stamps affixed to them. This evidence is sufficient to convince a rational fact finder of defendant's guilt beyond a reasonable doubt. The district court is therefore affirmed on this issue.

We have carefully considered all Simpson's claims and find them to be without merit. We affirm the judgment of the district court in its entirety.

AFFIRMED.