

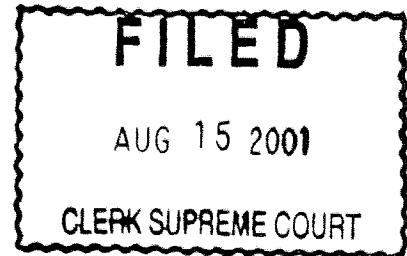
IN THE COURT OF APPEALS OF IOWA

No. 1-345 / 00-0975
Filed August 15, 2001

STATE OF IOWA,
Plaintiff-Appellee,

vs.

BILL E. HAIFLEY,
Defendant-Appellant.



Appeal from the Iowa District Court for Polk County, Donna L. Paulsen,
Judge.

Bill E. Haifley appeals from the judgments and sentences entered upon his convictions for conspiracy to manufacture a controlled substance, manufacturing a controlled substance, possession of a controlled substance with intent to deliver, and possession of an explosive or incendiary device.

AFFIRMED IN PART AND REVERSED IN PART.

Tiffany Koenig, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, John P. Sarcone, County Attorney, and Stephanie Cox, Assistant County Attorney, for appellee.

Considered by Streit, P.J., and Mahan and Zimmer, JJ.

STREIT, P.J.

Bill Haifley was convicted of manufacturing methamphetamine, conspiracy to manufacture methamphetamine, possession of methamphetamine with intent to deliver, and possession of an incendiary or explosive device or material with the intent to manufacture methamphetamine. We affirm in part and reverse in part.

1. Background Facts & Proceedings.

In December 1999 Des Moines firefighters responded to a fire at an apartment rented by Bill Haifley and his wife, Rebecca. Present in the apartment when the fire broke out were Bill, Rebecca, and their two teenage daughters. Also present were Bill's brother, who was visiting from Florida, and Barry Clark, a frequent guest of the Haifleys'.

Because of the suspicious nature of the fire, the firefighters called the Des Moines police. There were items in the kitchen consistent with the manufacture of methamphetamine. There was also a burned area on the floor near the apartment's entrance "that was consistent with some type of a liquid, flammable substance, being dropped in that particular area and ignited." The police investigator determined the fire, which had charred nearly everything in the kitchen, had been a flash fire.¹

The police obtained a search warrant for the apartment. They found many items consistent with the manufacture of methamphetamine throughout the apartment. Among these items were empty pseudoephedrine bottles, stripped

¹ The investigator explained a flash fire occurs when flammable vapors come off of a liquid, ignite, scorch everything in the immediate area, and then quickly burn out.

lithium batteries, empty half-gallon Coleman fuel cans, coffee filters with methamphetamine residue, and finished methamphetamine.

Bill and Rebecca Haifley were each charged with manufacturing methamphetamine, conspiracy to manufacture methamphetamine, possession of an incendiary or explosive device or material with the intent to manufacture methamphetamine and possession of methamphetamine with intent to deliver. After a bench trial, the district court found them each guilty of all four charges. Bill Haifley appeals, claiming the evidence was not sufficient to convict him of any of these charges, the district court abused its discretion in imposing consecutive sentences, and his trial attorney was ineffective.²

II. Sufficiency of the Evidence.

Haifley claims the evidence was not sufficient to convict him of manufacturing methamphetamine, conspiracy to manufacture methamphetamine, possession of an incendiary or explosive device or material with the intent to manufacture methamphetamine, and possession of methamphetamine with intent to deliver. We review for correction of errors at law. Iowa R. App. P. 4. We will uphold a conviction under a sufficiency-of-the-evidence challenge if it is supported by substantial evidence. See *State v. Chang*, 587 N.W.2d 459, 462 (Iowa 1998). If a rational trier of fact could find Haifley guilty beyond a reasonable doubt, the evidence is substantial. See *State v. Thomas*, 561 N.W.2d 37, 39 (Iowa 1997). We give the State the benefit of all legitimate inferences and presumptions that can fairly and reasonably be deduced from the

² Rebecca Haifley has brought a separate appeal. See *State v. Haifley*, No. 00-0976 (Iowa Ct. App. Aug. 15, 2001).

evidence. See *State v. Conyers*, 506 N.W.2d 442, 444 (Iowa 1993). Direct and circumstantial evidence are equally probative. Iowa R. App. P. 14(f)(16).

A. Manufacture of Methamphetamine.

Haifley claims the evidence was not sufficient to convict him of manufacturing methamphetamine in violation of section 124.401(1)(b)(7) of the Iowa Code.³ He argues the evidence does not show methamphetamine was manufactured in his apartment given certain items necessary to successfully complete the process—particularly anhydrous ammonia—were not located at the apartment. Similarly, he argues the evidence does not show the methamphetamine found in his apartment was the end product of manufacturing that took place there. Finally, he argues the evidence shows if someone was guilty of manufacturing methamphetamine, it was Barry Clark.

Substantial evidence supports Haifley's manufacturing conviction. Although law enforcement officers did not find every item necessary to complete the methamphetamine-manufacturing process in the Haifleys' apartment, they did find items associated with every step of the process. Many of these items—

³ Section 124.401(1)(b)(7) states, in pertinent part, the following:

Except as authorized by this chapter, it is unlawful for any person to manufacture . . . or conspire with one or more persons to manufacture . . . a controlled substance

....
(b) Violation of this subsection with respect to the following controlled substances . . . is a class "B" felony . . . :

....
(7) More than five grams but not more than five kilograms of methamphetamine, its salts, isomers, or salts of isomers, or analogs of methamphetamine, or any compound, mixture, or preparation which contains any quantity or detectable amount of methamphetamine, its salts, isomers, or salts of isomers, or analogs of methamphetamine.

including twenty-four empty pseudoephedrine bottles; eight lithium batteries, two of which had been stripped; a pop bottle top fitted with plastic tubing, apparently for use as part of a make-shift hydrochloric gas generator; and glassware and coffee filters with methamphetamine residue—were found in the Haifleys' bedroom. Other items—including 0.12 grams of pseudoephedrine powder—were found in Haifley's toolbox. Given the circumstantial evidence in this case, a rational trier of fact could legitimately infer Haifley was involved in manufacturing methamphetamine "on or about December 30, 1999." As stated by the district court, "Merely because others may have been involved in the manufacturing does not support [Haifley's] claim of [his] own lack of knowledge or involvement."

We recognize law enforcement officers found less than three grams of finished methamphetamine in the Haifleys' apartment and could not confirm whether it had been manufactured there. Haifley's manufacturing conviction thus rests, in part, on the State's evidence showing 86.4 grams of pseudoephedrine—the amount of pseudoephedrine that had presumably been in the twenty-four empty bottles found in the Haifleys' bedroom—has a potential yield of thirty-one to thirty-nine grams of methamphetamine. Building on *State v. Casady*, 597 N.W.2d 801 (Iowa 1999), we find the State appropriately used potential-yield-analysis evidence in this case to help show Haifley was involved in manufacturing more than five grams of methamphetamine. Given the incriminating items found in the Haifleys' apartment, a rational trier of fact could legitimately infer the small amount of finished methamphetamine also found there did not correspond to the actual amount of methamphetamine Haifley, his wife,

and perhaps others manufactured. The State's potential-yield-analysis evidence bolsters this inference as it provides a specific, probable range of the amounts actually manufactured.⁴ We affirm the district court.

B. Conspiracy to Manufacture Methamphetamine.

Haifley claims the evidence was not sufficient to convict him of conspiring to manufacture methamphetamine in violation of section 124.401(1)(b)(7). We do not address this claim because we have already found there was sufficient evidence to convict Haifley of manufacturing methamphetamine. Under section 124.401(1)(b), conspiracy to manufacture a controlled substance and manufacturing that controlled substance are not separate offenses—they are alternative means of violating the statute. See *State v. Maghee*, 573 N.W.2d 1, 7 (Iowa 1997); *State v. Williams*, 305 N.W.2d 428, 434 (Iowa 1981). Thus, given double jeopardy principles, Haifley can only receive one sentence for the single offense of violating section 124.401(1)(b)(7). See *Maghee*, 573 N.W.2d at 7. The district court appropriately accomplished this by ordering "[Haifley] shall be imprisoned for a period not to exceed 25 years on Counts I and II [(conspiracy to manufacture methamphetamine and manufacturing methamphetamine)] which merge according to law." We affirm the district court.

C. Possession of an Incendiary or Explosive Device or Material.

⁴ This State's criminologist based her potential-yield analysis on the following assumption: "In a clandestine laboratory, the yield can vary widely but would probably average 40-50% of the maximum theoretical [of 92%] for the lithium-ammonia reduction method." Under her analysis, even if the manufacturers in this case achieved only a seven percent yield, they would have been able to produce more than five grams of methamphetamine from 86.4 grams of pseudoephedrine. (86.4 grams x 0.92 x 0.07 = 5.6 grams)

Haifley claims the evidence was not sufficient to convict him of possession of an incendiary or explosive device or material with intent to manufacture methamphetamine in violation of section 712.6.⁵ On appeal, the State urges Coleman fuel is an explosive material and Haifley possessed such fuel with the requisite intent. Haifley again argues that if someone was guilty of this crime, it was Barry Clark.

Even if Coleman fuel had been in the two empty cans in the Haifleys' kitchen and such fuel is an explosive material within the meaning of section 712.6, substantial evidence does not support Haifley's conviction for violating the statute. Possession can be actual or constructive. See *Maghee*, 573 at 10 (citation omitted). A person is in actual possession of something on or around his person when he "has direct physical control" of it. *Id.* Law enforcement officers found two empty Coleman fuel cans near the stove in the Haifleys' kitchen—not on Haifley's person or in a place to which he had exclusive access. The evidence in this case thus does not support a finding he had "direct physical control" over any Coleman fuel.

A person is in constructive possession of something when, although he does not have actual possession of it, he "has knowledge of the presence of [it] and has the authority or right to maintain control of it either alone or together with someone else." *Id.* Our supreme court adheres to the following rule regarding constructive possession:

⁵ Section 712.6 states the following: "Any person who shall possess any incendiary or explosive device or material with the intent to use such device or material to commit any public offense shall be guilty of a class 'C' felony."

But where the accused has not been in exclusive possession of the premises but only in joint possession, knowledge of the presence of the [items at issue] on the premises and the ability to maintain control over them by the accused will not be inferred but must be established by proof. Such proof may consist either of evidence establishing actual knowledge by the accused, or evidence of incriminating statements or circumstances from which a jury might lawfully infer knowledge by the accused of the presence of the [items] on the premises.

State v. Reeves, 209 N.W.2d 18, 23 (Iowa 1973); see also *State v. McDowell*, 622 N.W.2d 305, 309 (Iowa 2001) (Ternus, J. concurring specially); *State v. Atkinson*, 620 N.W.2d 1, 3 (Iowa 2000). Haifley clearly was in joint possession of his apartment. There is no evidence—such as an admission by Haifley or eyewitness testimony—linking him to any Coleman fuel. The evidence tends to link such fuel to Barry Clark: The Haifleys' daughters both testified they saw him alone in the kitchen before the fire, and Clark's friend testified Clark had told him "he was heating up some Coleman, and it caught fire." The evidence in this case is not "of the type credited in the *Reeves* case to establish [Haifley's] knowledge and control over [any Coleman fuel]." See *McDowell*, 622 N.W.2d at 308. A trier of fact could not find Haifley guilty beyond a reasonable doubt of possession of an incendiary or explosive device or material with intent to manufacture methamphetamine.

The State's argument Haifley aided and abetted the commission of this crime by providing a place where it could be stored or used does not salvage his conviction. See Iowa Code § 703.1 (1999) ("All persons concerned in the commission of a public offense, whether they directly commit the act constituting

the offense or aid and abet its commission, shall be charged, tried and punished as principals.").

One cannot be convicted of a crime upon a theory of aiding and abetting unless there is substantial evidence to show he assented to or lent countenance and approval to the criminal act either by active participation in it or by some manner encouraging it prior to or at the time of its commission.

State v. Lott, 255 N.W.2d 105, 107 (Iowa 1977). Haifley may have known someone had Coleman fuel in his apartment. He may even have been engaging in the same criminal activity—the manufacture of methamphetamine—as that person. This is not enough, however, to show his active participation in or encouragement of possession of an incendiary or explosive device or material with intent to manufacture methamphetamine. See *id.* We reverse the district court.

D. Possession of Methamphetamine with Intent to Deliver.

Haifley claims the evidence was not sufficient to convict him of possessing methamphetamine with the intent to deliver it in violation of section 124.401(1)(c)(6).⁶ He argues "[a]t best, he could only be convicted of possession of methamphetamine."

Substantial evidence supports Haifley's possession-with-intent-to-deliver conviction. Law enforcement officers found 1.45 grams of methamphetamine in

⁶ Section 124.401(1)(c)(6) applies to methamphetamine offenses involving

Five grams or less of methamphetamine, its salts, isomers, or salts of isomers, or analogs of methamphetamine, or any compound, mixture, or preparation which contains any quantity or detectable amount of methamphetamine, its salts, isomers, or salts of isomers, or analogs of methamphetamine.

a Pyrex dish in Haifley's toolbox. The toolbox had Haifley's name on it, and he admitted it was his. See *Reeves*, 209 N.W.2d at 23 ("Such proof may consist either of evidence establishing actual knowledge by the accused, or evidence of incriminating statements or circumstances from which a jury might lawfully infer knowledge by the accused of the presence of the [items] on the premises.") They found another 0.7 grams of methamphetamine in five paper packets, or "bindles," that were in the Haifleys' bedroom in either Haifley's toolbox or a safe.⁷ In that same room, they also found a ten-gram scale, an unspecified number of small plastic bags, and twenty-four empty pseudoephedrine bottles that presumably had contained 86.4 grams of pseudoephedrine. An officer testified methamphetamine distributors divide finished methamphetamine into uniform doses by using a scale and then often package those doses for distribution in bindles or small plastic bags. See *State v. See*, 532 N.W.2d 166, 169 (Iowa Ct. App. 1995) ("The quantity and packaging of a controlled substance may be indicative of an intent to deliver."). He further testified one-quarter gram is a typical dose. Thus, assuming 86.4 grams of pseudoephedrine will yield thirty-one to thirty-nine grams of methamphetamine, Haifley, his wife, and perhaps others had manufactured or were in the process of manufacturing well over 100 one-quarter-gram doses of methamphetamine. See *id.* A rational trier of fact could find Haifley guilty beyond a reasonable doubt of actually or constructively possessing methamphetamine with the intent to deliver it. We affirm the district court.

⁷ The safe was roughly one foot away from the Haifleys' bed and was open during the fire.

III. Consecutive Sentences.

Haifley claims the district court abused its discretion when it imposed consecutive sentences. The district court imposed a twenty-five year prison term for Haifley's merged conspiracy and manufacturing convictions and imposed concurrent ten-year prison terms for his other two convictions. It ordered Haifley to serve these latter sentences consecutive to the first sentence. Haifley argues the resulting thirty-five year prison term is unwarranted and was based solely on his drug addiction. We review for correction of errors at law. Iowa R. App. P. 4. "A sentence will not be upset on appellate review unless the defendant demonstrates an abuse of trial court discretion or a defect in the sentencing procedure such as trial court consideration of impermissible factors." *State v. Wright*, 340 N.W.2d 590, 592 (Iowa 1983).

Haifley has not shown the district court abused its discretion. At the sentencing hearing, the district court stated the sentences it was imposing were "appropriate because of the serious nature of the offense [and] the Defendants' prior record." It also noted it had "considered all relevant factors related to sentencing and all matters related in the presentence report." After the State asked the district court to impose a total prison term of 115 years, the district court responded,

I don't believe that a period of incarceration of 115 years is necessary for the protection of the public and it would be an undue expense to the public to keep these defendants locked up for basically the rest of their lives. And I do feel that a 35 year total term of incarceration is a fair resolution of this matter and a fair period of incarceration. It is obvious that the underlying problem here is a drug addiction that both defendants have and have chosen to not seriously address. The Court believes that after

completion of their sentences and drug treatment they will be in a position to live in the community and obey the laws and not be a threat to the community.

The district court further explained,

I do believe that the consecutive sentences however with regard to the counts are appropriate because not only did these defendants choose to endanger themselves by the methamphetamine lab, they endangered their daughters and their daughters are lucky to be here today, and endangered the rest of the people in the apartment complex. So I do believe the consecutive sentences with regard to the two counts are appropriate, but I do not believe that the tripling of sentences is necessary.

The district court did not "exercise its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable." *State v. Privitt*, 571 N.W.2d 484, 486 (Iowa 1997). We affirm the district court.

IV. Effectiveness of Counsel.

Finally, Haifley claims his trial attorney was ineffective. We review such claims de novo. *State v. Howes*, 525 N.W.2d 874, 876 (Iowa Ct. App.1994). To prevail, Haifley must show his attorney's performance fell outside a normal range of competency and the deficient performance so prejudiced him as to give rise to the reasonable probability that, but for his counsel's errors, the result of the proceeding would have been different. See *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984); *Ledezma v. State*, 626 N.W.2d 134, 142 (Iowa 2001).

Haifley argues his attorney should not have advised him to waive his right to a jury trial. He contends he "was prejudiced in that a jury could not have found him guilty on the evidence presented by the State and the evidence presented by the defense." In evaluating ineffective-assistance-of-counsel claims,

The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision. It should not depend on the idiosyncrasies of the particular decisionmaker, such as unusual propensities toward harshness or leniency.

Strickland, 466 U.S. at 695, 104 S. Ct. at 2068, 80 L. Ed. 2d at 698. Haifley cannot base his claim on the contention a jury would have reached a different verdict than the district court. We affirm the district court.

V. Conclusion.

We have considered all of the arguments Haifley and the State have presented on appeal, whether discussed in detail or not. Having done so, we reverse Haifley's conviction for possession of an incendiary or explosive device or material with the intent to manufacture methamphetamine; vacate the sentence imposed for this conviction; and dismiss the accompanying charge. We affirm his remaining convictions. As the district court has ordered, the sentences for these remaining convictions shall run consecutively.

AFFIRMED IN PART AND REVERSED IN PART.