IN THE COURT OF APPEALS OF IOWA

No. 0-321 / 99-949
Filed July 26, 2000

STATE OF IOWA,
Plaintiff-Appellee,

vs.

KENNETH DANIEL AVERY, III,
Defendant-Appellant.

FILED
JUL 26 2000
CLERK SUPREME COURT

Appeal from the Iowa District Court for Warren County, Gary G. Kimes, Judge.

Kenneth Daniel Avery III appeals his convictions on charges of manufacturing a controlled substance and failure to affix drug tax stamp. **AFFIRMED IN PART; REVERSED IN PART; REMANDED.**

Linda Del Gallo, State Appellate Defender, and Tricia A. Johnston, Assistant State Appellant Defender, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, Kevin A. Parker, County Attorney, and Gary W. Kendell, Assistant County Attorney, for appellee.

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

ZIMMER, J.

Kenneth Daniel Avery III challenges the sufficiency of the evidence to support his convictions on charges of manufacturing a controlled substance (methamphetamine) and failure to affix drug tax stamp. We conclude Avery failed to preserve error on his challenge to the manufacturing charge but we find insufficient evidence to support the drug tax stamp charge. We affirm in part, reverse in part and remand.

On January 29 and 30, 1999, Warren County officers surveilled Kenneth Avery III and his son, Kenneth Avery IV,[1] based on information the two men were involved in drug trafficking. On January 30, police stopped Avery's pickup truck and searched the vehicle. Officers found two bags of marijuana under the passenger's seat and two more inside a duffel bag in the bed of the truck. In plastic garbage bags in the truck bed, officers found debris, some of which was consistent with the manufacture of methamphetamine. These items included: seventy-nine empty bottles which had contained pseudoephedrine hydrochloride tablets, a glass jar containing pseudoephedrine hydrochloride powder, an empty box which had contained a drying agent called Damp Rid, an empty box that had contained coffee filters, lithium batteries from which the strips of lithium were missing, numerous empty punctured cans which had contained starter fluid, some plastic tubing, a funnel, and assorted containers. Pseudoephedrine hydrochloride is the principal precursor from which methamphetamine is made. However, additional materials necessary to methamphetamine production were lacking: anhydrous ammonia, lithium metal, starter fluid, and muriatic acid (drain

[1] All references to "Avery" in this opinion are to the defendant, Avery III.

cleaner).

On February 1, 1999, the State filed a trial information charging Avery with the manufacture of methamphetamine, in violation of Iowa Code section 124.401(1)(b) (1997) (Count I); two counts of use of a person under age eighteen in the drug trade in violation of Iowa Code section 124.406A (Counts II and III); possession of marijuana with intent to deliver, in violation of Iowa Code section 124.401(1)(d) (Count IV); failure to affix drug tax stamp, in violation of Iowa Code sections 453B.3 and 453B.12 (Count V); and possession of pseudoephedrine with the intent to use as a precursor, in violation of Iowa Code section 124.401(4) (Count VI). Counts II through VI also charged Avery III as an habitual offender in light of prior convictions.

Avery and his son's jury trial commenced on April 27, 1999. At the close of the State's case, Avery moved for judgment of acquittal on all counts. The trial court granted Avery directed verdicts on Counts II and III because the state had presented no evidence regarding the ages of the defendant or his son. At the close of all the evidence, Avery renewed his motion for judgment of acquittal on the remaining counts. These motions were denied. The jury returned guilty verdicts on all remaining counts. On May 24, 1999, Avery filed combined motions for new trial and in arrest of judgment, which were denied.

Avery appeals. He contends there was insufficient evidence to support his convictions on the charges of manufacturing a controlled substance and failure to affix drug tax stamp. He does not challenge his convictions on the charges of possession of marijuana with intent to deliver and possession of pseudoephedrine with intent to use as a precursor.

000237

I. Scope of Review. We review sufficiency of the evidence challenges for correction of errors at law. *State v. Chang*, 587 N.W.2d 459, 461-62 (Iowa 1998). In our review of a ruling on a motion for judgment of acquittal, we view the evidence in the light most favorable to the State. *State v. Boleyn*, 547 N.W.2d 202, 204 (Iowa 1996). We accept any legitimate inferences that may reasonably be deduced from the evidence. *Id.* We uphold the denial of a motion for judgment of acquittal if there is substantial evidence in the record supporting the charges. *Id.* Evidence is substantial if a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Schmidt*, 588 N.W.2d 416, 418 (Iowa 1998). In making this assessment, we consider all the evidence, not just evidence supporting the verdict. *Id.*

II. Manufacturing Charge. Avery argues the evidence was insufficient to prove he manufactured methamphetamine because none of the steps necessary to manufacture the substance had been taken. He points out he did not have all of the elements necessary for making meth and possessed none of the finished product. He concedes he possessed precursor, for which he was found guilty under a different statute. The State argues Avery's general motion for judgment of acquittal did not identify the specific elements of the charge which the evidence allegedly failed to support and was, therefore, insufficient to preserve his challenge.

A motion for judgment of acquittal does not preserve error where there was no reference in district court to the grounds urged on appeal. *State v. Crone*, 545 N.W.2d 267, 270 (Iowa 1996); *State v. Geier*, 484 N.W.2d 167, 170-71 (Iowa 1992). Avery's trial counsel made a motion for judgment of acquittal

with regard to the manufacturing charge but did so by incorporating the argument made by the codefendant's counsel—that the statute defining that charge was unconstitutionally vague. However, the motion for acquittal made no reference to any evidentiary insufficiency concerning the manufacturing element, the absence of certain necessary ingredients, or the fact the manufacturing process had not yet begun. We cannot construe the constitutional argument as a challenge to the sufficiency of the evidence of manufacturing. Therefore, the motion for judgment of acquittal did not preserve error on this issue.

The arguments now being made on appeal did not appear until Avery's motion for new trial. This challenge came too late to preserve it for our review. Motions for new trial cannot raise new issues: "'[t]he grounds of a motion for new trial must stand or fall on exceptions taken at trial and a party cannot in a post[-] verdict motion amplify or add new grounds as a basis for relief.'" *Geier*, 484 N.W.2d at 170 (citations omitted). Furthermore, Avery does not claim trial counsel was ineffective for failing to properly raise the sufficiency-of-the-evidence argument (which appears to have some merit[2]). *See State v. Rubino*, 602

[2] Avery was charged only with the completed act of manufacturing methamphetamine, not conspiracy or attempt to do so. Although we do not decide the issue, we have concerns regarding the sufficiency of the evidence on this charge. Avery lacked four necessary ingredients for methamphetamine manufacture, the items he possessed were legal, he was found with none of the finished product, there was no evidence he knew how to manufacture the product, and no evidence he had completed any steps of the manufacturing process. Other jurisdictions have addressed similar sufficiency of the evidence issues and they conflict on the required quantum of evidence; in some states, the evidence against Avery would not even be enough to convict on attempt, while in others the evidence would suffice for a manufacturing conviction. *Compare United States v. Weston*, 4 F.3d 672 (8th Cir. 1993), *and State v. O'Brien*, 5 S.W.3d 532 (Mo. Ct. App. 1999) (finding evidence insufficient on attempted manufacturing charge where defendant had necessary supplies but there was no evidence of 'substantial step' beyond preparation), *and State v. Arles*, 998 S.W.2d 136 (Mo. Ct. App. 1999) (finding evidence insufficient where defendant possessed items that were available to general public and legal to possess), *and Hunt v. State*, 773 P.2d 375 (Okla. Crim. App. 1989) (concluding there was insufficient evidence of attempted manufacture where lab equipment found but manufacturing process had not been initiated), *and Chapin v. State*, 671 S.W.2d 608 (Tex. Ct. App. 1984), *and State v. Roby*, 360 A 2d 572 (Vt. 1976) (holding evidence insufficient on manufacturing charge where defendant arrested

N.W.2d 558, 563 (Iowa 1999) (noting ineffective assistance of trial counsel is a recognized exception to appellate preservation-of-error rules); *cf. State v. Sanborn*, 564 N.W.2d 813, 816-17 (Iowa 1997) (finding trial counsel ineffective for failing to challenge evidentiary insufficiency on essential element of felon-in-possession-of-firearm charge). We conclude Avery failed to preserve error. *See State v. Pearson*, 547 N.W.2d 236, 241 (Iowa App. 1996) (declining to consider meritorious issue that had not been properly preserved, except under rubric of ineffective assistance of counsel).

III. Drug Tax Stamp Charge. The State concedes error was properly preserved on this issue. Avery contends the record does not contain evidence regarding the presence or absence of drug tax stamps on the marijuana. Avery points out that officers were not asked questions about what an official tax stamp looks like, whether they observed any tax stamps on the marijuana bags at the scene, or whether anything was subsequently removed from the bags after they were seized. The State's response is *'res ipsa loquitur'*: since the seized bags of marijuana were introduced into evidence, the jurors could see for themselves whether there was anything on the bags which could reasonably be taken for a drug tax stamp. We can find no authority that directly bears on this issue, nor was any provided to us, so we resort to general principles.

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at the beginning of manufacturing process but no finished product obtained and one necessary ingredient missing) *with Smith v. State*, 3 S.W.3d 712 (Ark. Ct. App. 1999) (finding evidence of manufacturing sufficient where defendant had all components but one and he admitted he was expecting missing ingredient to arrive at time of arrest), *and People v. Lancellotti*, 23 Cal. Rptr. 2d 640 (1993) (same), *and State v. Brown*, 820 P.2d 878 (Ore. Ct. App. 1992), *and Brown v. State*, 757 S.W.2d 828 (Tex. Ct. App. 1988). In those jurisdictions finding the evidence of manufacture sufficient, the evidence was usually much stronger than in this case and often included admissions by the defendants. Furthermore, if Avery's possession of precursor were also sufficient to convict him of manufacturing, there would potentially be no distinction between that offense and the offense of possession of precursor, a result violative of double jeopardy principles. *See State v. Westeen*, 591 N.W.2d 203, 209 (Iowa 1999).

The State must produce substantial evidence on each of the essential elements of the crime charged. *State v. Limbrecht*, 600 N.W.2d 316, 317 (Iowa 1999). The elements of the drug tax stamp offense are: (1) defendant is a dealer, (2) who unlawfully possesses, distributes or offers to sell, (3) a taxable substance, (4) without affixing a stamp, label, or other official indicia evidencing that the required tax has been paid. *See* Iowa Code § 453B.3 (1997); *State v. White*, 545 N.W.2d 552, 555 (Iowa 1996). The State offered no direct evidence on the fourth element, the presence or absence of drug tax stamps.

However, a verdict can rest on circumstantial evidence alone. *State v. Kirchner*, 600 N.W.2d 330, 334 (Iowa App. 1999) (citation omitted). Circumstantial evidence

> is the proof "of one fact, or a set of facts, from which the existence of the fact to be determined may reasonably be inferred." Circumstantial evidence involves two things: (1) "the assertion of witnesses as to what they have observed," and (2) "a process of reasoning, or inference, by which a conclusion is drawn." Circumstantial evidence "must be based upon the evidence given, together with a sufficient background of human experience to justify the conclusion."

State v. Hopkins, 576 N.W.2d 374, 378 (Iowa 1998) (quoting *Brewster v. United States*, 542 N.W.2d 524, 528 (Iowa 1996)). Although circumstantial evidence is as probative as direct evidence, such evidence must at least raise a fair inference of guilt as to each essential element of the crime. *Kirchner*, 600 N.W.2d at 334 (citation omitted). Evidence which merely raises suspicion, speculation, or conjecture is insufficient. *Id.* (citation omitted).

We conclude the introduction of the bags of marijuana themselves does not suffice to prove the charge of failure to affix a drug tax stamp. The State asks us to hold that the bags of marijuana "speak for themselves." Such a

holding would carry the chain of inference too far into the realm of mere conjecture. We would have to presume the jurors knew what a drug tax stamp looked like and that they even thought to examine the bags for stamps. The jurors would have had to speculate that the bags never had stamps on them when found by the police and that the bags were not tampered with thereafter. The evidence leads to a mere suspicion of the existence of the fact sought to be proved. The inference that drug tax stamps *were* affixed to the bags is equally plausible. The State failed to carry its burden of proof. The trial court should have granted Avery's motion for judgment of acquittal. We reverse Avery's conviction on the drug tax stamp charge and remand for its dismissal.

AFFIRMED IN PART; REVERSED IN PART; REMANDED.