

IN THE COURT OF APPEALS OF IOWA

No. 9-544 / 89-262

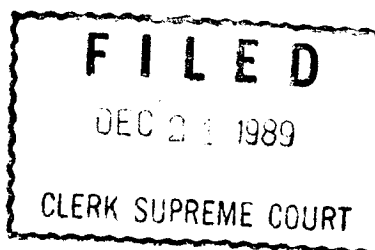
STATE OF IOWA

Appellee,

vs.

THERESA S. HARRIS,

Appellant.



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Appeal from the Iowa District Court for Muscatine County, Jack L. Burns, Judge.

Defendant was convicted of delivery of a controlled substance. She now appeals. She claims she was placed in double jeopardy and there was insufficient evidence to support her conviction. **AFFIRMED.**

Arlen L. Poock of Metcalf, Conlon & Siering, Muscatine, for defendant-appellant.

Thomas J. Miller, Attorney General; Ann E. Brenden, Assistant Attorney General; and Stephen J. Petersen, County Attorney, for plaintiff-appellee.

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

**HABHAB, J.**

Defendant Theresa Harris appeals her conviction, following a jury trial, of delivery of a controlled substance in violation of Iowa Code section 204.401(1). On appeal defendant raises two issues: first, she contends that she was subjected to double jeopardy by her conviction of delivery of a controlled substance after having already pled guilty to a count of possession of controlled substances, where both crimes arose from the same transaction; second, defendant argues that her conviction is not supported by substantial evidence. We affirm.

In July 1988 two Muscatine police officers began an undercover investigation at Chet's bar. After several visits to the bar, the officers inquired from the bartender, Carl "Chet" Evans, whether he knew of anyone who could procure cocaine for them. Evans stated that he did not have any cocaine, but did have some marijuana available. Evans then left the bar with the defendant. When the two subsequently returned with the marijuana, the defendant motioned for the two officers to come to the back of the bar.

Several evenings later the two officers again attempted to purchase cocaine from Evans. As on the previous occasion, Evans initially consulted with the defendant before responding. The same factual scenario occurred on other occasions when the officers attempted to purchase

cocaine from Evans. On each occasion Evans would consult with the defendant before responding to the officers' request.

On July 31, 1988, the two officers again sought out cocaine from Evans. He told the officers that he had to first make a phone call. Evans then dialed the phone number for Harris' residence, but there was no answer. On Evans' second try a person answered and after asking for Theresa, he was told that she was at the mall. Evans then told the officers if they'd stop back in half an hour that "we can get you some."

Upon the officers' return, Evans made yet another phone call. Following this conversation, Evans informed the officers that the price of the cocaine would be \$575, and that the two officers were to follow him in their vehicle.

The officers followed Evans first to a house where he picked up the defendant, and then to a school parking lot. At the school parking lot Evans asked the officers for the cash in order to make the purchase. Evans and the defendant then both left. Upon their return, Evans gave the two officers a quarter ounce of cocaine and informed them "if [they] ever need[ed] anything, just get ahold of Theresa." Evans and the defendant were subsequently arrested. The defendant had \$60 in marked money on her at the time of her arrest.

The defendant was charged with both possession of a controlled substance, cocaine, pursuant to Iowa Code section 204.401(3), and delivery of a controlled substance, cocaine, pursuant to Iowa Code section 204.401(1). She pled guilty to the possession charge, but not guilty to the delivery charge. The defendant subsequently raised the defense of double jeopardy. The district court denied her motion to dismiss, ruling that since possession was not a lesser included offense of delivery, double jeopardy did not bar the second charge.

I.

The Fifth Amendment to the United States Constitution provides that no individual shall be "subject for the same offense to be twice put in jeopardy of life or limb." The double jeopardy clause "protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." North Carolina v. Pearce, 395 U.S. 711, 717, 89 S. Ct. 2072, 2076, 23 L. Ed. 2d 656, 664-65 (1969).

In Blockberger v. United States, 284 U.S. 299, 304, 52 S. Ct. 180, 182, 76 L. Ed. 306, 309 (1932), the Supreme Court set forth the following test to determine whether two offenses constitute the "same offense" under the double jeopardy clause:

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.

As the Iowa Supreme Court noted in Schrier v. State, 347 N.W.2d 657, 667 (Iowa 1984), "If a requisite element of one offense is not necessarily essential to conviction of the other under the so-called 'statutory test,' no double jeopardy claim is presented."

The statutory elements approach is the method used in Iowa for determining lesser included offenses. See State v. Jeffries, 430 N.W.2d 728, 736 (Iowa 1988). Under this approach, the Iowa Supreme Court has clearly held that possession is not a necessary element of delivery; therefore, possession of a controlled substance is not a lesser-included offense of the crime of delivery of a controlled substance. State v. Kucera, 244 N.W.2d 571, 573 (Iowa 1976); State v. Grady, 215 N.W.2d 213, 214 (Iowa 1974).

Since possession is not a necessary element of delivery, the defendant's double jeopardy claim is meritless. Furthermore, since no factual issues were involved on the question of double jeopardy, the district court properly handled the issue as a matter of law.

## II.

The defendant further asserts that her conviction is not supported by substantial evidence. Substantial evidence "means such evidence as could convince a rational

trier of fact that the defendant is guilty of the crime charged beyond a reasonable doubt." State v. Schrier, 300 N.W.2d 305, 306 (Iowa 1981). The evidence is considered in the light most favorable to the State with the State being permitted all legitimate inferences and presumptions which may be properly deduced from the record evidence. See State v. Howard, 404 N.W.2d 196, 197 (Iowa App. 1987). We consider direct and circumstantial evidence to be equally probative in our review. Id; see State v. Duncan, 312 N.W.2d 519, 522 (Iowa 1981). From the record evidence in this case, we conclude that sufficient evidence exists upon which a rational jury could find beyond a reasonable doubt that the State had proven the elements of the crime of delivery of a controlled substance. We therefore affirm defendant's conviction.

**AFFIRMED.**