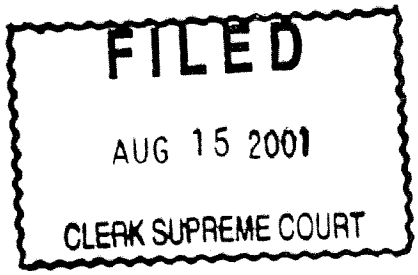
IN THE COURT OF APPEALS OF IOWA

No. 1-346 / 00-0976
Filed August 15, 2001



STATE OF IOWA,
Plaintiff-Appellee,

vs.

REBECCA JEANINE HAIFLEY,
Defendant-Appellant.

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

Rebecca Jeanine Haifley appeals from the judgments and sentences entered upon her convictions for conspiracy to manufacture methamphetamine, manufacture of a controlled substance, possession with intent to deliver, and possession of an explosive or incendiary device or material. **AFFIRMED IN PART AND REVERSED IN PART.**

Linda Del Gallo, State Appellate Defender, and Martha J. Lucey, Assistant State Appellate Defender, 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.

Rebecca Haifley was convicted of conspiracy to manufacture methamphetamine, manufacturing 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.

I. 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 conspiracy to manufacture methamphetamine, manufacturing methamphetamine, possession of methamphetamine with intent to deliver, and possession of an incendiary or explosive device or material with the intent to manufacture methamphetamine. After a bench trial, the district court found them each guilty of all four charges. Rebecca Haifley appeals, claiming the evidence was not sufficient to convict her either of manufacturing methamphetamine or of possession of an incendiary or explosive device or material with intent to manufacture methamphetamine, the district court imposed an illegal sentence, and her trial attorney was ineffective. [2]

II. Sufficiency of the Evidence.

Haifley claims the evidence was not sufficient to convict her either of manufacturing methamphetamine or of possession of an incendiary or explosive device or material with intent to manufacture methamphetamine. 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 evidence. *See State v. Conyers*, 506 N.W.2d

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[2] Bill Haifley has brought a separate appeal. *See State v. Haifley*, No. 00-0975 (Iowa Ct. App. Aug.15, 2001).

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 her of manufacturing methamphetamine in violation of section 124.401(1)(b)(7) of the Iowa Code.[3] She concedes "[l]aw enforcement clearly found items in [her] apartment used in the production of methamphetamine." She argues, however, the State's inability to demonstrate she was involved in the manufacturing process and the State's failure to find more than five grams of finished methamphetamine are fatal to its case.

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—including twenty-four empty pseudoephedrine bottles; eight lithium batteries, two of which had been stripped; a pop bottle top fitted with plastic tubing, apparently

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[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 . . . 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.

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. The twenty-four empty pseudoephedrine bottles were in plain view in a wastebasket near the foot of the Haifleys' bed. Given the circumstantial evidence in this case, a rational trier of fact could legitimately infer Haifley was involved in manufacturing methamphetamine. As stated by the district court, "Merely because others may have been involved in the manufacturing does not support [Haifley's] claim of [her] own lack of knowledge or involvement."

We recognize law enforcement officers found less than three grams of finished methamphetamine in the Haifleys' apartment. 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. The supreme court addressed a comparable issue in *State v. Casady*, 597 N.W.2d 801 (Iowa 1999). In that case, the defendant was convicted of conspiracy to manufacture methamphetamine in violation of section 124.401(1)(b)(7) even though law enforcement officers found only .11 grams of methamphetamine at his coconspirator's home. *Casady*, 597 N.W.2d at 807. At trial the State offered evidence showing the potential methamphetamine yield of the precursors present in various substances seized from the home exceeded five grams.[4] *Id.* at 806.

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[4] Specifically, the law enforcement officers seized "baking dishes containing a pink liquid and a white solid mixture" and "jars containing melted pill residue." *Casady*, 597 N.W.2d at 806. Although the substances in these containers weighed well over five grams, the

On appeal, the supreme court approved of the evidence, stating "[t]he only way for the jury to determine [the defendant conspired to make more than five grams of methamphetamine], without merely speculating, was to hear from an expert ." *Id.* The supreme court did not address whether potential-yield-analysis evidence can be used in nonconspiracy manufacturing cases.

Building on *Casady*, we hold 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, her husband, 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.[5] We affirm the district court.

State apparently did not attempt to prove the defendant conspired to manufacture the requisite amount of methamphetamine by simply offering evidence of the substances' total weight as is allowed by section 124.401(1)(b)(7). *See State v. Rivera*, 614 N.W.2d 581, 584 (Iowa Ct. App. 2000). Perhaps the State assumed the substances, which contained 17.3 grams of pseudoephedrine, did not constitute a "compound, mixture, or preparation [containing] any quantity or detectable amount of methamphetamine, its salts, isomers, or salts of isomers, or analogs of methamphetamine." *See* Iowa Code § 124.401(1)(b)(7) (1999).

[5] 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)

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

Haifley claims the evidence was not sufficient to convict her of possession of an incendiary or explosive device or material with intent to manufacture methamphetamine in violation of section 712.6.[6] On appeal, the State urges Coleman fuel is an explosive material and Haifley possessed such fuel with the requisite intent. Haifley argues the State's failure to show she had ever possessed Coleman fuel is fatal to its case.

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 State v. Maghee*, 573 N.W.2d 1, 10 (Iowa 1997) (citation omitted). A person is in actual possession of something on or around her person when she "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 she had exclusive access. The evidence in this case thus does not support a finding she had "direct physical control" over any Coleman fuel.

A person is in constructive possession of something when, although she does not have actual possession of it, she "has knowledge of the presence of [it] and has the authority or right to maintain control of it either alone or together with

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[6] 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."

someone else." *Id.* Our supreme court adheres to the following rule regarding constructive possession:

> 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 her apartment. There is no evidence—such as an admission by Haifley or eyewitness testimony—linking her 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 thus 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 her 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 her apartment. She may even have been engaging in the same criminal activity—the manufacture of methamphetamine—as that person. This is not enough, however, to show her 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.

III. Legality of the Sentence.

Haifley claims she should not have been convicted and sentenced for both conspiracy to manufacture methamphetamine and manufacturing methamphetamine. The district court, after finding Haifley guilty of both of these counts, noted the counts "merge[d] according to law" and sentenced her to an indeterminate term of incarceration not to exceed twenty-five years. Haifley argues, and the State concedes, this sentence was illegal pursuant to section 706.4. We review for correction of errors at law. Iowa R. App. P. 4.

Section 706.4 states the following:

> A conspiracy to commit a public offense is an offense separate and distinct from any public offense which might be

> committed pursuant to such conspiracy. A person may not be convicted and sentenced for both the conspiracy and for the public offense.

See also State v. Waterbury, 307 N.W.2d 45, 52 (Iowa 1981) (stating the statute should be viewed as "merely creating a merger of the conspiracy and substantive offense where the defendant has been found guilty of both offenses"). Section 706.4 is inapplicable to this case. *See Maghee*, 573 N.W.2d at 7; *State v. Williams*, 305 N.W.2d 428, 434 (Iowa 1981). Under section 124.401(1), conspiracy to manufacture a controlled substance and manufacturing a controlled substance are not separate offenses—they are alternative means of violating the statute.[7] *See Maghee*, 573 N.W.2d at 7. Thus, given double jeopardy principles, the district court imposed an illegal sentence if it imposed two sentences for the single offense of violating section 124.401(1). *See id.* The district court avoided this problem 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." *Cf. id.* (vacating a sentence for a section 124.401(1) conspiracy violation where the district court had ordered that sentence to run *concurrently* with another sentence it had imposed for the defendant's other section 124.401(1) violation). We affirm the district court.

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[7] Arguably, therefore, Haifley's failure to raise a sufficiency-of-the-evidence challenge to her conspiracy conviction renders it unnecessary to consider her sufficiency-of-the-evidence challenge to her manufacturing conviction.

IV. Effectiveness of Counsel.

Finally, Haifley claims her trial attorney should have challenged the admissibility of the State's potential-yield-analysis evidence. We review ineffective-assistance-of-counsel claims de novo. *State v. Howes*, 525 N.W.2d 874, 876 (Iowa Ct. App.1994). To prevail, Haifley must show her attorney's performance fell outside a normal range of competency and the deficient performance so prejudiced her as to give rise to the reasonable probability that, but for her 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 the potential-yield-evidence presented by the State's criminologist was inadmissible pursuant to *Daubert v. Merrel Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993).[8]

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[8] Pursuant to *Daubert*,

> the trial judge must determine at the outset . . . whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.

Daubert, 509 U.S. at 592-93, 113 S. Ct. at 2796, 125 L. Ed. 2d at 482 (footnotes omitted). Factors that may be to be considered include the following:

> (1) whether the theory or technique is scientific knowledge that can and has been tested, (2) whether the theory or technique has been subjected to peer review or publication, (3) the known or potential rate of error, or (4) whether it is generally accepted within the relevant scientific community.

We have already noted the supreme court found comparable potential-yield-analysis evidence admissible in *State v. Casady*. Haifley's attorney cannot be faulted for failing to pursue this issue. *See State v. McPhillips*, 580 N.W.2d 748, 754 (Iowa 1998) (noting an attorney is not ineffective for failing to pursue an issue that has no merit). 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 her remaining convictions. As the district court has ordered, the sentences for these remaining convictions shall run consecutively.

AFFIRMED IN PART AND REVERSED IN PART.

Leaf v. Goodyear Tire & Rubber Co., 590 N.W.2d 525, 533 (Iowa 1999) (citing *Daubert*, 509 U.S. at 593-94, 113 S. Ct. at 2797, 125 L. Ed. 2d at 483).