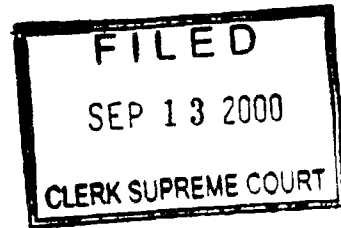


IN THE COURT OF APPEALS OF IOWA

No. 0-454 / 98-2147
September 13, 2000



STATE OF IOWA,
Plaintiff-Appellee,

vs.

TAMMY LYNNE PAGE,
Defendant-Appellant.

Appeal from the Iowa District Court for Clarke County, J.W. Jordan,
Judge.

Defendant appeals from the judgment and sentence entered upon a jury
verdict finding her guilty of delivery of a controlled substance in violation of Iowa
Code sections 124.401(1)(c)(6) and 124.206(4)(b) (1997). **AFFIRMED.**

Kenneth J. Weiland, Jr. of Weiland Law Firm, Des Moines, for appellant.

Thomas J. Miller, Attorney General, Kristin Mueller, Assistant Attorney
General, John D. Lloyd, County Attorney, and Shauna Russell Shields, Assistant
County Attorney, for appellee.

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

MAHAN, J.

Defendant appeals from the judgment and sentence entered upon a jury verdict finding her guilty of delivery of a controlled substance in violation of Iowa Code sections 124.401(1)(c)(6) and 124.206(4)(b) (1997). She contends (1) the trial court erred by including a jury instruction allowing a conviction for aiding and abetting, and (2) there was insufficient evidence to convict her of delivery of a controlled substance.¹ We affirm.

On October 11, 1997, undercover agent Paul Feddersen and a confidential informant went to Page's residence in order to purchase narcotics. Upon their arrival, the informant asked Page if she had any methamphetamine available they could purchase. Page said she did not, but indicated she was waiting for a phone call. Shortly thereafter, Page received a phone call from her source, during which the two discussed the amount of methamphetamine she could get for herself and agent Feddersen. Page's source agreed to come get the money for the drugs, then return a half-hour later with the methamphetamine. Agent Feddersen expressed concerns about giving money to a stranger and letting the person leave with it, but Page assured him the arrangement would be

¹ On February 3, 1998, the Clarke County Attorney filed an information charging Page with delivery of a controlled substance, schedule II, in violation of Iowa Code sections 124.401(1)(c)(6) and 124.206(4)(b). On March 12, 1998 the Clarke County Attorney filed an amended information charging Page with possession with the intent to deliver a controlled substance, schedule II, in violation of Iowa Code sections 124.401(1)(c)(6) and 124.206(4)(b). The district court, county attorney, and defendant proceeded to trial on the charge of delivery of a schedule II controlled substance. The court instructed the jury based on this charge. Page was found guilty and sentenced for delivery of a schedule II controlled substance. The reasons for the amendment, and the subsequent trial based on the charge in the original information, are not clear from the record. References in appellant's brief suggesting Page was found guilty and sentenced for the crime of possession with intent to deliver a schedule II controlled substance are in error. Page does not raise this discrepancy in her argument.

okay. Agent Feddersen and the confidential informant left for a period of time to communicate with surveillance personnel.

Upon their return to the Page residence, agent Feddersen and the confidential informant encountered Jeff Page, defendant's husband, and Jenna McBroom. Page gave Jenna \$100, as did agent Feddersen, for the purpose of purchasing methamphetamine. While they waited for Jenna to return with the methamphetamine, the confidential informant asked Page about obtaining drugs at a later date. Page indicated a future transaction would be possible.

Jenna and her husband, Scott McBroom, returned a short time later. Agent Feddersen testified Jenna gave several packages of methamphetamine to Page, who in turn handed two packages of it to Feddersen. Page's husband testified Page did not hand the drugs to agent Feddersen. According to Page's husband, Jenna handed Page her drugs, then Jenna handed drugs to agent Feddersen. Agent Feddersen received one gram of a substance that later tested positive for methamphetamine.

Page was arrested on December 23, 1997. On September 22, 1998, a jury found Page guilty of delivery of a controlled substance. On November 5, 1998, the district court sentenced Page to an indeterminate term of incarceration not to exceed ten years and suspended the term of incarceration. The court ordered three years of formal and supervised probation. Page appeals.

Jury Instruction. Our review of jury instructions is for errors at law. Iowa R. App. P. 4; *State v. Breitbach*, 488 N.W.2d 444, 449 (Iowa 1992). We review to decide if the jury instructions are correct statements of the law and are supported by substantial evidence. *State v. Liggins*, 557 N.W.2d 263, 267 (Iowa

1996). Error in giving or refusing jury instructions does not require reversal unless it results in prejudice to the defendant. *State v. Kellogg*, 542 N.W.2d 514, 516 (Iowa 1996).

Page asserts the trial court committed error by including a jury instruction allowing conviction for aiding and abetting. Specifically, she argues (1) at no time did the State indicate in the information Page was being charged with aiding and abetting in the commission of delivery of a controlled substance; and (2) the evidence presented at trial did not support the contention Page aided and abetted the act of delivery.

To convict an individual of a crime on an aiding and abetting theory, the State must produce substantial evidence the individual "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. Johnson*, 534 N.W.2d 118, 123 (Iowa App. 1995) (quoting *State v. Lott*, 255 N.W.2d 105, 107 (Iowa 1977)). Knowledge of the criminal act at or before its commission is essential. *Johnson*, 534 N.W.2d at 123. This knowledge may be inferred from circumstances surrounding the act. *Id.* Sufficient evidence exists to establish aiding and abetting if the jury could conclude the defendant associated herself with the venture or participated in it as something the defendant wished to bring about. *State v. Galvan*, 297 N.W.2d 344, 348-49 (Iowa 1980); *State v. Lott*, 255 N.W.2d 105, 108 (Iowa 1977). An aider and abettor in the commission of a public offense is charged, tried, and punished as a principal. Iowa Code § 703.1 (1999); *State v. Gordon*, 531 N.W.2d 134, 136 (Iowa App. 1995).

Page did not object to the trial information during the discussion regarding jury instructions. Therefore, she has failed to preserve error on her argument concerning the lack of an aiding and abetting charge in the trial information. See *State v. Taylor*, 490 N.W.2d 536, 538 (Iowa 1992). Even if she had properly raised the objection, however, the law provides an information need not contain allegations an accused is an aider and abettor. *State v. Black*, 282 N.W.2d 733, 734-35 (Iowa 1979); *State v. Rydel*, 262 N.W.2d 598, 601 (Iowa 1978) ("To have charged defendant as an aider and abettor in the county attorney's information would have been surplusage.") Further, a trial information can be amended to conform to proof at trial. Iowa R. Cr. P. 4(8)(a); *State v. Crutcher*, 174 N.W.2d 449, 451-52 (Iowa 1970).

Page argues the evidence in her case differed substantially from the evidence in *State v. Lott*, 255 N.W.2d 105 (Iowa 1977), relied upon by the State to support the aiding and abetting jury instruction. The *Lott* court held the following constituted substantial evidence from which the jury could find Lott aided and abetted the seller in the delivery of drugs:

[Lott] acknowledged his ability and willingness to supply illicit drugs. He agreed to arrange a transaction. He made the initial contact with [the seller], called him later to confirm the arrangement, accompanied [the confidential informant and undercover agent] to the apartment building, made two trips alone to [the seller's] apartment to check on his readiness, introduced [the informant and agent] to [the seller], remained through the transaction and vouched to [the informant] for the quality of the cocaine. He expressed a willingness to arrange future sales and stayed with [the seller] when the transaction was completed.

Lott, 255 N.W.2d at 108. The court acknowledged one who aids only the transferee (buyer) cannot be guilty of delivery. *Id.* at 107. The court distinguished *United States v. Moses*, 220 F.2d 166 (3rd Cir. 1955), in which the

Third Circuit held evidence the defendant introduced undercover agents to her supplier insufficient to show she aided and abetted the seller, explaining “although [Moses’] conduct was prefatory to the sale, it was not collaborative with the seller.” *Id.* at 107-108 (quoting *Moses*, 220 F.2d at 168). In *State v. Brown*, 466 N.W.2d 702 (Iowa App. 1990), this court held the following testimony constituted substantial evidence to support a conviction of aiding and abetting commission of delivery of a controlled substance:

There is testimony here the defendant initiated the transaction and acknowledged his ability and willingness to supply the drugs. . . . [H]e pointed out the supplier and informed the undercover police officers how they could get his supplier to stop the car. Further, from the testimony, the jury could find that the defendant, after the officers stopped their car, asked them the amount in dollars of the crack cocaine they wanted to purchase. In addition, there is evidence that he told officers to tell his supplier that he was the one who was serving them.

Id. at 704.

We find the facts in this case sufficiently analogous to *Lott* and *Brown* to support the submission of the aiding and abetting instruction to the jury. While Page did not initiate the contact with the seller, she discussed the terms and arranged the logistics of the sale with the seller. Page was present at all stages of the transaction. She knew where the seller would obtain the methamphetamine, and assured agent Feddersen the arrangement would be okay. She informed the buyers she would be willing to arrange future purchases. She obtained the drugs from the seller and handed them to the buyer. Page actively “associated herself with the venture” and “participated in it as something she sought to bring about.” See *Brown*, 466 N.W.2d at 704. The trial court properly submitted the aiding and abetting instruction.

Sufficiency of the Evidence. Our review is for errors at law. Iowa R. App. P. 4; *Johnson*, 534 N.W.2d at 123. We are bound by the jury's verdict unless there was not substantial evidence to support it. *Id.* We view the evidence in the light most favorable to the State, but consider all the evidence, not just that which supports the verdict. *State v. Canas*, 597 N.W.2d 488, 494 (Iowa 1999). Evidence is substantial if it could convince a rational trier of fact the defendant is guilty of the crime charged beyond a reasonable doubt. *Id.*

Page claims insufficient evidence supported her conviction.² Specifically, Page argues her actions were merely those of a buyer, not a seller, and did not rise to the level of delivery or aiding and abetting delivery of a controlled substance. She argues the fact she assisted the undercover agent in purchasing the methamphetamine does not rise to the level of delivery or aiding and abetting delivery as charged in this case.

To convict Page of delivery of a controlled substance, the State was required to prove (1) Page delivered a controlled substance, and (2) Page knew the substance she delivered was a controlled substance. Iowa Code § 124.401; *State v. Moore*, 529 N.W.2d 264, 265 (Iowa 1995). **Delivery means "the actual, constructive, or attempted transfer from one person to another of a controlled substance, whether or not there is an agency relationship."** Iowa Code § 124.101(7).

² Page claims insufficient evidence supported the verdict for *possession of a controlled substance with intent to deliver*. The State correctly points out the jury convicted Page of *delivery* of a controlled substance. We will review Page's claim of insufficient evidence based on the conviction of delivery of a controlled substance.

Alternatively, the jury could have found Page guilty of aiding and abetting the delivery of a controlled substance. Substantial evidence of aiding and abetting may include either active participation in the crime or in some manner encouraging it prior to or at the time of its commission. *State v. Lewis*, 514 N.W.2d 63, 66 (Iowa 1994).

We find substantial evidence to support Page's conviction of either aiding and abetting delivery or delivery of a controlled substance. Page arranged the methamphetamine sale with her source, negotiating price and discussing the logistics of the sale. She assured agent Feddersen about the reliability of her source, and agreed to future drug transactions. The source came to Page's home, took money from Page and agent Feddersen, and returned later with the methamphetamine. Upon her return, the source handed packages of the drug to Page. Testimony differed over whether Page in turn handed agent Feddersen the drug, but the jury was free to believe or disbelieve the testimony of witnesses as it chose. See *Brown*, 466 N.W.2d at 703-04. The jury apparently accepted agent Feddersen's version of events as more credible. Page participated in the transaction and encouraged it. Substantial evidence existed to support Page's conviction for delivery of a controlled substance.

AFFIRMED.