

IN THE COURT OF APPEALS OF IOWA

No. 8-769 / 07-2005
Filed October 15, 2008

STATE OF IOWA,
Plaintiff-Appellee,

vs.

NANCY JANE QUIGLEY,
Defendant-Appellant.

Appeal from the Iowa District Court for Marshall County, Michael J. Moon,
Judge.

Nancy Quigley appeals her conviction for possession of
methamphetamine (more than five grams) with intent to deliver and a drug tax
stamp violation. **REVERSED AND REMANDED FOR DISMISSAL.**

Mark C. Smith, State Appellate Defender, and Robert P. Ranschau,
Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney
General, Jennifer Miller, County Attorney, and James S. Scheetz, Assistant
County Attorney, for appellee.

Considered by Mahan, P.J., and Vaitheswaran and Doyle, JJ.

DOYLE, J.

Nancy Quigley appeals her conviction, following jury trial, for possession of methamphetamine (more than five grams) with intent to deliver and a drug tax stamp violation. On appeal she argues (1) there was insufficient evidence to support the finding of guilt; (2) her trial counsel was ineffective in failing to insure the trial court admonished or instructed the jury to disregard prejudicial testimony and in failing to object to hearsay statements; and (3) the district court erred in ruling on her post-trial motions without a hearing. Because we conclude the State failed to prove possession, we reverse and remand for dismissal.

I. Background Facts and Proceedings.

Around noon on May 4, 2007, Marshalltown detective David Powell and Tama County deputy sheriff Bruce Rhoads were conducting surveillance of a “known drug house” in Marshalltown located at 916 South Center Street. Powell observed a car registered to Christina Dilly park on High Street around the corner from the house under surveillance. Two females exited the vehicle and went into the house. A short time later, the females exited the house, returned to the car, and drove away east on High Street. Powell, in an unmarked vehicle, followed the car, which turned right on First Avenue, then left on Helm Street, then right on South Second Street, and finally left on East South Street. Powell did not see anything tossed from the car, but lost sight of it several times during the chase. He called Officer Christopher Roush for assistance. Roush stopped the car in the 500 block of East South Street.

Dilly was driving, and Quigley was in the front passenger seat. When asked for her name, Quigley gave a name other than Nancy Quigley. During a

search, \$3828 in cash and a glass methamphetamine pipe were found in Quigley's pocket. When asked about the money, Quigley said it was Dilly's. Quigley was arrested. Powell took Quigley's cell phone and testified that it constantly rang and when he answered it, people gave responses that indicated to him that they were looking to buy drugs. The car was searched after it was impounded. A backpack was found on passenger side of the front seat. The backpack contained numerous small plastic bags and a bag containing fourteen grams of a white substance, which later tested negative for the presence of controlled substances. The backpack also contained numerous other items, including a glass methamphetamine pipe. Three cell phones were found on the front seat, and four cell phone chargers were found in the car. Another blue pack or duffel bag was found on the rear seat. It contained a Vector digital scale and some plastic pen tubes. A pillowcase containing a glass bong was found in the trunk.

At about three o'clock that afternoon, Carol Spencer, who lived at 1101 South Second Avenue, discovered a metal box containing several bags of "crystally" substances in her driveway. Her house is along the route of travel taken by Dilly's vehicle during the chase. Spencer later turned the items over to the police. The box contained five plastic bags. The substance in the bags tested positive for methamphetamine and weighed 32.35 grams. Testing did not reveal any identifiable fingerprints on the metal box or the plastic bags.

On direct examination, Dilly testified as follows:

Q. Was Nancy doing anything with her hands while you were being followed by the car before you saw the squad car or the police car with lights? A. I mean she was movin' around a lot, but I

don't really know for sure like what she was doing' just cuz' I'm like—I mean I'm in a residential area and I'm not knowin' where to go, so I'm kind of like movin' quick reaction and I'm tryin' not to wreck us. You know, there's kids, a school right there, everything, and so I wasn't really paying much attention to what she was doin' other than talkin' to her and listenin'.

Q. And what was she doing with her hands? . . . A. Just movin' around. I mean I wasn't—I wasn't payin'—you know, I wasn't directly looking at her. I was lookin' ahead of me, and I had never like been in a situation like that before, you know, so I really wasn't payin' attention to what she was doin'. I mean she could see her move around out of the corner of my eye. But, for the most part, I'm watching behind me and in front of me so I don't crash into anybody and then so I can see what this person behind me was doin'.

A. —all I'm saying is I did not see her—I don't know if what she threw out was drugs or whatever. I'm just sayin' I seen her move around, you know, because out of the corner of my eye I can see movement, you know, we're both in the front seat.

Q. But you saw her throw things out of the car, correct?

A. Possibly.

On cross-examination, Dilly testified:

Q. And you never actually saw anything go out the window; is that correct? A. Right. I mean I just seen a lot of movement, you know. I mean I don't know how to explain it. She was just movin' around and you can see things out of the corner of your eye, still sittin' there, still movin', you know. And she's also lookin' back at me, you know. I mean so I don't—it's possible, you know, but I don't think so. I just seen movement. I can't say for sure that I seen her throw anything out the window.

After the jury trial, Quigley was found guilty of the crime of possession of methamphetamine with intent to deliver and the crime of failing to affix a drug tax stamp. Quigley now appeals.

II. Scope and Standard of Review.

We review sufficiency of the evidence claims for errors at law. Iowa R. App. P. 6.4. We uphold a verdict if substantial evidence supports it. *State v.*

Weaver, 608 N.W.2d 797, 803 (Iowa 2000). “Evidence is substantial if it would convince a rational fact finder that the defendant is guilty beyond a reasonable doubt.” *State v. Biddle*, 652 N.W.2d 191, 197 (Iowa 2002). We consider all record evidence, not just the evidence supporting guilt, when making sufficiency of the evidence determinations. *State v. Quinn*, 691 N.W.2d 403, 407 (Iowa 2005). Direct and circumstantial evidence are equally probative. Iowa R. App. P. 6.14(6)(p). We view the evidence in the light most favorable to the State, “including legitimate inferences and presumptions that may fairly and reasonably be deduced from the record evidence.” *Biddle*, 652 N.W.2d at 197. “The State must prove every fact necessary to constitute the crime with which the defendant is charged.” *State v. Webb*, 648 N.W.2d 72, 76 (Iowa 2002). “The evidence must raise a fair inference of guilt and do more than create speculation, suspicion, or conjecture.” *Id.*

III. The Merits.

Quigley contends there was not sufficient evidence to conclude she had possession of the methamphetamine. No direct evidence was presented at trial to establish Quigley had possession of the methamphetamine. There was no evidence that Quigley had possession of the tin and five small bags of methamphetamine prior to the chase. Neither Detective Powell nor Officer Roush observed any items being thrown from Dilly’s car during the chase. Dilly testified she was not watching Quigley while driving the car, and could not testify that she observed Quigley toss anything out the window. Quigley’s fingerprints were not found on the tin or the plastic bags. The tin and plastic bags containing the methamphetamine were not discovered until some hours after the chase.

Spencer testified that she knew there had been other instances of drug arrests made in her neighborhood and that she had heard about drug activity in the blocks around her residence.

The law is clear that a jury verdict of guilty can be supported by circumstantial evidence alone. *State v. Moses*, 320 N.W.2d 581,586 (Iowa 1982); *State v. O'Connell*, 275 N.W.2d 197, 205 (Iowa 1979). However, this in no way relieves the State of its burden of proof, which is beyond a reasonable doubt. We do not believe the circumstantial evidence presented at trial rose to the level to convict Quigley. Evidence must raise a fair inference of guilt and do more than create speculation, suspicion, or conjecture. See *Webb*, 648 N.W.2d at 76. There was no evidence that Quigley possessed the methamphetamine before getting into Dilly's car. Dilly did not see Quigley throw a tin from the car during the chase. Although the officers chasing the car lost sight of it briefly, neither officer observed anything being tossed from the car. Similar evidence to the tin and plastic bag of methamphetamine was not found in the car. We conclude the evidence does not "allow a reasonable inference that the defendant . . . had control and dominion over the contraband" she was charged with possessing. *State v. Cashen*, 666 N.W.2d 566, 571 (Iowa 2003). Given the circumstances above, the evidence was insufficient to prove beyond a reasonable doubt that Quigley had dominion and control over the methamphetamine. If the underlying drug charge fails, it follows that Quigley cannot be guilty of a violation of section 435B.3 or section 435B.12 for failing to affix a tax stamp. We reverse the district court's judgment of conviction and sentence on the charges of possession and drug stamp violation and remand for

an order of dismissal. Our disposition of the case renders it unnecessary to address Quigley's ineffective assistance of counsel claim or her claim the district court erred in ruling on her post-trial motions without a hearing.

REVERSED AND REMANDED FOR DISMISSAL.