

IN THE COURT OF APPEALS OF IOWA

No. 8-783 / 08-0233
Filed November 13, 2008

STATE OF IOWA,
Plaintiff-Appellee,

vs.

SEAN MICHAEL GYLES,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Joel D. Novak, Judge.

Sean Michael Gyles appeals his convictions for conspiracy to deliver methamphetamine and possession of methamphetamine. **AFFIRMED.**

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

Thomas J. Miller, Attorney General, Kevin Cmelik, Assistant Attorney General, John P. Sarcone, County Attorney, and Stephanie Cox, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Miller and Potterfield, JJ.

MILLER, J.

Sean Michael Gyles appeals his convictions for conspiracy to deliver methamphetamine and possession of methamphetamine. He contends there was insufficient evidence that he participated in a conspiracy to deliver methamphetamine, and that he received ineffective assistance of trial counsel. We affirm his convictions and preserve his ineffective assistance claim for a possible postconviction proceeding.

On July 12, 2007, law enforcement officers executed a search warrant at the residence of Gyles and Nichole Cory. Drug paraphernalia, a digital scale with drug residue on it, approximately fifty little plastic baggies, and .22 grams of methamphetamine were found in the residence. After these items were found, Gyles and Cory indicated to the officers they wanted to cooperate with them. Gyles told the officers he had been involved with drug activity for some time. He said he could buy methamphetamine from Armondo, who had supplied him with fifteen to twenty ounces over the preceding couple of months and to whom he still owed \$1,400. He said he could buy methamphetamine from John Farrell, with whom he had an arrangement pursuant to which each sold methamphetamine to the other from time to time. Cory stated she had been with and seen Gyles deliver drugs on over fifty occasions. She gave the officers additional names of individuals she knew to be dealing drugs. Ultimately, the State refused any cooperation with Gyles. The State did enter into a plea agreement with Cory and pursuant to that agreement she agreed to testify against Gyles.

At Gyles's trial Cory testified she had used methamphetamine off and on from 1997 until 2007, and used it with Gyles from the time she moved in with him in May of 2007. She stated she was frequently with Gyles when he purchased the drugs from Armondo, at times driving him to Armondo's to get methamphetamine. They started out buying small quantities from Armondo but eventually increased how much they would buy. Their relationship with Armondo progressed such that eventually he would "front" Gyles and Cory drugs, essentially providing them drugs on credit. Gyles and Cory would then use some of the "fronted" methamphetamine and sell some of it to finance their habit.

Cory also testified that John Farrell would both supply them with methamphetamine and sell their excess. They would finance some of their own drug purchases that way. She stated that most of the drugs they personally used were paid for with money obtained through the sale of "fronted" drugs. Cory testified she observed Gyles in possession of the scales and plastic baggies and observed him weigh and package methamphetamine. She had seen him sell methamphetamine out of their bedroom on fifty or more occasions. Cory also testified she sometimes delivered the methamphetamine for Gyles after watching him weigh and package it. The jury found Gyles guilty of conspiracy to deliver methamphetamine and possession of methamphetamine.

Gyles appeals, contending there was insufficient evidence to support the guilty verdict for conspiracy to deliver methamphetamine, and that he received ineffective assistance of trial counsel. More specifically, he argues that because the amount of methamphetamine found in his residence was consistent with

personal use the jury could not conclude he was guilty of conspiracy to deliver methamphetamine, and that other than Cory's testimony there was no corroboration of his admissions to the officers.

We review claims of insufficient evidence for errors at law. *State v. Rohm*, 609 N.W.2d 504, 509 (Iowa 2000). We will uphold a finding of guilt if substantial evidence supports the verdict. *Id.* "Substantial evidence' is evidence upon which a rational finder of fact could find a defendant guilty beyond a reasonable doubt." *Id.* We view the evidence in the light most favorable to the verdict. *State v. Acevedo*, 705 N.W.2d 1, 4 (Iowa 2005).

To prove the existence of a conspiracy, the State had to prove (1) Gyles agreed with another that Gyles or the other would deliver a controlled substance, (2) Gyles entered into an agreement with the intent to promote or facilitate delivery of a controlled substance, (3) Gyles or the other participant in the agreement committed an overt act, and (4) the agreement was not with a law enforcement agent. See Iowa Code § 706.1 (2007). A conspiracy may be proved by circumstantial evidence and an agreement may be inferred from the surrounding circumstances. *State v. Ruiz*, 496 N.W.2d 789, 792 (Iowa Ct. App. 1992). A tacit agreement will suffice, and there need not be any written statement or even a speaking of words which expressly communicates the agreement. *State v. Larue*, 478 N.W.2d 880, 882 (Iowa Ct. App. 1991).

Based on the evidence in the record before us, we conclude substantial evidence supports the jury's verdict on the conspiracy charge. A digital scale with drug residue and little plastic baggies were found in the bedroom shared by

Gyles and Cory. The police expert testified at trial that these items were consistent with weighing and packaging or repackaging of methamphetamine for sale. This evidence of drug dealing corroborates Gyles's admissions to the officers and Cory's statements and testimony that Gyles was engaged in methamphetamine dealing in which he at times sought her assistance and in which she at times agreed to participate and did so.

We conclude there is substantial evidence from which a rational jury could conclude beyond a reasonable doubt that Gyles conspired with Cory to deliver methamphetamine.

Gyles next claims his trial counsel was ineffective for failing to object to testimony elicited by the prosecution from one of the investigating officers. Specifically, in the context of discussing the possibility of making a deal with authorities for his cooperation the prosecuting attorney asked the officer, "And what was the response from the county attorney's office about Mr. Gyles's cooperation?" The officer testified: "Dan [from the County Attorney's office] advised Deputy Cook that there were some pending charges on Mr. Gyles and also he owed the State some money on an earlier case or something like that." Gyles contends this evidence was inadmissible under Iowa Rule of Evidence 5.404(b), that counsel breached an essential duty in not objecting to its admission, and this breach prejudiced him because the jury was lead to believe he was of bad character.

In order to prevail on his claims of ineffective assistance of counsel, Gyles must show (1) counsel failed to perform an essential duty, and (2) prejudice

resulted. *State v. Lane*, 726 N.W.2d 371, 393 (Iowa 2007). We evaluate the totality of the relevant circumstances in a de novo review. *Id.* at 392. Ordinarily, we prefer to leave ineffective assistance of counsel claims for postconviction relief proceedings. *State v. Hirschke*, 639 N.W.2d 6, 8 (Iowa 2002). We do so to allow a record on the performance of trial counsel to be developed, *Berryhill v. State*, 603 N.W.2d 243, 245 (Iowa 1999), and to give the allegedly ineffective attorney the opportunity to respond to and defend the allegation of ineffective assistance. *State v. Laffey*, 600 N.W.2d 57, 60-61 (Iowa 1999). We preserve Gyles's ineffective assistance claim for these reasons.

Accordingly, we affirm Gyles's convictions and preserve his claim of ineffective assistance of counsel for a possible postconviction relief proceeding.

AFFIRMED.