

**IN THE COURT OF APPEALS OF IOWA**

No. 0-876 / 10-0222  
Filed March 7, 2011

**STATE OF IOWA,**  
Plaintiff-Appellee,

**vs.**

**BRIAN LEE HANSON,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Pottawattamie County, Timothy O'Grady, Judge.

A defendant appeals from his convictions of delivery of a controlled substance, failure to affix a drug tax stamp, and ongoing criminal conduct.

**AFFIRMED.**

Mark C. Smith, State Appellate Defender, and David A. Adams, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Linda J. Hines, Assistant Attorney General, Matthew D. Wilber, County Attorney, and Amy Zacharias and Shelly Seldak, Assistant County Attorneys, for appellee.

Considered by Sackett, C.J., and Vogel and Vaitheswaran, JJ. Tabor, J., takes no part.

**VOGEL, J.**

Following a jury trial, Hanson was convicted of two counts of delivery of a controlled substance (methamphetamine) in violation of Iowa Code sections 124.401(1)(b)(7) (2009) (more than five grams) and 124.401(1)(c)(6) (five grams or less); failure to affix a drug tax stamp in violation of Iowa Code sections 453B.3 and 453B.12; and ongoing criminal conduct in violation of Iowa Code sections 706A.1(5), 706A.2(4), and 706A.4. Hanson appeals. He challenges the sufficiency of the evidence and asserts that the district court erred in instructing the jury on joint criminal conduct and aiding and abetting. Our review is for correction of errors at law. *State v. Spies*, 672 N.W.2d 792, 796 (Iowa 2003) (sufficiency of the evidence); *State v. Kellogg*, 542 N.W.2d 514, 516 (Iowa 1996) (jury instructions).

Hanson was charged with delivery of a controlled substance, failure to affix a tax stamp, and ongoing criminal conduct as either a principal or an aider and abettor.<sup>1</sup> The evidence presented at trial demonstrated that in January

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<sup>1</sup> The jury was instructed,

Instruction No. 28

When two or more persons act together and knowingly commit a crime, each is responsible for the other's acts during the commission of the crime or escape from the scene. The defendant's guilt is the same as the other person's unless the acts could not reasonably be expected to be done in aiding the commission of the crime.

Instruction No. 29

All persons involved in the commission of a crime, whether they directly commit the crime or knowingly "aid and abet" its commission, shall be treated in the same way.

"Aid and abet" means to knowingly approve and agree to the commission of a crime, either by active participation in it or by knowingly advising or encouraging the act done in some way before or when it is committed. Conduct following the crime may be considered only as it may tend to prove the defendant's earlier participation. Mere nearness to, or presence at, the scene of the crime, without more evidence, is not

2009, a confidential informant worked with police officers to conduct two controlled buys from Hanson. Before both of the buys, the informant met with police officers, was searched and given a digital audio recorder, which recorded and transmitted audio to the officers.

On January 13, 2009, the first controlled buy occurred. Before going to Hanson's house, the informant phoned Hanson and arranged to purchase five grams of methamphetamine for \$500. The informant and Hanson negotiated a price, "80 cents for a hundred," which the informant and the State's expert witness testified that .08 gram is referred to as "80 cents." The officers dropped the informant off near Hanson's house and watched him go into Hanson's house. While the informant was inside Hanson's house, Scott Hart arrived at the house with methamphetamine. Prior to this, the informant did not know that Hart was going to be involved in the sale. The informant described the transaction,

[Hart] stepped inside the door, handed the drugs to [Hanson]. [Hanson] handed me the drugs. I gave [Hanson] the money. [Hanson] gave it to [Hart]. [Hart] never come all the way in. He took one step inside the door and that was it.

. . . .  
I sat in the house with [Hanson] . . . [Hart] walked in. . . . When he got there, he knocked on the door. [Hanson] answered the door. They didn't go past the bar by the front—inside the front door when you walk in, there is a bar to the right. They sat there and did their deal. . . . They changed wares, [Hanson] come exchange with me, give [Hart] back the money and—

The informant never spoke to Hart. After leaving Hanson's house, the informant gave the methamphetamine to the officers and reported what had happened.

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"aiding and abetting." Likewise, mere knowledge of the crime is not enough to prove "aiding and abetting."

Sometime later that month, Hanson phoned the informant and asked if he knew anyone looking for drugs. The informant and Hanson negotiated a price, which was again “80 cents for a hundred.” The amount Hanson sold to the informant during the first buy was 1.8 ounces less than they had agreed. The informant testified that Hanson “was supposed to make up for the gram and 80 cents the last one was short, too, because he thought it was for the same people.” The informant arranged to purchase a half-ounce of methamphetamine from Hanson for \$900. On January 22, 2009, the second controlled buy occurred. The informant again went to Hanson’s home, after which Hanson phoned Hart and Hart brought the methamphetamine to the home, but did not go inside. The informant described the second transaction,

A. . . . . Brian went out and got it and brought it back to me.

Q. And who did you give the money too? A. Brian.

. . . . .

Q. And what—who gave you the drugs? A. Brian.

Hanson and the informant spoke about the quantity and quality of the drugs. They discussed the color of the methamphetamine, which was yellow and Hanson claimed the quality was good in spite of this coloring. Immediately after leaving Hanson’s house, the informant turned the drugs over to officers.

Hanson challenges the sufficiency of the evidence. Hanson first argues that neither of the delivery convictions can be sustained because there was no testimony that he delivered the methamphetamine.<sup>2</sup> Delivery is defined as “the

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<sup>2</sup> In challenging the sufficiency of the evidence supporting both delivery convictions, Hanson also argues that there was no evidence that he possessed the methamphetamine. “[P]roof of possession is not necessary for proof of delivery.” *State v. Spies*, 672 N.W.2d 792, 796 (Iowa 2003); *State v. Welch*, 507 N.W.2d 580, 582 (Iowa 1993) (“[D]elivery does not require possession.”); *State v. Grady*, 215 N.W.2d 213, 214

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). Prior to each controlled buy, the informant and Hanson negotiated a price and quantity and Hanson agreed to sell the informant methamphetamine. In each instance, Hanson contacted Hart so that Hanson could obtain the methamphetamine, and physically transfer the drugs to the informant. We find there was sufficient evidence to support both of the delivery convictions.

Next, Hanson argues the tax stamp conviction cannot be sustained because there was no testimony that he possessed the methamphetamine. “Possession is an element of . . . failure to affix a drug tax stamp.” *State v. Padavich*, 536 N.W.2d 743, 750–51 (Iowa 1995). Hanson arranged for Hart to come to his house, and Hanson went outside and physically obtained the methamphetamine and brought it inside his house. *See State v. Maghee*, 573 N.W.2d 1, 10 (Iowa 1997) (explaining that the defendant had dominion and control over the room where the cocaine was seized and thus, had constructive possession); *Padavich*, 536 N.W.2d at 751 (“A person who has direct physical control of something on or around [his or her] person is in actual possession of it.”). Hanson had the methamphetamine in his hands and gave it to the informant. We find there was sufficient evidence of possession to support the tax stamp conviction.

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(Iowa 1974) (“[A] person might act as a broker in the drug trade, effecting delivery of a controlled substance by transfer of title or sale, without ever having possession of the material. . . . Thus, possession is not a necessary legal element of delivery.”). Hanson’s argument is without merit.

Hanson also argues the ongoing criminal conviction cannot be sustained because (1) sufficient evidence does not support the underlying delivery convictions and (2) there was no evidence that Hanson had a specific purpose or intent to gain financially from any of the alleged transactions. Because we found sufficient evidence supported the underlying delivery convictions, Hanson's first argument must fail. Iowa Code chapter 706A (Ongoing Criminal Conduct) defines "specified unlawful activity" as "any act . . . committed for financial gain on a continuing basis, that is punishable as an indictable offense . . . ." Iowa Code § 706A.1(5). There was sufficient evidence that Hanson as the principal had the intent to gain financially—Hanson had separate dealings with Hart in order to obtain the methamphetamine; the informant and Hanson discussed the cost, quantity, and quality of the methamphetamine being sold; and the informant testified that a person selling drugs generally receives drugs or money, along with the State's expert witness's testimony that the sale of drugs are generally for profit. We find Hanson's convictions are supported by sufficient evidence.

Last, Hanson challenges the aiding and abetting jury instructions. He argues that because there was "no evidence of Hanson ever possessing or delivering the drugs to the confidential informant," there was not sufficient evidence to support giving the aiding and abetting instructions.<sup>3</sup> As discussed

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<sup>3</sup> Hanson also asserts that the district court erred in instructing the jury as to aiding and abetting because aiding and abetting was not pled in the trial information. It is unnecessary to allege in the trial information whether the one charged directly committed the act constituting the offense or aided and abetted its commission. Iowa Code § 703.1 ("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."); *State v. Black*, 282 N.W.2d 733, 735 (Iowa 1979) ("[W]e hold there was no fatal variance between the information charging

above, Hanson was not merely present at the scene of the crime, but was a participant in the sale of the methamphetamine. Having found his convictions for delivery of a controlled substance were supported by sufficient evidence, his argument regarding the aiding and abetting jury instruction must also fail. We affirm.

**AFFIRMED.**

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the defendant as a principal and the proof that he was an aider and abettor[.]”). Hanson’s argument is without merit.