

IN THE COURT OF APPEALS OF IOWA

No. 2-718 / 11-2083
Filed November 15, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

SHAUNTA ROSE HOPKINS,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Robert A. Hutchison,
Judge.

Shaunta Hopkins appeals from the judgment and sentence entered following her convictions on several drug offenses. **AFFIRMED IN PART AND REVERSED IN PART.**

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

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

Considered by Vaitheswaran, P.J., and Potterfield and Bower, JJ.

BOWER, J.

Shaunta Hopkins appeals from the judgment and sentence entered following her convictions on two counts of conspiracy to deliver a controlled substance, possession of a controlled substance with intent to deliver, possession of a simulated controlled substance with intent to deliver, possession of a controlled substance, and failure to possess a tax stamp. She contends there is insufficient evidence to find her guilty of both conspiracy charges. She also contends the district court erred in failing to merge her conspiracy to deliver a controlled substance conviction with her possession of a controlled substance conviction.

The evidence is sufficient to support Hopkins's conviction for conspiracy to deliver crack cocaine. However, we find there is insufficient evidence to support a conviction for conspiracy to deliver a simulated controlled substance. Because the convictions for possession of crack cocaine and conspiracy to deliver crack cocaine stem from two separate acts, merger is not required. We reverse Hopkins's conviction for conspiracy to deliver a simulated controlled substance and affirm on all other grounds.

I. Background Facts and Proceedings.

Shaunta Hopkins was in bed with her boyfriend, Kiko Simmons, when police executed a search warrant on her home the morning of May 4, 2011. The search revealed crack cocaine packaged individually in one-gram units, located in several areas of the home. In the living room of the home, officers found plastic baggies and a weighing scale. Another scale was located in the kitchen.

Some of the crack cocaine was found between the mattresses of the bed, along with a red notebook that had Hopkins name listed along with other individuals. Several cell phones were recovered in the home; one phone had pictures of Hopkins holding cash and a gun.

A total of \$2025 in cash was discovered in the home. Hopkins told the officers that she had money in the bedroom dresser. The police found \$980 in cash located in the dresser. Hopkins also stated that she sold crack cocaine and that Simmons was involved in drug dealing. She admitted she had gone with Simmons on approximately four occasions while he sold drugs.

Hopkins told the officers that she had approximately ten ecstasy pills in the dresser. The search revealed a bag containing fifty-one pills that appeared to be ecstasy. Testing later revealed they were caffeine pills.

At the same time the search warrant was executed on Hopkins's home, the police executed search warrants on three other Des Moines homes. Drugs and drug-related items were discovered at each address. Cell phones located at each location revealed multiple contacts between the individuals at these residences, including Hopkins.

On May 27, 2011, Hopkins was charged along with Simmons and several other individuals with conspiracy to deliver crack cocaine, possession of crack cocaine with intent to deliver, failure to possess a tax stamp for crack cocaine, conspiracy to deliver a simulated controlled substance (ecstasy), and possession of a simulated controlled substance with intent to deliver (ecstasy). Following an

October 2011 trial, a jury found Hopkins guilty on all charges. Her motion for new trial was overruled.

II. Sufficiency of the Evidence.

We review challenges to the sufficiency of the evidence for the correction of errors at law. *State v. Neitzel*, 801 N.W.2d 612, 624 (Iowa 2011). If the verdict is supported by substantial evidence, we will uphold the verdict. *Id.* Substantial evidence is evidence upon which a rational jury could find the defendant guilty beyond a reasonable doubt. *Id.* The State must prove every fact constituting the crime with which the defendant is charged. The evidence must do more than create speculation, suspicion, or conjecture; it must raise a fair inference of guilt. *Id.* We consider all evidence in the record, both that which is favorable to the verdict and that which is unfavorable, but we view the evidence in the light most favorable to upholding the verdict. *Id.*

Hopkins challenges the sufficiency of the evidence finding her guilty of both conspiracy charges. Iowa Code section 706.1 (2011) defines conspiracy as follows:

1. A person commits conspiracy with another if, with the intent to promote or facilitate the commission of a crime which is an aggravated misdemeanor or felony, the person does either of the following:
 - a. Agrees with another that they or one or more of them will engage in conduct constituting the crime or an attempt or solicitation to commit the crime.
 - b. Agrees to aid another in the planning or commission of the crime or of an attempt or solicitation to commit the crime.
2. It is not necessary for the conspirator to know the identity of each and every conspirator.
3. A person shall not be convicted of conspiracy unless it is alleged and proven that at least one conspirator committed an overt act

evidencing a design to accomplish the purpose of the conspiracy by criminal means.

4. A person shall not be convicted of conspiracy if the only other person or persons involved in the conspiracy were acting at the behest of or as agents of a law enforcement agency in an investigation of the criminal activity alleged at the time of the formation of the conspiracy.

An agreement to form a conspiracy may be proven through circumstantial evidence and inferences drawn from that evidence. *State v. Fintel*, 689 N.W.2d 95, 102 (Iowa 2004). Direct evidence is not required to prove a conspiracy. *State v. Mapp*, 585 N.W.2d 746, 748 (Iowa 1998).

With regard to her conviction for conspiracy to deliver crack cocaine, Hopkins argues there is insufficient evidence to show she conspired with any of the other parties charged. Deangelo McKinney, who was also charged with the conspiracy, was found in Hopkins's bathroom with \$534 on his person when police searched the home. The cell phones located at the various locations revealed connections between Hopkins and another individual charged with the conspiracy, Matthew Padilla. The red notebook found under Hopkins's mattress contained the address of Jessie Williams, whose home was also searched that day and who was charged with conspiracy. Hopkins also admitted to police that she had sold crack cocaine and had gone with Simmons on approximately four occasions when he sold drugs. Viewing this evidence in the light most favorable to the verdict, we conclude substantial evidence exists by which a reasonable jury could find Hopkins guilty of conspiracy to deliver crack cocaine.

Hopkins also challenges the sufficiency of the evidence to support her conviction for conspiracy to deliver a simulated substance. A simulated

substance is defined as a substance that is “expressly represented” to be a controlled substance, or one that is “impliedly represented” to be a controlled substance because “its nature, packaging, or appearance would lead a reasonable person to believe it to be a controlled substance.” *State v. Henderson*, 478 N.W.2d 626, 629 (Iowa 1991). She first argues there is insufficient evidence that she expressly represented the caffeine pills found in her home to be ecstasy. She also argues there is no evidence of an agreement between her and anyone else regarding the delivery of ecstasy.

We find substantial evidence supports a finding the caffeine pills were a simulated controlled substance. Hopkins informed the police that she had ten ecstasy pills in her dresser. Although five times that amount was discovered in the dresser, it does not change Hopkins’s representation of the pills as ecstasy. Furthermore, the pills appeared to be ecstasy; they were small, with blue and pink markings, which “are common colors for ecstasy” found in Des Moines.

The evidence supporting the conspiracy to deliver the simulated controlled substance, however, falls short. Unlike the evidence tying the crack cocaine in the home to a larger conspiracy, there is no evidence of the simulated controlled substance in any of the other locations searched by the police. Nor is there any evidence of communication regarding the simulated ecstasy. Given the lack of evidence to support a conspiracy charge regarding the simulated controlled substance, we reverse Hopkins’s conviction and sentence for this charge.

III. Merger.

Hopkins next contends the district court erred in failing to merge her conspiracy to deliver a controlled substance conviction with her possession of a controlled substance conviction.

Iowa Code section 701.9 provides:

No person shall be convicted of a public offense which is necessarily included in another public offense of which the person is convicted. If the jury returns a verdict of guilty of more than one offense and such verdict conflicts with this section, the court shall enter judgment of guilty of the greater of the offenses only.

This section codifies the Double Jeopardy Clause of the United States Constitution, and its purpose is to prevent a court from imposing a greater punishment than contemplated by the legislature. *State v. Lambert*, 612 N.W.2d 810, 815 (Iowa 2000). An alleged violation of this section is reviewed for the correction of errors at law. *Id.*

The test for determining whether an offense is a lesser-included offense has been stated as follows:

[U]nder the legal test the lesser offense is necessarily included in the greater offense if it is impossible to commit the greater offense without also committing the lesser offense. If the lesser offense contains an element not required for the greater offense, the lesser cannot be included in the greater. This is because it would be possible in that situation to commit the greater without also having committed the lesser. In using this test, we look to the statutory elements rather than to the charge or the evidence.

State v. Braggs, 784 N.W.2d 31, 35-36 (Iowa 2010). In applying this test, we look only to the statutory elements of the offense. *Id.* at 36. If the lesser offense contains an element not included in the greater offense, it is not included. *Id.*

Conspiracy was not a separate offense, but rather an alternative means of violating section 124.401(1).¹ *State v. Maghee*, 573 N.W.2d 1, 7 (Iowa 1997). Therefore, a person may not be convicted of both conspiracy to commit drug trafficking and drug trafficking for the same offense. See *State v. Williams*, 305 N.W.2d 428, 434 (Iowa 1981). The State, however, alleges Hopkins's possession of a controlled substance conviction and the conspiracy to deliver a controlled substance conviction do not stem from the same offense but rather are two separate acts for which Hopkins may be punished.

The district court agreed with the State's view of the charges.

But I don't think that Count I and Count II merge, because of the way this case came about. We're talking about drugs in different locations. That's my belief. . . . That's what I think is correct in this case. Sometimes they merge. Sometimes they don't, and I think in this case, factually, they do not.

We find no error. There was evidence by which the jury could find Hopkins possessed the crack cocaine found at her residence, as well as evidence to support a conviction for conspiracy to deliver the crack cocaine found at Padilla's residence. Because two separate acts are involved, there is no Double Jeopardy violation. Accordingly, we affirm.

AFFIRMED IN PART AND REVERSED IN PART.

¹ This section states that:

it is unlawful for any person to manufacture, deliver, or possess with the intent to manufacture or deliver, a controlled substance, a counterfeit substance, or a simulated controlled substance, or to act with, enter into a common scheme or design with, or conspire with one or more other persons to manufacture, deliver, or possess with the intent to manufacture or deliver a controlled substance, a counterfeit substance, or a simulated controlled substance.