

**IN THE COURT OF APPEALS OF IOWA**

No. 3-858 / 12-1428  
Filed October 23, 2013

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

**vs.**

**VILAYCHITH FILA KHOUANMANY,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Polk County, D.J. Stovall, Judge.

Vilaychith Khouanmany appeals from convictions of conspiracy to deliver a controlled substance, possession of a controlled substance with intent to deliver, and failure to possess a tax stamp. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Erin M. Carr of Carr & Wright, P.L.C., Des Moines, for appellant.

Thomas J. Miller, Attorney General, Darrel Mullins, Assistant Attorney General, John Sarcone, County Attorney, and Andrea Petrovich, Assistant County Attorney, for appellee.

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

**POTTERFIELD, P.J.**

Vilaychith Khouanmany appeals from convictions of conspiracy to deliver a controlled substance, possession of a controlled substance with intent to deliver, and failure to possess a tax stamp. She challenges the sufficiency of the evidence of possession to support any of the convictions. She also asserts there is insufficient evidence of an agreement to deliver marijuana to sustain the conspiracy conviction. Because there is substantial evidence of possession, we affirm the convictions of possession with intent to deliver and failure to possess a tax stamp. However, we conclude there was not substantial evidence of an agreement to deliver to support the conspiracy conviction. We therefore affirm in part, reverse in part, and remand for resentencing.

**I. Background Facts.**

From the testimony and other evidence presented at trial, the jury could reasonably find the following. On September 14, 2011, Khouanmany's apartment on Ingersoll Avenue was under surveillance by Des Moines police. Irene Atkinson drove Khouanmany to the apartment. Atkinson diverted the attention of the police officer watching the apartment and then returned to her car. Khouanmany came to the car carrying bags, climbed into the rear passenger seat, and told Atkinson to "just drive." When the two learned that police had issued a search warrant for Atkinson's car, Khouanmany asked to be let out. Atkinson saw Khouanmany throw the bags out of the vehicle and then Khouanmany climbed out. Atkinson took her vehicle to a garage and had another friend pick her up. When she returned to the location where Khouanmany had thrown the bags and exited the car, Khouanmany was gone.

The following day, Khouanmany's sister from Sacramento, California, called Atkinson and told Atkinson to "[g]o pick up [Khouanmany's] bags." When Atkinson could not locate any bags where she had let Khouanmany out of the car, she called Khouanmany's sister back and was told, "They are across the parking lot in the bushes." Atkinson found three bags, knew that at least one of them contained marijuana,<sup>1</sup> took them to an apartment building managed by her parents, and placed them in a utility closet to which she had keys. Khouanmany called Atkinson, asked her if she had "got her bags," and asked Atkinson to "put it up safe."

When Atkinson later led police to the locked utility closet, the police found name-brand bags Atkinson recognized as belonging to Khouanmany. Within the bags were receipts,<sup>2</sup> clothing, and other items linking them to Khouanmany. Also found in the carrying bags were five bags of marijuana, which was of a quantity Detective Mike Stueckrath testified was "more than personal use," as well as a digital scale and several baggies consistent with distribution. Detective Jeff Cronin testified that the weight of the marijuana ("a little under two pounds"), "plus the way it's separately packaged," and the presence of a digital scale and packaging materials indicated distribution.

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<sup>1</sup> Atkinson testified that when she picked up the bags, one was partially open and she saw what looked like marijuana in a cookie jar she had given to Khouanmany. Atkinson also testified she recognized a pipe found in one of the bags as one she had used when smoking marijuana with the defendant.

<sup>2</sup> One receipt was from a Coach store, the customer's name was Vilay Khouanmany, and one inventory number on the receipt matched the tag on a Coach duffel bag found in the locked utility closet. Another receipt from "Medizen" in Sacramento, California, bore a picture of a marijuana leaf, and had Vilay Khouanmany's name on it.

Following a jury trial, Khouanmany was found guilty of conspiracy to deliver a controlled substance with intent to deliver, possession of a controlled substance with intent to deliver, and failure to possess a tax stamp. She now appeals, contending there is insufficient evidence to sustain the convictions.

## **II. Scope and Standard of Review.**

We review challenges to the sufficiency of the evidence for the correction of legal error. *State v. Cashen*, 666 N.W.2d 566, 569 (Iowa 2003). We uphold the jury's verdict if the record contains substantial evidence to support it. *Id.* Substantial evidence is the quality and quantity of proof that could convince a rational fact finder that the defendant is guilty beyond a reasonable doubt. *Id.* To gauge whether the evidence is substantial, we review the record in the light most favorable to the verdict. *Id.* We consider all of the evidence in the record, not just the evidence supporting guilt. *State v. Webb*, 648 N.W.2d 72, 76 (Iowa 2002).

## **III. Discussion.**

*A. Possession.* “In the realm of controlled substance prosecutions, possession can be either actual or constructive.” *State v. Cashen*, 666 N.W.2d 566, 569 (Iowa 2003). Actual possession may be shown by direct or circumstantial evidence. *State v. Reeves*, 209 N.W.2d 18, 21–22 (Iowa 1973). A person has actual possession of a controlled substance when the product is found on the person. See *State v. Vance*, 790 N.W.2d 775, 784 (Iowa 2010).

Moreover, where a controlled substance is not found on a defendant, the State may show constructive possession through other proof, such as

incriminating statements made by the defendant, incriminating actions of the defendant upon the police's discovery of the controlled substance among or near the defendant's personal belongings, the defendant's fingerprints on the packages containing the controlled substance, and any other circumstances linking the defendant to the controlled substance.

*State v. Nitcher*, 720 N.W.2d 547, 558 (Iowa 2006) (citation and internal quotation marks omitted)). “Unlawful possession of a controlled substance requires proof that the defendant: (1) exercised dominion and control over the contraband, (2) had knowledge of its presence, and (3) had knowledge that the material was a controlled substance.” *Id.* We look to all the facts and circumstances to evaluate whether the jury could reasonably infer the defendant knew of the drugs' presence and had control and dominion over them. *Cashen*, 666 N.W.2d at 571. “The existence of constructive possession turns on the peculiar facts of each case.” *Webb*, 648 N.W.2d at 79.

Although the marijuana was not found on Khouanmany's person, substantial evidence could support a finding that she had actual possession of the marijuana on September 14, 2011, when she brought the bags into Atkinson's vehicle and then took the bags when she left the vehicle. See *Vance*, 790 N.W.2d at 784. In any event, there is substantial circumstantial evidence from which a rational jury could find the defendant was in constructive possession of the marijuana recovered from the locked utility closet.<sup>3</sup>

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<sup>3</sup> Khouanmany challenges only the sufficiency of the evidence of possession; she does not challenge the sufficiency of the evidence of intent to deliver. See *State v. See*, 532 N.W.2d 166, 169 (Iowa Ct. App. 1995) (noting intent to deliver can be inferred from the manner of packaging drugs and the quantity of the drugs possessed); see also *State v. Grant*, 722 N.W.2d 645, 648 (Iowa 2006) (finding opinion testimony by law enforcement personnel experienced in the area of buying and selling drugs may be offered as evidence for purposes of aiding the trier of fact in determining intent).

*B. Agreement.*

“A conspiracy is essentially a criminal contract characterized as a concert of free wills, union of the minds of at least two persons, and a mental confederation involving at least two persons.” *State v. Kern*, 831 N.W.2d 149, 159 (Iowa 2013) (citation and internal quotation marks omitted). “Conspiracies are, by nature, clandestine affairs.” *Id.* Because direct evidence of an agreement to form a conspiracy is often absent, “we have consistently allowed circumstantial evidence and inferences drawn from the circumstances to support a conviction on a conspiracy charge.” *Id.*

The jury was instructed that to convict the defendant of conspiracy to deliver a controlled substance, the State was required to prove (1) that Khouanmany “agreed with another” that “one or more of them would commit the crime of delivery of a controlled substance, or solicit another to deliver a controlled substance”; or “attempt to deliver a controlled substance.” Further, that (2) the “defendant entered into the agreement with the intent to promote or facilitate the delivery of a controlled substance”; (3) “[o]ne or more of the individuals committed an overt act”; and (4) a “co-conspirator was not a law enforcement agent investigating the delivery of a controlled substance or assisting law enforcement agents in the investigation when the conspiracy began.” The jury was also instructed:

The State must prove that the defendant and another came to a mutual understanding that the delivery of a controlled substance would be attempted or committed. The agreement can be oral or written, informal or formal, and need not be detailed. It may be proven by direct or circumstantial evidence of a person’s words, actions or gestures.

Moreover,

The State does not need to prove the defendant knew all the details of the conspiracy nor all the other persons who had agreed to commit the crime of delivery of a controlled substance. However, the State must prove the defendant knowingly participated in the agreement at some time. If a person performs the act that promotes or facilitates the purpose of the conspiracy without knowledge of the conspiracy, he/she is not a conspirator.

The defendant contends that even if Atkinson's testimony provides some evidence of Khouanmany's possession, there is no evidence of an agreement with another to deliver a controlled substance. The State argues that accepting Atkinson's description of Khouanmany and her sister's urging Atkinson to help move Khouanmany's items from her apartment and into hiding, "[t]he jury could believe the women agreed to save the stockpile of marijuana from the police in order to distribute it later." Such a belief on the jury's part would be nothing more than speculation and we thus agree with Khouanmany's argument. Atkinson was never asked whether she expected the marijuana to be delivered to others. She testified she did not know the amount of marijuana in the bags; she saw only a cookie jar with some marijuana and a marijuana pipe.

"Circumstantial evidence of an agreement must be based on more than suspicion." *Kern*, 831 N.W.2d at 159. We cannot uphold a conviction based on mere speculation. See *State v. Speicher*, 625 N.W.2d 738, 742 (Iowa 2001). The record before us does not contain evidence that Khouanmany entered into an agreement with another to deliver marijuana. We therefore reverse Khouanmany's conviction of conspiracy to deliver a controlled substance.

Because we have affirmed in part and reversed in part, we remand for resentencing.

**AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**