

IN THE COURT OF APPEALS OF IOWA

No. 6-945 / 05-1557
Filed April 11, 2007

STATE OF IOWA,
Plaintiff-Appellee,

vs.

ANGELA CHRISTINE McDERMOTT,
Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, George L. Stigler, Judge.

Angela Christine McDermott appeals from the judgment and sentences entered by the district court on jury verdicts finding her guilty of multiple drug offenses. **AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Patricia Reynolds, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Brad P. Walz, Assistant County Attorney, for appellee.

Considered by Sackett, C.J., and Zimmer and Eisenhauer, JJ.

ZIMMER, J.

Angela Christine McDermott appeals from the judgment and sentences entered by the district court on jury verdicts finding her guilty of possession of more than five grams of methamphetamine with the intent to deliver and conspiracy to manufacture more than five grams of methamphetamine in violation of Iowa Code section 124.401(1)(b) (2003), possession of marijuana with the intent to deliver in violation of section 124.401(1)(d), possession of ephedrine and/or pseudoephedrine with the intent to manufacture methamphetamine in violation of section 124.401(4), and a drug tax stamp violation under section 453B.12. McDermott contends the evidence is insufficient to support her convictions, her trial counsel was ineffective for failing to move for judgment of acquittal on the basis the State failed to prove she had the intent to deliver methamphetamine and marijuana and the intent to manufacture methamphetamine, and the court abused its discretion in overruling her objections to the State's rebuttal evidence and to alleged hearsay admitted during rebuttal. We affirm.

I. Background Facts and Proceedings

On May 15, 2004, sometime after midnight, Waterloo Police Sergeant Richard Knief and several other uniformed police officers went to the Heartland Inn to investigate suspected drug activity. Sergeant Knief learned Dean Beninga had paid for rooms 114 and 202 with cash and registered with a fictitious address. When Sergeant Knief knocked on the door of room 202, the door was answered by Angela McDermott. The sergeant observed Beninga and J.R. McGraw near the desk in the room, but McGraw quickly stepped out of sight.

The officers had McDermott, Beninga, and McGraw exit the room and step into the hallway, allowing the door to shut and lock behind them.

McDermott provided the officers with her correct name. She had only a cellular telephone on her person. The officers found \$527 on McGraw's person, as well as a cigarette package that contained a small amount of methamphetamine consistent with personal use. Beninga had \$505 in his wallet. Officers took McDermott, Beninga, and McGraw to the police station. Sergeant Knief left the hotel to obtain a search warrant for room 202, while Officer Brice Lippert remained to watch the room and locate a female suspect believed to be with McGraw.

Sergeant Knief and Officer Lippert executed a search warrant on room 202 sometime after 3:15 a.m. On the bed, officers found articles of female clothing, as well as a black purse that contained McDermott's current driver's license, \$291, two plastic bags of marijuana without tax stamps, six plastic bags of methamphetamine, pseudoephedrine pills, and tinfoil commonly used to ingest methamphetamine. Officers also discovered a large handbag containing an envelope addressed to McDermott and a bottle of Prozac and Haldol, as well as a makeup kit containing unused plastic bags, bags with suspected methamphetamine residue, and a straw commonly used to snort methamphetamine.¹

A number of bottles containing ephedrine and pseudoephedrine were discovered in a blue suitcase and in dresser drawers. Some of the bottles

¹ Additional female clothing was hanging on the clothes rack, and the bathroom contained hair and bath products not provided by the hotel.

contained more than the thirty-six tablets listed on the labels. An empty pill bottle was located in the garbage can. The officers also located ninety empty plastic bags, bags containing white residue, a pipe, a small torch, tinfoil, and bags of methamphetamine. Another bag of methamphetamine was discovered in the pocket of a pair of men's blue jeans. A black bag near the desk in the room contained \$3600, and a digital scale sat on top of the desk. Other items discovered in the room included several pairs of gloves, a cup of powder possibly used as a cutting agent, a drill, burnt forceps, and a bottle converted into a pipe.

Officers also searched a vehicle in the parking lot that was registered to Beninga. Inside the vehicle, they discovered a bag of gloves, empty plastic bags, scissors, muriatic acid, tubing, and a pump.

On May 16, 2004, Cedar Falls police received a telephone call from the general manager of the Extended Stay Inn, Richard Potter. Potter told the police room 134, which was registered to McDermott from April 28 though May 14, contained possible drug paraphernalia. Later that day, Cedar Falls Officer Dennis O'Neill searched room 134 and seized items believed to be related to methamphetamine use and manufacturing. The items seized included an unopened bag of coffee filters,² plastic tubing, small plastic bags, a bag and plastic cup with residue, burnt tubes, a pipe, a packet of pseudoephedrine pills, and an empty pseudoephedrine pill bottle. The empty bottle was the same brand as many of the bottles seized from room 202 at the Heartland Inn.

Based on the events we have just described, the State filed a trial information charging McDermott with possession of more than five grams of

² The hotel provided coffee in filtered packets.

methamphetamine with the intent to deliver as a second offender, conspiracy to manufacture more than five grams of methamphetamine as a second offender, possession of marijuana with the intent to deliver as a second offender, possession of ephedrine and/or pseudoephedrine with the intent to manufacture methamphetamine, and a drug tax stamp violation. McDermott was also charged with two counts of unlawful possession of prescription drugs. A jury trial commenced in May 2005.

Waterloo Sergeant Corbin Payne, a certified narcotics officer who examined the items seized from room 202, opined the quantity of methamphetamine, the method of packaging, and the other items found in the room were more consistent with the distribution of methamphetamine than personal use. He testified that methamphetamine is usually weighed on a scale and packaged for sale in small plastic bags, and the weight and packaging of methamphetamine indicates whether it is intended for personal use or delivery. He further testified the six bags of methamphetamine found in McDermott's purse, which totaled 7.69 grams,³ and the presence of more than \$200 in cash were consistent with sale and distribution. According to Sergeant Payne, a common amount of methamphetamine for personal use would be one gram or less, such as the one-quarter gram discovered upon McGraw's person.

Sergeant Payne testified methamphetamine is manufactured from a precursor, such as the large number of pseudoephedrine pills discovered in room 202. Iowa Division of Criminal Investigation Criminalist Terry Rowe estimated the amount of pseudoephedrine found in the room, more than forty grams, could

³ The bags ranged in weight from 0.26 grams to 3.14 grams.

yield between 5.5 and 14.7 grams of finished methamphetamine. Although other ingredients such as anhydrous ammonia and lithium batteries were not found in the hotel room, Sergeant Payne testified it is common to perform different steps of the manufacturing process at different locations. For example, the pump discovered in Beninga's vehicle could be used to speed up the manufacturing process, and gloves are commonly used for protection from the chemicals.

The marijuana discovered in McDermott's purse was packaged in two bags that weighed 25.2 and 26.3 grams, respectively. Sergeant Payne testified the discovery of two separate packages of marijuana totalling more than fifty grams was more consistent with sale and distribution than with personal use. Although Payne testified it is common to use and sell marijuana, he concluded a portion of the marijuana found in McDermott's purse was intended for sale.

Beninga, who had married McDermott after their arrest in May, testified for the defense.⁴ Beninga said a woman named Jenny spent the night of May 13 with him in room 202 and he spent May 14 with his father at a local hospital. Beninga claimed when his father died the evening of May 14, he called McDermott because he did not want to be alone, and he offered to rent a second room for McDermott's children. Beninga contended he did not ask McDermott to bring anything drug-related to the room and did not discuss drugs or precursors with her.⁵ Beninga admitted he brought methamphetamine and bottles of pseudoephedrine to the room, and he admitted he used, manufactured, and sold

⁴ Beninga pled guilty to three methamphetamine charges.

⁵ Beninga admitted he visited McDermott's room at the Extended Stay Inn on a number of occasions. His most recent visit occurred May 12. Beninga denied bringing items to manufacture methamphetamine to McDermott's room, and he denied seeing such items when he visited the room.

methamphetamine. However, he denied manufacturing the drug with McDermott, or planning to manufacture with her that day.

The jury returned not-guilty verdicts on the two charges of unlawful possession of prescription drugs and returned guilty verdicts on all remaining charges. McDermott filed a motion in arrest of judgment and a motion for new trial, which the district court denied. The court sentenced McDermott to a prison term not to exceed fifty years on the possession of methamphetamine with intent to deliver conviction. The court did not impose sentence on the conspiracy conviction because that offense merged with the defendant's conviction for possession of methamphetamine with intent to deliver pursuant to section 706.4.⁶ McDermott was sentenced to a term of incarceration of up to five years for each of the remaining three convictions. All sentences were ordered to run concurrently. McDermott now appeals.

II. Sufficiency of Evidence

McDermott claims the record contains insufficient evidence to support her convictions. We review this claim for the correction of errors at law and uphold the jury's verdict if substantial evidence supports it. *State v. Williams*, 695 N.W.2d 23, 27 (Iowa 2005). Substantial evidence is defined as evidence that "could convince a rational trier of fact that the defendant is guilty beyond a reasonable doubt." *State v. Robinson*, 288 N.W.2d 337, 339 (Iowa 1980). We consider all the evidence in the record, not just the evidence supporting guilt.

⁶ Section 706.4 provides:

A conspiracy to commit a public offense is an offense separate and distinct from any public offense which might be committed pursuant to such conspiracy. A person may not be convicted and sentenced for both the conspiracy and for the public offense.

State v. Carter, 696 N.W.2d 31, 36 (Iowa 2005). We view the evidence in the light most favorable to the State and consider legitimate inferences and presumptions that may reasonably be deduced from it. *Id.* Circumstantial and direct evidence are equally probative. Iowa R. App. P. 6.14(6)(p).

A. Constructive Possession. In challenging the sufficiency of the evidence to support her convictions for possession of methamphetamine and marijuana with intent to deliver, possession of ephedrine and/or pseudoephedrine with intent to manufacture, and a drug tax stamp violation, McDermott asserts the State failed to prove she actually possessed, constructively possessed, or aided and abetted in the possession of the drugs or precursors. To prove unlawful possession, the State has the burden of proving McDermott: (1) exercised dominion and control over the contraband, (2) had knowledge of its presence, and (3) had knowledge the material was a controlled substance. *State v. Bash*, 670 N.W.2d 135, 137 (Iowa 2003). Proof that McDermott had opportunity of access to the location where the contraband is found will not, without more, support a finding of unlawful possession. *Id.*

Because none of the contraband was found on McDermott's person, the State must establish that McDermott was in constructive possession of the drugs and precursors. *See Carter*, 696 N.W.2d at 38. Constructive possession occurs when the defendant has knowledge of the presence of the controlled substance and has the authority or right to maintain control of it. *Bash*, 670 N.W.2d at 138. Although constructive possession may not be inferred from the mere fact a defendant is sharing a premises with others, it may be established by proof of other circumstances linking the defendant to the controlled substance, such as

incriminating statements by the defendant, incriminating actions of the defendant when the police discover a controlled substance among or near the defendant's personal belongings, and the defendant's fingerprints on the packages containing the controlled substance. *State v. Nitche*, 720 N.W.2d 547, 558 (Iowa 2006).

Viewing all the evidence in the light most favorable to the State, we believe a rational jury could conclude McDermott knew her purse contained methamphetamine, marijuana, and pseudoephedrine and exercised dominion and control over those items. In this case, the contraband was discovered in a purse that also contained McDermott's current driver's license, and the presence of the controlled substances among her personal effects weighs in favor of finding constructive possession.

The record reveals McDermott had access to Beninga's room after he left to attend a graduation party. The defendant had taken a shower just before law enforcement officers knocked on the motel room door. Officers found female clothing on the bed near the purse that contained McDermott's license, on the floor, and on a clothes rack. They also found a makeup kit in the room and extra bath and hair products in the bathroom. The officers recovered another handbag in the motel room that contained a piece of mail addressed to McDermott. An empty pseudoephedrine pill bottle discovered in McDermott's room at the Extended Stay Inn was the same brand as many of the bottles of pseudoephedrine seized in room 202. Based on these circumstances, we believe the jury could reasonably have concluded McDermott had a proprietary interest in or an immediate right to control the contents of the purse, which included bags of marijuana and methamphetamine and a bottle of precursor pills.

We also find the jury could have reasonably concluded the defendant aided and abetted the possession of additional methamphetamine and pseudoephedrine pills found in the room.

B. Conspiracy. McDermott also contends the evidence was insufficient to support the jury's finding that she conspired to manufacture methamphetamine. In order to establish McDermott's guilt on the conspiracy charge, the State had to prove, in relevant part, that she had entered into an agreement with Beninga to manufacture methamphetamine.⁷ McDermott asserts the State failed to prove the existence of any such agreement.

In support of her contention, McDermott argues there is no direct evidence of an agreement and points out that Beninga testified she was only present as a guest in his hotel room and was not there for any illegal purpose. However, the jury was not required to credit Beninga's testimony, particularly in light of his recent marriage to McDermott. See *State v. Thornton*, 498 N.W.2d 670, 673 (Iowa 1993) (noting it is the jury's duty to assess witness credibility and assign evidence whatever weight it deems proper, and it may believe or disbelieve testimony as it chooses). Moreover, an agreement can be proved through

⁷ Jury Instruction 20 states:

The State must prove all the following elements of Conspiracy to Manufacture Methamphetamine:

1. On or about the 15th day of May, 2004, the defendant Angela Christine McDermott agreed with Dean Alan Beninga that one or more of them would commit the offense of Manufacture of Methamphetamine.
2. The defendant entered into the agreement with the intent to promote or facilitate the Manufacture of Methamphetamine.
3. The defendant or Dean Alan Beninga committed an overt act: acquiring of pseudoephedrine and/or ephedrine or other materials to manufacture methamphetamine.

If the State has proved all of these elements, the defendant is guilty of Conspiracy. If the State has failed to prove any one of the elements, the defendant is not guilty of Count II.

circumstantial evidence, including declarations and conduct of alleged conspirators and any and all reasonable inferences arising from such evidence. *State v. Speicher*, 625 N.W.2d 738, 742 (Iowa 2001). “Importantly, an agreement need not be—and oftentimes is not—formal and express. A tacit understanding—one ‘inherent in and inferred from the circumstances’—is sufficient to sustain a conspiracy conviction.” *Id.* (citations omitted).

The record reveals McDermott had a large quantity of finished methamphetamine in her purse along with pseudoephedrine pills, a common precursor used to manufacture methamphetamine. Bottles of the same brand of pseudoephedrine were discovered throughout room 202. Additional pseudoephedrine pills and an empty bottle were found in McDermott’s room at the Extended Stay Inn, along with items commonly associated with methamphetamine manufacturing, including coffee filters, tubing, and plastic bags. Still more items associated with methamphetamine manufacturing were found in Beninga’s car, which was parked outside the hotel. Finally, the record contains testimony that it is common to perform different stages of the manufacturing process at different locations. This evidence, when viewed in the light most favorable to the State, provides sufficient support for a determination that McDermott and Beninga entered into the necessary agreement.

We find substantial evidence to support McDermott’s convictions.

III. Ineffective Assistance of Counsel

McDermott claims her trial counsel was ineffective for failing to move for judgment of acquittal on the basis the State failed to prove she had the intent to deliver marijuana and methamphetamine or the intent to manufacture

methamphetamine. We review this claim de novo. *State v. Collins*, 588 N.W.2d 399, 401 (Iowa 1998). McDermott must establish by a preponderance of evidence that her trial counsel failed to perform an essential duty and prejudice resulted. *State v. Martin*, 587 N.W.2d 606, 609 (Iowa Ct. App. 1998). If McDermott is unable to prove either prong, her ineffective assistance claim will fail. *State v. Scalise*, 660 N.W.2d 58, 62 (Iowa 2003).

We conclude McDermott's trial counsel breached no duty by failing to move for judgment of acquittal on either of the above-noted bases. The record in this matter contains substantial evidence McDermott possessed the necessary intent. Accordingly, the motion for judgment of acquittal would have been denied, and defense counsel has no duty to make a meritless motion. *State v. Rice*, 543 N.W.2d 884, 888 (Iowa 1996).

A. *Intent to Deliver.* As previously noted, the State presented evidence that the six individually packaged bags of methamphetamine and the presence of more than \$200 in cash found in McDermott's purse was consistent with sale and distribution and that her purse contained far more methamphetamine than the common amount of methamphetamine for personal use. In addition, the State presented evidence that the discovery of two separate packages of marijuana totaling more than fifty grams in McDermott's purse was more consistent with sale and distribution than with personal use. The foregoing is sufficient to allow a rational jury to conclude McDermott possessed the methamphetamine and marijuana with the intent to deliver.

B. *Intent to Manufacture.* McDermott asserts that even if the State proved she possessed pseudoephedrine, it did not prove she did so with the

intent to use it in the manufacture of methamphetamine. See *State v. Truesdell*, 679 N.W.2d 611, 618 (Iowa 2004) (determining the version of the statute under which McDermott was charged “is directed at the intent of the possessor to use the product to manufacture a controlled substance, not the mere knowledge or belief of the possessor that the product would be used to manufacture a controlled substance”). However, as the State notes, the jury was instructed it could find McDermott guilty if the State proved she “possessed or did knowingly aid and abet the possession of that substance with the intent that it be used to manufacture” methamphetamine. This instruction, which is now law of the case, see *State v. Taggart*, 430 N.W.2d 423, 425 (Iowa 1988), allowed the jury to convict McDermott so long as it found she intended the precursors be used to manufacture methamphetamine whether or not she intended to participate in the actual manufacturing process.

We have already determined substantial evidence supports McDermott’s conviction for conspiracy to manufacture methamphetamine, specifically the requirement that she entered into an agreement to manufacture the drug. The same facts that support McDermott’s conspiracy conviction, when viewed in the light most favorable to the State, substantially support a determination that McDermott possessed pseudoephedrine with the intent that it be used to manufacture methamphetamine. In fact, contrary to McDermott’s contention, these facts are sufficient to raise a fair and reasonable inference that McDermott intended to personally use the precursors in the manufacturing process.

IV. Rebuttal Evidence and Hearsay

McDermott's final claim is that the court abused its discretion in overruling her objections to certain testimony by Officer O'Neill and Richard Potter, the manager of the Extended Stay Inn. McDermott objected to testimony from Officer O'Neill that he discovered coffee filters, plastic tubing, small plastic bags, burnt tubes, a plastic cup with residue, an empty pseudoephedrine pill bottle, and other pseudoephedrine pills in McDermott's hotel room at the Extended Stay Inn and that these items are commonly associated with manufacturing methamphetamine. She also objected to testimony from Potter that a housekeeper entered McDermott's hotel room and reported seeing what appeared to be drug paraphernalia, after which Potter called the police, and officers arrived to search the room.

The district court disagreed with McDermott's contention that the foregoing testimony was not proper rebuttal evidence. The court also overruled McDermott's hearsay objection to the portion of Potter's testimony that repeated the housekeeper's observations. However, it instructed the jury as follows: "I'm going to permit this to explain conduct and so in that regard it's not admissible for the truth of the matter asserted, but just to show why the witness did what the witness did." We review the district court's decision to admit this evidence for an abuse of discretion. *State v. Johnson*, 539 N.W.2d 160, 162 (Iowa 1995).

A. Rebuttal Evidence. Rebuttal evidence is that which explains, repels, controverts, or disproves evidence produced by the opposing party. *Id.* at 162-63. Generally, rebuttal evidence is confined to new matters first introduced by the opposing party. *Carolan v. Hill*, 553 N.W.2d 882, 889 (Iowa 1996). Thus,

evidence that is merely cumulative, adding nothing further to the position taken by previous witnesses, is not admissible as rebuttal. *Id.* The district court has considerable discretion in admitting rebuttal evidence, and we will disturb its ruling only upon a showing of clear abuse of discretion. *State v. Webb*, 309 N.W.2d 404, 411 (Iowa 1981).

As we stated previously, Beninga testified on McDermott's behalf. He claimed responsibility for the bottles of pseudoephedrine and methamphetamine discovered in his room at the Heartland Inn. Furthermore, he claimed McDermott only came to the room because he did not wish to be alone after his father's death. Beninga claimed he never discussed drugs with McDermott, he did not ask her to deliver anything to him the night of May 15, and he never manufactured methamphetamine with her. On cross-examination, Beninga claimed he did not know if McDermott knew how to manufacture methamphetamine. He also admitted he had been to her room at the Extended Stay Inn as recently as May 12, but he said he had seen no items related to methamphetamine manufacturing at that time.

The testimony elicited by the State from Officer O'Neill and Potter was aimed directly at discrediting defense testimony that McDermott was merely a visitor in Beninga's room and had no involvement with his methamphetamine manufacturing and dealing. It also discredited testimony from Beninga that McDermott did not know how to manufacture methamphetamine and did not have items related to methamphetamine manufacturing in her hotel room. The disputed testimony was proper rebuttal evidence, and the district court did not abuse its discretion by admitting it.

B. Hearsay. We also reject McDermott's claim that the district court erred in admitting Potter's testimony because it contained inadmissible hearsay. Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted," and hearsay is generally inadmissible. Iowa R. Evid. 5.801(c); *State v. Summage*, 532 N.W.2d 485, 487 (Iowa Ct. App. 1995). However, testimony is not hearsay if it is "received as relevant circumstantial evidence reasonably necessary to complete the whole story of the crime charged." *Summage*, 532 N.W.2d at 488. We find Potter's statement concerning the housekeeper's discovery was necessary to explain why he contacted the police to investigate McDermott's room. The statement was not elicited by the State to prove there was drug paraphernalia in the room, and the district court gave a proper limiting instruction. We accordingly conclude the court did not abuse its discretion in overruling McDermott's hearsay objection.

V. Conclusion

Because we find no merit in any of McDermott's appellate claims, we affirm her convictions for possession of more than five grams of methamphetamine with the intent to deliver, conspiracy to manufacture more than five grams of methamphetamine, possession of marijuana with the intent to deliver, possession of ephedrine and/or pseudoephedrine with the intent to manufacture methamphetamine, and a drug tax stamp violation.

AFFIRMED.