FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 0-497 / 89-1855

STATE OF IOWA,

Plaintiff-Appellee,

vs.

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RODGER LYNN PAGE, SR.,

Defendant-Appellant.

Appeal from the Iowa District Court for Scott County, James E. Kelley, Judge.

Defendant appeals his convictions, following a jury trial, for three counts of delivery of cocaine. **AFFIRMED.**

Raymond E. Rogers, State Appellate Defender, and Linda Del Gallo, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, William E. Davis, County Attorney, and Hugh Pries, Assistant County Attorney, for appellee.

Heard by Schlegel, P.J., and Sackett and Habhab, JJ.

SACKETT, J.

Defendant Rodger Lynn Page, Sr., appeals from judgment and sentence entered following conviction of two counts of delivery of a controlled substance in violation of Iowa Code section 204.401(a)(a) (1989) and one count of conspiracy to deliver cocaine. Defendant contends the trial court erred in refusing to give his requested instructions on entrapment and agency. We affirm.

I.

Defendant contends the judge should have given an instruction on entrapment. The State, among other things, argues there was not sufficient evidence to submit the issue of entrapment to the jury. We agree with the State there was not sufficient evidence to support submission of entrapment to the jury.

Entrapment occurs when a law enforcement agent induces the commission of an offense, using persuasion or other means likely to cause normally law-abiding persons to commit the offense. Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment. State v. Miller, 216 N.W.2d 375, 382 (Iowa 1973). The government may employ artifice and stratagem to apprehend those engaged in criminal activity, and this does not constitute entrapment in and of itself. State v. Williams, 315 N.W.2d 45, 54 (Iowa 1982).

The defendant has the burden of generating a fact question on the defense of entrapment. State v. Cooper, 248 N.W.2d 908, 910 (Iowa 1976). In deciding whether the evidence is sufficient to generate a jury question, the reviewing court views the evidence in the light most favorable to the defendant.

The evidence showed a police officer was introduced to defendant by a confidential informant. After several contacts, defendant went with the police officer to a supplier's home. Defendant went with the officer to the supplier's home three times. At the supplier's home, the officer gave defendant money and twice the defendant ultimately returned to the officer with cocaine. The third time defendant observed a body bug on the officer before any delivery was completed.

The parties agree resolution of the issue hinges on whether there are facts to support a finding the law enforcement officer used persuasion or other means likely to cause a normally law abiding person to commit the offense. Defendant claims the following supports submission: (1) evidence the drug sales were induced by the confidential informant who was a friend of his, and (2) the evidence that the police officer made a series of contacts with him before the purchase which he claims was repeated badgering. We disagree with defendant that this is evidence of persuasion or other means that would cause a

normally law-abiding person to commit the offense. We affirm the trial court on this issue.

II.

Defendant's next contention is the court should have instructed the jury that defendant asserted any activity he was engaged in was at the direction of the buyer, the police officer, and to convict defendant the State was required to prove beyond a reasonable doubt defendant did not act as the agent of the buyer, the police officer. Defendant also requested the aiding and abetting the buyer instruction be expanded so as to include an "agent of the buyer" defense. The trial court also denied this request.

The "agent of the buyer defense" was unavailable to defendant as a matter of law.

Iowa Code section 204.101(8) provides:

> "Deliver" or "delivery" means the actual, constructive, or attempted transfer from one person to another of a controlled substance, whether or not there is an agency relationship. (emphasis added).

Defendant physically transferred cocaine to the officer in the deliveries which formed the basis of two counts under which defendant was charged. The statute precludes use of the "agent of the buyer" defense because one who transfers a controlled substance has made a delivery of that substance whether or not he is an agent.

Defendant relies on State v. Lott, 255 N.W.2d 105, 107 (Iowa 1977), which holds that one cannot be guilty of

delivery of a controlled substance if he aids and abets only the transferee. Lott, however, is distinguishable. In Lott the defendant introduced the transferor and the transferee, and then stood by while they made a drug deal between themselves. In Lott the defendant did not participate in the transfer of a controlled substance, unlike the defendant here who actually transferred the cocaine to the officer.

Defendant's only argument with reference to the conspiracy charge is that because no delivery occurred, it raises a question as to defendant's involvement. We find no basis to this argument. A conspiracy to deliver charge involves a proposed or actual transfer by one or more coconspirators. A transfer or proposed transfer by any conspirator would be deemed to have been committed by all other conspirators. State v. Dewey, 220 N.W.2d 629, 631 (Iowa 1974). Iowa Code section 204.101(8) precludes use of the defense "agent of the buyer" by one who has transferred a controlled substance. Because defendant was considered having delivered the substance, he would not be entitled to the requested instruction. See State v. Zaruba, 306 N.W.2d 772, 774 (Iowa 1981). We affirm the trial court on this issue.

AFFIRMED.