FILED
AUG 30 1983
CLERK SUPREME COURT

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IN THE COURT OF APPEALS OF IOWA

Filed August 30, 1983

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	
vs.	)	3-113
GARY LYNN BOYER,	)	69200
Defendant-Appellant.	)	

Appeal from Scott District Court, J. Hobart Darbyshire, Judge.

Defendant appeals his conviction for conspiracy in violation of Iowa Code § 706.1, claiming error in instructions regarding common intent of co-conspirators. REVERSED AND REMANDED.

Marc R. Engelmann, Eldridge, for defendant-appellant.

Thomas J. Miller, Attorney General, and Joseph P. Weeg, Assistant Attorney General, for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Schlegel, and Hayden, JJ.

SNELL, J.

Defendant Gary Lynn Boyer arranged a meeting between Christina Parks and an undercover police agent. The agent gave Parks money for the purchase of a quantity of marijuana. The marijuana was never delivered to the agent. Both Parks and defendant were charged with conspiracy, Iowa Code § 706.1, to deliver marijuana. Parks was allowed to plead guilty to a lesser offense, third degree theft, Iowa Code § 714.2(3), before defendant's trial took place. Parks testified at trial that her intent at all times was to steal the buyer's money.

Our scope of review in criminal proceedings is on assigned error. Defendant asserts that because Parks did not intend to deliver marijuana, she cannot be a party to a conspiracy to do so. If Parks was not a party to the conspiracy, defendant cannot be convicted of conspiracy because conspiracy requires at least two persons in its commission. State v. Keul, 233 Iowa 852, 862, 5 N.W.2d 849, 855 (1942). See also United States v. Fox, 130 F.2d 56, 57 (3d. Cir. 1942). Defendant claims the evidence presented in the case was insufficient to find conspiracy and that the jury instructions inadequately explained the requirement for conspiracy that both parties must have a common object in mind.

The State concedes that because of the specificity of the charge against defendant, Park and defendant both had to have a mutual intent to commit the same criminal act. It asserts that both the evidence and the jury instructions were sufficient to allow the jury to convict defendant. We disagree.

The standard of review in challenging the sufficiency of the evidence is well established. See State v. Welton, 300 N.W.2d 157, 159-60 (Iowa 1981); State v. Robinson, 288 N.W.2d 337, 339 (Iowa 1980). We will uphold a verdict if there is substantial evidence in the record tending to support the charge. State v. Aldape,

307 N.W.2d 32, 39 (Iowa 1981); State v. Schrier, 300 N.W.2d 305, 306 (Iowa 1981). The evidence of intent by Parks consists of her actions and conversation leading the police agent to believe that she was contacting someone by telephone to deliver the marijuana. The evidence, however, is also consistent with Parks' claim that she was only going through this scenario as an act to further her desire to steal the agent's money.

The credibility of witnesses and the weight to be given their testimony is a function of the factfinder. State v. Schrier, 300 N.W.2d at 309; State v. Robinson, 288 N.W.2d at 341. Although the quantum of evidence on this issue is slight, it is sufficient to submit the issue of Parks' intent to the jury for its determination and ultimate resolution of the conspiracy question.

The jury instructions, although adequate for most cases involving conspiracy, do not explain the requisite two-party nature of the crime. Defendant may have intended that marijuana be delivered, but that does not constitute conspiracy. His belief that Parks acquiesced is not important either. It takes two to conspire; thus, there can be no conspiracy with one who intends to frustrate the conspiracy. See Sears v. United States, 343 F.2d 139, 142 (5th Cir. 1965); People v. Atley, 392 Mich. 298, 311-12, 220 N.W.2d 465, 471 (1974); Johnson v. Sheriff, Clark County, 91 Nev. 161, 163, 532 P.2d 1037, 1038 (1975). We feel that the trial court failed to so instruct the jury that they would understand the real issues for their determination. The jury here should have been instructed that Parks must have had the same intention in the conspiracy as defendant. The State claims that it is only because of the specificity of the charge in this case that it is required to show Parks intended to deliver marijuana; if the charge in defendant's case had been merely for conspiracy, the State argues that the conspirators could intend to commit different criminal acts and nonetheless be in violation of Iowa Code § 706.1. This argument is without merit. The weight of authority considers it

necessary that both conspirators have a common object in mind. See State v. Schreck, 231 Iowa 542, 548, 1 N.W.2d 690, 693 (1942)(to prove conspiracy it is sufficient to prove that conspirators, with a view to attainment of the same purpose, pursued that purpose by their acts, so that the jury will be justified in concluding that they were engaged in a conspiracy to effect a common object). See also United States v. Lester, 282 F.2d 750, 753 (3d Cir. 1960)(common design is essence of conspiracy); People v. Braun, 375 Ill. 284, 288, 31 N.E.2d 287, 289-90 (1940)(common unlawful design); Commonwealth v. Schwartz, 210 Pa. Super. 360, 381, 233 A.2d 904, 914 (Pa. Super. Ct. 1967)(heart of offense is common understanding); Commonwealth v. Albert, 151 Pa. Super. 184, 187, 30 A.2d 184, 185 (Pa. Super Ct. 1943)(parties acting together with common and corrupt purpose in view). The gist of conspiracy is the enhanced danger to society from wrongful combination of purpose. People v. Comstock, 147 Cal. App. 2d 287, 294, 305 P.2d 228, 233 (Cal. Dist. Ct. App. 1956). There would be no enhanced danger to society if the purpose of the agreement was not the same for each conspirator. Thus, defendant and Parks must have had the same object in mind in order for defendant to be convicted of conspiracy. The jury instructions did not adequately explain this facet of the case so that the jury would understand the issue for determination. Error in instructing the jury does not necessitate reversal unless it is prejudicial. State v. Gibb, 303 N.W.2d 673, 686 (Iowa 1981). Here, however, the inadequate explanation was prejudicial to defendant.

REVERSED AND REMANDED.

All judges concur except Donielson, J., and Oxberger, C.J.

DONIELSON, J. (dissenting)

I respectfully dissent.

The majority states that the jury "should have been instructed that Parks [alleged co-conspirator] must have had the same intention in the conspiracy as defendant" in order to be convicted (emphasis added). No Iowa authority is cited for this proposition, nor am I able to find any in Iowa or any other jurisdiction. I believe this is a remarkable new development in conspiracy law with far-reaching implications. From now on, in any conspiracy trial, the State will be required to prove not only the intent of the defendant being tried but also of everyone else involved in the conspiracy. This will mean that the State will be required to prove the intent of a person or persons who may not have been charged or indicted or who may not even be available during trial or who may be unknown in order to determine such intent; in effect, a trial within a trial. I cannot believe that our conspiracy law requires the imposition of such an onerous burden on the State. This will greatly lengthen conspiracy trials and for the most part will greatly reduce the practicality of bringing a conspiracy charge.

Even if the majority is correct in stating that defendant and Parks had to have common intent to commit the same crime, I believe the jury instructions, considered as a whole, adequately set forth that requirement. The following instructions make clear the required mutual intent element:

INSTRUCTION 14

> The law provides that a Conspiracy is an agreement or combination between two or more persons to engage in a course of conduct which will consist, in whole or in part, of criminal acts to be committed by one or more of the conspirators.

INSTRUCTION 15

> You must find the defendant not guilty of the offense of Conspiracy, unless the State establishes by evidence beyond a reasonable doubt each of the following elements:

1. That on or about the 25th day of February, 1982, the defendant entered into an agreement with one Christina Parks, to commit the offense of Conspiracy to Sell One Half Pound of Marijuana for $225.00.

2. That he did so with the intent that the object or purpose of the agreement be performed.

3. That an overt act was done by the defendant or another member of the conspiracy in furtherance of the agreement, as that term is explained in Instruction No. 21.

If you find the State has proved by evidence beyond a reasonable doubt each of the elements, then you will find the defendant guilty; but, if you find the State has failed to prove beyond a reasonable doubt one or more of the elements, then you shall find the defendant not guilty.

INSTRUCTION 17

The law provides that a person commits a Conspiracy to Deliver a Controlled Substance when he enters into a combination or agreement with one or more persons to Deliver a Controlled Substance.

INSTRUCTION 19

It is not necessary that an alleged conspirator know all the other conspirators. The members of a conspiracy may be widely separated geographically, and yet may be in agreement to commit a criminal act and may act in concert in pursuit of that purpose.

INSTRUCTION 20

The gist of the offense of Conspiracy is an agreement or combination to commit a criminal act.

While it is not necessary to show that the members entered into any express, formal or detailed agreement, or that they directly, by words spoken, or in writing, stated between themselves what their object or purpose was to be, or the details thereof, or the means by which the object or purpose was to be accomplished, the evidence in the case must show that the members, in some way or manner or through some contrivance, came to a mutual understanding to commit a criminal act. However, an "overt act," as defined in Instruction No. 21 does not, in and of itself, prove the existence of a conspiracy.

INSTRUCTION 21

An "overt act" is any act committed by one of the members of a conspiracy which shows a design to accomplish the purpose of a conspiracy. It is an act intentionally

committed in an effort to bring about or accomplish some object or purpose of a conspiracy.

It is not necessary that the act or acts be criminal in nature, if considered separately and apart from the conspiracy.

INSTRUCTION 26

With regard to Element Number 2 of Instruction Number 15, the State is required to prove that at the time of the commission of the agreement or combination between two or more persons to engage in a criminal course of conduct, if you find such was committed, the defendant must have had an intent to enter into an agreement or combination between himself and one or more other persons.

Where intent is an essential element of the offense or degree of offense charged, it must be proved beyond a reasonable doubt. Intent is a mental state, emotion, or condition of the mind with a design, resolve or determination that the doing of an act shall be with a certain purpose. As such, intent is seldom, if ever, capable of direct and positive proof. Rather, the intent, if any, may be arrived at by such reasonable inferences and deductions as may be drawn from the facts proved by the evidence, in accordance with common experience and observation.

In determining the intent of any person you may, but are not required to, infer that he intended the natural and probable consequences which ordinarily follow his voluntary acts. (emphasis added)

These instructions make it clear that defendant, in order to be convicted of conspiracy, had to have an agreement with Parks to deliver a controlled substance and intend to carry out that agreement.

I find no error in the instructions and believe that the record contains sufficient evidence to support defendant's conviction. I would affirm.

Oxberger, C.J., joins this dissent.