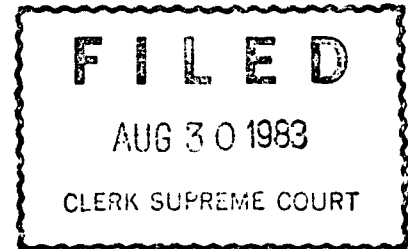


IN THE COURT OF APPEALS OF IOWA



STATE OF IOWA,

)

Plaintiff-Appellee,

)

Filed August 30, 1983

vs.

)

RAYMOND HARMISON,

)

3-3567941

Defendant-Appellant.)

Appeal from Polk District Court - Dale S. Missildine, Judge.

Defendant appeals from his conviction of first-degree theft in violation of Iowa Code §§ 714.1, .2. AFFIRMED.

Helen Stirling and John P. Roehrick of Roehrick, Lavorato, Schuster, & Hassel, P.C., Des Moines, for defendant-appellant.

Thomas J. Miller, Attorney General, and Lona Hansen, Assistant Attorney General, for plaintiff-appellee.

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

DONIELSON, J.

Defendant appeals from his conviction of first-degree theft in violation of Iowa Code §§ 714.1, .2. He claims 1) the trial court erred in failing to give an entrapment instruction to the jury; 2) the charge against him should be dismissed or a new trial granted due to the State's failure to preserve and produce a piece of allegedly exculpatory evidence; and 3) there was no substantial evidence that defendant knew the illegal nature of the sale of equipment in which he assisted. We affirm.

Defendant was convicted of theft of a John Deere skid loader belonging to a contractor who was using it at a house construction site on the northwest side of Des Moines. Defendant offered to sell a skid loader to a man named John Deere who worked at the John Deere plant in Ankeny. Deere mentioned the skid loader to a third person, who was actually a confidential informant for the Polk County sheriff's department. The sheriff's department arranged with the informant to set up a "buy" of the skid loader.

The loader was picked up by the informant, Deere, and defendant, and loaded on a flat bed truck that apparently belonged to Leisure Country, a John Deere dealer. The skid loader would not start, so it was winched onto the truck. They then drove to the Leisure Country shop, where the door was unlocked by the manager of Leisure Country and where defendant used Leisure Country tools to get the machine running. It was then taken on the flat bed truck to the informant's property and unloaded. Near the end of the transaction the manager of Leisure Country gave the informant a piece of paper which evidently was to serve as a bill of sale or receipt.

Defendant's theory of the case was that he thought the transaction was a legitimate one conducted by Leisure Country. The State's theory apparently was that defendant and the manager of Leisure Country, and possibly others, were

involved in a theft ring. The manager was evidently separately prosecuted. The informant and John Deere were given immunity from prosecution in exchange for their testimony at defendant's trial.

Before trial, defendant filed a motion generally asking the State to produce any exculpatory evidence in its possession. The bill of sale or receipt was not among the items produced. Defendant was found guilty of first-degree theft, and sentenced to incarceration for up to ten years. After an appeal had been taken, defendant moved for a limited remand of the case to trial court in order to determine whether the bill of sale had been in the State's possession, whether it was exculpatory, and whether it was covered by the defendant's motion for production. Hearings were held in trial court, with witnesses being examined as to the receipt. The informant thought he had given the receipt to a sheriff's deputy, but the deputy could not remember receiving it and could not find it in the case file. The court concluded after hearing the witnesses that the bill of sale was "never in the possession of the State," the State produced everything in its files, and that as defendant had an opportunity to question witnesses about the bill of sale at trial, he was not prejudiced by the failure of the State to produce the item.

I.

Defendant requested that the jury be given an entrapment instruction, alleging that he was coerced into participating in this illegal transaction by the actions of Deere and the informant. Defendant assigns error to the court's refusal to give that instruction.

The elements of entrapment were spelled out in State v. Leonard, 243 N.W.2d 75, 79-80 (Iowa 1976):

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. (citations omitted)

We agree with the State that the record in this case would not support the submission of an entrapment instruction to the jury. The evidence indicates that it was defendant who initially made it known that he had a skid loader for sale. He actively participated in the negotiation of the sale terms with Deere and the informant. At most, the conduct of the latter two merely afforded defendant the opportunity to be involved in the illegal sale. Under the Leonard standard, this is not enough to constitute entrapment. The trial court did not err in refusing to give the requested instruction.

II.

Defendant next claims that he is entitled to a new trial or dismissal of the charge because of the State's failure to produce the alleged sale receipt in violation of his pretrial motion to produce any exculpatory evidence. On limited remand, the trial court concluded, and defendant concedes, that the receipt has been lost and that the State did not wrongfully withhold it from him. Instead, defendant claims that the State had a duty to preserve the receipt once it came into the State's hands and that its failure to do so requires dismissal of the charge or a new trial.

The question regarding the suppression of allegedly exculpatory evidence is controlled by United States v. Agurs, 427 U.S. 97, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976). When, as here, the defendant makes a "dragnet" request for anything exculpatory and does not make a request for the specific item in question, he is entitled to a new trial only " 'if the omitted evidence creates a reasonable doubt that did not otherwise exist.' " State v. Love, 302 N.W.2d 115, 123 (Iowa 1981). We do not believe the introduction of the actual receipt in this case would have created a reasonable doubt not otherwise existing. There was much testimony from defendant, Deere and the informant regarding the receipt and its contents and form. The jury was therefore already adequately informed about the receipt

and defendant's theory that it supported his claim that he thought the sale was legitimate. The introduction of the receipt itself into evidence would have been cumulative at best and certainly could not have created any new reasonable doubt. Defendant cannot prevail on this issue.

III.

Finally, defendant claims that the trial court erred in overruling his motions for directed verdict of acquittal because there was insufficient evidence to support the theft charge or the resulting verdict. In determining this issue, we examine all of the evidence in the light most favorable to the State. State v. Robinson, 288 N.W.2d 337, 340 (Iowa 1980). Direct and circumstantial evidence is equally probative. Iowa R. App. P. 14(f)(16).

We believe there was sufficient evidence to allow the case to go to the jury. The record contains testimony that defendant initiated this transaction and actively participated in the negotiations. The informant testified that when he, defendant, and Deere were at the construction site to pick up the loader, "[defendant] said to Mr. Deere 'we'll go over and look like we're looking at the house' and I was to go look at the skid loader to see if it met my approval." From this and other evidence, the jury could infer defendant's participation in a plan to remove the loader and to conceal the illegal nature of their activities. The trial court did not err in overruling defendant's motions for directed verdict.

Finding no reversible error, we affirm defendant's sentence and conviction.

AFFIRMED.