IN THE COURT OF APPEALS OF IOWA

No. 6-653 / 96-0189

STATE OF IOWA,

Plaintiff-Appellee,

vs.

KATE RENEE HIGHTSHOE,

Defendant-Appellant.

FILED
NOV 27 1996
CLERK SUPREME COURT

Appeal from the Iowa District Court for Story County, William J. Pattinson, Judge.

Defendant appeals her conviction and sentence for the crime of theft in the second degree. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Annette L. Hitchcock and Christopher Cooklin, Assistant State Appellate Defenders, for appellant.

Thomas J. Miller, Attorney General, Martha E. Boesen, Assistant Attorney General, and Mary E. Richards, County Attorney, for appellee.

Considered by Habhab, P.J., and Huitink and Vogel, JJ.

PER CURIAM

This is an appeal by a defendant challenging her conviction for second-degree theft, in violation of Iowa Code sections 714.1(1) and 714.2(2). We affirm on appeal by memorandum opinion pursuant to Iowa Supreme Court Rule 9.

On May 30, 1995, K-Mart loss control managers were watching employee George Bellevue. That evening, Bellevue checked outside the store several times. Belefia Parks and Kate Hightshoe drove up, with their headlights off, and parked in front of the garden center where Bellevue was working. Once inside the store, Parks placed $1000 worth of electronics merchandise in two carts. Hightshoe and Parks each pushed a cart through the garden center area. Bellevue assisted them in taking the merchandise out to Park's vehicle. They did not pay for the merchandise.

The loss control managers confronted Bellevue, Hightshoe, and Parks in the parking lot. Bellevue stated he intended to take the UPC symbols off the boxes and then ring up the sale. Parks stated Hightshoe was going to pay for the merchandise with a credit card. Hightshoe told the loss control managers she intended to write a check. She admitted she did not have any credit cards or $1000 in her checking account. A jury found Hightshoe guilty of theft in the second degree. She now appeals.

I. Hightshoe claims there was insufficient evidence in the record to support the jury's verdict. She asserts the State did not present sufficient evidence to show

she intended to deprive K-Mart of the property. A jury's finding of guilt is binding on us unless we conclude the record lacks substantial evidence to support such a finding. *State v. Bush*, 518 N.W.2d 778, 779 (Iowa 1994).

We find there is substantial evidence in the record to support Hightshoe's conviction. She assisted in taking the merchandise out to the car when it was clearly apparent the merchandise had not been paid for. We also note that Hightshoe stated she intended to write a check for the merchandise, but admitted she did not have sufficient money in her checking account to cover the check.

II. Hightshoe contends the district court erred by permitting the loss control managers to testify to the statements made by Bellevue and Parks concerning how they were going to pay for the merchandise. She believes the statements were inadmissible hearsay. The district court determined Parks and Bellevue were co-conspirators and the statements were not hearsay.

Under Iowa Rule of Evidence 801(d)(2)(E), a statement is not hearsay if it is offered against a party and is a statement by a co-conspirator of a party during the course of and in furtherance of the conspiracy. *State v. Kidd*, 239 N.W.2d 860, 864 (Iowa 1976). We will uphold a district court's determination that a conspiracy existed if it is supported by substantial evidence. *In re Property Seized from DeCamp*, 511 N.W.2d 616, 621 (Iowa 1994).

We find there was substantial evidence of a conspiracy. The evidence showed Bellevue, Parks, and Hightshoe acted in concert in taking the property. Bellevue's assistance was needed to allow Parks and Hightshoe to take the merchandise past the garden center cash registers without paying. On the other hand, Bellevue needed the assistance of Parks and Hightshoe to collect the merchandise and push it out to the waiting vehicle.

The statements, which provided different explanations on how the merchandise was to be paid for, were made during the course of the conspiracy because they were made when the group was confronted while putting items in Parks' vehicle. The statements were also made in furtherance of the conspiracy because they were an attempt to conceal the conspiracy.

We affirm Hightshoe's conviction for theft in the second degree. Costs of this appeal are assessed to Hightshoe.

AFFIRMED.