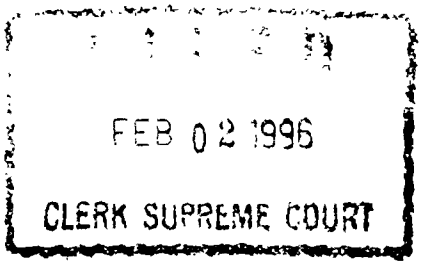
IN THE COURT OF APPEALS OF IOWA

No. 5-576 / 94-1930



STATE OF IOWA,

Appellee,

vs.

J.D. RAY ANDERSON,

Appellant.

Appeal from the Iowa District Court for Woodbury County, James D. Scott, Judge.

Defendant appeals from judgment and sentences, following jury trial, entered upon his convictions of one count of conspiracy to commit robbery, two counts of first-degree robbery, one count of second-degree robbery, and two counts of first-degree theft, in violation of Iowa Code sections 706.1, 711.2, 711.3, and 714.2(1) (1993). **AFFIRMED IN PART AND MODIFIED IN PART.**

Linda Del Gallo, State Appellate Defender, and Sharon R. Stevens, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Susan M. Crawford, Assistant Attorney General, and Thomas S. Mullin, County Attorney, for appellee.

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

CADY, J.

J. D. Ray Anderson appeals the judgment and sentence entered following his conviction of two counts of first-degree robbery, one count of second-degree robbery, one count of conspiracy to commit robbery and two counts of first-degree theft. We affirm in part and modify in part.

On April 13, 1994, J.D. Anderson and three other teenagers, Neal Ehlers, Cory Byrne, and Neal Comer, were involved in a robbery at the West 19th Street 7-Eleven convenience store, an assault on a pedestrian involving mace, and a robbery at the Morningside 7-Eleven convenience store. Following arrest, the State charged Anderson and the others with committing the crimes as either principles or aiders and abettors and with conspiracy. The three other teenagers entered into plea agreements with the State and testified against Anderson at trial.

At trial, the three teenagers testified that Ehlers and Comer committed the West 19th robbery, Comer committed the assault, and Anderson committed the Morningside robbery. Ehlers and Comer testified the four men spent the afternoon together and purchased some mace. Ehlers testified that later in the day the men discussed "mugging people." He also testified that as the group was driving around, Anderson and the others were discussing robbing someplace in order to obtain money. Ehlers further testified he and Anderson had begun to rob the Riverside 7-Eleven, but left due to the presence of a police officer.

The State also presented evidence from the victims of the crimes. Jonathan Kiewel, the clerk at the West 19th store testified Ehlers robbed the store and received approximately $33. David Bennett, a student at the Morningside campus, testified a man approached him and sprayed his face with mace, then ran to a car announcing he had "just sprayed that guy." Frank Cooley, the clerk at the Morningside 7-Eleven, testified Anderson robbed him at gunpoint and received approximately $30 in cash. The State also played a videotape of Anderson's confession concerning the Morningside 7-Eleven robbery.

At trial, Anderson denied any involvement in the crimes. The jury found Anderson guilty of two counts of first-degree robbery, one count of second-degree robbery, one count of conspiracy to commit robbery and two counts of first degree theft.

The district court sentenced Anderson to two indeterminate terms of incarceration not to exceed twenty-five years for his first-degree robbery convictions. The court also sentenced him to serve four indeterminate terms not to exceed ten years for his second-degree robbery, two theft, and conspiracy convictions. The court allowed the sentences to run concurrently on all charges.

Anderson now appeals claiming the district court erred in failing to merge the conspiracy to commit robbery into the remaining robbery convictions. The State argues the conspiracy conviction relates to the abandoned robbery attempt at the Riverside 7-Eleven. Anderson also contends the State presented insufficient evidence

to support a conviction of first-degree robbery, first-degree theft, second-degree robbery as an aider and abettor and conspiracy to commit robbery.

I. Conspiracy Conviction

We review the trial court's decision for errors of law. Iowa R. App. P. 4. Criminal sentences not authorized by statute are void and cannot be permitted to stand. *Overton v. State*, 493 N.W.2d 857, 859 (Iowa 1992). *See also* Iowa R. Crim. P. 23(5)(a) (court may correct an illegal sentence at any time); *State v. Draper*, 457 N.W.2d 600, 605 (Iowa 1990) *cert. denied*, 498 U.S. 1025, 111 S. Ct. 674, 112 L. Ed.2d 666 (1991) (sentence not authorized by statute is an illegal sentence).

Iowa Code section 706.4 (1993) 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.

Section 706.4 requires the offense of conspiracy to be merged into the substantive offense where the criminal object of the conspiracy has been achieved. John L. Yeager and Ronald L. Carlson, *Iowa Practice: Criminal Law and Procedure*, § 116 (vol. 4 1979). *See also* C.J.S. *Conspiracy* § 47 (1967). A conspiracy need not be related to a single crime, but rather one conspiracy can encompass multiple crimes. *See United States v. North*, 900 F.2d 131, 133 (8th Cir. 1990) (single conspiracy exists where there is one overall agreement to perform various acts intended to accomplish objectives of the conspiracy). The fighting issue in this case is whether

Anderson's conviction related to a conspiracy to rob the Riverside 7-Eleven or to a conspiracy to commit various crimes throughout the course of the evening.

Looking at the circumstances surrounding the evening and the method in which the State approached the conspiracy charge, we find the conviction for conspiracy related to an agreement to commit various criminal activities throughout the course of the evening.

Here, testimony indicated the men, including Anderson, spent the afternoon together at a pool hall and briefly discussed mugging persons that evening; the group had previously gone to a pawn shop to purchase mace which they tried out on a dog; and the group drove around that evening discussing robbing someplace in order to obtain money. Looking at the circumstances surrounding the afternoon and evening of the robberies, Anderson entered into an agreement not merely to rob the Riverside 7-Eleven, but entered into an agreement to mug and rob persons throughout the evening for money. *See State v. Moritz*, 293 N.W.2d 235, 239 (Iowa 1980) (nature of the agreement between conspirators determines whether a single overall conspiracy or separate conspiracies have occurred).

Various factors aid our determination as to whether the State's claim of multiple conspiracies really constitute one overall conspiracy. These factors include: whether the conspiracies share common objectives and involve the same co-conspirators, whether continuity existed between the separate offenses, and whether the alleged offense occurred in the same time and place. *Moritz*, 293 N.W.2d at 240.

In the present case, the attack and robberies were directed at the objective of obtaining money. The same four men remained together and participated in some manner throughout the course of the evening when all of the crimes took place. All of the crimes took place throughout the course of one evening and evidencing a continuous plan to mug and rob persons. While each crime had a different victim, this alone cannot justify a finding of a separate conspiracies. *Moritz*, 293 N.W.2d at 240. Under the *Moritz* factors, we find Anderson participated in a single conspiracy.

Moreover, the State approached its prosecution of Anderson under a single conspiracy theory. The charging information filed against Bright never specified multiple conspiracies or specified intended victims of the conspiracy. The language of the jury instructions and verdict forms similarly did not specify specific victims. In its resistance to Anderson's motion to for judgment of acquittal for the conspiracy charge, the State argued the agreement between the four men was an evolving agreement, taking place over several conversations and that dozens of acts were committed pursuant to the conspiracy.

We find a single conspiracy existed between Anderson and the other three men. As such, Anderson cannot be sentenced for both the underlying conspiracy and the completed crimes. We therefore find the trial court erred in failing to merge the conspiracy sentence into the underlying offenses. As such we nullify Anderson's judgment and sentence for conspiracy. *See* Iowa Code § 814.20 (1995) (appellate court may reduce the sentence on appeal).

II. Sufficiency of the Evidence

Our standard of review is well settled. A verdict will be upheld where there is substantial evidence to support the charge. *State v. LeGear*, 346 N.W.2d 21, 23 (Iowa 1984). Substantial evidence means such evidence as could convince a rational trier of fact the defendant is guilty of the crime charged beyond a reasonable doubt. *Id.* The evidence is viewed in the light most favorable to the State, including legitimate inferences and presumptions which may fairly and reasonably be deduced from the record. *State v. Bass*, 349 N.W.2d 498, 500 (Iowa 1984). We consider all the evidence at trial, not just the evidence that supports the verdict. *State v. Robinson*, 288 N.W.2d 337, 340 (Iowa 1980).

Anderson's convictions for first degree-robbery and first-degree theft for the West 19th Street 7-Eleven, second degree-robbery for the attack on Bennett, stem from his participation as an aider and abettor. An aider and abettor may be tried and punished as a principal. Iowa Code § 703.1 (1993). The State bears the burden of proving the aider and abettor "assented to or lent countenance and approval to the criminal act either by active participation in it or by some manner encouraging it prior to or at the time of its commission" *State v. Lewis*, 514 N.W.2d 63, 66 (Iowa 1994).

A. West 19th Street 7-Eleven

Anderson was present at the West 19th robbery in which Ehlers acted as the principal. *See Lewis*, 514 N.W.2d at 66. (presence, companionship, and conduct

before and after the offense may infer a defendant's participation in the crime). Anderson had also discussed mugging people and robbing someplace with Ehlers and the others. Ehlers testified Anderson knew Ehlers had a gun with him. Anderson also accompanied Ehlers to the foiled Riverside 7-Eleven robbery. He himself stated, in his videotaped confession, the entire group was aware of what was going on with both robberies. Anderson's presence at the crime, discussions with the group, and actions prior to the robbery evidence encouragement to Ehlers to commit the crime.

Moreover, Anderson's action after the robbery evidence his prior encouragement in the crime. *See State v. Barnes*, 204 N.W.2d 827, 828-29 (Iowa 1972) (subsequent conduct relevant to show defendant's prior encouragement or participation in proving aiding and abetting). After the West 19th robbery, he ripped up a $2 bill found among the stolen money and threw it out the window in order to avoid detection by police. Anderson also acted as the principal for the robbery of the Morningside 7-Eleven, in which his actions were nearly identical to Ehlers' actions at the West 19th store. He also remained with the group throughout the entire evening.

We find the State has provided sufficient evidence to show the defendant approved of the West 19th 7-Eleven robbery by encouraging the offense through his continuous presence, companionship, discussion with the others, and conduct prior to and following the offense.

B. Robbery of David Bennett

Anderson was also present at the attack of Bennett. Testimony indicated he accompanied the group to the pawn shop in the afternoon to purchase mace and talked with the group about mugging people. He also was present when Comer tested the mace on a dog. Testimony also indicated the group drove around searching for someone to mace and that someone, possibly Anderson walked around the campus while the rest remained on the lookout then returned to the car. Comer, the principal of the attack also testified several hands from the car pointed towards a car right before he maced Bennett and the group drove off laughing after the attack. A jury could reasonably infer Anderson pointed and laughed with the group.

We find sufficient evidence to support Anderson's conviction for aiding and abetting the robbery. Anderson's discussion with the group and actions prior to and following the attack evidence his encouragement to Comer to mace Bennett.

C. Conspiracy to Commit Robbery

Since we have found the conspiracy charge should have been merged into the underlying robbery and theft offenses, we need not address Anderson's sufficiency of the evidence claim.

III. Conclusion

We affirm Anderson's conviction for both counts of first-degree robbery, both

counts of first degree-theft, and one count of second-degree robbery. We however, modify Anderson's sentence to nullify the conviction and sentence for conspiracy.

AFFIRMED IN PART AND MODIFIED IN PART.