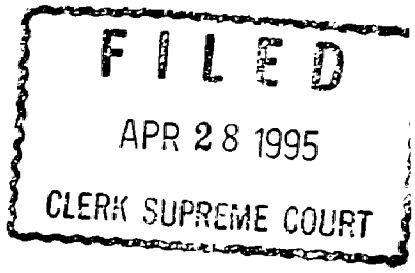
IN THE COURT OF APPEALS OF IOWA

No 5-033 / 94-291




**STATE OF IOWA,**

Appellee,

vs.

**GARY STEPHEN LONG,**

Appellant.

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Appeal from the Iowa District Court for Washington County, James P. Rielly, Judge.

Defendant appeals his conviction of conspiracy to commit theft in the second degree. **AFFIRMED.**

Jerald W. Kinnamon and Heather L. Shank of Kinnamon, Kinnamon, Russo & Meyer, Cedar Rapids, for appellant.

Thomas J. Miller, Attorney General, Thomas S. Tauber, Assistant Attorney General, and Gerald N. Partridge, County Attorney, for appellee.

Heard by Hayden, P.J., and Sackett and Huitink, JJ.

**HUITINK, J.**

Gary Long appeals his conviction of conspiracy to commit theft in the second degree. We affirm.

On June 16, 1993, Jerry Williams knocked on Dorothy Shafer's door, asking to unload "surplus" asphalt on her driveway from nearby road construction. Williams told her the asphalt would cover 100 feet of the driveway. Shafer agreed to pay a dollar a foot for the asphalt. There was to be no charge for labor, materials, or grading. Several men arrived in a truck carrying asphalt forty-five minutes later.

A second truck driven by Long arrived at Shafer's residence, and Williams asked her if he could unload this truckload as well. She agreed. After the asphalt had been applied to Shafer's driveway, two men appeared to take some measurements. Williams handed Shafer a bill for $6525. Long was standing nearby. Williams told her he would reduce the charge to $6500. Shafer explained she did not have the money (at the time she had $9.97 in checking and $200 in savings). Long told her to call her bank. Shafer wrote out a check for $6500. Williams or Long told her the payee's name was Dick Parker. When they left, Shafer called the bank to stop payment on the check. She also called the police.

Long and Dick Parker attempted to cash the check. When they were unsuccessful, they left the check at the bank. Officer Lyle Hansen saw the two men exit the bank, see him, split up, and go opposite directions. Hansen saw them again a block

away as Long stopped his truck to pick up Parker. Hansen stopped the men and asked them to accompany him to the police station.

Long told police the crew and equipment were his. Long was charged with second-degree theft, conspiracy to commit second-degree theft, and being an habitual offender. The second-degree theft charge was dropped before trial

At trial, Long objected to any testimony about statements made by members of his crew as hearsay. The court overruled the objections. The jury found Long guilty as charged, and the court entered judgment and sentence on the verdict.

Long's defense was that he lacked knowledge of any conspiracy to commit theft by deception. He contends the district court erred in instructing the jury by (1) refusing to add "knowingly" to Instruction 13, the instruction for theft by deception and (2) failing to give the Uniform Jury Instruction on "knowledge" since he claims it is an essential element of conspiracy. He contends these errors deprived him of his theory of defense and violated his constitutional rights. We disagree.

The record shows Long failed to preserve any constitutional claims at trial; therefore he cannot raise them for the first time on appeal. *State v. Johnson*, 476 N.W.2d 330, 333 (Iowa 1991). Our review of the jury instructions therefore is for errors at law. *State v. Douglas*, 485 N W.2d 619, 622 (Iowa 1992).

Contrary to Long's assertions, the marshalling instruction was Instruction 12. This instruction provided the jury with the elements of the charged crime of conspiracy.

Instruction 13 defined the target crime of theft by deception. This crime was only the object of the conspiracy. Instruction 12 was a Uniform Instruction setting forth the elements of conspiracy, none of which contain the word "knowingly." "Knowledge" is not an element of conspiracy. Iowa Code § 706.1 (1993).

Requested instructions or wording may be properly refused if a point raised is substantially given or covered by the instructions submitted. *State v. Doss*, 355 N.W.2d 874, 881 (Iowa 1984). In reading the instructions as a whole it is clear Instructions 14, 17, and 21 thoroughly covered the issues of Long's knowing participation in, and knowledge of, the conspiracy. *See State v. Ripperger*, 514 N.W.2d 740, 750-51 (Iowa App. 1994). The district court did not err in refusing Long's requested additions or instructions. We affirm the district court on this issue.

Long next contends the court erred in admitting statements of his alleged co-conspirators before the State established the existence of a conspiracy. Although Long raises other issues as to the statements, he failed to preserve those issues for appeal. Our scope of review of the district court's determination that a conspiracy existed is governed by the substantial evidence test. *In re Property Seized from DeCamp*, 511 N.W.2d 616, 620 (Iowa 1994) (citation omitted).

Besides Officer Hansen's testimony, there was additional evidence presented before the court admitted testimony concerning the statements of Favors and Coffman (Long's drivers and other alleged co-conspirators). Sergeant Smit testified Long

admitted he was doing the asphalt work, he was in charge, he owned the equipment, and that Jerry Williams was selling jobs for him.

Rodney Young, the asphalt plant operator, testified he sold two truckloads of asphalt to a private crew on June 16. Although he did not see Long at the plant, Young identified one of Long's drivers as the driver of one of the trucks that picked up the asphalt. Young's descriptions of the two trucks matched those owned by Long. The times of sales provided by Young indicate the transactions took place shortly after Williams first contacted Shafer.

Our review of the record convinces us there is substantial evidence to support the district court's determination that a conspiracy existed in which Long, Parker, Favors, and Coffman participated. The district court is therefore affirmed on this issue.

Next Long contends the court erred in admitting certain testimony he claims went beyond the minutes of the testimony. He also argues the court erred in allowing the State to refer to "a new theory of prosecution," based on the challenged testimony, in its closing argument.

Our review of the record reveals Long failed to preserve either of these issues for appeal. He failed to make a proper objection as to the first issue and, in any event, he failed to obtain a ruling in response to his argument. The closing arguments were not reported; therefore they are not part of the record. Long made no attempt to

preserve this issue through proper procedural means, thus waiving his right to appeal. *See State v. Cunningham*, 493 N.W.2d 884, 889 (Iowa App. 1992).

Finally, Long contends the evidence was not sufficient to support his conviction. We disagree.

Our standard of review for a sufficiency of the evidence challenge 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).

The State was required to prove (1) Long's intent to promote or facilitate the commission of the underlying crime of theft by deception and (2) the existence of an agreement between Long and another person that one of them would commit, attempt to commit, or solicit the commission of theft by deception. Iowa Code § 706.1 (1993). It makes no difference whether the State proves, in the course of presenting its case, that Long actually committed the underlying act in order to establish the conspiracy.

Intent may be established by circumstantial evidence and by inferences reasonably to be drawn from the conduct of the defendant and all of the attendant circumstances in the light of human behavior and experience. *State v. Casady*, 491 N.W.2d 782, 787 (Iowa 1992). An agreement may be shown by circumstantial evidence such as the alleged participants or evidence of a scheme. *State v. LaRue*, 478 N.W.2d 880, 882 (Iowa App. 1991).

In addition to Officer Hansen, Sergeant Smit, and Rodney Young, the State presented the testimony of Dorothy Shafer and three experts. Shafer testified she was told the asphalt was "surplus." She stated she did not sign a contract for either load of asphalt and was told there would be no charge for labor, material or grading. She expected to pay approximately $300 for the use of the machinery. Shafer testified the asphalt has since cracked and is in disrepair.

The experts testified as to the inferior quality of the paving and the high cost charged to Shafer. Don Jordison testified the paving job had "limited structural value and load carrying capacity." Brett Finegan also testified about the asphalt's nonuniform thickness and overall weakness. Carl Cavner testified Shafer was overcharged for a poor quality job.

The jury, as finders of fact, were at liberty to believe or disbelieve the testimony of any of the State's witnesses. *State v. Blair*, 347 N.W.2d 416, 421 (Iowa 1984). The jury was not required to accept Long's evidence and arguments contradicting the State's

evidence. *State v. Trammel*, 458 N.W.2d 862, 863 (Iowa App. 1990). We conclude the State's evidence was sufficient to convince a rational trier of fact that Long committed the crime of conspiracy to commit theft by deception. The district court is therefore affirmed on this issue.

We have carefully considered all Long's claims and find them to be without merit. We affirm the judgment of the district court in its entirety.

**AFFIRMED.**