

IN THE COURT OF APPEALS OF IOWA

No. 1-995 / 11-0487
Filed February 1, 2012

STATE OF IOWA,
Plaintiff-Appellee,

vs.

RYAN MARK PESKA,
Defendant-Appellant.

Appeal from the Iowa District Court for Clinton County, David H. Sivright,
Judge.

Defendant appeals claiming there was insufficient evidence to support his
conviction and the court imposed an illegal sentence. **AFFIRMED IN PART AND
VACATED IN PART.**

Mark C. Smith, State Appellate Defender, and Martha J. Lucey, Assistant
State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Kyle Hanson, Assistant Attorney
General, Michael L. Wolf, County Attorney, and Amanda Trejo, Assistant County
Attorney, for appellee.

Considered by Vogel, P.J., Eisenhauer, J., and Sackett, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

SACKETT, S.J.

Defendant, Ryan Mark Peska, appeals his conviction for conspiracy to deliver or delivery of a controlled substance, namely LSD, within 1000 feet of a public school, in violation of Iowa Code sections 124.401(1)(b)(5) and 124.401A (2009), and failure to affix a drug tax stamp, in violation of Iowa Code sections 453B.3 and 453B.12. Peska asserts there was insufficient evidence presented at trial to sustain his conviction of conspiracy to deliver or delivery of LSD. He also claims the district court imposed an illegal sentence when it 1) ordered him to pay the substance abuse resistance education surcharge on the failure to affix a drug tax stamp conviction, and 2) ordered him to serve the five-year real property sentence enhancement on the conspiracy to deliver LSD conviction. Upon our review of the record, we find that there was sufficient evidence to sustain Peska's conviction on the conspiracy to deliver or delivery of LSD charge. However, we find the district court did impose an illegal sentence. We therefore affirm the conviction, but vacate part of Peska's sentence.

I. BACKGROUND AND PROCEEDINGS. After his arrest on drug charges, Shane Hickey agreed to become a confidential informant for the police department. Hickey became aware an acquaintance of his, Joe Broughton, was selling Pez candy laced with LSD. Hickey informed the police, who asked Hickey to arrange to purchase the drugs. Hickey called Broughton and asked to purchase ten Pez candies. Broughton told him the purchase price would be \$120, and that he had to obtain the drugs from someone in Fulton, Illinois.

The purchase was to take place on November 22, 2009, at Hickey's home. Hickey was searched by police, fitted with an audio wire, and given money for the controlled buy. Hickey was under constant police surveillance, and the police also maintained surveillance on Broughton's residence. Hickey contacted Broughton to find out when he could expect the exchange. Broughton informed him that it would be another fifteen to twenty minutes as he had to either go to Fulton, or was waiting for someone from Fulton to drop off the Pez.

Meanwhile, the officer watching Broughton's house reported a black Chevy Cavalier with an Illinois license plate had arrived. The car was registered to a Kristy Peska in Fulton, Illinois. The officer observed two individuals exit Broughton's house, enter the black vehicle, and drive away. Hickey then received a call from Broughton saying he was on his way, and would be at Hickey's house in about five minutes.

A few minutes later, the officers observed the same black vehicle pull up to Hickey's house. Hickey went out to the driveway where Broughton, sitting in the passenger seat, handed over the ten Pez candies in exchange for the money. Hickey counted the Pez and then returned to his home where he provided the drugs to police. Hickey did not specifically look at the driver of the vehicle.

Several months later, the police arrested Broughton charging him with seven drug-related counts including one count related to the drug deal at issue in this case. The police obtained his cell phone records which indicated he was obtaining the Pez candy from Ryan Peska. In addition, Broughton confirmed it

was Peska that sold him the Pez that he then re-sold to Hickey, and it was Peska that drove him to Hickey's home. Broughton accepted a plea deal and received immunity for his testimony against Peska.

A warrant was issued for Peska's arrest and on September 21, 2010, the State charged Peska with conspiracy to deliver or delivery of a controlled substance, to wit LSD, and failure to affix a drug tax stamp. The case proceeded to trial on February 14, 2011, where the jury found Peska guilty as charged. Peska was sentenced to a term of incarceration not to exceed thirty years for conspiracy to deliver or delivery of a controlled substance within 1000 feet of a public school, and a term not to exceed five years for failure to affix a drug tax stamp. The sentences were to run concurrently. The court ordered Peska to pay the court costs, court-appointed attorney fees, jail fees, and the law enforcement initiative and the substance abuse resistance education surcharges on both counts. The court waived the mandatory minimum sentence and went on to suspend the prison sentences and fines. Instead Peska was placed on probation for three years. Peska appeals challenging the sufficiency of the evidence and the legality of his sentence.

II. SUFFICIENCY OF THE EVIDENCE. We review challenges to the sufficiency of the evidence for correction of errors at law, and we will uphold the jury's verdict if it is supported by substantial evidence. *State v. Nitcher*, 720 N.W.2d 547, 556 (Iowa 2006). Evidence is considered substantial if a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. *State v. Casady*, 597 N.W.2d 801, 804 (Iowa 1999). We consider all the

evidence in the light most favorable to the State, drawing all reasonable inferences. *State v. Milom*, 744 N.W.2d 117, 120 (Iowa Ct. App. 2007). The evidence must “raise a fair inference of guilt as to each essential element of the crime,” and must not raise only suspicion, speculation, or conjecture. *State v. Speicher*, 625 N.W.2d 738, 741 (Iowa 2001) (citing *Casady*, 597 N.W.2d at 787). Because Peska does not assert the law contained in the jury instructions was incorrect, we will review Peska’s sufficiency claim in light of the instructions given to the jury. *Nitcher*, 720 N.W.2d at 556.

The jury was first instructed that there were two alternate theories under which they could convict Peska of count one: 1) Peska aided and abetted Broughton in the delivery of LSD, or 2) Peska conspired with Broughton to commit the offense of delivery of LSD. The jury was told that they were not required to agree as to which theory led to the verdict, but that the verdict must be unanimous.

The marshalling instruction for count one provided the State must prove,

1. On or about the 18th day of November, 2009 through the 1st day of December, 2009, the defendant either
 - (a) Aided and abetted the delivery of LSD by Joseph Broughton, or,
 - (b) entered into a common scheme or design with, or conspired with Joseph Broughton to deliver LSD.
2. The defendant knew the substance Joseph Broughton delivered, or that the defendant conspired to deliver, was LSD.

Peska claims that there was insufficient evidence of an agreement between himself and Broughton to support the conspiracy theory. He also claims the aiding and abetting theory lacked sufficient evidence because the State never proved he knew the reason he was driving Broughton to Hickey’s home.

Iowa Code section 706.1 sets out the elements of the crime of conspiracy.¹ At the heart of the crime of conspiracy is an agreement between two or more people to commit or plan to commit a crime. See *Speicher*, 625 N.W.2d at 741–72 (stating an agreement to form a conspiracy has been described as a “concert of free wills,” “union of the minds of at least two persons,” and “a mental confederation involving at least two persons”). The agreement does not need to be express or formal. *Casady*, 597 N.W.2d at 805. The agreement may be “a tacit understanding” or “may be inherent in and inferred from the circumstances, especially declarations, acts, and conduct of the alleged conspirators.” *Id.*

In this case, we find sufficient evidence from which a jury could conclude Peska and Broughton had an agreement to deliver LSD. Broughton testified at trial that Peska was an acquaintance with whom he decided to develop some sort of business relationship. He started selling LSD provided by Peska because, “he had it, and I liked it, and I could get rid of it.” Over a period of approximately three months, Broughton testified he received twenty to forty hits of LSD from Peska two to three times a week. From the amount of LSD ordered

¹ Iowa Code section 706.1(1) provides

A person commits conspiracy with another if, with the intent to promote or facilitate the commission of a crime which is an aggravated misdemeanor or felony, the person does either of the following:

a. Agrees with another that they or one or more of them will engage in conduct constituting the crime or an attempt or solicitation to commit the crime.

b. Agrees to aid another in the planning or commission of the crime or of an attempt or solicitation to commit the crime.

by Broughton, the jury could reasonably conclude it was not for Broughton's personal use.

The text messages sent between Broughton's and Peska's phones also indicate an agreement to sell the LSD Broughton purchased from Peska. On November 20 Broughton wrote, "U get me 40 pez." Peska responded, "Yea 380." Broughton then wrote back, "These things are goin lol." This exchange could be interpreted by a reasonable fact finder as Broughton communicating that he was having success distributing the LSD purchased from Peska.

Hickey's testimony and the testimony of the police officers also supported a finding of an agreement between Broughton and Peska. Hickey testified that during the controlled buy Broughton told him that he had to obtain the Pez from someone in Fulton, Illinois. Minutes later, the police observed Peska arrive at Broughton's house in a vehicle registered in Fulton, Illinois. After Peska arrived, Broughton called Hickey back to tell him he would be arriving with the Pez in five minutes. Peska then drove Broughton to Hickey's home where the drug exchange was conducted in the vehicle in full view of Peska. From this evidence, we find the jury could reasonably conclude Peska and Broughton had an agreement to deliver LSD.

We also find the same evidence supports the State's alternative theory of Peaks aiding and abetting Broughton in the delivery of LSD. The jury was instructed that "aid and abet" means to "knowingly approve and agree to the commission of a crime, either by active participation in it or by knowingly advising or encouraging the act in some way before or when it is committed." We believe

the jury could conclude Peska knowingly participated or encouraged the delivery of LSD. He supplied the Pez that Broughton sold to Hickey, and within minutes of supplying the Pez to Broughton, he drove Broughton to Hickey's home. In addition, the text messages referenced above show that Broughton told Peska that the Pez Peska was supplying to Broughton was selling quickly. The evidence presented showed that Peska was not an innocent bystander who unsuspectingly drove Broughton to a drug deal. Instead, the evidence showed that Peska supplied drugs to Broughton knowing that Broughton was re-selling the drugs to others.

We find sufficient evidence supports that Peska conspired with Broughton or aided and abetted Broughton in the delivery of LSD.

III. SENTENCE. Peska next claims that the district court imposed an illegal sentence when it 1) ordered him to pay the substance abuse resistance education surcharge on the failure to affix a drug tax stamp conviction, and 2) ordered him to serve the five-year real property sentence enhancement on the conspiracy to deliver LSD conviction. We review the district court's sentence for correction of errors at law. *State v. Rodriguez*, 804 N.W.2d 844, 848 (Iowa 2011).

Peska claims, and the State concedes, the district court erred in assessing the ten dollar substance abuse resistance education surcharge on the drug tax stamp conviction. Iowa Code section 911.2 requires the court to assess the surcharge if a violation arises out of an offense provided for in chapter 321J or chapter 124, division IV. The drug tax stamp violation arises out of Iowa Code

sections 453B.3 and 453B.12, not division IV of chapter 124, or Chapter 321J. Because the law does not provide for the imposition of the surcharge for the failure to affix a drug tax stamp conviction, we vacate this portion of Peska's sentence.

Peska also asserts the district court erred in ordering him to serve an additional five years in prison for conspiring to deliver the drugs within 1000 feet of a public school in violation of Iowa Code section 124.401A.² The State asserts Peska waived this claim by failing to object to the special interrogatory the court submitted to the jury asking whether the State had proven the offense in count I was committed within 1000 feet of real estate comprising a public school. The State asserts Peska's failure to object to the instruction waived his right to assert error on appeal, and also the instruction, right or wrong, became the law of the case.

Upon our review, we find the State misinterprets Peska's claim. Peska is not asserting that the special interrogatory given to the jury was incorrect or that it should not have been given. He is asserting that the sentence the court imposed was not authorized by Iowa law. "An illegal sentence is one that is not

² Iowa Code section 124.401A provides,

In addition to any other penalties provided in this chapter, a person who is eighteen years of age or older who unlawfully manufactures with intent to distribute, distributes, or possesses with intent to distribute a substance or counterfeit substance listed in schedule I, II, or III, or a simulated controlled substance represented to be a controlled substance classified in schedule I, II, or III, to another person who is eighteen years of age or older in or on, or within one thousand feet of the real property comprising a public or private elementary or secondary school, public park, public swimming pool, public recreation center, or on a marked school bus, may be sentenced up to an additional term of confinement of five years.

permitted by statute.” *State v. Gordon*, 732 N.W.2d 41, 43 (Iowa 2007). Because the sentence is void, it is not subject to the usual concepts of waiver and can be corrected at any time. *Id.* Because we find Peska did not waive his challenge to the sentence enhancement, we will proceed to address Peska’s claim on its merits.

Iowa Code section 124.401A provides that the court may impose an additional term of confinement of five years if a person manufactures with the intent to distribute, distributes, or possesses with the intent to distribute a controlled substance within 1000 feet of a school. Absent from the list of the offenses contained in section 124.401A is the crime of conspiracy.

The jury was instructed on two alternate theories under count one: conspiracy to deliver LSD, or aiding and abetting the delivery of LSD. The jury was instructed that it did not need to be unanimous on the theory, only on the verdict. See *State v. Corsi*, 686 N.W.2d 215, 222 (Iowa 2004) (“[I]f substantial evidence is presented to support each alternative method of committing a single crime, and the alternatives are not repugnant to each other, then unanimity of the jury as to the mode of commission of the crime is not required.”). The district court did not submit to the jury a special interrogatory requesting they disclose which of the two theories they based their verdict on. There is therefore no way to know whether the jury found Peska guilty of aiding and abetting or of conspiracy. Because the enhancement would apply to one only of the theories,

aiding and abetting,³ and not conspiracy, the court was not authorized by law to impose the five-year sentence enhancement. We therefore vacate that portion of Peska's sentence.

AFFIRMED IN PART AND VACATED IN PART.

³ A person convicted of aiding and abetting a crime is "charged, tried and punished as a principal." *State v. Bloomer*, 618 N.W.2d 550, 555 (Iowa 2000); see also Iowa Code § 703.1. Thus, if Peska is convicted of aiding and abetting Broughton in the delivery of the LSD, he is punished as if he was the one to actually deliver the LSD. Iowa Code section 124.401A provides the sentence enhancement is applicable to those convicted of distributing controlled substances within 1000 feet of a school. In chapter 124 "distributing" means to deliver. Iowa Code § 124.101(11). Thus, the sentence enhancement is applicable to the aiding and abetting alternative, but not the conspiracy.