

IN THE COURT OF APPEALS OF IOWA

FILED

APR 30 1985

CLERK SUPREME COURT

STATE OF IOWA,

Plaintiff-Appellee,

vs.

TIMOTHY JOHN MILLER,

Defendant-Appellant.

Filed April 30, 1985

5-102
84-965

Appeal from the Iowa District Court for Clayton County - William G. Klotzbach.

Defendant appeals from his conviction of delivery of a simulated controlled substance (cocaine) in violation of Iowa Code section 204.401(2). AFFIRMED.

Charles Harrington, Appellate Defender, and Patrick R. Grady, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General, and Mickey W. Greene, Assistant Attorney General, for plaintiff-appellee.

Heard by Donielson, P.J., and Snell and Sackett, JJ.

SACKETT, J.

Two drug agents operating under-cover for the Department of Criminal Investigation made arrangements with Ruth Wiedow to purchase "cheap coke." One agent, David Englehardt, and Wiedow went to the L&D Lounge in Volga. While at the lounge, the agent and Wiedow met defendant and talked to him. All three eventually returned to Wiedow's home in the country to complete the transaction.

Wiedow and defendant were subsequently arrested. An analysis of the drug sold to Englehardt revealed it to be lidocaine, which is generally used as a topical anesthetic and is not a controlled substance. Both defendant and Wiedow were charged with delivery of a simulated controlled substance. Defendant's defense was that he was selling lidocaine, a noncontrolled substance, and had no knowledge Wiedow had represented the drug to be cocaine. He had also placed a typewritten disclaimer in the drug packet. In a bench trial, defendant was convicted of delivery of a simulated controlled substance. He appeals from that conviction claiming that insufficient evidence was presented by the State.

All the evidence, including inferences and presumptions, must be viewed in the light most favorable to the State when we review the sufficiency of the evidence. State v. Blair, 347 N.W.2d 416, 418-19 (Iowa 1984). The verdict of the fact finder will not be disturbed unless the record lacks substantial evidence to support it. See Id. at 419. Substantial evidence is that evidence which would convince the fact finder of defendant's guilt beyond a reasonable doubt. State v. Aldape, 307 N.W.2d 32, 39 (Iowa 1981).

Defendant was convicted of violating Iowa Code §204.401(2)(a) which provides:

2. Except as authorized by this chapter, it is unlawful for a person to create, deliver, or possess with intent to deliver, a counterfeit substance or a simulated controlled substance, or to act with, enter into a common scheme or design with, or conspire

with one or more other persons to create, deliver, or possess with intent to deliver, a counterfeit substance or a simulated controlled substance.

A person who violates this subsection with respect to:

a. A counterfeit substance classified in schedule I or II which is a narcotic drug, or a simulated controlled substance represented to be a narcotic drug classified in schedule I or II, is guilty of a class "C" felony.

Under Iowa law, any person participating in committing a public offense whether they directly commit the offense or aid and abet shall be charged, tried and punished as a principal. Iowa Code §703.1 (1983). That person's guilt shall depend on their own actions and not on the degree of another person's guilt. Id.

The trial court based its verdict on certain findings of fact including: The packaged drug was to be sold at a price of \$1,200 for two ounces; the agent testified lidocaine normally sells for \$80 per ounce. The DCI agents had prior drug dealings with Wiedow who offered to sell them "cheap coke" and introduced them to defendant. Wiedow represented the packaged substance as cocaine. The transaction was not consummated in the bar parking lot. Agent Engelhardt, Wiedow and defendant drove several miles back to Wiedow's home because defendant did not want to bargain in a parking lot. Defendant's explanation that he saw the agent had a gun and so felt safer in a remote area than in town is difficult to follow.

The drug packet contained a typewritten disclaimer: "Caution: Sold for laboratory or chemical use only, not for food, drug, or household use." Defendant never called the substance "coke" and was never seen with the bag in his possession.

The record supports these findings; and, in addition, our review of that record reveals additional evidence to support the trial court's decision, including: Wiedow admitted she was the middleman in drug transactions involving defendant. Wiedow's testimony and that of another witness are in many instances in direct conflict. However, Wiedow did not recall many events because she was so upset.

Defendant testified he paid approximately \$12.50 per ounce for the lidocaine and planned to sell it for \$400 per ounce. Others referred to the drug as "coke" in defendant's presence and he never corrected them. Defendant referred to the lidocaine as "item" and concealed it in the ditch. He was aware that the drug might be sold as a controlled substance as evidenced by his admonishments of that fact to Wiedow.

Defendant urges us to believe that his conduct and participation in this transaction was that of an innocent bystander. It would be ridiculous to allow a drug trafficker to protect himself from criminal liability by simply never calling the drug by its name¹ and placing a typed disclaimer in each package. Dealers could then ply their trade - selling "drug-appearing" noncontrolled substances for large amounts of money - without fear of prosecution.

Substantial evidence supports the verdict of the trial court.

AFFIRMED.

¹ Agent Englehardt testified that most drug dealers do use slang terms in referring to the drugs because they believe it protects them if they are arrested.