FILED
APR 26 1979
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed April 26, 1979
vs.	)	
MATTHEW DILLEY,	)	49/61384
Defendant-Appellant.	)	

Appeal from Page District Court - J. L. Larson, Judge.

Defendant appeals from conviction for delivery of marijuana in violation of § 204.401(1)(b), The Code 1977. Affirmed.

Harold G. De Kay, of Atlantic, for appellant.

Thomas J. Miller, Attorney General of Iowa, and Thomas A. Evans, Jr., Assistant Attorney General, for appellee.

Heard by Oxberger, C. J., Donielson, Snell, Carter and Johnson, JJ.

DONIELSON, J.

Defendant Matthew Dilley appeals from his jury conviction for delivery of a controlled substance, marijuana, for profit in violation of section 204.401(1)(b), The Code 1977. The basis for the charge was defendant's sale of a quarter pound of marijuana to William Missman and Dean Kitchen, special agents with the Iowa Bureau of Narcotics, Department of Public Safety, on July 11, 1977. Defendant asserts that the trial court erred when it failed to instruct the jury of the proper crime charged, failed to instruct that the two undercover police officers were accomplices, failed to instruct on its own motion concerning the lesser included offense of simple possession, and admitted into evidence two BCI lab reports without proper foundation. We affirm the trial court.

Defendant contends initially that he was charged only with delivery, and that the trial court erred when it instructed the jury that he could be convicted of delivery of a controlled substance for profit. Sections 204.401 and 204.410 describe a violation as "unlawful delivery or possession with intent to deliver;" contained therein are three possible offenses: delivery or possession with intent to deliver for profit, accommodation offense, and simple possession. It is the evidence presented by the state, and not the unnecessary inclusion of the words "for profit" in the charge, that determines the instructions to be offered the jury. See State v. Metcalf, 260 N.W.2d 857, 860 (Iowa 1977). The trial court instructed the jury correctly as to the crime charged.

Defendant's contention that the two undercover agents who purchased marijuana from him were accomplices is without merit. A witness is an accomplice if he could be indicted and convicted of the same crime as the defendant. State v. Stufflebeam, 260 N.W.2d 409, 411 (Iowa 1977). Undercover activity by police is a necessary and legitimate tool of enforcement by those involved in the detection and prosecution of crime; this type of activity is not unlawful. See State v. Leonard, 243 N.W.2d 75, 80 (Iowa 1976). Even if Missman's and Kitchen's carefully proscribed undercover activities were not sanctioned, there is no evidence in the record to support a charge of delivery against them. The trial court did not err when it ruled as a matter of law that the agents were not accomplices of defendant.

Defendant's brief indicates his next contention is whether the trial court erred when it failed to submit the offense of possession to the jury. Defendant cites no

relevant authority, and fails to apprise this court of the fact that he made no request of the trial court that a possession instruction be included and did not object when such an instruction was not offered. Unexcused failure to make a record on instructions is not a mere technical error or defect that can be disregarded on appellate review. State v. Wellington, 264 N.W.2d 739, 742 (Iowa 1978); State v. Wisher, 217 N.W.2d 618, 620 (Iowa 1974). This is not a case where it was incumbent upon the court to instruct **sua sponte** on a lesser included offense. See State v. Jochims, 241 N.W.2d 25 (Iowa 1976). In any event, possession of a controlled substance is not a lesser included offense of the crime of delivery. State v. Kucera, 244 N.W.2d 571, 573 (Iowa 1976). Defendant's contention is without merit.

Finally, defendant contends that the trial court improperly admitted state exhibits one and two, which were copies of the state crime laboratory reports identifying the substance sold by defendant as marijuana. These reports were admitted into evidence pursuant to section 749A.2, The Code, which establishes a statutory presumption of the qualifications and expertise of state laboratory technicians and makes admissible any report prepared by them. See State v. Dykers, 239 N.W.2d 855 (Iowa 1976). The handling of the marijuana and results of the report were testified to by the agents at trial. After admission of the exhibits, defense counsel was informed that the laboratory technician who performed the test was available for cross-examination concerning her report. The procedure followed by the state was consistent with section 749A.2; the ruling of the trial court allowing the reports in was consistent with its purpose and was not error. See State v. Dykers; State v. One Certain Conveyance, 1971 Honda 350, etc., 211 N.W.2d (Iowa 1973).

AFFIRMED.