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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)

Plaintiff-Appellee,) Filed November 26, 1980

vs.)

MARTHA RUTH CLARK,) 0-264
64161

Defendant-Appellant.)

Appeal from Linn District Court - Ansel J. Chapman, Judge.

Defendant appeals from conviction of possession with intent to deliver a controlled substance for profit in violation of section 204.401(1), The Code 1979. - AFFIRMED.

John M. Heckel, of Klinger, Heckel & Robinson, Cedar Rapids, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Shirley Ann Steffe, Assistant Attorney General, for plaintiff-appellee.

Submitted to Oxberger, C.J., and Donielson, Snell, Carter, and Johnson, JJ.

PER CURIAM

Defendant Martha Clark appeals from her conviction of possession with intent to deliver a controlled substance for profit in violation of section 204.401(1), The Code 1979. Defendant was sentenced to a term of incarceration not to exceed ten years. Defendant contends the trial court erred in admitting evidence not set forth in the minutes of testimony filed by the prosecution, in submitting a certain instruction to the jury, and in overruling defendant's motion to suppress. We affirm.

I. At the time of defendant's arrest the police seized a quantity of heroin. At trial defendant objected to testimony concerning the performance of a field test, filling out evidence tags, taking custody of the heroin, return of the search warrant, transportation of the heroin to the crime lab in Des Moines, transportation of the heroin to the police station and holding it there. Defendant supported her objections by contending that the allegedly impermissible testimony exceeds the scope of the minutes of testimony filed by the prosecution in violation of State v. Walker, 281 N.W.2d 612 (Iowa 1979). The minutes of testimony state:

> J. D. HANSEL, L. GRECO, DAVID KNOTT, DENTON SCHULTZ, will testify that on March 23, 1979 the above named witnesses who are members of the Metro Narcotics Squad had executed a search warrant at 2129 North Towne Place, Cedar Rapids, Linn County, Iowa. the [sic] officers will further testify that they went to this address and found the defendant, Martha Ruth Turner Clark Gibson [sic] at the address. At the time of the execution of the search warrant the defendant was found to have a quantity of heroin in her possession in sufficient amounts to indicate this was for delivery. These witnesses will testify to further facts and details concerning the case.

A prosecuting attorney under rule 5(3) of the Iowa Rules of Criminal Procedure has a duty to insert in the minutes a full and fair statement of the testimony of each witness he expects to call. It is not possible to formulate fixed criteria by which to determine the sufficiency of minutes. State v. Walker, 281 N.W.2d 612, 614 (Iowa 1979). What constitutes a full and fair statement of the witness' testimony must necessarily be decided on a case-by-case basis. Id. The minutes must be sufficient to fully and fairly alert a defendant generally to the source and nature of the evidence against him, id, so as to enable him to prepare a defense, see id. at 613. The minutes need not, however, detail each circumstance of the expected testimony. Id. at 614.

In the case at bar, the challenged testimony comes within the scope of the minutes. The minutes state that the prosecution witnesses would testify that when the search warrant was executed defendant was found to possess a significant amount of heroin. Defendant reasonably could be expected to anticipate that the State would produce testimony concerning the return of the search warrant, given notice that the State would produce testimony concerning execution of the search warrant. The remainder of the challenged evidence goes to laying a foundation for the admissibility of the heroin, exhibits A, B, C, and D, into evidence. Part of the charge filed against defendant was possession of heroin, and the minutes stated that there would be testimony concerning the discovery of heroin in defendant's possession. We believe that this information was sufficient to alert defendant to the prospect of the State's introduction of the type of testimony defendant challenges. Knowing that the State would try to prove defendant possessed heroin, defendant reasonably could be expected to anticipate that the State would introduce evidence laying a foundation for admission into evidence of heroin allegedly possessed by defendant. The trial court therefore did not err in admitting the challenged testimony into evidence.

II. Instruction #14 of the instructions the trial court submitted to the jury reads:

> The term "profit" includes not only a monetary gain but the recoupment of the cost incurred in acquiring the substance, as well as anything of value or benefit received by a person which is of a tangible nature, or in the form of services, privileges or entertainment.
>
> However, if a person possesses with intent to deliver a controlled substance as a favor or kindness to another or is done in an act of friendship or assistance [sic], then the possession with intent to deliver is not for profit.

Defendant contends that the trial court erred in submitting to the jury the last sentence of instruction #14. The evidence shows that the heroin was possessed with the intent of planting it on an enemy as a "set up." According to defendant, the heroin was possessed with the intent to get revenge against Archie Buckley, who was thought by defendant's brother to have murdered another brother of defendant. Defendant argues that the instruction is objectionable because there is no indication in the record that defendant intended to deliver the heroin as a kindness or favor to another or as an act of friendship or assistance. It may be reversible error for a trial court to submit a jury

instruction not grounded in record evidence. Cf. State v. Swallum, 111 Iowa 37, 38, 40, 82 N.W. 439, 439 (1900) (reversible error to submit to jury issue of material fact upon which there was no evidence); State v. Stout, 75 Iowa 215, 216-17, 39 N.W. 275, 276 (1888) (reversible error to submit jury instruction not warranted by any evidence in record). A trial court must instruct the jury on the law applicable to the facts as supported by the evidence. State v. Fuhrmann, 261 N.W.2d 475, 479 (Iowa 1978); State v. Watts, 244 N.W.2d 586, 590 (Iowa 1976).

We conclude that in the case at bar the trial court did not err in submitting instruction #14 to the jury, because the instruction is applicable to the facts as supported by the evidence. In considering the propriety of jury instructions we review them in their entirety. State v. Langlet, 283 N.W.2d 330, 337 (Iowa 1979); State v. Holmes, 276 N.W.2d 823, 826 (Iowa 1979). Defendant was charged with possession of heroin with intent to deliver for profit. By showing that an inordinately large quantity of heroin was found in defendant's possession, the State did produce evidence that defendant intended to deliver the heroin for profit. The jury was obliged to determine whether defendant intended to deliver the heroin for profit. In order to make its determination the jury must know what constitutes intent to deliver for profit. Part of knowing what constitutes intent to deliver for profit is knowing what does not constitute intent to deliver for profit. Instruction #14 as a whole states what does and does not constitute intent to deliver for profit. We therefore conclude that the trial court did not err in submitting the challenged part of instruction #14 to the jury, because it gave the jury information important to its making a determination of a material issue of fact raised by record evidence.

Furthermore, even assuming that the trial court's submission to the jury of part of instruction #14 was error because not grounded in record evidence, we hold that the error was harmless. A conviction should not be reversed for errors in instructions unless there is a reasonable basis for finding that the jury was confused or that the instructions, when viewed as a whole, are so contradictory that the jury may have followed a wrong one instead of a proper one. State v. Lynch, 197 N.W.2d 186, 190 (Iowa 1972). In the case at bar there is nothing in the record that furnishes a reasonable basis for finding that the jury was confused, nor, having examined the instructions as a whole,

do we find them in the least bit contradictory. Therefore reversal based on the error of including a correct and harmless legal definition in the jury instructions is unwarranted.

III. Defendant contends that the trial court erred in overruling his motion to suppress evidence seized pursuant to the execution of the search warrant issued by a magistrate. In overruling defendant's motion to suppress the trial court discussed how the criteria set out in Aguilar v. Texas, 378 U.S. 108, 84 S. Ct. 1509, 12 L.Ed.2d 723 (1964), State v. King, 256 N.W.2d 1 (Iowa 1977), and State v. Easter, 241 N.W.2d 885 (Iowa 1976) were satisfied in the case at bar and concluded that the magistrate's issuance of the search warrant was therefore valid. In testing the sufficiency of probable cause for issuance of the search warrant the trial court relied entirely on the recitals in the affidavit and the magistrate's abstract of oral testimony endorsed on the application. State v. Liesche, 228 N.W.2d 44, 48 (Iowa 1975). Defendant does not deny that the application of the Liesche test and the Aguilar, King, and Easter criteria to the case at bar vindicates the validity of the search warrant. Defendant contends, however, that the warrant is defective because the affiant materially misled the magistrate by omitting some information. The omission was the affiant's nondisclosure of the revenge motive of defendant's brother for having the heroin in his apartment, where police testified to finding defendant in possession of heroin. We reject defendant's argument.

In reviewing a trial court's ruling on a motion to suppress, we consider the totality of circumstances disclosed by the suppression hearing evidence. State v. Bakker, 262 N.W.2d 538, 544 (Iowa 1978); State v. Knutsen, 234 N.W.2d 105, 106 (Iowa 1975). It is defendant's obligation to provide this court with a record which affirmatively discloses the error on which he relies. State v. Mark, 286 N.W.2d 396, 402 (Iowa 1979); Bakker, 262 N.W.2d at 544. In her appellate brief defendant cites no authority for the proposition that an otherwise valid search warrant may be defective because the issuing magistrate was materially misled by an omission of the affiant. Failure to cite authority in support of an issue may be deemed a waiver of that issue. State v. Potts, 240 N.W.2d 654, 656 (Iowa 1976); State v. King, 225 N.W.2d 337, 343 (Iowa 1975); Iowa R. App. P. 14(a)(3).

Iowa case law has provided for a defendant's challenging a facially adequate search warrant by challenging the truth of the affiant's statements. State v. Post, 286

N.W.2d 195, 201-02 (Iowa 1979); State v. Boyd, 224 N.W.2d 609, 616 (Iowa 1974). No Iowa precedents provide for challenging a facially adequate search warrant by showing the magistrate was misled through omissions of the affiant. In the instant case defendant made no preliminary showing at the suppression hearing that the omission was material to the magistrate's issuance of the warrant. See State v. Post, 286 N.W.2d 195, 201-02 (Iowa 1979); State v. Boyd, 224 N.W.2d 609, 616 (Iowa 1974). Had the affiant informed the magistrate of defendant's brother's motivation, the magistrate's probable cause determination and consequent issuance of the search warrant would have been in no way affected. We therefore conclude that the trial court did not err in overruling defendant's motion to suppress the heroin evidence seized through execution of the search warrant.

AFFIRMED.