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CLERK SUPREME COURT

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IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)
Plaintiff-Appellee,)
vs.)
DOROTHY ANN MAHAN,) 8-690
Defendant-Appellant.) 88-200

Appeal from the Iowa District Court for Scott County (130652-01), Phillip T. Steffen, Jr., Judge.

Defendant appeals her conviction and sentence, following a jury trial, for the crime of prostitution. **REVERSED AND REMANDED.**

William L. Wegman, State Public Defender, and Raymond E. Rogers, Assistant Public Defender, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Bruce Kempkes, Assistant Attorney General, for plaintiff-appellee.

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

PER CURIAM **169**

Defendant appeals from her conviction and sentence, following a jury trial, for the crime of prostitution. In violation of Iowa Code section 725.1 (1987). We reverse.

A male undercover officer observed the defendant, Dorothy Ann Mahan, walking along a Davenport street late in the evening. The officer pulled his car over and offered the defendant a ride, which she accepted. While riding the officer made small talk and then introduced the subject of sex. After some initial hesitation, the woman agreed to a sex act. The officer then asked how much money she would charge, and the defendant quoted a price of $20. The officer tendered a twenty-dollar bill and then arrested the defendant for the crime of prostitution.

At trial, Mahan raised an entrapment defense. She testified she had never engaged in prostitution and did not intend to do so on the night of the arrest. She testified she accepted a ride from the undercover officer because she was lonely and depressed and because she found the officer attractive. She stated that she agreed to the sex act without any intention of seeking a fee in return. However, when the officer indicated he would pay, she decided to accept the money because she was broke.

The jury found the defendant guilty of the crime of prostitution. The court then sentenced her to imprisonment for up to two years. She has appealed from her conviction and sentence.

As grounds for this appeal Mahan challenges the sufficiency of the evidence to establish either that she had committed the elements of the crime of prostitution or that she had not been entrapped by an undercover officer. She also challenges instructions proffered by the court on the issues of entrapment and on the elements of the crime which she is charged. Finally, she contends the district court abused its sentencing discretion by imposing a prison term of up to two years.

Our scope of review is for errors at law. Iowa R. Civ. P. 4.

I. Jury Instruction 9. At the close of evidence, the defendant objected to the language employed in jury instruction nine. The instruction was submitted as follows:

> The phrase, "offers for sale" or "offers to purchase" refers to any verbal statement, or any act or conduct by which a person would be invited to be a partner in a sex act for money or other thing of value.
>
> It is this asking, requesting or soliciting of another to be a partner in a sex act or the acceptance of such request or soliciting for money or other thing of value that is made unlawful, regardless of whether there was a sex act, and regardless of whether there was an actual payment of any kind to either person.
>
> The request, solicitation or acceptance need not be in any particular form of words and can be accomplished by gesture and other indications that there was to be a sex act.

Defendant objected because instruction nine allowed the jury to find her guilty on a theory of prostitution not

charged by the State and unsupported by the evidence. We determine the trial court erred in not sustaining defendant's objection. The prostitution statute, Iowa Code section 725.1 (1987), provides as follows:

> A person who sells or offers for sale the person's services as a partner in a sex act, or who purchases or offers to purchase such services, commits an aggravated misdemeanor.

Thus, the statute prohibits four types of sexual conduct: selling, offering for sale, purchasing, and offering to purchase. The trial information filed by the State accused defendant with prostitution on the ground that she "did offer for sale her services as a partner in a sex act . . . ." By drafting the information in this manner, the State chose to limit prosecution of defendant to one of the four alternatives enumerated under section 725.1, forcing the State to prove this alternative beyond a reasonable doubt. See State v. Wales, 325 N.W.2d 87, 88 (Iowa 1982).

In State v. Johnson, 162 N.W.2d 453 (Iowa 1968), the supreme court held: "It is well established an indictment need not detail the manner in which an offense is committed, but if it undertakes to do so the proof must establish guilt in substantially the manner alleged." Id. at 455. In light of these principles, defendant contends the other alternatives not listed in the trial information are irrelevant here and the jury should not have been instructed on them.

Defendant objects to the language in instruction nine which concerned the term "acceptance." She contends this language covers circumstances where a patron accepts a prostitute's offer to engage in sex for money. Clearly, the patron who accepts such an offer is guilty under section 725.1, however, that is not what the State charged in this case, nor do the facts remotely support that charge.

The trial court is obligated to instruct the jury on all "the laws applicable to the facts supported by the evidence . . . ." State v. Watts, 244 N.W.2d 586, 590 (Iowa 1976). It is reversible error for the trial court to instruct the jury on an issue unsupported by the evidence. State v. Mays, 204 N.W.2d 862, 865 (Iowa 1973).

In this case, the acceptance language obviously prejudiced the defendant because it indicated the jury could find her guilty of prostitution if she accepted the officer's request that she engage in sex for money. This instruction then allowed the jury to find the defendant guilty of an alternative under section 725.1 not charged by the State. Therefore, we determine the trial court erred in overruling defendant's objection and thus, we reverse and remand this case for a new trial.

II. In light of our determination in division I, we do not address defendant's other assignments of error.

REVERSED AND REMANDED.