FILED
JAN 25 1979
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Appellee,	)	Filed January 25, 1979
vs.	)	
MARK McCOY,	)	760 61261
Appellant.	)	

Appeal from Polk District Court - Ray A. Fenton, Judge.

Appeal by defendant from convictions of possession of controlled substances with intent to deliver, alleging error in failing to give separate instructions on lesser included offenses of simple possession. - Affirmed.

Nicholas S. Krpan, Des Moines, for Appellant.

Thomas J. Miller, Attorney General of Iowa, Kermit L. Dunahoo, Assistant Attorney General, and Dan Johnston, Polk County Attorney, for Appellee.

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

PER CURIAM

Defendant Mark McCoy appeals his conviction by jury of two separate counts of possession of a schedule I controlled substance with intent to deliver, to wit: marijuana and amphetamine, in violation of § 204.401(1), The Code. On appeal, defendant alleges the trial court erred in refusing to give separate instructions on the lesser included offenses of possession of marijuana and possession of amphetamines for the reason that the separate instructions were necessary to clearly and fairly present the lesser included offenses of simple possession.

Instruction 10 contained the necessary elements of possession with intent to deliver marijuana but only as an accommodation. Instruction 12 was a similar marshalling instruction on the crime of possession with intent to deliver amphetamines, also as an accommodation. Both instructions contained the sentence that "if you find the State has proved the first two propositions set out above beyond a reasonable doubt, but failed to so prove the third proposition (possession with intent to deliver only as an accommodation for another), then it will be your duty to find the defendant guilty of possession of a controlled substance."

When objecting to proposed instructions, defendant requested an elemental form instruction on simple possession of each controlled substance. It was defendant's position that by not being in the form of separate instructions, they were easily read over and might not be considered by the jury when it selected the appropriate form of verdict. The trial court rejected defendant's request on the ground that the requested material was in fact contained in court Instructions Nos. 10 and 12. Defendant then excepted.

A trial court must instruct on a lesser included offense when both the legal and factual tests are satisfied. State v. Rosewall, 239 N.W.2d 171, 174 (Iowa 1976). See also State v. Metcalf, 260 N.W.2d 857, 859-61 (Iowa 1977). Simple possession is a lesser included offense under § 204.401(1), possession with intent to deliver. Metcalf, supra. However, it is not required that the State submit a separate instruction. In State v. Tensley, 249 N.W.2d 659, 662 (Iowa 1977), the supreme court in commenting on a requested instruction stated:

> [T]he rule is clear the trial court is not bound to any model or form in wording instructions. State v. McGranahan, 206 N.W.2d 88, 92 (Iowa 1973). A requested instruction may be properly refused if the point raised is otherwise substantially covered. State v. Hall, 235 N.W.2d 702, 725 (Iowa 1975); State v. Stanton, 214 N.W.2d 125, 126 (Iowa 1974); State v. Orozco, 202 N.W.2d 344, 347 (Iowa 1972). Instructions must be considered as a whole and not in isolation. State v. Buchanan, 207 N.W.2d 784, 787 (Iowa 1973); State v. Lynch, 197 N.W.2d 186, 189-190 (Iowa 1972).

In the instant case, Instructions 10 and 12 informed the jury that before they could find defendant guilty of possession with intent to deliver a controlled substance only as an accommodation to another, it must first find the State established three things beyond a reasonable doubt. If the State failed to prove the third proposition beyond a reasonable doubt, the jury was instructed to find the defendant guilty of simple possession. However, if the State failed to prove either or both of the first two propositions, the jury was told to return a verdict of not guilty.

We find the lesser included offenses of simple possession of a controlled substance, to wit: marijuana and amphetamines, were properly instructed upon. The requested instructions were properly refused because the point raised was sufficiently covered elsewhere. Tensley, supra. Taken as a whole, there is no error in the instructions. Defendant's convictions are affirmed.

AFFIRMED.