



IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
	)	
Appellee,	)	Filed March 29, 1978
	)	
v.	)	
	)	
ANDY DAINS,	)	429
	)	<u>59507</u>
Appellant.	)	

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

Defendant claims a supplemental jury instruction given on the accommodation issue was erroneous, and the evidence was insufficient. Affirmed.

Leon F. Spies, Iowa City, for appellant.

Richard C. Turner, Attorney General, Faison Sessoms, Assistant Attorney General, and Jack W. Dooley, Johnson County Attorney, for appellee.

Heard by Allbee, C.J., Donielson, Snell and Oxberger, JJ.; Carter, J., takes no part.

PER CURIAM

Defendant, Andy Dains, stands convicted of delivery of a schedule II controlled substance, cocaine, in violation of § 204.401(1), The Code. His complaints are directed toward a supplemental jury instruction given on the accommodation issue, and at the sufficiency of the evidence supporting the jury's conclusion that defendant accomplished the delivery with an intent to profit.

I.

A. Defendant's attack on supplemental instruction 2 is three pronged. He first argues that the instruction allowed the jury to consider whether David Wilson, the individual from whom defendant acquired the drugs, intended to profit by their sale. The jury would then, according to defendant's view of the instruction, be allowed to impute Wilson's intent to defendant. Therefore, defendant posits, he could be found guilty of delivery with intent to profit on the basis of Wilson's state of mind, and in the absence of the requisite intent on his own part.

It is important to note at the outset that the State has the burden, in an accommodation hearing, to prove a negative: that the delivery was not made as an accommodation. A showing of intent to profit is merely one method of showing that a delivery was not for accommodation. *State v. McNabb*, 241 N.W.2d 32, 33-34 (Iowa 1976). It is a sufficient answer to defendant's first complaint to point out that the instruction does not contain the objectionable matter which defendant purports to find there. The portion of the instruction at which defendant points an accusing finger says that if defendant intended that his principal (Wilson) should profit, that intent is sufficient. The instruction is proper; such a showing indicates that the sale was not an accommodation. Cf. *State v. Lott*, 255 N.W.2d 105, 109 (Iowa 1977). ("[T]he State was not limited to the necessity of proving defendant personally intended to profit in the transaction.")

B. Defendant next claims that there was insufficient basis in the evidence for giving the portion of the supplemental instruction dealing with intent for the principal to profit. The standard for submission of issues to a jury is recited in *State v. Ritchison*, 223 N.W.2d 207, 211 (Iowa 1974). Defendant's testimony established that the drugs came from Wilson, who set the price. All of the purchase money was passed on to Wilson. Agent Roger Timko testified that defendant warranted the quality of the

merchandise; the defendant, however, claimed to merely sell drugs, and not use them. Timko recounted defendant's certainty as to the accuracy of the drugs' weight, and his interest in the field testing procedure which Timko employed. The agent also provided testimony from which it could be determined that the price for the drugs was in the "middle high range." (We are aware, of course, that his opinion on this point was the subject of heated dispute.) Timko testified that one gram of cocaine will provide 40 dosage units. The 14 gram transaction here could reasonably be found to be a wholesale transaction. This conclusion is reinforced by the agent's observation that street sales commonly involve from one tenth of a gram to one gram. Finally, there was testimony regarding the presence at the transaction of another six grams beyond those which were actually sold.

The evidence thus would allow a jury to conclude that defendant was either in the business of selling narcotics or well acquainted with it. It would have been justified in finding that if defendant himself did not intend to profit by the sale, he intended to facilitate a profit by Wilson. Defendant's present complaint is unjustified.

C. Defendant's third attack on the instruction was not presented to trial court. Thus we do not consider it. *State v. Williams*, 256 N.W.2d 207 (Iowa 1977).

II.

Finally, defendant challenges the sufficiency of the evidence to support the jury's determination of the accommodation issue. *State v. Overstreet*, 243 N.W.2d 880, 881-882 (Iowa 1976) guides our consideration of this question. The evidence which we referred to in division I B is sufficient to support the jury's resolution, whether on the theory that defendant intended to profit by the transaction, or that he intended Wilson to so profit. The assignment is without merit.

AFFIRMED.