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NOV 19 1979
CLERK SUPREME COURT

277

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed November 19, 1979
vs.	)	
GRANT WIEBRAND,	)	298 / 62531
Defendant-Appellant.	)	

Appeal from Cerro Gordo District Court - John F. Stone, Judge.

Defendant appeals conviction for delivery of a controlled substance for profit, not for accommodation, in violation of section 204.401(1)(b), supplement to the Code, 1977. - Reversed and remanded.

William J. Keen, of Levinson, Enabnit & Keen, Mason City, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Douglas F. Staskal, Assistant Attorney General, for plaintiff-appellee.

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

OXBERGER, C.J.

Defendant Grant Wiebrand appeals conviction for delivery of a controlled substance for profit, not for accommodation, in violation of section 204.401(1)(b), supplement to the Code, 1977. - Reversed and remanded.

Defendant was convicted for delivery of marijuana for profit. On appeal he asserts the trial court improperly defined "profit" in the jury instructions thereby denying him a fair trial. The State contends defendant waived error on this matter because the trial court did not expressly rule upon his exception to the instruction and further urges that even if any error occurred, it was harmless because sufficient evidence was present for the jury to find defendant intended to profit from the delivery.

Initially, we find defendant's exception to the jury instruction preserved error on the matter. The objection was made at the proper time, prior to the court's giving the instructions to the jury, and alleged specific grounds in support of defendant's claim the instruction was ambiguous and confusing. The trial court's rejection of the exception, although not explicit, is apparent from the court's statement, "I believe there's authority for that; is there not?", and its inclusion of the instruction in its original form. This case is unlike those discussed in State v. Brown, 172 N.W.2d 152, 157-160 (Iowa 1969), where objections were never made or otherwise not preserved.

Defendant contends the trial court's instruction number seven improperly defined "profit". The trial court instruction stated profit "[i]ncludes not only 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." Defendant's trial counsel objected to the instruction stating it "seems to indicate the recoupment of cost may be an element of profit rather than an element of total cost to the defendant."

When an element of a crime is delivery for profit, "[t]he word 'profit' takes its ordinary dictionary meaning. In the instant case, it means the excess of returns over expenditures." State v. McNabb, 241 N.W.2d 32, 35 (Iowa 1975); accord, State v. Didley, 264 N.W.2d 732, 733 (Iowa 1978). Although a trial court may use its own language in instructions, it must adequately cover legal principles. State v. Seehan, 258 N.W.2d 374, 379 (Iowa 1977). Here, the trial court instruction failed to indicate recoupment alone was not profit. The instruction did not advise the jury that profit occurred only

when benefits exceeded expenditures. We cannot conclude the instruction properly stated the requisites for delivery for profit.

Error in instructing the jury is deemed prejudicial unless the contrary appears beyond reasonable doubt. State v. Davis, 228 N.W.2d 67, 73 (Iowa 1975). We cannot conclude from our review of the whole case that the error here did not prejudice defendant.

REVERSED AND REMANDED.

Donielson and Johnson, JJ., dissent.

DONIELSON, J. (dissenting)

I.

I dissent from the majority's disposition of this case. I would hold that defendant's exception to the challenged jury instruction did not preserve the alleged error. Defendant failed to request or receive a specific ruling from the trial court on his objection to the instruction. "An objection not ruled on in the trial, when there has been no request for ruling, does not preserve error." State v. Johnson, 222 N.W.2d 483, 485 (Iowa 1974). State v. Schiernbeck, 203 N.W.2d 546, 547 (Iowa 1973).

The majority holds that the trial court's statement, "I believe there's authority for that; is there not?", and its inclusion of the instruction in its original form combine to form an implicit ruling by the trial court on defendant's objection. This view ignores the meaning of the words used and the context in which they were said. The trial court's response can best be characterized, not as a ruling, but as a request for authority supporting defendant's objection, support contrary to what the court believed to be the correct position. Defendant did not answer the trial court's request for authority and, apparently, realized later in the trial that a ruling had not been given. It is the duty of the objecting party to force a ruling or to make a record of the court's refusal to rule. See State v. Cunha, 193 N.W.2d 106, 111 (Iowa 1972); State v. Hephner, 161 N.W.2d 714, 717 (Iowa 1968); Iowa R. Crim. P. 196. The alleged error in the instruction was not preserved and cannot be a basis for reversal.

II.

On the merits, I disagree with the majority's holding that the instruction was in error. Defendant contends the instruction was erroneous since the jury may have read it to mean that profit included a mere recovery of cost. Such a conclusion requires a tortured, strained reading of the instruction. The trial court instructed the jury that "a profit includes not only 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." The instruction read as a whole defines profit in terms of an excess of returns over expenditures; calculating recoupment of cost is a necessary step to calculation of profit. The instruction does not allow a reasonable reading that recoupment of cost alone is profit. The instruction was correct. See State v. Hillsman, 265 N. W.2d 114, 116 (Iowa 1979); State v. Didley, 264 N. W.2d 732, 733 (Iowa 1978).

I would affirm the conviction.

Johnson, J., joins Division I of this dissent.