FILED
NOV 20 1984
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)

Plaintiff-Appellee,) Filed November 20, 1984

vs.)

ROBERT HENRY COLE, JR.,) 4-368
83-1595

Defendant-Appellant.)

217

Appeal from the Iowa District Court for Johnson County - Harold J. Swailes, Judge.

Defendant appeals from his conviction for delivery of a controlled substance in violation of Iowa Code section 204.401(1)(b) (1983). AFFIRMED.

Charles Harrington, Appellate Defender, and LuAnn White, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Steven K. Hansen, Assistant Attorney General, for plaintiff-appellee.

Considered by Donielson, P.J., Schlegel, and Hayden, JJ.

SCHLEGEL, J.

Defendant, Robert Cole, Jr., appeals from his conviction for delivery of a controlled substance in violation of Iowa Code section 204.401(1)(b) (1981). We affirm.

On July 19, 1982, Bradford Thompson, an undercover agent, and a confidential informant went to defendant Cole's residence to purchase LSD. Earlier in the day, the informant had contacted Cole by telephone and discussed having a friend (the undercover agent) purchase 100 doses of LSD. When Thompson and the informant arrived at Cole's apartment, Cole told Thompson that the LSD was not at the apartment, but that Cole had made arrangements for another person to pick up the substance from Cole's source. Cole stated that the other person was late and asked Thompson to take them to the source. Thompson agreed to do so, but before they could leave, the other person arrived. Cole then said the other person, Livingston Moyston, would pick up the LSD.

Thompson and Cole discussed the terms of the drug sale. Cole said the price for 100 doses of LSD was $175 and explained that Thompson would be purchasing "spaceship acid." At Thompson's request, Cole showed Thompson a sample of the LSD. Cole demanded that Thompson pay him before Moyston left. Thompson handed $180 to Cole. Cole gave Thompson $5 in change. Cole then gave the money, and additional $200, to Moyston. He instructed Moyston that the money was to pay for the LSD and for other controlled substances that Cole had purchased from his source in the past.

While Moyston was gone, Cole, Thompson, and the informant conversed. Cole mentioned the possibility of Thompson becoming his partner in a scheme to sell marijuana.

Moyston returned with a package of LSD. He gave the package directly to Thompson, who opened the package to examine its contents. Cole requested to look at the LSD, so Thompson displayed it to Cole. Thompson and the informant then left Cole's apartment.

Our review of this criminal case is for correction of errors at law. Iowa R. App. P. 4.

I. Proposed Jury Instruction. Cole requested that the court include the following instruction in the jury instructions:

> In order to find the Defendant guilty of the charge of delivery of a controlled substance, it is necessary that the State of Iowa prove with evidence beyond a reasonable doubt that the Defendant did not act at the behest of or as the agent of the buyer, Bradford Thompson. The State must prove with evidence beyond a reasonable doubt that the Defendant acted in concert with, at the behest of, or was himself the seller in this matter.

The trial court did not give this instruction. Cole asserts that the failure to give the instruction was reversible error. He cites State v. Lott, 255 N.W.2d 105 (Iowa 1977), as support for his assertion. We hold that refusal to give the requested jury instruction was not error.

State v. Lott does not control the disposition of this case. Lott differed factually from this case in two important aspects. First, the defendant in Lott was charged under a theory of aiding and abetting. Id. at 106. Second, the trial court in Lott did give a variant of the instruction requested in this case. Id. at 108. Thus, the supreme court in Lott did not rule on whether refusal to give such an instruction would be error. However, the court ruled in State v. Zaruba that the trial court did not err in refusing to give such an instruction when the defendant made actual delivery of the controlled substances. 306 N.W.2d 772, 774 (Iowa 1981).

Cole, in this case, was charged with delivery of a controlled substance. He was not prosecuted on a theory of aiding and abetting. Although there is no evidence of actual delivery, there is evidence of constructive delivery. Unlawful delivery of a controlled substance includes both actual and constructive delivery. Iowa Code § 204.101(8) (1981). Because both actual and constructive delivery are illegal, we believe the holding in Zaruba applies to cases in which the evidence

supports a finding of either actual or constructive delivery. Defendants in such cases are not entitled to jury instructions of the kind requested by Cole.

The instruction requested by Cole has merit in situations where the evidence shows aiding and abetting, situations which raise the question whether the defendant was aiding the buyer or the seller. Because one who aids only the buyer is not guilty of delivery, Lott, 255 N.W.2d at 107, a jury instruction like the one in question is appropriate. However, when the defendant is charged with actual or constructive delivery such a jury instruction has no merit. By statute, actual or constructive delivery is unlawful. Iowa Code § 204.401 (1981). That law does not make exceptions based upon who induced the delivery. See id. In fact, under the definition of "delivery," the existence of an agency relationship is irrelevant. Id. § 204.101(8). Because Cole was prosecuted for delivery, and not for aiding and abetting, the trial court did not err in refusing to submit the requested jury instruction.

II. Sufficiency of the Evidence. Cole also challenges the sufficiency of the evidence. In reviewing the sufficiency of the evidence the court considers the evidence in a light most favorable to the State and considers all the evidence. State v. Robinson, 288 N.W.2d 337, 340 (Iowa 1980). The verdict must be supported by substantial evidence, which is evidence that could convince a rational trier of fact that the defendant is guilty of the crime charged beyond a reasonable doubt. Id. at 339. Direct and circumstantial evidence are equally probative, and the evidence must raise a fair inference of guilt and do more than create speculation, suspicion or conjecture. State v. Hamilton, 309 N.W.2d 471, 479 (Iowa 1981); State v. Schrier, 300 N.W.2d 305, 308 (Iowa 1981). Here the evidence when considered as a whole in the light most favorable to the State supports a finding of guilt.

Cole told Thompson that arrangements had been made to bring LSD to Cole's apartment. Cole discussed the price of the LSD, accepted payment, and made

change for Thompson. Cole then sent a courier to bring the LSD to the apartment. These acts are sufficient to support a finding that Cole "delivered" the LSD. Personal delivery of the contraband is not necessary for a finding of guilt. State v. Jochims, 241 N.W.2d 25, 28 (Iowa 1976). One who acts as a "broker in the drug trade" may be guilty of delivery. State v. Grady, 215 N.W.2d 213, 214 (Iowa 1974). We find Cole's challenge of the sufficiency of the evidence meritless.

AFFIRMED.