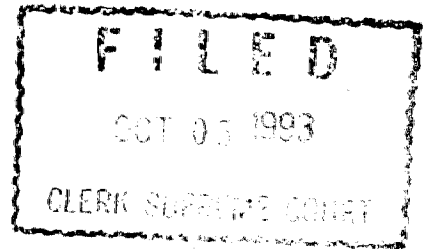


IN THE COURT OF APPEALS OF IOWA

No. 3-363 / 92-1456



STATE OF IOWA,

Appellee,

vs.

TIMOTHY M. JOHNSON,

Appellant.

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Appeal from the Iowa District Court for Clinton County,
David H. Sivright, Judge.

The defendant appeals his conviction and sentence,
following a jury trial, for delivery of marijuana.

AFFIRMED.

Linda Del Gallo, State Appellate Defender, and B. John
Burns, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Martha E. Boesen,
Assistant Attorney General, and Lawrence H. Schultz, County
Attorney, for appellee.

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

HAYDEN, J. 000636

On September 20, 1991, the State charged Timothy Johnson with two counts of delivery of marijuana. The matter proceeded to a jury trial. The State produced evidence two undercover police officers purchased marijuana from Timothy on two occasions, September 20 and 21, 1990. Timothy's brother, Kevin, who was working as a confidential informant, arranged the purchases of marijuana. Kevin was present during the transactions.

Timothy testified in his own behalf. On cross-examination Timothy stated he sold the marijuana to Kevin, not to anyone else.

The district court instructed the jury on the elements of delivery of a controlled substance in two instructions. There was one instruction for each count charged by the State against Timothy. Count I involved the transaction that allegedly occurred on September 20, 1990, and count II involved the transaction that allegedly occurred on September 21, 1990. The instructions stated the two elements of the charge were (1) delivery of marijuana by Timothy and (2) knowledge by Timothy the substance he delivered was marijuana. Both jury instructions stated: "The State has proved both elements [of delivery of a controlled substance]. Therefore, you must consider the defense of entrapment as explained in Instruction No. 14."

Timothy objected to these two instructions on the ground they impermissibly invaded the province of the

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jury. He argued the issue of whether the State had proven the elements of the offense were fact questions that must be determined by the jury. The district court overruled the objection on the ground Timothy's testimony at trial constituted an admission to the charges of delivery of marijuana. The court also found:

there is no factual dispute concerning the delivery of marijuana nor that the defendant knew the substance he delivered was marijuana. The defendant's testimony was that he delivered the substance to his brother, Kevin, and that he knew that it was, in fact, marijuana. The Court finds that the instruction is appropriate and focuses the issues where they belong in this case, which is the question of entrapment.

The jury returned a verdict of not guilty on count I of delivery of a controlled substance and guilty on count II. The court entered judgment on the jury's verdict and sentenced Timothy to a period of incarceration not to exceed five years. The court, however, suspended the sentence and placed Timothy on probation for four years. Timothy appeals.

Our scope of review is for the correction of errors of law. Iowa R. App. P. 4.

The sole issue raised on appeal is whether the district court erred in instructing the jury the State had proven the elements of delivery of marijuana. Timothy contends the court erred because the issue of whether he delivered marijuana and knew the substance he delivered was marijuana was a question for the jury only. We disagree with defendant's argument.

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This case involves one attempted sale of marijuana and two sales of marijuana between Timothy and undercover officers. Timothy testified at trial he sold marijuana to Kevin and the substance he sold to Kevin was marijuana. On direct examination Timothy gave the following testimony:

Q: Now, the officer showed up at 8:10--or 6:10 p.m. was when they first-- No. Strike that. I'm sorry. I think the testimony, I believe, is that at 8:15 or thereabouts they first arrived at your apartment on that day, and they have testified you didn't have any marijuana there; is that correct? A. They said that I didn't have any there when they first came?

Q. Well, they said, you said that you had to go get it or you had to go see if somebody had it or something of that sort. A. The first day they came, there, I had it there. I had the price way up on it, so they wouldn't buy it, because I didn't want to sell it to them.

Q. Now, the second time, you had it, you gave it to Kevin? A. Yes.

Q. Now, the third time we're talking about. What was the situation the third time. You knew Kevin was going to come. Why didn't you have the marijuana available? A. Because I didn't really want to do it. I was hoping that he wouldn't show up.

Q. And did he show up? A. Yes, he did.

Q. And did you get the marijuana right away? A. No, I didn't.

Q. Did they continue to wait around? A. Yeah. They waited at Kevin's house.

Q. How many times did they come back and see you; do you recall? A. About three.

On cross-examination Timothy testified regarding the second transaction between himself and the undercover officers and Kevin:

Q. And then they came back again and you sold the ounce of cannabis to them for \$230.00? A. Yeah. After my brother bugged me almost the whole night.

Q. And then on the 21st--the next day--you sold two ounces of cannabis for \$460.00. A. Yes.

Q. Is that yes? A. Yes.

Q. And you did all three of those--the attempted transaction and the two completed transactions. You did all three of those things out of the goodness of your heart? A. Yeah. I'd do anything for my family.

In State v. Shepard the Iowa Supreme Court addressed whether an admission by a party to an action, elicited on cross-examination, is such a judicial admission that it establishes the facts admitted so that no jury determination is required. The supreme court held in the affirmative. State v. Shepard, 247 Iowa 258, 267, 73 N.W.2d 69, 74 (1955) (citing Stearn v. Chicago R.I. & P.R., 166 Iowa 566, 579, 148 N.W. 128, 133 (1914)). The court stated:

The general rule is . . . expressed in 20 Am. Jur., Evidence, section 557: "The view is that admissions made in the course of judicial proceedings are substitutes for, and dispense with, the actual proof of facts." In 31 C.J.S., Evidence, § 381, p. 1175, it is said: "an admission in testimony dispenses with the necessity of proving the fact admitted.

Shepard, 247 Iowa at 266, 73 N.W.2d at 74; see 29 Am. Jur. 2d Evidence § 597 (1967) ("A judicial admission is a formal act of a party . . . in court, dispensing with proof of a fact claimed to be true, and is used as a substitute for legal evidence at the trial."); 31A C.J.S. Evidence § 381 (1964).

A defendant can eliminate an element of a crime from issue by equivocally admitting it as a witness. State v. Morgan, 322 N.W.2d 68, 69 (Iowa 1982) (citing Shepard, 247 Iowa at 266, 73 N.W.2d at 74); see State v. Donelson, 302

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N.W.2d 125, 134 (Iowa 1981). The Iowa Supreme Court has "held definitely that admissions by a party in open court, unexplained and uncontradicted, are to be taken as conclusively true." State v. Zbornik, 240 Iowa 450, 458, 80 N.W.2d 735, 739, (1957). Such testimony from a defendant may elevate the State's allegation to a verity and may establish a fact so no jury determination is necessary. Donelson, 302 N.W.2d at 135; Shepard, 247 Iowa at 266-67, 73 N.W.2d at 74; State v. Vargason, 462 N.W.2d 718, 719 (Iowa App. 1990) (citations omitted). Timothy made statements on the witness stand during direct and cross-examinations regarding the transactions and the substance involved. Defendant testified he sold a substance he knew to be marijuana on September 20 and 21, 1990. These statements by defendant constituted admissions to the delivery of marijuana charges. The two jury instructions submitted by the district court regarding the State's proof of the elements of the charges were proper. We note the only issue raised on appeal is whether the district court erred in submitting these two instructions to the jury. We affirm on the issue appealed.

AFFIRMED.