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IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Appellee,	)	Filed March 29, 1978
vs.	)	
ROBERT A. LEWIS,	)	<u>373</u>
Appellant.	)	59723

Appeal from Marshall District Court - Milton D. Seiser, Judge.

Appeal from conviction of possession with intent to deliver a controlled substance alleging errors in instructions, denial of due process by State's failure to produce confidential informant, denial of motion for continuance and denial of motion for directed verdict asserting insufficiency of evidence. - Affirmed.

William L. Springer, Marshalltown, for Appellant.

Richard C. Turner, Attorney General of Iowa, Faison Sessoms, Assistant Attorney General, and Carl D. Baker, Marshall County Attorney, for Appellee.

Heard by Allbee, C.J., and Donielson, Snell, Oxberger and Carter, JJ.

PER CURIAM

Defendant Robert A. Lewis appeals from a jury verdict convicting him of possession with intent to deliver a controlled substance in violation of § 204.401(1)(b), The Code. On appeal, defendant asserts error in the trial court's instructions to the jury, denial of his due process rights by the State's failure to produce a confidential informant and in not sustaining his motion for directed verdict in that the evidence was not sufficient to support the jury verdict.

Instructions. Defendant alleges three separate errors in the instructions in support of his claim for a reversal. The first concerns his requested instruction on the defense of entrapment. Defendant alleges the fourth paragraph of instruction 11 impermissibly focuses on the predisposition of defendant to commit the particular offense. He argues that the subjective test was rejected in *State v. Deanda*, 218 N.W.2d 649 (Iowa 1974) and *State v. Mullen*, 216 N.W.2d 373, 382 (Iowa 1974) and the trial court erred in instructing on other than the objective test. See *State v. Williams*, 256 N.W.2d 207, 208-9 (Iowa 1977).

Defendant's contention fails for three reasons. First, a defendant may not request an instruction and then attack its validity on appeal. *State v. Overmann*, 220 N.W.2d 914, 919 (Iowa 1974). In the instant case, the trial court adopted defendant's requested instruction verbatim. Any error which may inhere in instruction 11 was invited by defendant and he is estopped from attacking its validity on appeal. *Overmann*, supra.

Secondly, defendant expressly waived any error when defense counsel responded that there were no other objections to instruction 11. *State v. Rosewall*, 239 N.W.2d 171, 174-5 (Iowa 1976); *State v. Blyth*, 226 N.W.2d 250, 273 (Iowa 1975); *State v. Jackson*, 223 N.W.2d 229, 232 (Iowa 1974).

Finally, the instruction does not, as defendant argues, focus on the predisposition of the defendant to commit the crime charged. Rather, instruction 11 calls the attention of the jury to the conduct of the police and whether it was likely to cause a normally law-abiding person to commit the crime. This is the objective test espoused in *Deanda* and *Mullen*. There was no error.

Defendant's second alleged error in the instructions concerns a supplemental

instruction given to the jury in response to their inquiry as to the definition of the word "dominion" contained in one of the instructions. The trial court stated that "for the purposes of this case, the word 'dominion' is synonymous with the word 'control'." Defendant objected to the definition and argues on appeal, as he did below, that the word dominion implies something stronger or greater than the word control.

The crucial item under consideration in instruction 10 was the definition of the words "delivery of a controlled substance," "possession" and "controlled substance." The instruction stated possession requires the substance involved be under defendant's conscious personal dominion and control. However, it need not have been on his person and two or more persons may be in possession of the same property "when each has the power of control and an intent to exercise such control jointly." (emphasis added).

In *State v. Pierce*, 240 N.W.2d 678, 679 (Iowa 1976), the supreme court held that evidence of possession is sufficient if it shows constructive possession. See also *State v. Reeves*, 209 N.W.2d 18, 22 (Iowa 1973). If we accept defendant's argument that dominion is greater than control, the result is the same. All that is required for conviction under § 204.401(1)(b) is possession with intent to deliver. Complete ownership or as defendant argues 'dominion' is not required. If it were, a criminal defendant would always be able to defend on the grounds that he lacked ownership and was therefore, incapable of effecting delivery. The law is otherwise.

A defendant can still be found guilty of possession with intent to deliver without a showing of ownership or dominion. All that need be shown is that defendant had possession and was capable and had the intent to deliver. This is established by a showing of control. In the instant case, defendant claimed the drugs belonged to another; however, the evidence shows he had joint control over part of them and an intent to aid in delivery. The trial court did not err in defining dominion for the purpose of this case as synonymous with control.

Defendant's final attack on the instructions concerns the trial court's submission to the jury of an instruction on aiding and abetting. Defendant alleges he was charged with the crime of delivery of a controlled substance and that he had

no notice of the allegations of aiding and abetting until the instructions were given to counsel. He argues it was error to give such an instruction where defendant did not have real notice of the true nature of the charge against him.

Section 688.1, The Code, provides that all persons concerned in the commission of a public offense, whether directly or as an aider or abettor, must hereafter be indicted, tried, and punished as principals. (emphasis added). One of the natural and intended consequences of § 688.1 would appear to be that the State may charge defendant as a principal but be able to prove defendant was either a principal in fact or an aider and abettor. See State v. Rydel, # 59292, filed February 22, 1978; State v. Garrett, 173 N.W.2d 87, 90 (Iowa 1969). See also State v. Rush, 242 N.W.2d 313, 316 (Iowa 1976); State v. Guess, 223 N.W.2d 214, 215-6 (Iowa 1974); State v. Hamilton, 179 N.W.2d 369, 370-1 (Iowa 1970). Defendant's claim that he did not have real notice of the true nature of the charge against him is without merit.

Due Process. Defendant also contends he was denied due process of law by the State's failure to produce a confidential informant and by the trial court's failure to grant a continuance. The State did not attempt to hide the identity of Mr. Joy, the confidential informant. Defendant attempted to subpoena Mr. Joy, but the State was unable to serve him, as his whereabouts were unknown. The record does not show the State could have produced Joy.

In State v. Schlick, 257 N.W.2d 59, 63 (Iowa 1977), the supreme court rejected a similar argument by the defendant therein. The court held Schlick suffered no prejudice because the informant did not testify. The primary interest secured by the confrontation clause, Amendment 6, United States Constitution, is the right of cross-examination. State v. Carney, 236 N.W.2d 44, 46 (Iowa 1975). Since Joy did not testify, Lewis was not denied the right of confrontation. Further, the granting or refusing of a motion for continuance is within the trial court's sound discretion and absent a clear showing of an abuse of that discretion, a reviewing court will not disturb the ruling on appeal. State v. Cowman, 212 N.W.2d 420, 423 (Iowa 1973). Defendant's motion was not supported by affidavit as required by § 780.2, The Code, and Rule 183(b), Rules of Civil Procedure; neither was it filed without delay.

Rule 182(a), R.C.P. Finally, there were no facts presented for consideration of the trial court from which it might reasonably have been expected or believed that Joy's attendance or testimony could be procured at any subsequent time. State v. Burns, 124 Iowa 207, 210, 99 N.W. 721 (1904). There was no abuse of discretion.

Sufficiency of Evidence. Defendant's final assignment of error is that the trial court erred in overruling defendant's motion for directed verdict made at the close of all the evidence. He argues the evidence was not sufficient to support the jury verdict. The rules regarding overruling motions for directed verdicts and sufficiency of the evidence to support a jury verdict are contained in State v. Overstreet, 243 N.W.2d 880, 883-4 (Iowa 1976). The evidence is viewed in the light most favorable to the State regardless of whether it is contradicted and every legitimate inference that may fairly and reasonably be deducted therefrom must be carried to the aid of the evidence. The action should be submitted to the jury and the trial court should not direct a verdict if there is any substantial evidence reasonably tending to support the charge. Overstreet, supra; State v. Lewis, 242 N.W.2d 711, 724 (Iowa 1976); State v. Dahlstrom, 224 N.W.2d 443, 447-8 (Iowa 1974).

From a review of the evidence, the trial court did not err in submitting the case to the jury. A factual question existed as to scope of defendant's participation in the offense. It would have been error for the trial court to have directed a verdict at the close of the evidence.

AFFIRMED.