

IN THE COURT OF APPEALS OF IOWA

FILED

JAN 26 1982

CLERK SUPREME COURT

STATE OF IOWA,

Plaintiff-Appellee,

vs.

ALAN KEITH VON HAGEN

Defendant-Appellant.

Filed January 26, 1982

163

1-378

86184

Appeal from Emmet District Court, Charles H. Barlow, Judge.

Defendant appeals from his convictions for delivery of a controlled substance for profit in violation of section 204.401(1)(b), The Code 1979, and possession of a controlled substance in violation of section 204.401(3), The Code 1979, claiming (1) the evidence was insufficient to support a finding the delivery was for profit; (2) the verdict forms should have been amended to show a finding of accommodation; (3) the State should not have been allowed to cross-examine defendant about the nature of a 1976 felony conviction; and (4) the enhanced sentencing provisions of section 204.13, The Code 1979, should not have been applied in the absence of a specific finding the substance delivered for profit was not marijuana. CONVICTION AFFIRMED, SENTENCE VACATED AND CASE REMANDED FOR RESENTENCING.

Loren Mitchell, Estherville, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Roxann M. Ryan Assistant Attorney General, for plaintiff-appellee.

Considered by Oxberger, C.J., and Donielson, Snell, Carter, and Johnson, JJ.

Defendant appeals from his convictions for delivery of a controlled substance for profit in violation of section 204.401(1)(b), The Code 1979, and possession of a controlled substance in violation of section 204.401(3), The Code 1979, claiming (1) the evidence was insufficient to support a finding the delivery was for profit; (2) the verdict forms should have been amended to show a finding of accommodation; (3) the State should not have been allowed to cross-examine defendant about the nature of a 1976 felony conviction; and (4) the enhanced sentencing provisions of section 204.413, The Code 1979, should not have been applied in the absence of a specific finding the substance delivered for profit was not marijuana. We affirm defendant's conviction and remand for resentencing by the district court.

Defendant, Alan Keith Von Hagen, was charged with possession and delivery of a controlled substance. At trial, defendant admitted delivering approximately one-half ounce of marijuana and twenty-five "white cross" amphetamine tablets to Steven Kopp, an undercover police officer for the city of Estherville. The jury returned a verdict of guilty on both counts. The trial court, concluding the mandatory sentencing provisions of section 204.413, The Code 1979, were applicable, sentenced defendant to a term not to exceed five years for delivery of a controlled substance for profit, and to a term of 120 days for possession of a controlled substance.

I. Defendant initially claims there was insufficient evidence of "profit" or "purpose to profit" to support the jury's verdict finding defendant guilty of delivery of a controlled substance for profit. We see no merit in defendant's argument.

In reviewing a challenge based upon insufficiency of the evidence, we view the evidence in the light most favorable to sustaining the verdict. State v.

Hillsman, 281 N.W.2d 114, 116 (Iowa 1979). We accept, as established, all reasonable inferences tending to support the jury's conclusion. State v. Overstreet, 243 N.W.2d 880, 884 (Iowa 1976). Additionally, we need to consider only evidence supporting the verdict, whether contradicted or not, since resolution of questions of fact and the credibility of witnesses is the duty of the factfinder. Id. Thus, a finding of guilt by the jury is binding on this court unless we conclude the verdict is without substantial support in the record or clearly contrary to the weight of evidence in the record. Id.

In the case at bar we find substantial evidence indicating defendant delivered a controlled substance for profit. Undercover officer Kopp testified he purchased twenty-five amphetamine tablets and approximately one-fourth ounce of marijuana from defendant for thirty dollars. Defendant testified to purchasing an ounce of marijuana for forty-five dollars and one hundred amphetamine tablets for twenty-five dollars. Simple arithmetic would indicate the cost to defendant of the drugs sold to officer Kopp was \$17.50 (one-fourth ounce of marijuana at \$45 per ounce plus twenty-five white cross tablets at \$25 per 100 tablets equals \$11.25 plus \$6.25, for a total of \$17.50). The record indicates defendant refused Kopp's original offer of twenty-five dollars for the drugs but accepted thirty dollars. Even assuming one-half ounce of marijuana was purchased by Kopp, defendant's cost of the drugs (\$28.75) was still less than the thirty dollars he received in exchange for the drugs. Given "profit" is defined as "the excess of returns over expenditures," State v. Hillsman, 281 N.W.2d 114, 116 (Iowa 1979), there was substantial evidence from which the jury could conclude the defendant profited, or intended to profit, from the delivery of the controlled substances to officer Kopp. Certainly a reasonable inference from defendant making an actual profit is the defendant intended to profit from the transaction. Consequently, we find no merit in the argument asserted by defendant.

II. Defendant asserts the trial court erred in submitting the uniform verdict forms to the jury without his proposed amendments. Defendant would amend verdict form No. 1, which states, "We, the jury, find the Defendant Alan Keith Von Hagen guilty of the crime of Delivery of a Controlled Substance for Profit" by adding the phrase "and not for accommodation" to the end of the sentence, and would amend verdict form No. 2, which stated, "We, the jury, find Defendant Alan Keith Von Hagen guilty of the crime of Delivery of a Controlled Substance." by adding the phrase "for accommodation." Defendant claims, without the amendments to the verdict forms as requested, Instructions 10 and 14 would be confusing and would place the burden upon defendant to show the delivery was an accommodation and not for profit. We see no merit in defendant's argument.

Instruction 10, in part, provides, "you must find the defendant not guilty of Delivery of a Controlled Substance for Profit, unless the State establishes by evidence beyond a reasonable doubt. . . 3. That the delivery by the defendant was for the purpose of making a profit." Clearly Instruction 10 places the burden of proving intent to profit upon the State. Contrary to defendant's assertion, Instruction 14 does not shift that burden. Instruction 14 initially defines profit and then states, "However, if a person delivers a controlled substance to another as a favor or kindness or in an act of friendship or assistance to that person, then the delivery is not for profit." Since the instructions clearly place the burden to prove intent to profit upon the State, and the instructions are presumed proper by defendant's failure to object, see State v. Wellington, 264 N.W.2d 739, 742 (Iowa 1978), the prejudice asserted by defendant is illusory. There being no prejudice to defendant from the instructions, the amendments to the verdict forms proposed by defendant would be useless surplusage. Consequently, the trial court properly rejected defendant's proposed amendments to the verdict forms. There was no error by the trial court.

III. Defendant claims the trial court erred in allowing the prosecution to examine defendant about a prior felony conviction.

Under State v. Martin, 217 N.W.2d 536 (Iowa 1974), evidence of a defendant's prior felony conviction is admissible if "(1) the felony involved dishonesty or false statement, and (2) the judge determines any danger of unfair prejudice does not substantially outweigh the probative value of such prior felony conviction, taking into account such factors as (a) nature of the conviction, (b) its bearing on veracity, (c) its age, and (d) its propensity to improperly influence the minds of the jurors." Id. at 542. The balancing process required by Martin is committed to the sound discretion of the trial court. Id. at 544. We will reverse the trial court's ruling admitting evidence of the prior felony conviction only upon a showing the court abused its discretion.

We find the trial court did not abuse its discretion in admitting evidence of defendant's prior conviction for larceny. The defendant's conviction for larceny is a crime involving dishonesty, State v. Webb, 309 N.W.2d 404, 413 (Iowa 1981), thus overcoming the first of Martin's prerequisites for admitting evidence of a prior felony conviction. The record also contains evidence the trial court balanced the probative nature of the felony conviction against the potential prejudicial effect of admitting the evidence. The court explicitly considered the factors required by Martin. The court also indicated, upon conclusion of the balancing process, not only could the existence of the prior felony conviction be brought out on cross-examination, but the prosecutor could also inquire into the nature of the conviction. The court thus properly exercised its discretion in allowing the prosecutor to expose the nature of defendant's prior felony conviction to the jury.

IV. Finally, defendant asserts the trial court erred in applying the mandatory minimum sentencing provisions of section 204.413, The Code 1979,

because the minimum sentence is mandatory only when the defendant intends to profit from the sale of a controlled substance, such as amphetamines, but is not applicable when the sale was an accommodation sale not for profit or was a sale of marijuana. The state concedes error on this issue. Without deciding on the applicability of section 204.413 on the merits, because of the state's position and because it cannot be determined whether the jury found the sale for profit was amphetamines or was marijuana, we remand with directions. Since the sale of amphetamines for profit and the sale of marijuana for profit are both Class D felonies, judgment shall be entered for one felony specifying that the provisions of section 204.413 shall not apply. We vacate the sentence and remand this case for resentencing by the district court.

CONVICTION AFFIRMED, SENTENCE VACATED AND CASE REMANDED FOR RESENTENCING.