



160

IN THE COURT OF APPEALS OF IOWA CLERK SUPREME COURT

STATE OF IOWA,	)	
Appellee,	)	Filed May 20, 1977
v.	)	
ARCHIE RAY NEWMAN,	)	<u>131</u>
Appellant.	)	59419

Appeal from Polk District Court - Wade Clarke, Judge.

Appeal from conviction and sentence for delivery of a controlled substance. Affirmed.

Richard C. Turner, Attorney General, Richard H. Doyle IV, Assistant Attorney General, and Dan Johnston, Polk County Attorney for appellee.

Robert A. Wright, of Des Moines, and Naomi S. Mercer, of Des Moines, for appellant.

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

CARTER, J.

The defendant, Archie Ray Newman, appeals his conviction for the crime of delivery of a schedule I controlled substance, in violation of chapter 204.401(1), The Code. Appellant urges five assignments of error, evolving from both the trial on the delivery charge and from the subsequent section 204.410 accommodation hearing. We address them in the order urged by defendant.

I. Defendant urges the trial court erred in overruling the defendant's motion for directed verdict or new trial because (1) there was no corroboration of the informer-Marilyn Allen's testimony and; (2) the trial court failed to sua sponte give an instruction regarding the informer's dubious reliability.

We find no error. First, no corroboration of the informer's testimony was required, even though a heroin addict, because the informer-buyer was not an accomplice. State v. Johnson, 219 N.W.2d 690, 694 (Iowa 1974), State v. McCullough, 226 N.W.2d 216 (Iowa 1975). Second, the defense attorney did not object or take exception to the instructions as given. A party may not sit by and permit the trial court to commit inadvertent error without protest, and then complain for the first time to this court; even when the argument on appeal is that the court should have given the instruction sua sponte. State v. Lyon, 223 N.W.2d 193, 194 (Iowa 1974).

II. Defendant urges that the trial court erred in refusing to hold the State to its bill of particulars.

Prior to trial by jury on the delivery charge, the defendant made a motion for a bill of particulars under section 773.6, The Code. One of the requests contained in the motion was,

"5. Require the State to set forth other sales which were made by defendant which the State intends to use as evidence in this case."

The State's answer was,

"5. No."

-2-

During trial on the delivery charge, evidence of prior sales made by the defendant was not offered. However, after conviction on the delivery charge, a jury trial on the accommodation issue commenced, during which the following question was asked by the prosecutor to Marilyn Allen, an informer:

"Q. Okay. How many times have you had occasion to purchase heroin from Mr. Newman?

Mr. Wright: Objection. Mistrial."

Following this exchange a record was made out of the presence of the jury by the defense attorney asking for a mistrial on the ground that the bill of particulars had been violated. Following discussion, the trial court judge rejected the request for mistrial and the trial continued. Marilyn Allen was then allowed to testify as to numerous buys from the defendant.

We recognize the rule that a bill of particulars normally restricts the proof to the matters specified. *State v. Salter*, 162 N.W.2d 427 (Iowa 1968). But it is obvious that the request for information upon which defendant relies, although designated as a bill of particulars, was in fact a discovery motion. A discovery motion and the response thereto does not necessarily limit the proof. The burden was upon defendant to establish that sufficient prejudice resulted from the State's incomplete response to require a mistrial. We note no effort was made to gain a continuance. We believe the denial and the motion for mistrial has not been demonstrated to be an abuse of the trial court's discretion.

III. Defendant further urges that the trial court erred by making the statement in chambers during the accommodation hearing that "this is just a trial to determine penalty." Appellant argues that the above statement indicates that the trial court conducted the accommodation hearing as if it were simply a sentencing procedure, and argues that this is a misapprehension

as to the purpose of an accommodation hearing. We find no merit in this claim. We find appellant's characterization of the manner in which the accommodation hearing proceeded to be inaccurate, and the trial court's characterization of accommodation hearing in this isolated instance to be without legal significance.

IV. Defendant urges that the trial court erred in consistently permitting the State to present inadmissible, prejudicial evidence, over objection of defense counsel. Defendant's objections are based on the testimony of Officers Edwards, Zimmerman and Robinson. We find no error. The initially questioned testimony was foundational, not hearsay as urged. Subsequent testimony was expert testimony, based upon proper foundation consistent with the guidelines of *State v. Ogg*, 243 N.W.2d 620, 622 (Iowa 1976). Admission or exclusion of expert opinion testimony rests largely in the judgment of the trial court and its ruling will only be reversed upon a clear showing of abuse of discretion. *Ganrud v. Smith*, 206 N.W.2d 311, 314 (Iowa 1973), *Dougherty v. Boyken*, 261 Iowa 602, 607, 155 N.W.2d 488, 491 (1968). We find no abuse of discretion in the present case.

V. Lastly, defendant urges that it was error for the trial court to deny defendant's motions for new trial and arrest of judgment. The trial court did not enter formal ruling on these motions but the overruling thereof inheres in the judgment and sentence. In said motions defendant reasserts the grounds previously considered and, relying upon the proposition originally recognized in *Trulock v. State*, 1 (Clarke) Iowa 515 (1855), further asserts that while no one error assigned may be sufficient to warrant a reversal, all considered together may be such as to show that the defendant has not had a full, fair, impartial trial. Recognizing that principle we have carefully examined the entire record and find nothing therein to warrant disturbing the judgment from which this appeal was taken.

Finding no grounds for reversal, we affirm.