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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	488
Plaintiff-Appellee,	)	Filed June 25, 1985
vs.	)	5-219 84-1201
DIANA POOR,	)	
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Buchanan County, L. John Degnan, Judge.

Defendant appeals from judgment and sentence for delivery of a controlled substance, asserting that the trial court erred: (1) in refusing to permit the defendant to reveal to the jury and to make an offer of proof on the total amount of money the state paid its confidential informant, and (2) in failing to state adequate and proper reasons for imposing a jail sentence on defendant. REMANDED.

Raymond E. Rogers, Assistant Appellate Defender, for defendant-appellant.

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

Heard by Oxberger, C.J., Donielson, and Hayden, JJ.

OXBERGER, C.J.

We remand the defendant's case based on errors made during her trial.

The defendant, Diana Poor, was convicted following a jury trial on July 12, 1984, of delivery of a controlled substance, an accommodation offense, in violation of sections 204.401(1)(b), .401(3), .410 (1985) of the Code. The prosecution's evidence showed that the defendant's cousin was married to Ronald Millard. Millard had known the defendant for about ten years, was unemployed, and receiving ADC payments when he says he volunteered to perform undercover drug investigations for police. Millard worked for the State from 1982 to April of 1983. On August 16, 1984, he says the defendant came to his house and proposed to sell him an ounce of marijuana for forty dollars. Although detectives searched Millard, placed a radio transmitter on him, and gave him forty dollars, the defendant never came to the park where they were allegedly to meet. Later in the evening, Millard says the defendant came to Millard's house and said she could make the sale now, but Millard arranged for the exchange to occur the next day. Millard was again given forty dollars and a radio transmitter. Millard then went to an apartment he said defendant was living in. After a few minutes in the apartment, Millard returned to the park where he had earlier been given the money, gave the deputy he met there the marijuana, and was given twenty dollars by the deputy sheriff. The deputy said the conversation that occurred during the alleged buy could not be recorded because of faulty equipment and he could not identify the woman's voice he heard as belonging to defendant.

The defense showed that Poor was not living in the apartment at the time of the drug purchase and had moved into her mother's house at the beginning of August. She said her cousin had approached her earlier about obtaining marijuana for Millard, but she told her cousin she did not know how to obtain the drug. Another cousin of the defendant rebutted Millard's testimony that he had not smoked marijuana in the last twelve years, and said he had seen Millard smoking marijuana in July 1982. The defendant's sister said she saw Millard smoking marijuana at his house in late 1982 or early 1983 and had seen marijuana plants growing in his house.

Millard testified that he became a police informant because he was a good citizen and that it was not for the purpose of obtaining money for the work. On direct examination, he said he had received twenty dollars for the arrest of his wife's cousin. The defense attempted to show that Millard, rather than being merely a citizen concerned about drug trade, found the business of being an informant to be lucrative. The following colloquy occurred during cross-examination of Millard:

> Q. How many other cases were you involved with for the Dubuque County Police—Sheriff? A. I was told not to answer that, I think.
>
> Q. Why not? A. I don't know the reason why not, I was just told not to.
>
> THE COURT: How is this relevant, Mr. Sauer?
>
> MR. SAUER? I wasn't aware of the fact that there had been any objection made, Your Honor.
>
> THE COURT: The Court is making the objection. I am asking you how it is relevant. If it is not relevant, proceed to a different question.

Later, the defense attempted to delve into the subject again:

> Q. You were involved in at least five to six drug buys here in Buchanan County; were you not? A. I don't know if I'm a supposed to answer that or not.
>
> Q. Who is it that is providing you—telling you whether or not you are supposed to answer?
>
> MR. VANDER HART: Your Honor, I am going to object to that question. It's irrelevant to this case.
>
> THE COURT: Any other drug buys are irrelevant to this case. The objection is sustained.
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> ***
>
> Q. Where did you acquire your knowledge of what marijuana smells like from? A. From working undercover.
>
> Q. Did you do some undercover before you allegedly made this buy on August 16, 1982?
>
> MR. VANDER HART: That question has been asked and it's been objected to. It's irrelevant to this case.
>
> THE COURT: Is that an objection or a statement?
>
> MR. SAUER: Objection, Your Honor.
>
> THE COURT: If it is an objection, it is sustained.

While cross-examining the deputy sheriff who worked with Millard, the defense again asked about money paid to Millard:

> Q. Did you know the total amount of money that you have paid Mr. Millard as a result of his informant activities?

MR. VANDER HART: Your Honor, I am going to interpose an objection. That is irrelevant to this case.

THE COURT: It is irrelevant unless you want to state for this particular case, outside of the area, the objection is sustained.

MR. SAUER: Is he being paid any additional sum of money other than the twenty dolars for his testimony here in Court today?

MR. VANDER HART: Your Honor, same objection.

THE COURT: Same ruling.

MR. SAUER: Your Honor, could we make an offer of proof outside the presence of the jury?

THE COURT: At the end of the session today.

At the end of the session, the defense says, the court did not allow the offer of proof to be made.

An offer of proof is made during trial to give the trial court a basis for its ruling and to allow this court to give proper review to claimed errors which occurred. State v. Ritchison, 223 N.W.2d 207, 212-13 (Iowa 1974). It is error not to allow such an offer of proof to be made. State v. Harrington, 349 N.W.2d 758, 760 (Iowa 1984); Parrish v. Denato, 262 N.W.2d 281, 286 (Iowa 1978).

An offer of proof should have been allowed. The State claims that the court did allow an offer of proof to be made, pointing to the following exchange:

THE COURT: Let the record show that Mr. Sauer, attorney for the defendant, has asked that he be allowed to make an offer of proof upon the question being asked the witness Joel Dryer whether or not Mr. Millard was paid anything extra for his testimony here today. The Court sustained an objection made by the County Attorney. This is your opportunity to make your offer of proof.

MR. SAUER: Can the witness be allowed to answer that question?

THE COURT: I do not know. I am going to find out first whether or not you have anything to offer and what it is.

MR. SAUER: Well, I assume that he was at least paid witness fees.

THE COURT: Anybody would assume that. That is not extra.

MR. SAUER: I don't know that amount, Your Honor.

THE COURT: Okay, so what you are saying is, that you want the record to show that this witness is going to be paid the regular witness fees. And if you want to make that a matter of record, we can do that tomorrow morning at the same time that we take up the matters concerning this report.

> I hope that during the time that we have between now and tomorrow morning, that you will pay some attention to that report, Mr. County Attorney, and see to it that it does not reflect any other case other than the one we are talking about.
>
> MR. SAUER: Your Honor?
>
> THE COURT: Sir?
>
> MR. SAUER: Also concerning the total amount of money that Mr. Millard may have been paid by the County, could the witness answer that question?
>
> THE COURT: Only about this case. That is all that is relevant. We are only talking about this case.

We do not agree that the defendant was allowed to make an offer of proof. We also reject the State's contention that failure to offer proof in this instance leaves nothing for this court to review. The error occurred in not allowing the proof to be made. We further disagree that there was no prejudice to defendant as a result of the error.

The State claims that when it is obvious from the record what the offer of proof would show, the record may be used as the missing offer of proof. State v. Harrington, at 760. The State says from the record before us it is obvious that the information sought went to Millard's participation in subsequent, unrelated drug investigations and argues this is irrelevant. We do not find the answer obvious from the record. As the record cited above indicates, one of the questions went to Millard's undercover activity prior to his involvement with defendant. We are also not convinced that the answers Millard might have given would be irrelevant even if purportedly related to subsequent drug transactions, since the court has indicated the defendant can show how much money was paid to an undercover informant. State v. Peterson, 219 N.W.2d 665, 671 (Iowa 1974); State v. Kimball, 176 N.W.2d 864, 868 (Iowa 1970); State v. Ceranek, 199 Iowa 47, 48, 201 N.W. 53 (1924); State v. Carroll, 85 Iowa 1, 2-4, 51 N.W. 1159, 1160 (1892). In any event, we must know what Millard's answer would be before making such a determination. We remand for the limited purpose of making an offer of proof, after which the appeal shall be returned here for further action.

REMANDED.