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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)
Appellee,) Filed April 26, 1979
vs.)
DONALD LEONARD HAWES,) 758/61151
Appellant.)

Appeal from Polk District Court - A. M. Critelli, Judge.

Defendant appeals from conviction of the crime of false representation in violation of Iowa Securities Law, section 502.28, The Code, alleging errors in instructions to the jury. - REVERSED AND REMANDED.

Raymond Rosenberg, Des Moines, for Appellant.

Thomas J. Miller, Attorney General of Iowa, John R. Perkins, Assistant Attorney General, and Dan Johnston, Polk County Attorney, for Appellee.

Heard by Oxberger, C. J., and Snell, Carter and Johnson, JJ. Donielson, J., takes no part.

SNELL, J.

Defendant, Donald Leonard Hawes, was convicted by a jury of the crime of false representation in violation of Iowa Securities Law § 502.28, The Code. The conviction on sixteen counts in separate indictments consolidated for trial arises out of the sale of securities of United Funding Investment Corporation, an Iowa Corporation. Defendant's motion for new trial was denied after which he appealed alleging errors in the court's instructions.

United Funding Investment Corporation was incorporated in 1973, the sole officer being defendant Hawes. Fifty thousand shares of the 100,000 authorized capital stock were issued, all to Hawes. The purpose of the corporation was to engage in various activities related to business financing. Hawes caused a prospectus to be drawn up for United Funding and gave the attorney who drafted it the information that went into it. The prospectus provided the information to prospective purchasers of debentures offered by United Funding. These debentures were to pay 12% and were sold by a salesman employed by outside brokers, who were told the nature of United Funding's business in meetings with Hawes. The money raised in this manner was loaned to a number of companies, many of which were associated with Hawes or his relatives or friends. When the loans were not paid back to United Funding it went into bankruptcy.

Section 502.28, The Code, provides:

> Any person, firm, association, company or corporation or any agent or representative thereof, whether subject to the provisions of this chapter or otherwise, that sells, offers for sale, or negotiates for the sale of any securities within this state, and knowingly makes any false representations or statements as to the nature, character, or value of such security, or the amount of the earning power of such security whether in the nature of interest, dividends, or otherwise or knowingly makes any other false or fraudulent representation to any person for the purpose of inducing said person to purchase said security, or conceals any material fact in the advertisement or prospectus of said security for the purpose of defrauding the purchaser, shall be deemed guilty of a felony and upon conviction thereof shall be punished by a fine of not less than $500 nor more than $5000 or by imprisonment in the penitentiary or reformatory for not more than five years or by both such fine and imprisonment.

Several errors in instructions are alleged on appeal. We direct our attention

to the assignment we deem critical. The trial court, in Instruction No. 10, told the jury the following:

> The state, in order to establish element 2(a) of Instruction No. 8, must show by evidence beyond a reasonable doubt that the 'false or fraudulent representations' occurred in the following particulars: . . . (c) that the companies to whom the defendant would loan money would give substantial collateral to secure the loans when, in fact, the defendant did not get any or at best only minimal or inadequate collateral from most of the companies to whom he loaned money. . . .

Instruction No. 8 provided that:

> Before the defendant can be found guilty of the offenses charged in the indictments, the state must establish by the evidence beyond a reasonable doubt each and all of the following elements as to each indictment: 2. that the defendant: (a) knowingly made any materially false or fraudulent representations as set out in Instruction No. 10 to the persons named in the indictment for the purpose of inducing that person to purchase a security, . . .

Hawes asserts that the evidence will not support a finding that he represented he would receive substantial collateral when making loans or that he knew or intended at the time he made the representation not to get collateral from the companies to whom he intended to make loans. Error was preserved on these issues in defendant's motion for directed verdict and motion for a new trial.

In Dierking v. Bellas Hess Superstore, 258 N.W.2d 312, 315-16 (Iowa 1977) the court quotes with approval from Fowler v. Benton, 229 Md. 571, 579, 185 A.2d 344, 349 (1962): "Ordinarily, however, the representation must be definite, and mere vague, general, or indefinite statements are insufficient, because they should, as a general rule, put the hearer upon inquiry, and there is no right to rely on such statements."

The representation regarding collateral in the prospectus that accounts receivable financing will usually involve a collateral pledge falls considerably short of supporting the instruction. In reviewing the testimony of salesmen for United we do not find representations that "substantial collateral" would be received. We also find an insufficiency of evidence to support a finding that at the time any such representation was made. Hawes knew he did not intend to obtain substantial collateral for loans made. In this regard, we also note error in the form of Instruction No. 8 which establishes the element of the offense to be failure to

obtain security rather than intent to obtain security.

The State attempts to establish intent by showing that a number of loans were made without any security. However, the evidence also shows the making of numerous loans secured by a mortgage, inventory or receivables or other collateral. We do not believe the hindsight view of these transactions establishes the requisite intent not to obtain substantial collateral. It is reversible error to submit an issue to the jury on which there is not sufficient evidence in the record to support the jury's findings. Grover v. Neidauer, 216 Iowa 631, 635, 247 N.W. 298, 300 (1933); Borough v. Minneapolis & Saint Louis Railway Co., 191 Iowa 1216, 1223, 184 N.W. 320 323 (1921). We conclude error occurred in the giving of this instruction. The verdict in this case was a general verdict. It cannot be upheld so long as the jury could have based its decision on an erroneous submission of an issue. Morrissey v. National Maritime Union of America, 544 F.2d 19, 26-27 (2d Cir. 1976); Patton v. Wells, 121 F. 337, 339-40 (8th Cir. 1903); Grover, 216 Iowa at 636, 247 N.W. at 300.

Reversed and remanded for new trial.

All judges concur, except Oxberger, C. J., who dissents.

OXBERGER, C. J. (dissenting)

I disagree with the majority's conclusion that there was insufficient evidence to support the giving of Instruction No. 8. In my opinion, the record indicates several examples of misrepresentations to the effect that substantial collateral would be obtained from companies receiving loans from United Funding Investment Corporation. For instance, Roland Bimby testified that defendant's agent told him all investments would be backed up by collateral. Edna Frisbee stated that defendant's agent informed her that United Funding would be making secured investments. Mike McCormick, who sold United Funding bonds, testified that he discussed the business purposes of the corporation with defendant's agent and was told that the corporation's loans would be highly collateralized and that this collateral would consist of real estate worth more than the amount of the loans. He further testified that he informed investers in the corporation that its loans would be highly collateralized. Norris Mercure testified he was told by McCormick that the corporation would be buying second mortgages on real estate. Alan Robb, one of defendant's salesmen, testified defendant told him at a sales meeting that the corporation's loans would have adequate collateral. To me, "adequate collateral" implies an amount of security greater than "substantial collateral."

The instant case presents a myriad of complex and important questions which I believe this court ought to address. I cannot, however, support a reversal of defendant's conviction on the ground stated in the majority's decision.