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IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Appellee,	)	Filed September 9, 1977
v.	)	
KENNETH DAVID DODGE,	)	218
Appellant.	)	<u>58707</u>

Appeal from Polk District Court - Thomas S. Bown, Judge.

Defendant appeals his conviction on two counts of delivery of a controlled substance and resulting sentences. Affirmed.

Morris & Morris, of Des Moines, for appellant.

Richard C. Turner, Attorney General, Dan Johnston, Polk County Attorney, and Francis X. Sarcone, Assistant Polk County Attorney, for appellee.

Submitted to Allbee, C.J., and Donielson, Snell, Oxberger and Carter, JJ.

PER CURIAM

Defendant, Kenneth David Dodge, appeals his conviction on two counts of delivery of a controlled substance in violation of section 204.401(1), The Code. Errors asserted are discussed in order of their assignment.

I. *Motions for directed verdict.*

A. *Sufficiency of the evidence.*

Defendant argues that trial court erred in failing to grant his motions for a directed verdict, contending the State's evidence was insufficient to establish the elements of the crimes charged. In determining whether the motions for directed verdict were properly overruled, we view the evidence in the light most favorable to the State. A verdict of acquittal should not be directed if there is any substantial evidence supporting the charges. *State v. Overstreet*, 243 N.W.2d 880, 883 (Iowa 1976).

Our review of the record reveals that two state agents identified defendant as the person who delivered controlled substances to one of the agents at a certain gas station in Des Moines on December 5 and December 9, 1974. We are satisfied there was substantial evidence to permit the jury to determine whether defendant participated in the sales of the controlled substances.

B. *Alibi.*

Defendant asserts that the State failed to refute his alibi defense. Thus, according to defendant, in refusing to grant a directed verdict trial court impermissibly "shifted the burden of proof away from the State." This assertion is answered in *State v. Sallis*, 238 N.W.2d 799, 801 (Iowa 1976), where the court stated *inter alia*: "[T]he State's duty to negative the defense of alibi does not become an independent element in the charge. The State's duty to prove the defendant was present inheres in the regular elements of the offense; the State must

prove the defendant performed the acts alleged." By overruling the directed verdict motions, trial court did not shift the burden of persuasion on the alibi issue to defendant. Trial court merely ruled the State's evidence was sufficient to generate a jury question on the issue whether defendant delivered controlled substances on the occasions alleged. We agree with trial court's rulings.

II. Character witness testimony.

Defendant also complains that trial court improperly prevented Mr. Fred Owen from testifying as a character witness in defendant's behalf. The parties agree that this question is governed by *State v. Hobbs*, 172 N.W.2d 268 (Iowa 1969). As set out in *Hobbs* at 272, the third requirement for a proper foundation is: "(3) Whether there have in fact been comments concerning the party's reputation for a given trait. . . ." The remaining requirements proceed on the assumption that there were such comments. At trial, however, Owen specifically acknowledged that he had heard no such comments, saying, "I have never had anybody comment it was good or bad as far as his reputation." Nor was there any showing that Owen was in such a position that he would have heard "anything that was said concerning [defendant's] character or reputation." *Hobbs*, supra at 276. These deficiencies in foundation precluded Owen from testifying as to defendant's reputation.

That defendant argues Owen's proposed testimony went to defendant's credibility, rather than the likelihood of defendant having committed the crimes, does not alter the foundation standard. *State v. Sill*, 199 N.W.2d 47, 49 (Iowa 1972). The prosecutor's objection was properly sustained.

AFFIRMED.