

**IN THE COURT OF APPEALS OF IOWA**

No. 3-341 / 12-0376  
Filed May 15, 2013

**STATE OF IOWA,**  
Plaintiff-Appellee,

**vs.**

**BRADLEY JOSEPH GREGG,**  
Defendant-Appellant.

---

Appeal from the Iowa District Court for Woodbury County, Michael S. Walsh, Judge.

A defendant appeals arguing insufficient evidence supports his conviction and the district court abused its discretion in refusing to provide a jury instruction.

**AFFIRMED.**

Mark C. Smith, State Appellate Defender, and Rachel C. Regenold, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Linda J. Hines, Assistant Attorney General, Patrick Jennings, County Attorney, and James Loomis, Assistant County Attorney, for appellee.

Considered by Doyle, P.J., and Danilson and Mullins, JJ.

**MULLINS, J.**

Bradley Gregg appeals from his conviction for utilizing a person under the age of eighteen to traffic a controlled substance, in violation of Iowa Code section 124.406A (2011). Gregg alleges there was insufficient evidence to prove one of the two alternative theories the jury could have used to convict him, namely that he “recruited” a minor to traffic a controlled substance. Gregg also contends the district court abused its discretion by not incorporating specific definitions of “agreement” in its instruction for conspiracy. We find sufficient evidence supports Gregg’s conviction, and the district court did not abuse its discretion in denying Gregg’s requested instruction. Accordingly, we affirm.

**I. BACKGROUND FACTS AND PROCEEDINGS**

A jury could have found the following facts. Sometime in June or July 2011, Jeremy Shortenhaus purchased marijuana from Gregg, a family friend. Shortenhaus told Gregg he could make him “quite a bit of money” by selling marijuana. Around that time Shortenhaus had moved in with Gregg after Shortenhaus’s father kicked him out of the house. When Shortenhaus suggested selling marijuana for Gregg a second time, Gregg told him to “call some people up” and “get things rolling.” Shortenhaus testified that he sold marijuana that Gregg provided and gave Gregg the money.

Shortenhaus was arrested for selling marijuana on July 8, 2011. He was seventeen years old at the time. He agreed to testify against Gregg as part of his plea agreement. Officers executed a search warrant on Gregg’s apartment and

discovered marijuana and related paraphernalia in various rooms and common areas, including Gregg's bedroom and Shortenhaus's bedroom.

The State charged Gregg with distribution of a controlled substance to a person under eighteen years of age; utilizing a person under the age of eighteen to traffic a controlled substance; possession with intent to deliver a controlled substance—marijuana; a drug tax stamp violation; and carrying a concealed weapon. The State also amended the trial information to add the enhancement for distribution of a controlled substance within 1000 feet of a school. The case proceeded to trial, and the jury found Gregg guilty of utilizing a person under the age of eighteen to deliver marijuana and guilty of the lesser included offense of possession of marijuana on each of the remaining three counts, which were merged at sentencing.<sup>1</sup> On the conviction for using a person under the age of eighteen to traffic a controlled substance, Gregg received a ten-year suspended sentence, four years of probation, and a \$1000 fine. Gregg now appeals only his conviction for using a person under eighteen years of age to traffic a controlled substance.

## **II. SCOPE AND STANDARD OF REVIEW**

Our review of challenges to the sufficiency of the evidence is for the correction of errors at law. *State v. Sanford*, 814 N.W.2d 611, 615 (Iowa 2012). We consider all the evidence in the light most favorable to the State including all reasonable inferences. *Id.* The jury's verdict will be upheld if it is supported by

---

<sup>1</sup> Gregg pleaded guilty to the crime of carrying a dangerous weapon, so the fifth charge was not submitted to the jury. Gregg does not appeal this conviction.

substantial evidence, which is evidence that can convince a rational jury that the defendant is guilty beyond a reasonable doubt. *Id.*

A district court's failure to give a jury instruction is reviewed "for an abuse of discretion." *In re Det. of Palmer*, 691 N.W.2d 413, 416 (Iowa 2005). "Error in giving or refusing jury instructions does not merit reversal unless it results in prejudice . . . ." *State v. Kellogg*, 542 N.W.2d 514, 516 (Iowa 1996). "The requirement that a jury instruction error result in prejudice before a conviction will be reversed mirrors the harmless-error analysis this court undertakes for any alleged error in a criminal trial." *State v. Hanes*, 790 N.W.2d 545, 550 (Iowa 2010). Where an error in the jury instructions is not of constitutional dimension, the reviewing court asks whether "it sufficiently appear[s] that the rights of the complaining party have been injuriously affected by the error or that he has suffered a miscarriage of justice." *Id.*

### **III. ANALYSIS**

#### **A. Sufficiency of the Evidence**

This case was submitted to the jury with alternate theories. The jury could find Gregg either "conspired with" or "recruited" a person under the age of eighteen for the purpose of delivering or manufacturing a controlled substance. See Iowa Code § 124.406A. The instruction stated:

1. On or about the 1st day of June, 2011, to on or about the 8th day of July, 2011, the Defendant conspired with or recruited Jeremiah Shortenhaus for the purpose of delivering marijuana.
2. Jeremiah Shortenhaus was under 18 years old at the time.
3. The Defendant was 18 years or older.

Gregg does not attack the sufficiency of the evidence with respect to the conspiracy theory but asserts there is insufficient evidence to prove he recruited Shortenhaus to deliver marijuana.

The State claims Gregg failed to preserve error through his motion for judgment of acquittal at trial because he did not specifically urge that the evidence was insufficient to prove he “recruited” a minor. We disagree. To preserve error on a challenge to the sufficiency of the evidence, a defendant “must make a motion for judgment of acquittal at trial that identifies the specific grounds raised on appeal.” *State v. Truesdell*, 679 N.W.2d 611, 615 (Iowa 2004). At trial, defense counsel challenged the sufficiency of the evidence “that Mr. Gregg actually utilized a person under the age of 18 to traffic a controlled substance” because there was “no showing of utilization.” Counsel asserted “there was a statement by Mr. Shortenhaus that indicated there was no agreement as to him trafficking anything for Mr. Gregg. He apparently just did it, according to him.” The specific issue raised on appeal is the sufficiency of the evidence with regard to one of the two theories of “utilization”—recruitment. While not a model of clarity, we find counsel adequately preserved error on this issue. Because error was preserved, we need not address Gregg’s ineffective assistance of counsel argument.

The jury was instructed they could find Gregg guilty if they found he conspired with or recruited Shortenhaus, but there is no indication as to which theory they accepted.

The rule in Iowa is that while the jury must be unanimous on whether a defendant committed a crime, when alternative modes or

theories of commission of a particular crime are presented, the jury need not be unanimous on a particular means of commission of the crime if substantial evidence to support each alternative [exists], and those alternative modes are not repugnant or inconsistent with [each] other.

*Gavin v. State*, 425 N.W.2d 673, 678 (Iowa Ct. App. 1988); see also *State v. Corsi*, 686 N.W.2d 215, 222 (Iowa 2004). However, if substantial evidence does not support each alternative theory, then the case has to be remanded for a new trial because we do not know whether the verdict rests on valid or invalid grounds. See *State v. Hogrefe*, 557 N.W.2d 871, 881 (Iowa 1996) (ordering a new trial when the evidence was only sufficient to support one of three theories of culpability submitted to the jury).

The question is whether a jury could find Gregg “recruited” a minor for the purpose of facilitating the transfer of drugs. The district court instructed the jury that “recruit” means “to seek out a person to perform a specific task or service.” Gregg argues that because Shortenhaus was the one who suggested he could sell marijuana for Gregg, there is no evidence in the record that Gregg “sought out” Shortenhaus to perform a task or service. The State counters that because Gregg provided Shortenhaus with the marijuana, expected it to be sold, and accepted the money from the sales, there is sufficient evidence of recruitment.

Both parties discuss *State v. Cartee*, 577 N.W.2d 649, 652 (Iowa 1998), the only reported case interpreting section 124.406A. In *Cartee*, the evidence suggested the defendant received money from his minor son and his son’s friends and used the money to purchase marijuana for them, also using a portion to provide drugs for himself. 577 N.W.2d at 651. While the jury instruction in that

case defined “recruit” as “to seek out a person to perform a specific task or service,” the court also cited Webster’s Ninth New Collegiate Dictionary 985 (1986) defining “recruit” as “to secure the services of: ENGAGE, HIRE.” *Id.* at 652. The court found sufficient evidence of recruitment because the jury could infer the defendant “engaged his minor son” in his drug dealings. *Id.*

Based on the court’s interpretation of the term “recruit” in *Cartee*, we conclude there is sufficient evidence that Gregg recruited a person under the age of eighteen for the purpose of facilitating the transfer of drugs. Even if the jury accepted Shortenhaus’s assertion that he was the one who initially suggested selling marijuana for Gregg, the evidence showed Gregg then told Shortenhaus to contact people he knew who would be interested in purchasing marijuana, provided Shortenhaus with the marijuana to sell, and collected the proceeds from Shortenhaus’s sales. The behavior between Gregg and Shortenhaus demonstrates, at the very least, a similar level of “engagement” in drug dealings as the behavior between the defendant and his minor son in *Cartee*. *See id.* Accordingly, we find sufficient evidence supports the jury’s verdict.

### **B. Jury Instructions**

Gregg contends the district court abused its discretion in denying his requested instructions regarding the definition of “conspiracy.” The district court provided the jury with the following definitions:

“To Conspire With” means that the Defendant knowingly acted with Jeremiah Shortenhaus to Deliver Marijuana, and that the Defendant had the specific intent to promote or facilitate the Delivery of Marijuana or that the Defendant knew that Jeremiah Shortenhaus had the specific intent to promote or facilitate the Delivery of Marijuana.

“Acted” means any act indicating the Defendant’s intent to accomplish the delivery of marijuana. The “act” itself by the Defendant does not have to be a criminal act.

Gregg requested the district court incorporate the following definitions of “agreement” and “mere association” as defined in the Iowa Criminal Jury Instructions 600.2 and 600.3:

600.2 Conspiracy—Agreement. The State must prove the defendant and (name(s) of alleged co-conspirator(s)) came to a mutual understanding (offense) would be attempted or committed. The agreement can be oral or written, informal or formal, and need not be detailed. It may be proven by direct or circumstantial evidence of a person’s words, actions or gestures.

600.3 Conspiracy—Mere Association. Merely because two or more persons associate with each other, or meet to discuss common interests or goals does not, by itself, establish an agreement or make one a member of a conspiracy.

The State contends the Iowa Criminal Jury Instructions for a conspiracy offense pursuant to Iowa Code section 706.1 are not necessary where the State did not charge Gregg with conspiracy to deliver a controlled substance. We agree. The State did not have to prove Gregg committed the criminal offense of conspiracy. It only had to prove Gregg conspired with Shortenhaus for the purposes of delivering marijuana. The requested instructions are not required with respect to the charge at issue. The district court concluded that it had accurately defined the phrase “to conspire with,” and would confuse the jury regarding the nature of the charge by adding the requested instructions.

“To conspire with” clearly contemplates some agreement or agreed action with another person. “Conspire” has been defined as “to make an agreement with a group and in secret to do some act: plot together” or “to concur or work to one end: act in harmony.” Webster’s Third New International Dictionary 485



(2002). The State correctly argues that it “need only show that Gregg ‘acted with’ Shortenhaus and that Gregg intended to promote or facilitate the delivery of marijuana or that he ‘acted with’ Shortenhaus knowing that Shortenhaus had the intent to promote or facilitate the delivery of marijuana.” The instruction actually given by the district court focuses on Gregg’s actions and knowledge, but requires the essential elements that Gregg intended to deliver marijuana and that he acted with Shortenhaus while one of them had the specific intent to deliver marijuana. Although the two challenged instructions that were given to the jury could be clearer, when the instructions are read together, we determine that the instructions were adequate.

Error in refusing to give a jury instruction does not merit reversal unless it results in prejudice. *Kellogg*, 542 N.W.2d at 516. We cannot conclude that failing to include the requested definitions in the conspiracy instruction resulted in any prejudice to the accused. For these reasons, the district court did not abuse its discretion in denying Gregg’s requested instructions.

**AFFIRMED.**