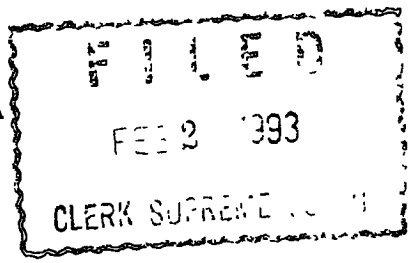
IN THE COURT OF APPEALS OF IOWA



No. 2-597 / 91-1928

STATE OF IOWA,

Plaintiff-Appellee,

vs.

WILLIE GUYTON, JR.,

Defendant-Appellant.

Appeal from the Iowa District Court for Black Hawk County, L.D. Lybert, Judge.

Willie Douglas Guyton, Jr., appeals from his convictions and sentences for possession of marijuana with intent to deliver, possession of cocaine with intent to deliver and interference with official acts. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Shari Barron, Assistant State Appellate Defender, for appellant.

Bonnie J. Campbell, Attorney General, Robert P. Ewald, Assistant Attorney General, Thomas J. Ferguson, County Attorney, and Shawn Wehde, Assistant County Attorney, for appellee.

Heard by Donielson, P.J., and Sackett, J., and Perkins, S.J.*

*Senior Judge from the 5th Judicial District serving on this court by order of the Iowa Supreme Court.

PER CURIAM

Defendant-appellant Willie Douglas Guyton, Jr., appeals from his convictions, following a jury trial, for possession of marijuana with intent to deliver, possession of cocaine with intent to deliver, and interference with official acts. Defendant contends (1) the trial court erred in allowing the State to introduce evidence that a large amount of drug trafficking occurs at the place where he was found in possession of drugs, (2) the State failed to prove beyond a reasonable doubt he possessed over one ounce of marijuana, and (3) his trial counsel was not effective. We find (1) the evidence of drug trafficking was not prejudicial, (2) there was substantial evidence to prove beyond a reasonable doubt defendant had over one ounce of marijuana, and (3) defendant has failed to show he was prejudiced by his counsel's performance. We affirm defendant's convictions.

Defendant was charged in one trial information with possession of marijuana with the intent to deliver and in a second trial information with possession of cocaine with the intent to deliver, and interference with official acts. The cases were consolidated for trial.

At trial, two officers testified to events preceding defendant's arrest on the marijuana charge. The officers

said on the evening of February 4, 1991, they conducted what they referred to as a "walk through" of a particular club in Waterloo. They said when they opened the door of the men's bathroom, they saw defendant and another man. The officers said they asked the men if they could search them and both men consented to a search. In searching defendant, the officers found twenty-one baggies of what they suspected was marijuana in defendant's pocket.

Defendant was taken to the police station where he signed a rights waiver form and was questioned. One of the officers testified defendant admitted he intended to sell the marijuana, but defendant denies he made such a statement.

An officer testified to events leading to the cocaine charge. He said on August 9, 1991, he was conducting a surveillance near the same club and, through binoculars, he saw a black man dressed in brown short bib overalls and a white t-shirt walk toward a man wearing a red shirt. The officer said he saw the man in the overalls reach into his pocket and pull out a baggie, remove a small object from the baggie and hand the small object to the man in the red shirt. He said the man in the red shirt gave the man in the overalls paper money and the man in the overalls rolled the baggie up and put the money and the baggie in his right front pants pocket.

The officer said he contacted two officers who were patrolling the area, gave them a description of the man in the overalls, and told them the direction the man was going.

One of the patrolling officers testified it took them two minues to arrive at the location where the man in the overalls had last been seen. She said she and her fellow officer saw a man in overalls, who she identified as defendant, sitting on the back porch of a house near the club. She said she approached defendant and asked if she could talk to him, and when defendant turned in the opposite direction she grabbed him, he twisted free from her grasp, but she and the other officer gained control of him and removed money and a single rock (later determined to be cocaine) from his right front pants pocket. Defendant also had money in his left front pocket and in his back pockets totaling $391.

Defendant was convicted for possession of marijuana with intent to deliver, possession of cocaine with intent to deliver, and interference with official acts. It is from this conviction defendant now appeals.

Defendant contends the trial court erred in allowing the State to introduce evidence over objection that a large amount of drug trafficking occurs at the club where he was arrested.

The State contends the trial court did not abuse its discretion in allowing testimony that the area where the arrest occurred was an area where drug dealers were known to operate. The State contends it was admissible because it showed why the officers were in the area. Evidence of other crimes is admissible to prove (1) motive, (2) intent, (3) absence of mistake or accident, (4) a common scheme or system of criminal activity embracing the commission of two or more crimes so related that proof of one tends to prove the other, or (5) identity of the person charged with the commission of the crime. State v. Oppedal, 232 N.W.2d 517, 524 (Iowa 1975).

There were no allegations defendant was linked to the other drug trafficking. Rather, the evidence allowed the jury to speculate on its relevance to the guilt of defendant. See Oppedal, 232 N.W.2d at 523. Defendant must be convicted by evidence he was guilty of the crime, not by evidence he was in an area where similar crimes occurred.

The State in contending the evidence was admissible relies in part on State v. Duncan, 312 N.W.2d 519, 522 (Iowa 1981). Duncan approves the State's introduction of evidence of the physical setting of the case, but is not dispositive of the issue of evidence of other crimes.

The evidence defendant's arrest was made in an area where unrelated arrests were made was not admissible, and the trial court abused its discretion in admitting it. We

do not, however, on this record find defendant was prejudiced by the evidence.

Defendant was charged with two different drug transactions. There is very substantial evidence defendant was guilty of the charges filed. We affirm on this issue.

Defendant contends there was not substantial evidence to prove he possessed over one ounce of marijuana; one ounce is 28.34 grams.

If defendant was in possession of one ounce or less of marijuana, defendant is guilty of an accommodation offense, see Iowa Code section 204.410 (1987), and is sentenced as though he committed a serious misdemeanor rather than a class D felony. See Iowa Code §§ 204.401(1)(b), 204.401(3).

The State introduced into evidence twenty-one baggies of plant material taken from defendant. Each separate bag contained between 1.2 and 1.9 grams of plant material. The State's evidence was the substance in the twenty-one bags collectively weighed 30.8 grams, or more than one ounce. Thirteen of the bags of plant material were tested, and the tests showed the thirteen bags contained marijuana. The weight of the thirteen bags of plant material tested was 19.6 grams, or less than one ounce. The balance of the twenty-one bags of plant material, or eight bags, was not tested. The weight of the untested bags of plant material was 11.2 grams.

The expert for the State who tested the plant material testified the eight bags of untested plant material were consistent with marijuana, but he would not testify the contents was marijuana. He said he could not determine the plant material was marijuana without testing it. He testified he had been asked to test material he thought was marijuana, but on testing found it was not.

The State responds the uncontroverted evidence is there was 30.8 grams in the baggies tested. The State characterized defendant's argument as absurd. The record made on the issue is confusing, but had the State carefully reviewed the record, it would have understood defendant's argument and been able to address it rather than merely characterizing it as absurd.

The thirteen bags of plant material tested and found to be marijuana did not collectively total more than one ounce. The State must produce sufficient evidence, direct or circumstantial, from which the jury is able to identify the substance as marijuana beyond a reasonable doubt. See Unites States v. Schrock, 855 F.2d 327, 334 (6th Cir. 1988). There is clearly direct scientific evidence 19.6 grams of the plant material is marijuana. There is no direct evidence the balance of the plant material is marijuana.

The question is whether there is substantial evidence to prove beyond a reasonable doubt that the untested plant

material is marijuana. The State may establish the identity of a drug through cumulative circumstantial evidence. Schrock, 855 F.2d at 334; see also State v. Osgood, 794 F.2d 1087, 1095 (5th Cir.) cert. denied, 479 U.S. 994, 107 S. Ct. 596, 93 L. Ed. 2d 596 (1986). Evidence is substantial when a reasonable mind could accept it as adequate to reach a conclusion. Dubuque Community Sch. Dist. v. Public Employment Relations Bd., 424 N.W.2d 427, 431 (Iowa 1988).

There is evidence the eight bags of untested plant material were found with the thirteen bags of plant material tested and found to be marijuana. There is evidence the plant material in the eight untested bags was consistent with marijuana.

The fact that the thirteen bags all tested positive for marijuana is substantial evidence that the remaining eight bags contained marijuana. Direct evidence that the bags contained marijuana is not necessary. See Iowa R. App. P. 14(f)(16).

Here, the evidence produced at trial, taken in the light most favorable to the State, reasonably leads to the inference that the defendant possessed over one ounce of marijuana.

Defendant further contends his trial counsel breached an essential duty in failing to object to allegedly improper opinion testimony and an improper comment on defendant's right to remain silent.

Opinion testimony is allowed if it will aid the jury in discharge of its duties and is based on some special training, experience, or knowledge of the witness. State v. Burrell, 255 N.W.2d 119, 123 (Iowa 1977). A witness may testify on the pattern or modus operandi of a certain offense and compare the facts of the case to it. State v. Olsen, 315 N.W.2d 1, 6-7 (Iowa 1982). The trier of fact is not obliged to accept opinion evidence, even from expert, as conclusive; it may be accepted in whole, in part, or not at all. See State v. Nunn, 356 N.W.2d 601, 604 (Iowa App. 1984). An officer testified he observed defendant allegedly passing the cocaine:

> Q. What occurred next from your surveillance position? A. Right then when I saw this transpiring I knew from my experience that it was a drug transaction going down. And so I contacted the officers in the patrol cars and told them what I had observed. . . .

Defendant's counsel did not object to this testimony. Later, on redirect examination, the same officer testified as follows:

> Q. And what - why did you make that request [for action by the other officers]?
>
> Defendant's counsel: Your Honor, I object. He's already gone into this. I don't believe it's proper redirect.
>
> The Court: Overruled.
>
> The Witness: The reason was again through my experiences and that a drug transaction had indeed occurred, and I wanted the officers to stop the subject with the brown bib overalls who had sold the drugs.

Defendant admits the objection by his counsel did not preserve error because substantially the same testimony had been introduced during the witness's direct testimony. Defendant contends his counsel, in failing to object to this testimony, breached on essential duty.

As a general rule, issues not presented in the trial court may not be raised for the first time on appeal. See Conner v. State, 362 N.W.2d 449, 457 (Iowa 1985). Review of an appellate issue is not precluded when failure to preserve error results from a due process denial of effective representation. See State v. Schoelerman, 315 N.W.2d 67, 73 (Iowa 1982). Defendant is not entitled to perfect representation, but only to that which is within the range of normal competency. Cuevas v. State, 415 N.W.2d 630, 632 (Iowa 1987). In order to prevail on this claim, defendant must show by a preponderance of the evidence that (1) his trial attorney failed to perform an essential duty, and (2) prejudice resulted. See State v. Risdal, 404 N.W.2d 130, 131-32 (Iowa 1987); Edman v. State, 444 N.W.2d 99, 101 (Iowa App. 1989). Our review of the evidence fails to show the result of the trial would have been different if not for the challenged testimony. During the direct examination of an officer who took defendant downtown following his arrest on the cocaine charge testified:

> Q. And during the time that you were in contact with the defendant at the scene and being transported, were you ever provided any

> explanation or information from the subject regarding the presence of the items that you saw? Seized? A. Not that I recall, no.

Defense counsel did not object to this testimony. Defendant contends the failure to object denied his right to the effective assistance of counsel because the above testimony constitutes an improper comment on defendant's right to silence. No prejudice resulted from either statement.

We affirm defendant's convictions.

AFFIRMED.

Donielson, P.J., and Perkins, S.J., concur; Sackett, J., concurs in affirming the conviction but would remand for resentencing.

SACKETT, J. (concurring in part and dissenting in part)

The State's only expert on the identification of the plant material testified:

> 1. he could not testify the contents were marijuana;
>
> 2. he could not determine plant material was marijuana without testing it; and
>
> 3. he had been asked to test material he thought was marijuana, but on testing it, found it was not marijuana.

I cannot say the evidence of baggies of plant material found with other baggies of plant material scientifically identified as marijuana is substantial evidence when there is no testimony the baggies of untested plant material in fact is marijuana and testimony of the State's expert is plant material cannot be identified as marijuana without testing.

I therefore would find defendant was only guilty of an accommodation offense and should have been sentenced accordingly. See Iowa Code § 204.410. I would affirm defendant's conviction, but remand to the trial court to resentence defendant on the marijuana charge under Iowa Code section 204.401(3).