

FILED

APR 25 1989

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)

Plaintiff-Appellee,)

vs.)

MICHAEL GORDON BOWES,)

Defendant-Appellant.)

392

8-683
87-1788

Appeal from the Iowa District Court for Clinton County
(9176), C.H. Pelton, Judge.

Defendant appeals from his convictions, following a jury trial, for possession of a controlled substance and possession of a controlled substance with intent to deliver. **AFFIRMED.**

William L. Wegman, State Public Defender, and James R. Huff, Assistant Public Defender, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Roxann M. Ryan, Assistant Attorney General, for plaintiff-appellee.

Considered by Schlegel, P.J., and Hayden and Habhab, JJ.

HAYDEN, J.

The defendant, Michael Gordon Bowes, appeals from his convictions, following a jury trial, for possession of a controlled substance and possession of a controlled substance with intent to deliver. We affirm.

A jury found defendant guilty of possession of a controlled substance in violation of Iowa Code section 204.401(3), and possession of a controlled substance with intent to deliver in violation of Iowa Code section 204.401(1)(a). Defendant was sentenced to thirty days in jail on a simple possession charge and to a prison term of up to ten years on the charge of possession with intent to deliver. Defendant has appealed.

As grounds for his appeal, Bowes contends the district court erred by allowing an expert witness to testify in his opinion the cocaine found in defendant's possession was of a greater quantity and a higher purity than one would possess for personal use.

The State argues that any alleged error has been waived by the defendant's failure to interpose a timely and proper objection. We agree.

The initial series of questions which defendant now complains proceeded as follows:

Q. [By the prosecutor.] If you are to assume a quantity of cocaine, ninety-four percent pure, the quantity being 139.57 grams, do you have any opinion as to whether or not that would be for distribution and for cutting?--I'm sorry, for cutting and for distribution, or for personal consumption? A. [By the agent] I do.

Q. What is that opinion? A. That opinion is that it is indicative of more than simple possession. It's a large enough quantity to indicate--

Mr. McKee: I'm going to object. I think he answered the question.

THE COURT: Overruled. You can proceed.

A. Quantity indicates more than personal use for possible redistribution.

For a party to properly preserve error in the trial court as to introduction of evidence, objections to evidence must be made at the earliest time after the grounds for objection become apparent. State v. Washington, 356 N.W.2d 192, 194 (Iowa 1984). If the objection to questions is late or follows the answer, a motion to strike, coupled with an application to have the objection precede the answer or excuse for tardiness, must be made. State v. Jones, 271 N.W.2d 761, 767 (Iowa 1978); State v. Washington, 356 N.W.2d 192, 194 (Iowa 1984).

Clearly, in this case, the defendant, was late in asserting his objection and further failed to ask for the objection to precede the answer or further to offer an excuse for tardiness. State v. Jones, 271 N.W.2d at 767. The net result, then, is the opinion testimony preceding the objection properly remained in the record.

The defendant also lists other instances where improper opinion testimony was allowed into the record despite proper objection. However, prejudice does not result from the court's failure to sustain the objection to improper opinion testimony when substantially the same evidence is

in the record without objection. State v. Brotherton, 384 N.W.2d 375, 379 (Iowa 1986). We therefore conclude the expert's later opinions regarding the purposes of which the defendant intended to use the cocaine would merely be cumulative to the previous admissible testimony and thus, no prejudice resulted from the trial court's failure to sustain defendant's later objections.

In addition, defendant, through a footnote, alleges ineffective assistance of counsel at trial.

Where the record on direct appeal is not adequate to permit us to resolve the issue, we preserve the defendant's claim for postconviction proceedings so the facts may be so developed. State v. Koenighain, 356 N.W.2d 237, 238 (Iowa App. 1984). This also gives the allegedly ineffective attorney the opportunity to explain his or her conduct. State v. Coil, 264 N.W.2d 293, 296 (Iowa 1978). We conclude there is an inadequate record for us to adjudicate the defense claim without counsel's explanation for his conduct. We therefore preserve defendant's ineffective assistance of counsel claim for a later proceeding.

AFFIRMED.