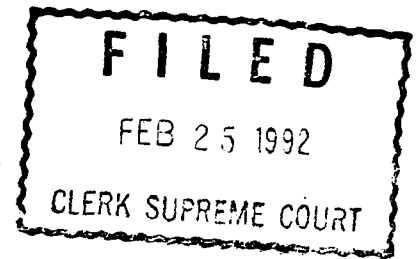


IN THE COURT OF APPEALS OF IOWA

No. 1-501 / 91-58



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STATE OF IOWA,

Appellee,

vs.

DONALD LEE JOHNSON,

Appellant.

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Appeal from the Iowa District Court for Polk County,  
Ray Hanrahan, Judge.

Johnson appeals his conviction, following a jury trial,  
for possession of cocaine with intent to deliver.

**AFFIRMED.**

F. Montgomery Brown of Cook, Gotsdiner, McEnroe &  
McCarthy, Des Moines, for appellant.

Bonnie J. Campbell, Attorney General, Thomas G. Fisher,  
Jr., Assistant Attorney General, John P. Sarcone, County  
Attorney, and Dan Voogt, Assistant County Attorney, for  
appellee.

Considered by Donielson, P.J., and Hayden and Sackett,  
JJ.

**DONIELSON, P.J.**

On August 21, 1990, police officers executed a search warrant for a motel room occupied by Donald Johnson and his family. The officers discovered thirty-nine individually wrapped, quarter-gram packages of rock cocaine hidden in the bathroom ceiling. Johnson acknowledged the cocaine was his. However, he claimed he possessed it only for personal use.

Johnson was charged with possession of cocaine with intent to deliver. A jury found him guilty, and he now appeals. Johnson asserts the trial court erred in allowing the opinion testimony of two police officers. He contends the officers' testimony exceeded the proper scope of expert testimony because it expressed a view on the ultimate question of defendant's guilt or innocence and, thereby invaded the province of the jury. Johnson also contends the district court abused its discretion by admitting motel records. He argues these motel records are inadmissible hearsay. Finally, Johnson contends his trial attorney rendered ineffective assistance by failing to object to certain evidentiary rulings and by failing to seek a mistrial due to juror misconduct.

We preserve Johnson's ineffective assistance of counsel claim for later postconviction relief proceedings in order to allow trial counsel an opportunity to explain the challenged conduct. See, e.g., State v. Mulder, 313 N.W.2d

885 (Iowa 1981); State v. Nebinger, 412 N.W.2d 180 (Iowa App. 1987).

I. Improper Opinion Evidence. Of Johnson's two remaining arguments, we first address his contention that the trial court erred in allowing two police witnesses to express opinions on prohibited subject matter. Our scope of review is for the correction of errors of law. Iowa R. App. P. 4. The trial court has broad discretion in ruling on the admissibility of evidence, and we will reverse the court's decision only on a clear showing of an abuse of that discretion. State v. Halstead, 362 N.W.2d 504, 506 (Iowa 1985). In order to show an abuse of discretion, one generally must show that the court exercised its discretion "on grounds or for reasons clearly untenable or to an extent clearly unreasonable." State v. Blackwell, 238 N.W.2d 131, 138 (Iowa 1976) (quoting Weeks v. Burnor, 132 Vt. 603, 606, 326 A.2d 138, 140 (1974)). On our review of this record, we are unable to find an abuse of the trial court's discretion. We, therefore, affirm.

During direct examination of Officer Renoe, the following colloquy occurred:

Q: And is the fact that there were 39 of these rocks individually bagged consistent with anything? A: That they were intended for distribution. (Emphasis added.)

Counsel: Objected to, your honor. That's the ultimate question, asking are they guilty or innocent and that's what he's attempting to--and I object to the question and I ask the objection precede his partial answer and that it be stricken and the jury advised.

Court: You can answer the question.

A: The only reason to package cocaine in individual quarter gram increments is to sell it.

Q: And why is that? A: Very obvious. There's no other reason why. That is the reason to package it.

Q: Based on your experience, training and education is the manner in which State's Exhibit No. 13 was packaged in State's Exhibit 13a consistent with personal use of the drug? A: No.

Another Des Moines police officer, Officer Soderquist, was similarly examined. His testimony was as follows:

Q: Officer Soderquist, the material that you found is specifically 39 individually wrapped rock-like substances, based upon your education, training and experience, is that consistent with anything? A: It's consistent -- . . . Individually wrapped items of narcotics are usually consistent especially in large quantity with those who are dealing or selling those type of narcotics.

Q: In this particular case, there were 39 individually wrapped rocky substances found. Would that qualify what you described as a large quantity in a substance? . . . Nine grams of cocaine is in my opinion a large quantity of cocaine, yes.

Johnson argues the preceding testimony amounted to an impermissible expression of the officers' opinion on the ultimate issue of guilt. The State contends this use of expert opinion was permissible to show the methods used by drug traffickers.

The starting point in analyzing the challenged testimony must be Iowa Rule of Evidence 704, which provides "[t]estimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." "[I]t has long been held that a witness, either lay or expert, may testify to an 'ultimate fact which the jury

must determine.'" State v. Murphy, 451 N.W.2d 154, 156 (Iowa 1990)(citing Grismore v. Consolidated Products Co., 232 Iowa 328, 362, 5 N.W.2d 646, 663 (1942)). Without question, a witness may testify as to the pattern or modus operandi of a certain offense and compare the facts of the case to it. State v. Burrell, 255 N.W.2d 119, 123 (Iowa 1977).

Of course, the scope of opinion testimony is not without its limits.

No witness should be permitted to give his opinion directly that a person is guilty or innocent, or is criminally responsible or irresponsible, or that a person was negligent or not negligent, or that he had capacity to execute a will or deed . . . [S]uch matters are not subjects of opinion testimony. They are mixed questions of law and fact. When a standard, or a measure, or a capacity has been fixed by the law, no witness whether expert or non-expert, nor however qualified, is permitted to express an opinion as to whether or not the person or the conduct, in question, measures up to that standard. On that question the court must instruct the jury as to the law, and the jury must draw its own conclusion from the evidence.

Grismore, 232 Iowa at 361, 5 N.W.2d at 663 (emphasis added).

Since 1942, the Iowa courts have elaborated on the proscription reiterated in Grismore, further explaining the restrictions on the scope of allowable opinion testimony. Nevertheless, the Iowa courts maintain their adherence to a liberal rule regarding the admission of opinion testimony. State v. Myers, 382 N.W.2d 91, 93 (Iowa 1986). The rule allows opinion testimony "if it will aid the jury in

screening the properly admitted evidence to ascertain the truth." Id.

In 1975 and 1976, the Iowa Supreme Court decided several cases in which the convictions of defendants charged with possession of a controlled substance with intent to deliver were challenged on similar grounds. In one of these cases, the court stated error had been committed by the trial court in allowing a witness to render an opinion regarding the defendant's intent. See State v. Oppedal, 232 N.W.2d 517 (Iowa 1975). However, as this finding was entirely unnecessary to the court's holding, it was merely dictum. In another case, the court affirmed the defendant's conviction but stated, again in mere dictum, that the trial court had erroneously allowed opinion testimony regarding the defendant's intent. See State v. Horton, 231 N.W.2d 36 (Iowa 1975). Finally, in a third case, the court reversed the defendant's conviction because the trial court allowed the arresting officer to testify regarding the defendant's intent. See State v. Ogg, 243 N.W.2d 620 (Iowa 1976). After close examination of these three cases, we find none of them to be controlling on the issue presented in the case at bar.

In State v. Oppedal, a prosecution witness was asked "if he had an opinion whether the marijuana seized from defendant was possessed for personal use." 232 N.W.2d at 524. The supreme court reversed the defendant's conviction for possession of a controlled substance with intent to

deliver on other grounds, but went on to state:

[I]ntent to deliver is an essential element of the crime charged in this case, and permitting a witness to testify directly that he had an opinion that a quantity of drugs was possessed by the defendant "with the intent to deliver" is tantamount to permitting the witness to testify he had an opinion as to the ultimate fact of defendant's guilt or innocence.

Id. (Emphasis added.).

In State v. Horton, the supreme court affirmed the conviction of a defendant charged with possession of a controlled substance with intent to deliver. 231 N.W.2d at 39. While the court found the trial court had erred in allowing certain testimony, the error, having not been preserved, was not reversible. Id. at 38. Nevertheless, the court stated the witness was improperly allowed to testify "My opinion would be that the marijuana was being held for delivery or to be delivered." Id. (Emphasis added.).

In State v. Ogg, the supreme court, split five to four, reversed a defendant's conviction for possession of a controlled substance with intent to deliver because the trial court allowed the arresting officer to testify the amount of the substance possessed by defendant "far exceeds what one might possess for personal use." 243 N.W.2d at 621. The court held the witness "was improperly allowed to express an outright opinion as to defendant's guilt on one of the essential elements of the crime." Id. The court in Ogg, relying heavily upon language of Grismore quoted in

State v. Droste, 232 N.W.2d 483, 488 (Iowa 1975), drew an analogy between a "standard", "measure" or "capacity" as used in Droste, and the element of "intent". Ogg, 234 N.W.2d at 488. The court then stated that the subjectivity of "intent" made the rationale even more persuasive. Id.

What these cases, along with Grismore and Iowa Rule of Evidence 704, seem to indicate is that there are two main ways in which opinion testimony on this subject can go awry. These are: (1) the witness states an opinion that the defendant had a certain intent, or (2) the witness uses the term, or some variant of the term, "deliver". In short, the first is objectionable because the crime of possession of a controlled substance with the intent to deliver includes the element of intent, and, as stated in Ogg, a witness may not "express an outright opinion as to the defendant's guilt on one of the essential elements of the crime." Ogg, 243 N.W.2d at 620 (emphasis added). The second is objectionable because "a witness, regardless of his expertise, may not opine on matters of domestic law." See Id. at 622 (Uhlenhopp, J. dissenting). A witness's use of the term "deliver" is improper for two reasons. Id.

First, the witness' understanding of the word "[deliver]" may not be the same as the legal definition--in which case the jury is implicitly being given an erroneous definition, by application, of the word "[deliver]." This possibility of confusion of meanings is stressed in McCormick, Evidence (2d ed.) § 12 at 28-29. See also Lindley v. Lindley, 384 S.W.2d 676, 682 (Tex.) (doctor held incompetent to testify that testator suffered an insane delusion--"a doctor's concept of what constitutes an insane delusion may be quite different from the legal concept").

Second, even if the witness' concept of the term ("negligence," "held for delivery," "probable cause," and so on) is the same as the legal concept, a witness arguably should not be allowed to answer a question including such a term, and thereby apply a legal standard to the facts, when under our system the judge instructs the jury on the law. This is the position taken in State v. Droste, supra, and State v. Johnson, 224 N.W.2d 617, 622 (Iowa). But see State v. Johnson, 237 N.W.2d 819 (Iowa).

Id. Accordingly, it is very important to closely examine the content of the challenged question and answer and compare it with that found to be objectionable on one or both of the two aforementioned grounds.

Officer Renoe did not opine the cocaine found in Johnson's possession was "intended for distribution." The question posed to Officer Renoe was "[I]s the fact that there were 39 of these rocks individually bagged consistent with anything?" (Emphasis added.) Officer Renoe's response was "That they were intended for distribution . . . . The only reason to package cocaine in individual quarter gram increments is to sell it." (Emphasis added.)

We interpret Officer Renoe's response to mean that the amount and the packaging were "consistent" with an intent to deliver the drug. As such, the statement is not a direct opinion on Johnson's intent, and therefore, not objectionable. Second, we point out the difference between the terms used by Officer Renoe, "distribution" and "sell," and the legal statutory term "deliver." Clearly, the

opinion is not objectionable on the grounds that it states an opinion on the domestic law.

Neither did Officer Renoe opine that the drug was not possessed for personal use. In this regard, Officer Renoe was asked "Based on your experience, training and education, is the manner in which [the drug] was packaged . . . consistent with the personal use of the drug?" (Emphasis added.) In response to this question, Officer Renoe said "No."

Similarly, Officer Soderquist opined only that the amount and packaging of the drug was consistent with dealing or selling the drug. While these opinions bear on the issue of Johnson's intent, they do not directly pass on it. This, of course, is not objectionable. Surely it is the sole purpose of evidence of any kind, whether opinion or otherwise, to convey the idea that defendant is guilty or not guilty. See State v. Ogg, 243 N.W.2d 620, 624 (Iowa 1976)(Uhlenhopp, J., dissenting). The witnesses' testimony did not state an opinion as to defendant's guilt. The testimony was intended to convey the idea that the packaging was consistent with an intent to deliver the drug.

Neither the testimony nor its impact is identical to that which was found impermissible in Oppedal. The question and answer at issue in Oppedal are clearly distinguishable from those in the instant case. In Oppedal, a witness was asked "if he had an opinion whether

the marijuana seized from defendant was possessed for personal use." See id. at 524. Unlike the present case, the witness in Oppedal was not asked whether the amount or packaging of the drug was consistent with personal use or an intent to deliver.

In Oppedal, the testimony directly related an opinion regarding the individual defendant's intent. 232 N.W.2d at 524. Accordingly, the supreme court in Oppedal stated "[P]ermitting a witness to testify directly that he had an opinion that a quantity of drugs was possessed by the defendant 'with intent to deliver' is tantamount to permitting the witness to testify he had an opinion as to the ultimate fact of defendant's guilt or innocence." Id. (Emphasis added.). However, in the present case, the testimony went only to whether the facts were consistent with a certain intent. The distinction is legitimate and crucial.

In State v. Ogg, defendant claimed it was error to permit a witness to testify that the amount of the drug possessed by defendant "far exceeds what one might possess for personal use." 243 N.W.2d at 621. The prosecutor had asked "whether the quantity defendant possessed would be 'more or less than that which would be considered for personal use.'" Id. The supreme court held the witness "was improperly permitted to express an outright opinion as to defendant's guilt on one of the essential elements [intent to deliver] of the crime." Id. Again, we find the

question and answer at issue in Ogg to be distinguishable from those in the instant case on the same basis that the question and answer in Oppedal were distinguishable.

Clearly, the facts of the Ogg case made the decision in that case a difficult one. Indeed, the supreme court was split five to four, with Chief Justice Moore, and Justices Uhlenhopp, Harris and McCormick dissenting. Were there a continuum ranging from the factual situation raised in Oppedal to the fact pattern in the instant case, we believe the Ogg case would fall closer to Oppedal between the two extremes. In Ogg and Oppedal, the term "consistent with" cannot be found in either the question or the answer challenged by the defendant. As such, both the Ogg case and the Oppedal case present a significantly different scenario than that presented by the instant case. We believe this difference is dispositive.

In conclusion, the witnesses in the instant case did not offer direct opinions as to Johnson's intent. Rather, they offered evidence by way of a relationship or pattern of consistency and inconsistency existing between the acts of the defendant and the intent of others who had performed the same acts. As such, their opinions merely bore on the ultimate question of defendants guilt without passing on it. That is what evidence is for. Moreover, neither Officer Renoe nor Officer Soderquist used the term "deliver". Instead, they used the terms "distribution", "dealing" and "selling". Therefore, they did not

incorporate a legal term, standard, measure, or capacity into their opinions. We find the testimony related to the pattern or modus operandi of the offense and offered a fact comparison. Burrell, 255 N.W.2d at 123; State v. Olsen, 315 N.W.2d 1, 6-7 (Iowa 1982). We further find the testimony aided the jury in ascertaining the truth in this case. See Myers, 382 N.W.2d at 93. Accordingly, we find the testimony in this case to be properly within the scope of allowable expert opinion testimony. Unable to find an abuse of the trial court's discretion in allowing the testimony, we affirm on this issue.

**II. Hearsay Evidence.** We next address Johnson's argument that several of the State's exhibits were erroneously admitted. Specifically, Johnson contends that motel records, admitted in exhibit 11 and Officer Renoe's testimony, constituted inadmissible hearsay. While the evidence simply showed Johnson's room number and home address, Johnson asserts he was prejudiced by its admission.

Again, our review on this issue is for an abuse of discretion. State v. Maniccia, 355 N.W.2d 256, 260 (Iowa App. 1984). We find no abuse of discretion and affirm the trial court.

The fact that Johnson was from Kansas City was not only established by the motel records, Johnson himself admitted it. Furthermore, Johnson admitted renting the room. We are persuaded that Johnson suffered no prejudice as a

result of the admission of this evidence. Admission of hearsay evidence is not prejudicial if substantially the same evidence exists in the record. See State v. Farris, 359 N.W.2d 190, 193 (Iowa 1984); State v. Nims, 357 N.W.2d 608, 609 (Iowa 1984).

The costs of this appeal are taxed to Donald Lee Johnson.

For all the reasons stated, the judgment of the district court is affirmed.

**AFFIRMED.**

Hayden and Sackett, JJ., concur in part and dissent in part.

**HAYDEN, J.** (concurring in part and dissenting in part)

I respectfully dissent to that portion of the majority's opinion designated as: I. Improper Opinion Evidence.

There is a fine but essential distinction between asking a witness to compare the evidence in a case with a particular, well-defined modus operandi and asking a witness for an opinion based on that evidence as to the legal guilt or innocence of the defendant. State v. Johnson, 224 N.W.2d 617, 622 (Iowa 1974). 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. Burrell, 255 N.W.2d 119, 123 (Iowa 1977). A witness may not testify on the guilt or innocence of the defendant. State v. Murphy, 451 N.W.2d 154, 156 (Iowa 1990).

In this case the officer's testimony relating to the manner in which cocaine is ordinarily packaged for sale was properly admitted into evidence and may have aided the jury. See State v. Olsen, 315 N.W.2d 1, 6-7 (Iowa 1982) (witness may testify on the pattern of modus operandi of a certain offense and compare the facts of the case to it); See also State v. Burrell, 255 N.W.2d 119, 123 (Iowa 1977) (witness may state an opinion defendant's actions fit within the modus operandi of an offense). From this description the jury could properly find the cocaine in defendant's possession was intended for sale.

However, the combined questions and responses at issue plainly crossed that "fine but essential" line between opinion which would be truly helpful to the jury and that which conveys a conclusion concerning defendant's legal guilt. In State v. Oppedal, 232 N.W.2d 517, 524, (Iowa 1975), intent to deliver was an essential element of the crime charged. In Oppedal, the court stated "permitting a witness to testify directly that he has an opinion that a quantity of drugs was possessed by the defendant 'with intent to deliver' is tantamount to permitting the witness to testify he had an opinion as to the ultimate fact of defendant's guilt or innocence." Id. Intent to deliver is an essential element of the crime charged in the present case. Officer Renoe opined the cocaine found in Johnson's possession was "intended for distribution." I determine the officer's testimony and its impact to be identical to that which was found impermissible in Oppedal.

Officer Renoe was also asked whether the manner in which the cocaine was packaged was consistent with personal use of the drug. The officer responded it was not. Ordinarily possession of drugs is either for personal use or for delivery to others. State v. Ogg, 243 N.W.2d 620, 621 (Iowa 1976). Obviously the officer's answer was intended to convey the idea defendant was guilty of the latter rather than the former. Rendering an opinion a defendant possessed an illegal substance for personal use is precisely the vice condemned in Oppedal, 232 N.W.2d at

524. Likewise, a witness may not testify the amount of illegal substance exceeded what one might possess for personal use because such testimony expresses an outright opinion of the defendant's guilt on one of the essential elements of the crime. Ogg, 243 N.W.2d at 621. "No witness should be permitted to give his opinion directly that a person is guilty or innocent, or is criminally responsible or irresponsible . . . ." Grismore v. Consolidated Products, 232 Iowa 328, 361, 5 N.W.2d 646, 663 (1942).

In State v. Droste, 232 N.W.2d 483, 488 (Iowa 1975), our supreme court stated

[w]hen a standard, or a measure, or a capacity has been fixed by law, no witness, whether expert or non-expert, nor however qualified, is permitted to express an opinion as to whether or not the person or the conduct, in question, measures up to that standard. On that question the court must instruct the jury as to the law, and the jury must draw its own conclusion from the evidence.

The rationale of Droste is even more persuasive where the defendant is charged with an intent crime because the criterion to be applied is subjective. Ogg, 243 N.W.2d at 621.

I determine Officer Renoe was improperly permitted to express an outright opinion as to defendant's guilt on one of the essential elements of the crime. I would reverse the trial court on this issue.

I concur with the majority's holding on the hearsay evidence issue.

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

I agree with Judge Donielson that the defendant's conviction should be affirmed. I do not, however, agree with Judge Donielson's conclusion in I. Improper Opinion Evidence. Rather, I agree with Judge Hayden who determines Officer Reno was improperly permitted to express the outright opinion as to the defendant's guilt on one of the essential elements of the crime. Unlike Judge Hayden, I would not reverse, because with the overwhelming evidence of the defendant's guilt, I cannot see where the exclusion of the evidence would have made any difference in the outcome of the trial.