FILED
MAR 23 1982
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,)
Plaintiff-Appellee,) Filed March 23, 1982 541
vs.)
WILLIAM WALTER CAGE,) 2-43/65925
Defendant-Appellant.)

Appeal from Black Hawk District Court - William G. Klotzbach, Judge.

Defendant appeals from his conviction of two counts of possession of a controlled substance with intent to deliver in violation of section 204.401(1)(a), The Code 1979, asserting 1) that trial court erred in admitting into evidence a police officer's testimony that it was the common practice of drug users to carry no more than two "hits;" 2) that evidence of $130.90 in defendant's possession when he was arrested should have been excluded as irrelevant and immaterial; and 3) that the evidence of defendant's intent to deliver was insufficient to warrant submission of the issue to the jury. AFFIRMED.

John W. Ackerman, Cedar Falls, Iowa, for defendant-appellant.

Thomas J. Miller, Attorney General of Iowa, and Richard L. Cleland, Assistant Attorney General, for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

Defendant, William Walter Cage, appeals from his conviction of two counts of possession of a controlled substance with intent to deliver in violation of section 204.401(1)(a), The Code 1979. He asserts 1) that trial court erred in admitting into evidence a police officer's testimony that it was the common practice of drug users to carry no more than two "hits;" 2) that evidence of $130.90 in defendant's possession when he was arrested should have been excluded as irrelevant and immaterial; and 3) that the evidence of defendant's intent to deliver was insufficient to warrant submission of the issue to the jury. We affirm.

On May 14, 1980, defendant was charged by a county attorney's information with two counts of possession of a controlled substance with intent to deliver in violation of section 204.401(1)(a), The Code. Following trial on September 18, 1980, the jury returned the verdict of guilty on both counts.

The evidence at trial revealed the following facts. On May 8, 1980, defendant was under surveillance by police detectives and, after being observed for some time, was arrested. A search of the car in which defendant was riding in and a search of his person revealed certain inculpatory evidence. Three paper packets containing cocaine were found in his left shirt pocket. One hundred and thirty-one dollars and ninety cents ($131.90) was found in his front trouser pocket. In his left rear trouser pocket the officers found a plastic disposable syringe and six empty paper packets (the same type found in defendant's shirt pocket), inside several food stamp books. Seven paper packets containing heroin were found under the front seat of the driver's side of the automobile.

At both the conclusion of the State's case and the defendant's case, defense counsel moved for the court to withdraw the issue of intent to deliver from consideration by the jury because of lack of evidence. The court overruled defendant's motion on each occasion and submitted the issue of both "possession" and of "intent to deliver" to the jury. On September 18, 1980, the jury returned a

verdict of guilty on all counts. On November 21, 1980, defendant was sentenced to concurrent ten year sentences on each of the counts. This appeal followed.

I. Scope of Review. Since this is an action at law, our review is for correction of errors only. Iowa R. App. P. 4; Rinehart v. State, 234 N.W.2d 649, 658 (Iowa 1975).

II. Expert Testimony. Defendant first argues that trial court erred in allowing a police detective to testify as to his opinion concerning the common practice of drug users not carrying more than two "hits." He asserts that such testimony was not proper testimony for an expert witness and that, even if it was proper, the testimony should not have been admitted without the State first providing foundational testimony that a factual basis exists for the opinion of the detective. We find no merit in defendant's assignment of error.

Defendant's objection at trial occurred as follows:

> Question: [by the prosecution] What is the common practice for quantity of a person who might [sic] a user, common practice for them to carry?
>
> Mr. Ackerman: Objection, your honor, there is no information as to whether there is a common practice?
>
> THE COURT: Overrule the objection and the witness may answer.
>
> THE WITNESS: It's been my experience that a user would not carry more than two hits.

Defendant's objection challenges neither the qualifications of the expert nor the propriety of such testimony in general. To preserve error for appeal, defendant must raise the proper objection when the evidence is admitted. State v. Nimmo, 247 N.W.2d 228, 231 (Iowa 1976). Failure to argue an alleged error below preserves no error for our review. See State v. Jump, 269 N.W.2d 417, 430 (Iowa 1978). Further, even if we were to hold that defendant's objection placed the question of the witness's qualifications in issue, he did not do so with sufficient specificity to preserve error. "A general objection does not preserve error[.]" State v. Burrell, 255 N.W.2d 119, 123 (Iowa 1977).

Finally, the law is well settled that a properly qualified witness may testify to the customs and practices of those who use or deal in narcotics. State v. Ogg, 243 N.W.2d 620, 621 (Iowa 1976). See also State v. Olsen, 315 N.W.2d 1, 7 (Iowa 1982). Defendant's challenge that "there is no information as to whether there is a common practice" is misplaced. A factual foundation is required only when an expert testifies as to his or her conclusion, or "opinion," on particular issues involved in a case. That is, there must be facts in the record, or facts given in a hypothetical question, to which the expert applies his or her knowledge, or "opinion," of practices or other circumstances characteristic of the field in which he or she is an expert. Testimony concerning the practices or other circumstances themselves needs no such foundation. It is enough that the expert is qualified. Compare Dolezal v. City of Cedar Rapids, 209 N.W.2d 84, 91 (Iowa 1973), with Ogg, 243 N.W.2d at 621. Defendant's analysis merely equivocates on the phrase expert opinion and is thus unpersuasive. His challenge to the validity or soundness of the expert's opinion regarding general practices of those who use or deal in narcotics goes to the reliability of the expert's opinion and is properly left for cross-examination.

III. Evidence of Amount of Money in Defendant's Possession. Defendant next argues that trial court erred in submitting evidence that he had $131.90 in his possession. We disagree. "A determination as to the relevancy and materiality of evidence rests largely in the trial court's discretion." State v. Mark, 286 N.W.2d 396, 412 (Iowa 1979). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." State v. Williams, 305 N.W.2d 428, 433 (Iowa 1981), quoting Kilianov v. Darland, 252 N.W.2d 732, 735 (Iowa 1977). Evidence is immaterial only if it is offered to prove a proposition not at issue. Mark, 286 N.W.2d at 412.

In the instant case, defendant was charged with possession of heroine and cocaine with intent to deliver. The State had the burden to prove beyond a reasonable doubt that defendant had the intent to deliver the controlled substances. § 204.401(a), The Code 1981. The fact that defendant had a greater quantity of controlled substances than is generally kept by users supports the inference that he possessed such controlled substances for delivery. The fact that he was unemployed and had a relatively large sum of money on his possession also supports that inference. On this record, we cannot say trial court abused its discretion in admitting the evidence.

IV. Sufficiency of the Evidence. Defendant finally argues that trial court erred in overruling his motion to remove the issue of intent to deliver from consideration of the jury. We disagree.

We will first enumerate those general principles important to our review of this issue. Trial court's refusal to direct a verdict for defendant will withstand challenge if there is any substantial evidence in the record to support it. State v. Schrier, 300 N.W.2d 305, 306 (Iowa 1981). Substantial evidence is that evidence which would convince a rational factfinder that the defendant is guilty of the crime charged beyond a reasonable doubt. State v. Robinson, 288 N.W.2d 337, 339 (Iowa 1980). We review the evidence in the light most favorable to the State, taking into consideration all evidence in the record. State v. Kern, 307 N.W.2d 22, 28 (Iowa 1981); State v. Rich, 305 N.W.2d 739, 741 (Iowa 1981); Robinson, 288 N.W.2d at 340. On factual issues, the credibility of the witnesses and the weight to be given to their testimony is for the jury. State v. Cott, 283 N.W.2d324, 329 (Iowa 1979). All legitimate inferences which may be fairly and reasonably deducted from the evidence will be accepted. Schrier, 300 N.W.2d at 306. "[I]ntent is seldom capable of direct proof, but may be shown by reasonable inferences drawn from the facts established." State v. Chatterson, 259 N.W.2d 766, 769 (Iowa 1977).

SNELL, J., (dissenting in part).

I respectfully dissent. Defendant was convicted of intent to deliver a controlled substance without evidence of intent to deliver. The State showed that defendant was unemployed yet had $130.90. That is not evidence of intent to deliver. A police detective testified that his experience was that a user would not carry more than two hits. That evidence tended to prove that defendant possessed more than a user commonly carried. That is not evidence of intent to deliver.

The question here is not whether the trial court erred in admitting the evidence. The question is whether these facts that individually do not show an intent to deliver when grouped and viewed together prove an intent to deliver. They do not. The sum of several zeros is still zero. A defendant must be judged guilty on the basis of evidence, not suspicion. The motion to withdraw the issue of intent to deliver from the jury should have been sustained.

Applying these principles to the evidence in the instant case, we conclude that there was sufficient evidence to submit the case to the jury and to support the jury's verdict. In this regard there was evidence from which the jury could infer that defendant received a substantial amount of money from other drug sales and that he intended to do the same with the large quantity of controlled substances he had in his possession. While no one aspect of this evidence is dispositive, viewed in a light most favorable to the State, we conclude that the evidence was sufficient to engender a jury question. We thus refuse to disturb the jury's verdict.

AFFIRMED.

All judges concur except Snell, J., who dissents.