IN THE COURT OF APPEALS OF IOWA

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CLERK SUPREME COURT

STATE OF IOWA,)
Plaintiff-Appellee,) Filed December 30, 1981
vs.)
KAILON C. GOETTSCHE,) 1-286 / 65535
Defendant-Appellant.)

Appeal from Montgomery District Court - E. F. Hanson, Judge.

Defendant appeals from his conviction by a jury of one count of delivering a controlled substance for a profit, two counts of delivering controlled substances as an accommodation, and one count of possession of marijuana with intent to deliver. AFFIRMED.

Charles L. Harrington, State Appellate Defender's Office, for defendant-appellant.

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

Heard by Oxberger, C.J., and Donielson, Carter and Johnson, JJ. Snell, J., takes no part.

PER CURIAM

Defendant, Kailon C. Goettsche, appeals from his conviction by a jury of one count of delivering a controlled substance for a profit, two counts of delivering controlled substances as an accommodation, and one count of possession of marijuana with intent to deliver. On appeal, defendant asserts: 1) trial court erred in allowing, over defendant's objection, an expert to testify and convey inferences as to his opinion of defendant's guilt; 2) trial court erred in allowing a witness to testify to certain matters to which defendant objected as not previously, fully and fairly set out in the minutes of testimony; 3) the information charging defendant with accommodation was defective in that it charged defendant under a sentencing provision of the Code rather than a charging provision; and 4) trial court erred in admitting into evidence state criminalistic laboratory reports without evidence that the department's rules for handling such evidence were followed. We affirm.

On March 6, 1980, three trial informations were filed against defendant charging him with: 1) delivery of phentermine, a schedule IV controlled substance, for profit, in violation of section 204.401(1)(c), The Code, 1979; 2) one count of delivery of pentavocine and one count of delivery of phentermine, each a schedule IV controlled substance, in violation of section 204.410, The Code, 1979; 3) possession of marijuana, a schedule I controlled substance, with intent to deliver, in violation of section 204.401(1)(b), The Code 1979. Trial commenced on May 28, 1979, and during the course of the State's case, defendant moved for a mistrial on the grounds that an expert witness for the State was improperly allowed to testify, over defendant's objection, as to his opinion that 37 baggies of marijuana seized from the defendant's residence were packed using the "common method" for packing small quantities of marijuana. Defendant also objected when the State attempted to introduce the criminalistics laboratory reports on the ground that compliance with the department's rules had not been shown. Finally, defendant moved at the close of the State's case to dismiss both counts of the second information for the reason that neither count charged the defendant with violation of a crime. Trial court overruled this motion, defense rested, and the case was submitted to the jury, which returned a verdict of guilty on all charges. 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.

II. Opinion Testimony. Defendant asserts that trial court erred in allowing a State's expert witness to express an opinion that 37 baggies of marijuana seized from

defendant's residence were packaged using the "common method" for packaging small quantities of marijuana. Defendant argues that the trial court, in allowing the State's witness to so testify, permitted the witness to convey his opinion as to the defendant's intent in possessing marijuana. We find no merit in defendant's analysis.

It is clearly improper for a witness to express an opinion as to whether a defendant is guilty of an offense or an element thereof. State v. Billings, 242 N.W.2d 726, 729 (Iowa 1976). It follows that an expert witness may not express an opinion as to whether a controlled substance is held by an accused for personal use or for delivery. State v. Nimmo, 247 N.W.2d 228, 230 (Iowa 1976); State v. Ogg, 243 N.W.2d 620, 621 (Iowa 1976); State v. Oppedal, 232 N.W.2d 517, 524 (Iowa 1975). However, a properly qualified witness may testify to the customs and practices of those who deal in narcotics. State v. Heck, 301 N.W.2d 741, 742 (Iowa 1981). See also State v. Boyd, 224 N.W.2d 609, 612-13 (Iowa 1974).

Having reviewed the record in its entirety, we conclude that the witness's testimony did not convey to the jury his opinion as to defendant's intent in possessing marijuana. The witness merely testified that the packaging of the marijuana he found in the defendant's residence was consistent with the "common method" of packing small quantities of marijuana which he had observed as an undercover narcotics agent. The jury could, and evidently did, infer from this testimony that, in packaging marijuana in this manner, defendant intended to deliver the marijuana. The fact that this inference could be made by the jury does not support the conclusion that the witness was testifying as to his opinion of the defendant's guilt or innocence. He testified to the facts of his experience and the jury drew its own conclusion. Any inference as to the witness's opinion of defendant's guilt or innocence is mere conjecture and offers no ground for reversible error.[1]

III. Minutes of Testimony. Defendant also asserts that the minutes of testimony attached to the trial information did not fully and fairly refer to alleged

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[1] We have reviewed State v. Haga, 507 P.2d 159, 165-167 (Wash. 1973), which defendant cites as authority for the proposition than an inference of defendant's guilt drawn from a witness's opinion is improper. We note, however, in that case, the opinion testimony concerned whether defendant showed any signs of grief. Important to the court's analysis in Haga was the fact that the "evidences of grief" were not stated. In the instant case, however, the witness testified to the factual circumstances as they existed and then opined as to the customs and practices of those who deal in narcotics. The "evidences" of the custom were stated.

admissions made by the defendant to prosecution witness agent Robert Johnson. As a consequence, defendant argues that trial court erred in allowing this testimony into evidence. After reviewing the record, we conclude that trial court's error, if any, was harmless. Virtually identical testimony was entered into evidence on redirect examination of another undercover agent, Robert Birnie, without objection by defendant. As the supreme court said in State v. Gilmore, 259 N.W.2d 846, 858 (Iowa 1977):

> This court has announced that the erroneous admission of evidence that may be justification for reversal is not prejudicial where substantially the same evidence is in the record without objection. See State v. Jurgenson, 225 N.W.2d 310, 312 (Iowa 1975), and authorities cited.

We find this rule applies in the instant case where the evidence of defendant's admission of the prior sale of drugs was introduced into the record without objection on Robert Birnie's redirect examination.

IV. Offense of Accommodation. Defendant further argues that trial court erred in overruling his motion to dismiss the second trial information for the reason that each count asserted therein charged violation of a sentencing provision only and not an offense set out by statute. We are not persuaded by this construction of section 204.410, The Code 1979, which, in part, states that "[a]n accommodation offense may be proved as an included offense under a charge of delivering or possessing with intent to deliver a controlled substance in violation of section 204.401(1)." State v. Metcalf, 260 N.W.2d 857 (Iowa 1977) (defining section 204.410 as a separate offender under the 1975 Code). From this analysis, we conclude that section, by providing the elements of the offense of accommodation, is properly interpreted as a charging statute and not merely as a sentencing statute.

V. Laboratory Reports. Defendant finally argues that certain State's exhibits were improperly admitted into evidence because there was no showing that the evidence was handled in conformity with the rules of the State criminalistics laboratory. Defendant bases this argument on the fact that the recitation in the laboratory report referred to incorrect sections of the administrative rule. The reports referred to 680 I.A.C. 4.5 instead of 680 I.A.C. § 12.1 to 12.11. We note, however, that the cited rules were the correct rules prior to August 2, 1979. An amendment to those rules published June 27, 1979 changed the numbering of the rules to the numbers that defendant argues should have been used. The effective date of this change was August 2, 1979. See 680

I.A.C. § 12.1-12.11. 1 Iowa Administrative Bulletin, Number 28 at 1540 (June 27, 1979). Since the exhibit was dated July 19, 1979, we believe that the rules were properly referred to in the report. Further, upon our review of these rules, we note that no substantive change was made in the amendment to these specific rules; only the numbering was changed. Since the rules in effect when the report was made were cited and no substantive change was made with which the custodians would have had to comply, we find no prejudicial error to defendant by admission of these reports into evidence.

Finding no error, we affirm defendant's conviction.

AFFIRMED.