

**FILED**

FEB 26 1985

426  
CLERK SUPREME COURT

**IN THE COURT OF APPEALS OF IOWA**

**STATE OF IOWA,**

)

Plaintiff-Appellee,

)

Filed February 26, 1985

vs.

)

**MITCHELL REX IRWIN,**

)

5-53

84-895

Defendant-Appellant. )

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Appeal from the Iowa District Court for Wapello County - Phillip R. Collett,  
Judge.

Defendant appeals from conviction and sentence for possession of a controlled substance with intent to deliver, in violation of Iowa Code section 204.401(1) (1983). **AFFIRMED.**

Charles L. Harrington, Appellate Defender, and Patrick R. Grady, Assistant Appellate Defender, for defendant-appellant.

Thomas J. Miller, Attorney General, and Pamela S. Greenman, Assistant Attorney General, for plaintiff-appellee.

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

**SACKETT, J.**

The defendant, Mitchell Rex Irwin, appeals his conviction and sentence for possession of a controlled substance (marijuana) with intent to deliver, in violation of Iowa Code section 204.401(1) (1983), imposed after a jury trial in the Wapello County District Court.

On the evening of November 8, 1983, Ottumwa police officers responding to a call regarding a minor traffic accident, arrived at the scene and observed the defendant still sitting in the driver's seat of his car, with the door open. The defendant was in a highly-intoxicated condition. While arresting the defendant for public intoxication, the officers detected the aroma of marijuana and later found marijuana strewn about the automobile. After subsequent searches of the defendant, his car and trunk, the following evidence was discovered: a hemostat, often used as a "roach clip"; three "ziplock" bags of marijuana, each containing over four ounces; a hand-held scale; several empty ziplock baggies; and \$473.00 in cash.

The sole issue on appeal is whether there was sufficient evidence for a rational jury to find beyond a reasonable doubt that the defendant possessed marijuana with the intent to deliver. We find the evidence was sufficient to sustain the jury's verdict and, therefore, we affirm the conviction.

The State and the defendant agree on the standard of review applicable upon a challenge to the sufficiency of the evidence. The evidence must be viewed in the light most favorable to the State, including all legitimate inferences and presumptions which may reasonably and fairly be deduced therefrom. State v. Blair, 347 N.W.2d 416, 419 (Iowa 1984); State v. Aldape, 307 N.W.2d 32, 39 (Iowa 1981); State v. Schrier, 300 N.W.2d 305, 306 (Iowa 1981); State v. Robinson, 288 N.W.2d 337, 339 (Iowa 1980). All of the evidence must be considered, not just that which supports the verdict. Blair, 347 N.W.2d at 419; Robinson, 288 N.W.2d at

340. We are bound to uphold a jury verdict unless we find the record lacks substantial evidence to sustain the charge, Blair, 347 N.W.2d at 419; and the evidence is substantial when it would "convince a rational trier of fact that the defendant is guilty of the crime charged beyond a reasonable doubt." Id.; Aldape, 307 N.W.2d at 39; Schrier, 300 N.W.2d at 306; Robinson, 288 N.W.2d at 339.

Although intent (to deliver) may be proven by either direct or circumstantial evidence, State v. Boyd, 224 N.W.2d at 612 (citing State v. Ampey, 210 N.W.2d 433, 434 (Iowa 1973)), difficulties of proof frequently require reliance on circumstantial evidence. State v. Luter, 346 N.W.2d 802, 809 (Iowa 1984); Boyd, 224 N.W.2d at 612. Accordingly, the "manner of packaging the substance, [the] presence of weighing devices[,] and [the] existence of other paraphernalia commonly used in drug dealing" are among relevant factors which should be considered. Luter, 346 N.W.2d at 809; State v. TeBackhorst, 305 N.W.2d 705, 708 (Iowa 1981); Boyd, 224 N.W.2d at 612-13.

Defendant argues, citing numerous cases, that evidence of the quantity of drugs, standing alone, does not support a finding beyond a reasonable doubt that the substance was possessed with an intent to deliver (citations omitted). This is because courts have great difficulty, without expert testimony, determining how much marijuana may reasonably be held for personal use. For this reason, the defendant insists, expert testimony is required as to the amount one might expect to possess for personal consumption, packaging the average seller might use, or other evidence of selling paraphernalia to sustain a finding of possession with intent to deliver. Boyd, 224 N.W.2d at 613; United States v. Staten, 581 F.2d 878, 886 (D.C. Cir. 1978); State v. Smith, 603 P.2d 638, 641 (Ka. App. 1979); Adkins v. Commonwealth, 229 S.E.2d 869, 871 (Va. 1976).

While we do not question the proposition that quantity possessed, without more, does not support a finding of intent to deliver, that standard is inapplicable

to this case, because the evidence of the amount of marijuana does not "stand alone" here. It is accompanied by evidence of packaging, the presence of scales, the presence of extra baggies which could be used to divide the marijuana for sale, and the large amounts of cash the defendant was carrying when he was arrested.

Expert testimony concerning the customs and practices of those who use or deal in controlled substances is admissible, State v. Ogg, 243 N.W.2d 620, 621 (Iowa 1976) (citing Boyd, 224 N.W.2d at 613), provided the expert is not allowed to state whether the quantity defendant possessed would be "more or less than that which could be considered for personal use." Ogg, 243 N.W.2d at 621. Such a question is for the jury to decide and the determination is not to be made by a witness, no matter how expert (s)he is. State v. Oppedal, 232 N.W.2d 517, 524 (Iowa 1975); State v. Horton, 231 N.W.2d 36, 38 (Iowa 1975). Such forbidden testimony also violates the rule firmly adhered to since Grismore v. Consolidated Products Company, 232 Iowa 328, 361, 5 N.W.2d 646, 663 (1942), which said: "No witness should be permitted to give his opinion directly that a person is guilty or innocent, or is criminally responsible or irresponsible . . . ." However, none of the authority defendant has cited supports the proposition that expert testimony is required to sustain a finding of intent to deliver, nor are we aware of any Iowa case which sustains such a notion. Furthermore, expert testimony is unnecessary in this case where there is other evidence besides possession from which the jury can infer intent.

The combined testimony of the defendant and his mother essentially was that he used marijuana in high quantities and the marijuana found in his car was for personal use only and was kept there to hide it from his mother. Although this testimony, if believed, would have explained the evidence in a manner inconsistent with an inference of intent to deliver, credibility of the witnesses is for the jury to determine, State v. Blair, 347 N.W.2d 416, 420 (Iowa 1984), and the jury evidently disbelieved defendant's claim that the marijuana was for his personal use.

The defendant's testimony regarding his finances supported the jury's conclusion. He stated that he smoked a pound of marijuana per month and that a pound cost him \$600.00. Yet, he also testified that his job paid \$150.00 a week, which was used not only to support his drug habit, but also for gas and maintenance for his car, and for buying beer. The jury could easily have concluded from this testimony that the defendant had another source of income. This finding has even firmer support in light of the \$473.00 in cash he had the night he was arrested.

Based on all of the evidence, we find that the State presented sufficient evidence to convince a rational jury beyond a reasonable doubt that the defendant was guilty of possession of marijuana with the intent to deliver and, accordingly, we affirm the conviction.

AFFIRMED.