



IN THE COURT OF APPEALS OF IOWA

STATE OF IOWA,	)	
Plaintiff-Appellee,	)	Filed April 26, 1979
vs.	)	
RAY DOUGLAS RUTZEN,	)	15
Defendant-Appellant.	)	61721
		61722
		61723

Appeal from Story District Court - David R. Hansen, Judge.

Defendant appeals convictions for possession of marijuana, delivery of marijuana and administration of a prescription drug to a minor. Affirmed.

Dale E. Ruigh, of Smith, Nutty, Sharp & Ruigh, of Ames, for appellant.

Thomas J. Miller, Attorney General of Iowa and Lona Hansen, Assistant Attorney General, for appellee.

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

DONIELSON, J.

Defendant Ray Rutzen appeals convictions for possession of marijuana with intent to deliver in violation of section 204.401(1)(b), The Code 1977, delivery of marijuana in violation of section 204.401(1)(b), and administration of a prescription drug to a minor in violation of section 155.30, The Code. We affirm as to each of defendant's contentions on appeal.

I. Validity of search. Defendant first contends that evidence seized from his residence should have been suppressed because there was no probable cause for issuance of the search warrant and the police improperly executed it. In the information for search warrant, Detective Olson stated that defendant's neighbors had observed many visitors to the Rutzen home who would stay at the house for only a short period of time, exchanges of money between these visitors and defendant, and small packages in the visitors' possession when they left defendant's home. The detective also listened to a taped conversation between defendant and an undercover officer in which defendant admitted to dealing in controlled substances from his residence. Based on our independent review of the facts, we think the magistrate was supplied with sufficient facts and circumstances on which he could have found probable cause to issue the warrant. See State v. Nelson, 234 N.W.2d 368, 373 (Iowa 1975). Defendant also argued for suppression of evidence on the basis of the officers' failure to comply with the requirements of section 751.9, The Code. We have reviewed the evidence on this issue de novo. State v. Brown, 253 N.W.2d 601, 602 (Iowa 1977). We find the officers did comply with section 751.9, and defendant's motion to suppress was properly overruled.

II. Consolidation of informations. Upon the State's motion, trial court ordered the three charges pending against defendant consolidated for trial. Defendant contends consolidation was improper because the offenses charged did not arise from a single transaction and consolidation prejudiced his right to a fair trial. All of the charges, possession of marijuana with intent to deliver, delivery of marijuana, and administration of a prescription drug, involved related activities occurring on September 8, 1977. The evidence seized during search of the bedroom of defendant's residence and the minutes of testimony attached to the informations pertained to all three offenses. Separate trials would have been repetitious, expensive, and wasteful. We find the charges were

closely enough related to allow consolidation and further find no prejudice to defendant resulted therefrom. See State v. Reynolds, 250 N.W.2d 434, 439 (Iowa 1977).

III. Relevancy of evidence. At trial, defendant objected to the testimony of two of his neighbors concerning their observations of his residence as well as the testimony of two detectives who had conducted surveillance of the home. His objection was on the grounds of relevancy. The test of relevancy is whether the evidence offered makes the desired inference more probable than it would be without such evidence. State v. Engeman, 217 N.W.2d 638, 639 (Iowa 1974). The witnesses' observations of suspicious visits to defendant's home were clearly relevant to the issue of whether or not defendant possessed controlled substances with an intent to deliver. Id. at 639.

IV. Expert testimony. Defendant made timely objection to the testimony of state's witness James Dahlgren who was permitted to express his opinion that nitrous oxide was a prescription drug. He asserts on appeal that the trial court erred when it admitted the testimony since (1) the witness was not qualified to form the opinion; (2) there was no sufficient foundation in the record to support the testimony, and (3) the subject matter was not a proper one for expert testimony. See Hedges v. Conder, 166 N.W.2d 844, 857 (Iowa 1969); Grismore v. Consolidated Products Co., 232 Iowa 328, 5 N.W.2d 646 (1942).

Dahlgren was employed as a chemist with the Iowa Bureau of Criminal Investigations laboratory where his duties included analysis of unknown or controlled substances. He had received a bachelor's degree in chemistry, special training from the United States Drug Enforcement Administration and the F.B.I. laboratory in Washington, D.C., and on-the-job training in the laboratory. He based his knowledge of the effects of nitrous oxide on pharmacological publications and his personal observations. He testified that he was familiar with the United States Pharmacopoeia and the National Formulary, and the fact that nitrous oxide was listed therein. We find that Dahlgren was qualified to give an expert opinion on the properties and effects of nitrous oxide and the facts on which he based his opinion were sufficiently disclosed. See State v. Ogg, 243 N.W.2d 620, 622 (Iowa 1976).

Defendant contends, however, that permitting Dahlgren to testify that in his opinion nitrous oxide is a prescription drug was tantamount to permitting the witness to

testify as to defendant's guilt or innocence. Section 155.3(10) defines "prescription drug" as (a) any drug or medicine required by federal law to bear a caution message; (b) any drug or medicine which because of its toxicity or other potentiality for harmful effect is not considered safe; or (c) a new drug or medicine limited under state law, etc. Section 155.3(1) also provides that drugs and medicines shall include substances and preparations recognized in the United States Pharmacopoeia or National Formulary. See also chapter 204, The Code.

Dahlgren testified that he had determined by scientific analysis that the container found at defendant's residence and introduced at trial contained nitrous oxide, and that nitrous oxide was a prescription drug. Earlier, Detective Larry Olson of the Ames Police Department testified without objection that the container carried a federal prescription label, and read the warning printed on the label to the jury. This evidence, without Dahlgren's opinion, was sufficient to establish nitrous oxide as a prescription drug under section 155.3(10)(a), and the jury should have been instructed that as a matter of law the evidence so established. Whether or not the canister found at defendant's residence and introduced at trial contained nitrous oxide was a question of fact to be decided by the jury. The instructions given by the trial court, by allowing the jury to decide whether nitrous oxide was a prescription drug, were more favorable to defendant than instructions he was entitled to. The admission of witness Dahlgren's opinion that nitrous oxide is a prescription drug resulted in no prejudice to defendant, and there was no error.

V. Sufficiency of evidence. A search of defendant's bedroom produced a 230 gram package of marijuana, a number of smaller packages of marijuana, a scale, plastic baggies, and drug paraphernalia. Detective Olson testified that the street value of the marijuana found in defendant's possession was around \$3600. He also stated that a person who distributes marijuana frequently uses materials similar to those found in defendant's bedroom. Beverly Best testified that on September 8, 1977, she visited defendant's home and upon her request, defendant gave her a small amount of marijuana which she intended to pay for later. She also stated she had previously purchased marijuana from defendant. Defendant admitted to Detective Kaufman that he sold marijuana and amphetamines to his friends. The neighbors' observations concerning

numerous "visitors" to defendant's home corroborates that admission. We hold there was sufficient evidence of defendant's possession of marijuana with intent to profit and delivery of marijuana with intent to profit. See State v. Didley, 264 N.W.2d 732, 733 (Iowa 1978); State v. Metcalf, 260 N.W.2d 857, 861 (Iowa 1977); State v. Boyd, 224 N.W.2d 609, 612-613 (Iowa 1974).

The search also uncovered a canister which carried a federal prescription warning label and was later determined to contain nitrous oxide. Dahlgren testified as to the toxicity and effects of nitrous oxide. Beverly Best testified that she had inhaled nitrous oxide in defendant's bedroom on September 8, 1977 at the invitation of defendant. Best was a minor on September 8, 1977. We hold there was sufficient evidence of defendant's administering nitrous oxide, a prescription drug, to a minor. See State v. Beyer, 258 N.W.2d 353, 356 (Iowa 1977).

AFFIRMED.

Oxberger, C. J., dissents.

OXBERGER, C. J. (dissenting)

I disagree with the majority's conclusion in Division IV. The question of whether nitrous oxide is a prescription drug is not a question of law to be decided by the court. See Hand v. State, 334 So.2d 601, 602 (Fla. 1976) (whether phenacyclidine was a barbiturate was question of fact). This was an issue for the jury to decide as the trial court properly recognized.

In State v. Horton, 231 N.W.2d 36, 38 (Iowa 1975), the court held that a police officer may not testify to his opinion on whether defendant possessed drugs for personal use or for delivery. An expert may give an opinion which goes to an ultimate question to be decided by the jury but may not testify on mixed questions of law and fact. Grismore v. Consolidated Products Co. 232 Iowa 328, 361, 5 N.W.2d 646, 663 (1942). In State v. Billings, 242 N.W.2d 726, 729 (Iowa 1976), the court held the term "in the nighttime" had a specialized legal meaning as used in the definition of burglary. Therefore, permitting a witness to testify that the offense was committed in the nighttime impermissibly allowed him to express an opinion on a question of mixed law and fact. In the instant case, nitrous oxide is not a controlled substance. Section 155.3(10), The Code, generally defines a prescription drug without listing any particular substances. The question posed to Dahlgren asked him whether State's Exhibit 1, which he had identified as a tank of nitrous oxide, contained a prescription drug. Under section 155.30, this term has a specialized legal meaning and is an element of the offense charged. In my opinion, the subject was inappropriate for opinion testimony. I would reverse defendant's conviction of administering a prescription drug to a minor and remand for a new trial.