

IN THE COURT OF APPEALS OF IOWA

No. 1-353 / 90-1678

FILED

OCT 29 1991

CLERK SUPREME COURT

STATE OF IOWA,

Plaintiff-Appellant,

vs.

485

AARON ANDREWS,

Defendant-Appellee.

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

The State has been granted discretionary review to
challenge the district court order setting aside part of
Andrews' verdict. **AFFIRMED.**

Bonnie J. Campbell, Attorney General, Elizabeth
Stevenson, Assistant Attorney General, John P. Sarcone,
County Attorney, and Jamie D. Bowers, Assistant County
Attorney, for appellant.

James F. Whalen, Polk County Public Defender, for
appellee.

Heard by Donielson, P.J., and Sackett and Habhab, JJ.

SACKETT, J.

The State appeals a trial court order granting defendant's motion for acquittal, following a jury verdict on a charge of possession of a controlled substance with intent to deliver in violation of Iowa Code section 204.401(1)(c)(3) (Supp. 1989). The defendant was also found guilty of carrying a weapon in violation of Iowa Code section 724.4 (1989). The weapons conviction was not set aside. The State was granted discretionary review.

The Des Moines Police Department received a report a man had been observed brandishing a gun in a car driven by a woman. The officers located a car that matched the description and bore the license number of the reported car. The car was stopped. Cara Williams, the driver, owned the car. Defendant was a passenger in the car. Under defendant's seat the officers found a ready to fire automatic weapon, bullets, and cocaine. The cocaine was in a double plastic bag that appeared to contain six \$50 rocks and one \$25 rock. Defendant was searched. The officers found two \$20 bills in his pocket. He also had three pennies.

An Officer Clock testified at trial as an expert. He had attended seminars on drug trafficking and was an undercover narcotics officer. He testified he was familiar with the crack cocaine business in Des Moines. He said the crack business was done through street dealing. The way to

street deal was to rent or use someone's car and deal from the car. Clock said then the dealer did not lose his or her car by forfeiture if caught. Clock said dealing out of someone's car was common. He said he knew the price of cocaine in Des Moines at the time the defendant was stopped. Clock said a rock, half a gram of cocaine, sold for \$50. He said a \$20 rock is three slivers from a \$50 rock. He said it is a cash business and dealers prefer \$20 bills.

Clock said a lot of cocaine trafficking cases involve weapons, which are usually kept with the money and the drugs. He said the automatic weapon found was consistent with drug trafficking. Clock also said the cocaine taken from the defendant was consistent with drug trafficking because it was divided into salable lots. He said that both the size and number of crack cocaine rocks were consistent with trafficking. He said two \$20 bills would buy two \$20 rocks, but the normal price for rocks was \$25 and \$50. Clock said a user would not be likely to purchase cocaine in different lots, but would buy one large rock to cut up or buy the cocaine hydrochloride and do the process himself or herself. He also noted the absence of user material in the car. He admitted the cocaine in the defendant's possession could be consumed by some users in one day. The State argues from this evidence a jury could find the defendant had the intent to deliver crack cocaine.

A trial court must view a judgment for acquittal in the light most favorable to the State. See State v. Allen, 348 N.W.2d 243, 247 (Iowa 1984); State v. Robinson, 288 N.W.2d 337, 340 (Iowa 1980). To support a conviction, the record must contain substantial evidence, which means evidence that could convince a rational trier of fact the defendant is guilty beyond a reasonable doubt. See Robinson, 288 N.W.2d at 339.

The trial court had reserved ruling on the motion during trial. In granting the motion for acquittal, the trial court found the only evidence connecting the defendant with any intent was circumstantial, and the testimony of Clock is to the modus operandi. The trial court found under Clock's testimony anyone with any amount of crack and any amount of money could be a dealer. The trial court noted possession of a controlled substance, standing alone, is not sufficient to infer an intent to distribute.

The State contends this is not a proper analysis of the evidence because Clock testified the size and number of crack cocaine rocks found in the defendant's possession were consistent with drug trafficking.

The trial court found Clock's testimony did not supply the necessary link. Clock testified to these issues as an expert. Clock's testimony sought to explain why the circumstantial evidence showed the defendant was a drug

dealer, despite the absence of a large amount of cocaine, a large amount of money, and other indications of drug dealing. There were obvious inconsistencies in Clock's testimony. Clock's opinion was, based on the amount of money and drugs, that the defendant had sold some cocaine. However, no cutting device was found in defendant's possession. Clock said drug dealers did not make change, and the normal price of a rock was \$25 or \$50. The defendant had two \$20 bills, which was not consistent with either a \$50 or \$25 sale.

We give the trial court considerable discretion in determining whether a subject of testimony is for an expert. Admission of expert testimony rests in the discretion of the trial court and will not be reversed absent a manifest abuse of discretion. See DeBurkarte v. Louvar, 393 N.W.2d 131, 138 (Iowa 1986). In order to justify admission of opinion evidence, the witness must be qualified, and the facts upon which he or she bases his or her opinion must be sufficient to enable the qualified witness to express an opinion which is more than a mere conjecture. Van Horn v. Iowa Public Serv. Co., 182 N.W.2d 365, 370 (Iowa 1970). A trial judge has the right to insist that expert testimony bring more to a jury than a lawyer can offer in argument. See In re Air Crash Disaster, 795 F.2d 1230, 1233 (5th Cir. 1986). There were inconsistencies in Clock's testimony. The trial court

found Clock's opinion was no more than conjecture. Substantial evidence to support a conviction requires evidence which allows more than suspicion, speculation, and conjecture. See State v. Lewis, 242 N.W.2d 711, 724 (Iowa 1976).

The trial court did not err in concluding the State's evidence did nothing more than allow the jury to speculate about the defendant's intent. We agree with the trial court. We affirm.

AFFIRMED.

Habhab, J., concurs; Donielson, P.J., dissents.

DONIELSON, P.J. (dissenting)

I respectfully dissent. Viewed in the light most favorable to the State, the evidence presented by the four police officers, particularly Officer Clock, was sufficient to convince a rational trier of fact, beyond a reasonable doubt, that Andrews had the intent to deliver the crack cocaine with which he was found.

Furthermore, there is no question but that we have jurisdiction, after the supreme court's grant of discretionary review, to reinstate the jury's verdict. Finally, reinstatement of the jury's verdict would not violate the double jeopardy clause of the fifth amendment to the United States Constitution. See United States v. Wilson, 420 U.S. 332, 352-53, 95 S. Ct. 1013, 1026, 43 L. Ed. 2d 232, 247 (1975)("[w]hen a judge rules in favor of the defendant after a verdict of guilty has been entered by the trier of fact, the Government may appeal from that ruling without running afoul of the Double Jeopardy Clause.).

I would reverse the trial court and remand this case for reinstatement of the jury's verdict of guilty.