IN THE COURT OF APPEALS OF IOWA

No. 7-374 / 96-1575 000465

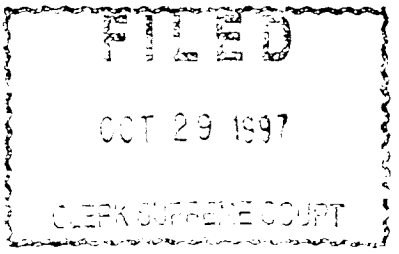
STATE OF IOWA,

Plaintiff-Appellee,

vs.

DONALD GENE VENTEICHER,

Defendant-Appellant.



Appeal from the Iowa District Court for Sac County, Joel E. Swanson, Judge.

Defendant appeals his conviction and sentence, following a jury trial, for possession with intent to deliver (cocaine) in violation of Iowa Code section 124.401(1)(c) (1995), possession with intent to deliver (marijuana) in violation of section 124.401(1)(d), and failure to affix a drug tax stamp in violation of section 453D.12. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Martha Lucy and John M. Priester, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Sharon K. Hall, Assistant Attorney General, and Pamela Dettman, County Attorney, for appellee.

Heard by Sackett, Huitink, and Habhab*, JJ.

*Senior judge assigned by order pursuant to Iowa Code § 602.9206 (1997).

HABHAB, S.J.

Appellant was a passenger in a vehicle driven by his brother. During a traffic stop, the officer smelled marijuana. An assisting officer searched the passenger compartment. Upon opening the glove box, he found a large sandwich bag inside a brown bag. The bag contained a large amount of marijuana packaged in several little baggies. Some of the baggies weighed half an ounce and others contained a quarter ounce or less. The bag also contained a hand-held scale. Both appellant and his brother were arrested.

While being processed, Officer Jansma assisted the jailer in booking appellant. Officer Jansma testified that when appellant's personal property and clothing were removed, they found a pipe, a bag containing a leafy green substance later identified as marijuana, and a small white envelope containing a powdery substance in his right boot.

Appellant contends the district court abused its discretion in admitting evidence concerning the items seized when he was being processed at the jail. He argues that he was not charged with a crime based on the drugs found on his person at the jail, but that this evidence was introduced at trial. Appellant maintains the prejudicial nature of the evidence far outweighed its probative value and should have been excluded. He maintains the State's entire case was based on circumstantial evidence, since none of the drugs found in the vehicle were in his immediate control.

He further asserts that the evidence he had a small amount of marijuana on his person unfairly led the jury to conclude he must have known about the marijuana in the glove box.

Appellant next argues his trial counsel was ineffective for failing to object to the police officer's testimony that the amount and packaging of the marijuana found in the vehicle were indicative of an intent to sell the marijuana. Appellant contends this testimony was improper because it rendered an opinion on the ultimate question of his guilt or innocence.

I. Admission of Evidence Found During Processing. There may be a question whether error was preserved regarding the admission of exhibit 6. Assuming error has been preserved, nevertheless, we conclude the evidence is relevant and its probative value outweighs any prejudice. Defense counsel belatedly objected to testimony describing the items in exhibit 6. It is well established that failure to object to evidence or to move to strike the same at the time the record is made and when the grounds for objection or motion to strike are first apparent precludes the party from asserting on appeal admission of evidence was error. *State v. King*, 225 N.W.2d 337, 341 (Iowa 1975); *State v. Farnum*, 554 N.W.2d 716, 719 (Iowa App. 1996). We note appellant's objections to the testimony concerning the items in exhibit 6 were not followed by motions to strike or requests that the objection precede the answer. *See State v. Brotherton*, 384 N.W.2d 375, 379 (Iowa 1986) (when an objection is late and

follows the answer, a motion to strike, coupled with an application to have the objection precede the answer or an excuse for tardiness, must be made). Error which is not preserved is waived. *See State v. Heacock*, 521 N.W.2d 707, 710 (Iowa 1994). We find error was not preserved concerning that testimony and decline to address appellant's arguments about the inadmissibility of the testimony concerning the items found on appellant during processing at the jail.

II. Ineffective Assistance of Counsel. Our review of an allegation of ineffective assistance of counsel is de novo. *State v. Howes*, 525 N.W.2d 874, 876 (Iowa App.1994). A defendant has the burden of proving by a preponderance of the evidence his attorney did not perform an essential duty and, as a result, he was prejudiced. *State v. Howell*, 557 N.W.2d 908, 913 (Iowa App. 1996). To demonstrate prejudice, a defendant must prove there is a reasonable probability that but for counsel's unprofessional errors the result of the proceeding would have been different. *State v. Tracy*, 482 N.W.2d 675, 680 (Iowa 1992). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* In alleging ineffective assistance, a defendant must overcome the strong presumption counsel was competent. *State v. Ray*, 516 N.W.2d 863, 865 (Iowa 1994).

Claims of ineffective assistance of counsel are usually not adjudicated on direct appeal because the attorney charged with ineffectiveness has not had an opportunity to respond to the allegations. *State v. McKettrick*, 480 N.W.2d 52, 56

(Iowa 1992). Such claims may be decided on direct appeal, however, if the defendant fails to show one of the two prongs. *State v. Pierson*, 554 N.W.2d 555, 562 (Iowa App.1996); *State v. O'Donnell*, 533 N.W.2d 576, 579 (Iowa App.1995).

At trial, the State inquired about the manner of packaging of the marijuana found in the glove box as follows:

> Q. And how was the marijuana inside, how was it packaged inside the brown bag? A. As you can see it was packaged in several little baggies, the two biggest bags weigh a half of an ounce each and then there were several that way, a quarter of an ounce which is commonly referred to as a quarter and there is a couple other small ones and that was packaged inside this little brown bag also. . . .
>
> Q. In your experience in drug stops such as this, what is the significance of the manner of packaging? A. The significance to this is that this is not for personal use, they're going to go out and sell each one of these bags to somebody here in town or somebody in the county. This is for sale, it's not for personal use. Usually personal use people have less than a quarter of an ounce or a quarter of an ounce or less, but once you start getting to half ounces plus, you've got several quarter ounces that they're going to sell to people.

Appellant argues this testimony was improper because it rendered an opinion on the ultimate question of the guilt or innocence of appellant. We disagree.

Iowa Rule of Evidence 704 allows otherwise admissible opinion testimony even though "it embraces an ultimate issue to be decided by the trier of fact." Iowa R. Evid. 704; *State v. Smith*, 522 N.W.2d 591, 593 (Iowa 1994) (citing *State v. Murphy*, 451 N.W.2d 154, 156 (Iowa 1990)). A witness may testify concerning one element of the crime. However, a witness may not express an opinion on the defendant's guilt or innocence. *Smith*, 522 N.W.2d at 593-94; *compare Murphy*, 451

000470

N.W.2d at 156 (opinion testimony on intoxication permissible) with *State v. Maurer*, 409 N.W.2d 196, 198 (Iowa App.1987) (testimony that, beyond all reasonable doubt, defendant operated a motor vehicle while intoxicated was inadmissible).

The officer's testimony as set forth above merely goes to the element of intent in the crime with which appellant was charged. It does not express an opinion that appellant was guilty, nor does it comment on whether the defendant acted with the intent to deliver or on whether the defendant committed the act to which the witness testified. Therefore, the testimony was admissible. The trial court was within its discretion in allowing the same.

Since the evidence was admissible, appellant was not prejudiced by counsel's lack of objection to the proffered testimony. Without a showing of prejudice, appellant's claim of ineffective assistance of counsel must fail. Accordingly, we affirm appellant's conviction.

AFFIRMED.