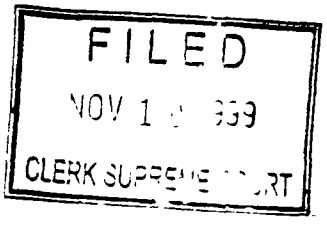
IN THE COURT OF APPEALS OF IOWA

No. 1999-268 (9-498) / 98-1651
Filed November 10, 1999



STATE OF IOWA,

Appellee,

vs.

WILLIAM RUMLEY,

Appellant.

Appeal from the Iowa District Court for Scott County, Bobbi M. Alpers, Judge.

William Rumley appeals from his convictions for possession with intent to deliver and a drug tax stamp violation. **AFFIRMED.**

Linda Del Gallo, State Appellate Defender, and Tricia A. Johnston, Assistant State Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, Linda J. Hines, Assistant Attorney General, and Robert E. Weinberg, County Attorney, for appellee.

Considered by Streit, P.J., and Mahan, and Zimmer, JJ.

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ZIMMER, J.

The defendant, William Rumley, appeals from his convictions, following a jury trial, for possession of a controlled substance (crack cocaine) with intent to deliver in violation of Iowa Code section 124.401(1)(c) (1997) and failure to affix drug tax stamp in violation of Iowa Code section 453B.12. On appeal, he asserts his trial counsel was ineffective for failing to challenge the sufficiency of the evidence and in failing to object to testimony which he claims invaded the province of the jury. We affirm Rumley's convictions.

I. Background Facts and Proceedings. On March 18, 1998, a Davenport police officer received a call from a confidential informant who told him that a black male named 'Billy' was sitting at the bar at Zeke's Birdland, with a scanner in front of him, selling crack cocaine. Officers Swank and Garrard were dispatched to investigate.

The officers arrived at th · bar shortly after midnight and observed Rumley seated at the end of the bar with a scanner. Both officers saw the defendant holding a black object in his hand which he immediately dropped behind the bar. Officer Swank recovered the black object from the floor where Rumley had dropped it. An examination of the object revealed a clear plastic baggie containing crack cocaine which was enclosed in a black plastic wrapper. Similar pieces of black plastic were found at the base of the chair where defendant had been sitting.

Rumley was arrested and transported to the Davenport police station. During the booking process, police found a total of $1,027 in cash in the defendant's pockets.

They also recovered a pager which Rumley had in one of his pockets. Rumley was charged with possession with intent to deliver cocaine and failure to affix a drug tax stamp. Following trial, a jury found Rumley guilty of both offenses as charged.

Rumley appeals. He argues his trial counsel was ineffective in two respects. First, he contends his trial counsel failed to challenge the sufficiency of the evidence Second, he asserts trial counsel failed to object to testimony which he claims invaded the province of the jury.

II. Standard of Review. Because a constitutional right is involved, we review ineffective assistance of counsel claims de novo. *State v. Smothers,* 590 N.W.2d 721, 722 (Iowa 1999). We do not usually resolve ineffectiveness claims on direct appeal because the record is inadequate, preferring to address them in postconviction relief proceedings where counsel is given an opportunity to respond. *State v. Williams,* 574 N.W.2d 293, 300 (Iowa 1998).

To prevail on a claim of ineffective assistance of counsel, a defendant must prove counsel failed to perform an essential duty and the failure prejudiced the defendant. *State v. Dinkins,* 553 N.W.2d 339, 341 (Iowa App. 1996). A defendant must overcome the strong presumption that counsel's actions were reasonable under the circumstances and fell within the normal range of competency. *State v. Pierson,* 554 N.W.2d 555, 562 (Iowa App. 1996) (citations omitted). Ineffectiveness claims may be decided on direct appeal if the defendant fails to show one of the two prongs, *id.*, or if "the record is clear and plausible strategy and tactical considerations do not explain counsel's actions." *State v. Neuzil,* 589 N.W.2d 708, 710-711 (Iowa 1999).

It is not necessary to determine whether counsel's performance was deficient before examining the prejudice component of an ineffective assistance claim. *State v. Hoeck*, 547 N.W.2d 852, 863 (Iowa App. 1996).

III. Failure to Challenge Sufficiency of Evidence. Rumley argues his counsel failed to challenge the sufficiency of the evidence to support his conviction on the drug tax stamp charge. He contends there was not enough evidence to support a finding he was in possession of ten or more dosage units as required by Iowa Code section 453B.1(3)(d), when he was found with only three rocks of crack cocaine, one large and two small. In considering whether the evidence is sufficient, we examine the record in a light most favorable to the State, including any inferences arising from the evidence. *State v. Adams*, 554 N.W.2d 686, 691 (Iowa 1996). We find the record adequate to decide Rumley's claim on direct appeal.

An element of the drug tax stamp charge is that the defendant be a dealer. A dealer is "any person who . . . possesses . . . in this state any of the following: a. Seven or more grams of a taxable substance other than marijuana, . . . d. Ten or more dosage units of a taxable substance which is not sold by weight." Iowa Code § 453B.1(3). A dosage unit is defined as "the unit of measurement in which a substance is dispensed to the ultimate user," including, but not limited to, "one pill, one capsule, or one microdot." Iowa Code § 453B.1(6). Only section 453B.1(3)(d) is at issue; Rumley's large rock weighed only 2.39 grams, too little for him to fall under section 453B.1(3)(a).

We find sufficient evidence a 'dosage unit' is the unit of measurement in which crack cocaine is dispensed *to the ultimate user*. The testimony indicated crack cocaine is sold in the form of small 'rocks.' Sergeant Greg Collins of the Davenport Police Department testified the size of a rock someone would normally ingest is an eighth to a quarter inch square, with the normal yield being ten rocks per gram of crack cocaine; 2.39 grams is not a standard measure for sale. Therefore, Rumley possessed approximately 23 dosage units in his 2.39-gram rock. Collins also testified the large rock possessed by Rumley would not be ingested by anyone without being chipped down into the small rocks. It would be unlikely for a dealer to sell one large rock; their profits come from cutting a big rock into smaller pieces and selling those.

This testimony provides an adequate basis to infer that, although Rumley had not yet divided the rock cocaine into dosage units, the large rock he possessed consisted of ten or more dosage units as it would be dispensed *to the ultimate user*. *See Adams*, 554 N.W.2d 686 (permitting inference that a 'dosage unit' is the proper measurement unit for sale of crack cocaine where officer would have testified defendant possessed ten or more dosage units). Because there was sufficient evidence to find Rumley guilty, the outcome would have been the same even if his counsel had argued in the motion for judgment of acquittal that there was insufficient evidence. An ineffectiveness claim cannot be sustained for failure to urge a meritless issue. *Neuzil*, 589 N.W.2d at 711. We conclude Rumley's counsel was not ineffective for failing to challenge the sufficiency of the evidence.

IV. Failure to Object to Improper Opinion Testimony. Rumley complains his counsel was ineffective for failing to object to the opinion of an expert witness, Police Sergeant Collins. He argues Collins rendered an opinion on the ultimate question of guilt or innocence--whether Rumley possessed with the intent to deliver If the ineffectiveness claim is based on the failure to object to the admission of certain evidence, we can ordinarily adjudicate the claim on direct appeal if the evidence was admissible. *Dinkins,* 553 N.W.2d at 341.

While ordinarily an expert may give an opinion on an ultimate issue to be decided by a trier of fact, our rules do not permit a witness to express a direct opinion on the guilt or innocence of a defendant. *Id.* Determining guilt or innocence is the exclusive function of the finder of fact; and consequently, is an improper subject of expert testimony. *Id.* Permitting a witness to testify directly that he had an opinion that a quantity of drugs was possessed by the defendant 'with intent to deliver' is tantamount to permitting the witness to testify he had an opinion as to the ultimate fact of defendant's guilt or innocence. *State v. Oppedal,* 232 N.W.2d 517, 524 (Iowa 1975). However, prosecutors may and frequently do call an expert to provide testimony to help the jury understand evidence of drug packaging, drug properties, and the like, and determine the element of intent in a possession charge. *Id.*

The line between permissible and impermissible opinion testimony in this context seems to draw at whether the witness' testimony relates specifically to the defendant. Compare *Oppedal,* 232 N.W.2d at 524 (finding impermissible the witness' opinion that quantity of drugs was possessed by the defendant with intent to

deliver) and *State v. Ogg*, 243 N.W.2d 620, 621 (Iowa 1976) (rejecting opinion testimony that the quantity of drugs "defendant possessed" would be more than would be considered for personal use) with *Dinkins*, 553 N.W.2d at 342 (permitting opinion that the facts of the case fit the profile of "a person who sells drugs"), citing *State v. Olsen*, 315 N.W.2d 1, 7 (Iowa 1982). An opinion that the evidence in the case is consistent with selling drugs is properly admitted as a comparison for the jury, not an opinion of guilt. *Dinkins*, 553 N.W.2d at 342.

The following colloquy took place between the State's attorney and Collins:

> Q. Now, Sergeant Collins, based on your experience and training, if you consider all the items that you had before you, the crack cocaine wrapped in black--which you've indicated the only purpose would be for concealment, the pager, over a thousand dollars in cash--in denominations such as I've indicated, mostly twenty dollar bills, tens, some hundreds, some fifties--a scanner, would all those items taken together found in the possession of a person--in your opinion, would it be more likely that that person was selling the crack cocaine or that they were using it?
> A. Oh, there's absolutely no doubt this is--this is in its totality, is for sale.

The prosecutor's question is appropriately placed in a nonspecific context. *Dinkins*, 553 N.W.2d at 342 (noting the State may properly ask expert whether the particular facts of the case, stemming from the expert's field of expertise, would be characterized as drug dealing or drug consumption). We find the question and answer appropriate and admissible. Collins simply opines that the evidence in the case is consistent with a sale of drugs and is properly admitted as a comparison for the jury.

Since the opinion evidence was admissible, Rumley's counsel committed no error in failing to object.

AFFIRMED.