STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1523

State of Minnesota,
Respondent,

vs.

Geshik O Binese Martin,
Appellant.

Filed October 20, 2009
Affirmed
Ross, Judge

Beltrami County District Court
File No. 04-CR-07-6055

Lori Swanson, Attorney General, James B. Early, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Timothy R. Faver, Beltrami County Attorney, 600 Minnesota Avenue Northwest, Suite 400, Bemidji, MN 56601-3190 (for respondent)

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Considered and decided by Worke, Presiding Judge; Ross, Judge; and Schellhas, Judge.

U N P U B L I S H E D O P I N I O N

ROSS, Judge

Geshik Martin appeals his controlled-substance conviction, arguing that police unconstitutionally seized him after they stopped a car in which Martin was a passenger. Alternatively, Martin argues that he is entitled to a new trial because the district court committed reversible error by allowing the state's expert witness to testify about Martin's intent to sell the drugs. Because we conclude that the deputy's attempt to search Martin did not violate Martin's constitutional rights and because the district court did not abuse its discretion by allowing the challenged testimony, we affirm Martin's conviction.

FACTS

Beltrami County Deputy Lee Anderson stopped a red Chevrolet Tahoe travelling westbound on Paul Bunyan Drive in Bemidji in December 2007. He had noticed that the right front turn signal was damaged and he saw the Tahoe turn right into a parking lot without signaling. Deputy Anderson followed the Tahoe into the lot, activated his squad car's emergency lights, and directed the Tahoe to pull into a parking space.

Deputy Anderson approached the driver, Nicole Lussier, and discussed the traffic violation. Deputy Jamie Scherf arrived to assist. Deputy Scherf approached the passenger's side of the Tahoe, and he recognized the passenger as Geshik Martin, a local professional boxer. Deputy Scherf was eager to talk to Martin about Martin's boxing, but interest in conversation was one-sided. Martin answered questions very briefly, kept his hands in his lap or pockets, and looked forward without eye contact with Deputy Scherf. The deputy described Martin as being "kind of fidgety." Later at the omnibus hearing,

Deputy Scherf answered whether Martin's "fidgety" demeanor raised any concern, stating, "Typically when you talk to somebody, especially about a sporting event or something that they're in, I would think that they'd make eye contact and kind of make conversation about it, but he was not." The deputy did not state that he was concerned for his safety at that time, and he testified that he did not suspect Martin of any criminal activity.

While Deputy Scherf talked with Martin, Deputy Anderson discovered that Lussier lacked a driver's license and proof of insurance. He told Lussier that he was therefore impounding the Tahoe and directed her out of the vehicle. Deputy Scherf also told Martin "that the vehicle was going to be towed, and that he would need to step out of [it]." Martin complied. According to the prosecutor's argument to the district court, at that point Martin was no longer being detained but was "free to walk away."

Crucial to the issues raised on appeal, however, Martin did not immediately leave. Instead, when he exited the Tahoe, he walked toward its rear door. Deputy Scherf asked Martin what he was doing and Martin responded that he wanted to get his jacket from the rear seat. Deputy Scherf said that he would get the jacket. Deputy Scherf grasped the jacket, felt it, discovered a cell phone charger in its pocket, and handed the charger and jacket to Martin.

As Deputy Scherf handed the jacket to Martin, Martin removed his hands from the front pouch-pocket of his hooded sweatshirt to put the jacket on. Deputy Scherf then "noticed something bulky" inside the sweatshirt pouch-pocket. This bulge aroused the deputy's curiosity, and he told Martin to "just wait for a minute." Deputy Scherf then

"reached for [Martin's] front pocket." He later explained that he was "unsure" what the bulky item was and wanted to "basically just kind of find[] out what it was." Martin reacted to the deputy's reach by backing up a few steps and asking, "Hey, what's going on?" Deputy Scherf told Martin, "[I want to] make sure what you have in your pockets, and I'm going to attempt a pat down on your outside." Martin said, "No," threw his jacket at Deputy Scherf, and ran away.

Deputy Scherf yelled for Martin to stop, but Martin kept running. Deputy Scherf pursued, and Martin reached into his pouch-pocket and threw something that "looked like confetti" into the snow. Deputies apprehended Martin in a nearby parking lot. They searched where Martin threw the confetti-like substance and discovered nine small packets of crack cocaine. They also searched Martin's person and found a significant amount of cash, most notably 29 $20 bills.

The state charged Martin with fleeing peace officers and with a third-degree controlled-substance crime (sale). Martin moved to suppress the drug evidence, arguing that it resulted from his being illegally seized. The district court denied the motion, concluding that the officer had a "reasonable and articulable suspicion that [Martin] had a weapon, justifying a pat down search of [Martin] for officer safety." The case proceeded to a jury trial with the critical issue being whether Martin intended to sell the drugs. Martin objected to the state's expert testimony regarding how the drugs were packaged and whether the cash and drugs that Martin possessed were "consistent with" drug sales. The district court allowed the testimony and the jury found Martin guilty. The district court sentenced Martin to 51 months in prison. This appeal follows.

D E C I S I O N

I

Martin first challenges the district court's denial of his pretrial motion to suppress evidence. This court reviews pretrial suppression rulings de novo, which permits an independent review of the evidence and a decision on whether suppression is warranted as a matter of law. *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999). Martin argues principally that the drug evidence must be suppressed because Deputy Scherf detained him without a reasonable, articulable suspicion of criminal activity. The federal and state constitutions guarantee the right of persons not to be subjected to "unreasonable searches and seizures." U.S. Const. amend. IV; Minn. Const. art. I, § 10; *see also Illinois v. Wardlow*, 528 U.S. 119, 123, 120 S. Ct. 673, 675 (2000) (citing *Terry v. Ohio*, 392 U.S. 1, 30, 88 S. Ct. 1868, 1884 (1968)) ("[A]n officer may, consistent with the Fourth Amendment, conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot."). We first consider the nature of the seizure.

The Challenged Seizure

The state asserted to the district court that Martin *was not* being detained by the deputies after they ordered him from the car for its impoundment; this adds a wrinkle to this appeal, in which the state now bases its argument chiefly on the opposite assertion that Martin *was* being lawfully detained after he was ordered from the car. To counter Martin's pretrial argument, the state had contended that Deputy Scherf had not seized

Martin because a reasonable person "would have believed that [he was] free to walk away from the encounter with [Deputy] Scherf."

Martin argues that Deputy Scherf "illegally seized Martin when he told Martin to 'wait for a minute' because he was going to execute a pat-search." He contends that because this "wait-for-a-minute" seizure occurred after the traffic stop had ended, the seizure and pat-search were unlawful unless Deputy Scherf reasonably suspected Martin of criminal activity *and* suspected that Martin was armed and dangerous. The argument has some theoretical merit, but it ultimately fails on the facts and practical circumstances.

The district court did not expressly decide whether Martin continued to be seized after he stepped from the Tahoe. Instead, it skipped the seizure analysis and concluded that "[b]ased on [Martin's] demeanor and the bulky pocket area of [Martin's] sweatshirt, [Deputy] Scherf had reasonable and articulable suspicion that [Martin] had a weapon, justifying a pat down search of [Martin] for officer safety." Martin focuses on this issue because if a search or attempted search resulted from an unconstitutional seizure, the evidence that it produced is subject to suppression as "fruit of the poisonous tree." *See State v. Bergerson*, 659 N.W.2d 791, 797 (Minn. App. 2003) (citing *Wong Sun v. United States*, 371 U.S. 471, 488, 83 S. Ct. 407, 417 (1963)) (stating that evidence obtained through an illegal seizure is "fruit of the poisonous tree" and generally inadmissible to support a conviction).

The state asserts that because Martin was lawfully seized when police stopped the Tahoe for an equipment violation, the traffic stop was still ongoing at the time of the attempted search and the search was justified because Deputy Scherf had a reasonable

suspicion that Martin was armed and dangerous. Because the circumstances of the stop and attempted search are not disputed and the record is complete, we can determine whether a seizure occurred even though the district court did not. *See State v. Fort*, 660 N.W.2d 415, 418 (Minn. 2003) ("While the district court did not make specific findings with respect to whether Fort was seized . . . we can make that determination based on the record before us."). A person is seized "when [an] officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen." *State v. Cripps*, 533 N.W.2d 388, 391 (Minn. 1995) (quoting *Terry v. Ohio*, 392 U.S. 1, 19 n.16, 88 S. Ct. 1868, 1879 n.16 (1968)). If police officers "convey a message that compliance with their request is required," a seizure has occurred. *Harris*, 590 N.W.2d at 98 (quotation omitted). To determine whether a person was seized, Minnesota courts analyze whether "an objectively reasonable person in [the defendant's] situation would have believed that he or she was neither free to disregard the officer's questions nor free to terminate the encounter." *Cripps*, 533 N.W.2d at 391.

A stop-and-frisk under *Terry* is constitutionally permissible only if two conditions are met: "First, the investigatory stop must be lawful. . . . Second, to proceed from a stop to a frisk, the police officer must reasonably suspect that the person stopped is armed and dangerous." *Arizona v. Johnson*, 129 S. Ct. 781, 784 (2009). For a stop to be lawful, a police officer must reasonably suspect that the person apprehended has engaged in or is engaging in criminal activity. *Id.*; *Terry*, 392 U.S. at 10, 88 S. Ct. at 1874. The first *Terry* condition is satisfied during a traffic stop precipitated by a traffic violation. *See*,

e.g., *State v. Kilmer*, 741 N.W.2d 607, 609 (Minn. App. 2007) (explaining that even an "insignificant" violation of a traffic law can provide the objective legal basis for a stop).

Martin was lawfully seized when police stopped the Tahoe. *See Brendlin v. California*, 551 U.S. 249, 255, 127 S. Ct. 2400, 2406 (2007) (explaining that a police officer effectively seizes "everyone in the vehicle" for the duration of a traffic stop); *see also Fort*, 660 N.W.2d at 418 (rejecting state's argument that passengers are not seized because "temporary detention of individuals during the stop of an automobile by the police constitutes a seizure under the Fourth Amendment" (quotation omitted)). He was the incidental subject of the police seizure, which was justified because of the Tahoe's broken light and Lussier's failure to signal.

The state's concession, buttressed by Deputy Scherf's testimony, establishes that at some point before the attempted search, the deputies understood that their justification to detain Martin under *Terry* had ended. Martin's attorney asked Deputy Scherf about the status of Martin's detention after Deputy Anderson decided to tow the Tahoe: "[O]nce it was decided that the car was going to be towed and you asked . . . Martin to get out, he would be free to leave at that point in time, would he not?" Deputy Scherf responded, "He would." We must interpret the prosecutor's argument that Martin was "free to walk away" and Deputy Scherf's testimony that Martin was "free to leave" to mean that Martin was indeed "free to leave." Since both the prosecutor and police acknowledged this freedom, the first element of the usual *Terry* stop-and-search (lawful detention) no longer existed once the deputy released Martin from the Tahoe. For reasons that follow, however, our decision does not depend on whether Martin was free

to leave (as the state asserted to the district court) or he was instead not free to leave (as the state asserts to this court). *But see LaPanta v. Heidelberger*, 392 N.W.2d 254, 257 (Minn. App. 1986) (holding that a party may not shift position on appeal). Martin's voluntary and intrusive continued presence at the immediate scene renders the deputy's decision to conduct a pat-search reasonable and therefore constitutional.

The Challenged Search

On our unique facts, Martin's apparent pre-search freedom does not resolve the constitutionality of his search. That he was "free to walk away" is relevant to a determination of when his lawful seizure ended. But it does not resolve the reasonableness of the search, which occurred within seconds of his being "free to leave" and before he actually acted on that freedom. Despite being free to leave, Martin stayed. He remained on the scene and forced continued police interaction with him by attempting to re-enter the vehicle from which the deputy had removed him. We therefore need not decide whether Deputy Scherf could lawfully continue to detain Martin under *Terry* after Martin was free to leave because Martin, detained or not, remained actively involved with the police on the scene. And his continued presence prevented the deputy from disregarding any potential concerns about officer safety. A reasonable deputy would retain these concerns until Martin disengaged from police and departed and, if the changing circumstances before Martin's departure warranted it, act on the concerns. Martin points to no caselaw that holds that police can no longer act on developing concerns about officer safety the instant the passenger becomes "free to walk away," and

we are aware of none. We therefore reject Martin's contention that Deputy Scherf violated his constitutional rights simply by searching him after he was purportedly freed.

Martin's continued presence and interaction also provides the basis to reject his related argument that Deputy Scherf's attempted pat-search illegally expanded the duration and scope of the traffic stop. Additionally, even treating the attempt to pat-search as a detention, we are convinced that it was not an unlawful expansion of the scope or duration of the original detention for the traffic violations. The Minnesota Constitution requires that the scope of a traffic-stop investigation be limited by the justification for the stop. Minn. Const. art. I, § 10; *State v. Askerooth*, 681 N.W.2d 353, 364 (Minn. 2004); *State v. Wiegand*, 645 N.W.2d 125, 135–36 (Minn. 2002). Generally, the scope and duration of the traffic stop "must be strictly tied to and justified by the circumstances that rendered the initiation of the investigation permissible." *Wiegand*, 645 N.W.2d at 135. This court ordinarily conducts a two-pronged analysis to determine the legality of an investigative stop. *Askerooth*, 681 N.W.2d at 364. We would first consider whether the stop was justified at its inception, and second, "whether the actions of the police during the stop were reasonably related to and justified by the circumstances that gave rise to the stop in the first place." *Id*. (citing *Terry*, 392 U.S. at 19–20, 88 S. Ct. at 1879).

But in setting limits on an officer's authority to expand the scope of a traffic stop, the Minnesota Supreme Court has expressly noted that an officer's decision to investigate concerns about officer safety does not raise the same issue or face the same scrutiny as a decision to investigate some additional criminal issue. *See Wiegand*, 645 N.W.2d at 136

(holding that the reasonableness requirement of both constitutions restricts the scope of a *Terry* investigation to the offense which "occasioned the stop, . . . the *limited search for weapons*, and . . . only those additional offenses . . . for which the officer develops" reasonable suspicion) (emphasis added); *see also Fort*, 660 N.W.2d at 419 n.2 (Minn. 2003) ("We feel compelled to make clear here, as we did in *Wiegand*, that our holding should not be read as limiting in any way a search conducted pursuant to *Terry v. Ohio . . . for purposes of officer safety*.") (emphasis added). Deputy Scherf's effort to address his concerns about officer safety did not unconstitutionally expand the substantive or durational scope of the stop.

We are therefore concerned only with the reasonableness of the deputy's decision to conduct the pat-search for weapons. We agree with the district court that the attempted, limited intrusion was reasonable. To conduct a lawful pat-search based on concerns for officer safety, an officer must have an "objective articulable basis" for thinking that a lawfully stopped person may be armed and dangerous. *State v. Payne*, 406 N.W.2d 511, 513 (Minn. 1987) (citing *Terry*, 392 U.S. at 1, 88 S. Ct. at 1868). We recognize that after Deputy Scherf retrieved Martin's jacket from the Tahoe and handed it to Martin, he still "did not suspect [Martin] of any criminal activity at that point in time." But the deputy had a developing and objectively reasonable basis for concern about officer safety. He had perceived Martin while he sat in the Tahoe as being fidgety and detached, he had seen Martin placing his hands in and out of the pouch-pocket of his sweatshirt, and he then suddenly noticed that there was something inside that pocket so large that it created a bulge. The district court also credited the deputy's assertion that he

thought "maybe [the bulge] was a weapon." Similar observations by officers have been adequate justification for a *Terry* pat-search in other cases. *See Pennsylvania v. Mimms*, 434 U.S. 106, 112, 98 S. Ct. 330, 334 (1977) (holding that a bulge in a jacket permitted the officer to conclude the suspect posed a serious and present danger to the safety of the officer); *Harris*, 590 N.W.2d at 104 (concluding pat-search was justified where suspect appeared extremely nervous, had a large bulge in the sleeve of his jacket, and tried to hide his arm).

Despite Martin's freedom to leave the scene, the circumstances indicate that the deputy developed a reasonable suspicion to pat-search Martin for weapons while Martin remained present. The district court did not err by refusing to suppress the evidence discovered after the deputy attempted to search him.

II

Martin next contends that his conviction must be reversed because the district court "erred by allowing the state's expert witness to invade the exclusive province of the jury by opining on whether Martin intended to sell the drugs he possessed." The state counters by arguing that Martin "has forfeited any objection to [the sales testimony]" because he failed to object. We first address the state's argument that the issue has not been preserved for our review.

Preservation of Issue for Appeal

We reject the state's contention that Martin failed to preserve the specific objection that the expert's testimony improperly reached the ultimate issue. We generally do not consider unobjected-to trial errors except to review for plain error. *State*

v. Ramey, 721 N.W.2d 294, 302 (Minn. 2006). But the record shows that Martin objected to the contested opinion testimony of Officer Regas, both before and during the trial. Before trial, Martin's attorney objected to the testimony by first questioning whether the witness qualified as an expert and then adding, "I don't think that he should be allowed to testify about the ultimate issue in this case, or maybe even render an opinion about the sacks in this case, you know, his evaluation of those, that he can provide his expert experience and knowledge." The district court overruled the objection, "authorize[d] the testimony of [Officer] Regas, and require[d] that the foundation [for his expertise] be laid in front of the jury."

At trial, when Officer Regas was testifying, Martin's attorney renewed her objection. The extended discussion of the basis for the objection directly refutes the state's assertion that Martin did not specifically challenge the witness's testimony to the ultimate facts:

> DEFENSE: Your Honor, I am objecting on the basis that the state is asking this expert to address the very issue that the jury must decide on. . . . I believe that it is intellectually dishonest to tell the jury that they get to decide, but have an expert tell them what to think about this evidence. . . . He can explain his opinion, experiences, and then the legal question for the jury is whether or not [the drugs were] possessed with the intent to sell? And to allow an expert with law enforcement to tell them that his opinion about that factual determination, that is the very essence of their decision in this case . . . .
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> . . . .
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> PROSECUTOR: Your Honor, we will rely on the case law that clearly allows [Officer] Regas to render an opinion, even though it goes to an ultimate fact. The court probably has the

> specific case in front of it . . . . But simply because an expert is rendering an opinion as to an ultimate issue in the case . . . the expert can testify to that . . . . That's why we have experts. Quite honestly, the jury can accept his opinion, or they can reject it.
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> . . . .
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> THE COURT: I will note that we did have a long discussion in regards to this issue, and based upon the cases that were attached with the memo . . . I am going to overrule the objection. [The prosecutor] was careful in the phrasing of his question, that it's consistent, and I don't want it to go any farther than that. So I'm going to overrule that objection, as I previously ruled in the pretrial motions.

Evident from this exchange, not only did Martin specifically object to the expert's testimony on the ultimate issue, the state expressly understood the basis and argued against the objection on that ground, and the district court ruled on the objection. Martin has adequately preserved the issue for appellate review. We turn to its merits.

Propriety of Expert Testimony

We are not persuaded by Martin's contention that the district court's allowing the expert's testimony warrants reversal. The district court has broad discretion whether to admit expert testimony and how to define the scope of that testimony, and we will not reverse absent an abuse of that discretion. *State v. Ritt*, 599 N.W.2d 802, 810 (Minn. 1999).

Martin contends that the district court committed reversible error by allowing Regas to "opine that the crack-cocaine discarded by Martin was not 'consistent for personal use,' but rather was 'consistent with someone who was in possession of a quantity of crack cocaine, and their intent would be to sell it.'" Because Martin was

charged with possession of drugs with the intent to sell, a central factual issue was whether he had the requisite intent to sell the drugs.

Opinion testimony regarding a trial's "ultimate issue" is generally admissible provided that it complies with rule 704 of the Minnesota Rules of Evidence, does not embrace a legal conclusion or term of art, and does not "merely tell the jury what result to reach." *State v. Moore*, 699 N.W.2d 733, 740 (Minn. 2005); *see also State v. Collard*, 414 N.W.2d 733, 736 (Minn. App. 1987) ("An expert witness may give testimony on the ultimate issue which the factfinder must decide."), *review denied* (Minn. Jan. 15, 1988). Rule 704 permits opinion testimony on ultimate issues if the testimony "is helpful to the factfinder." *Moore*, 699 N.W.2d at 740 (discussing rule 704 and providing that testimony is not "helpful" when it involves matters within the knowledge and experience of the jury, does not add precision or depth to the jury's understanding, and states a legal conclusion).

The district court allowed Officer Regas to testify that, in his opinion, the cocaine that Martin discarded was "not consistent with personal use." Officer Regas based his opinion on several facts, including, "the nine individual bindles that all appeared to be consistent in size and weight, that Mr. Martin was found in possession of $1,265, and the fact that there was nine, it's not consistent with personal use." He testified that, from his "experience, the person who's purchasing crack cocaine for personal use [would buy] one or two dubs, or maybe one fifty rock." He explained that "the most commonly sold form of crack cocaine is the twenty dollar rock, or the dub" and the denomination of money

recovered from Martin therefore "looked consistent with proceeds from the sale of crack cocaine."

We are not persuaded by Martin's argument that this testimony should have been excluded based on the idea that it was not helpful and that it basically informed the jury what result to reach. Regas's testimony was helpful because the manner in which cocaine is packaged and sold is not within the knowledge or experience of a lay jury. His testimony added context to the jury's understanding of the nature of the seized contraband.

Martin also argues that Regas's testimony should have been excluded because it involved a mixed question of law and fact and was therefore inadmissible under *State v. Provost*, 490 N.W.2d 93 (Minn. 1992). The *Provost* court held that expert testimony is not "admissible on the ultimate question of whether in fact the defendant had the requisite *mens rea* when he committed the crime." *Id*. at 101. It explained that "*mens rea* is a legal construct," and expert testimony cannot relate to "a mixed question of law and fact." *Id.*

But *Provost* is materially dissimilar to this case. *Provost* involved psychiatric opinion testimony regarding whether a defendant accused of murder had the requisite intent to kill. One of the defendant's arguments was that he was mentally ill and could not form the requisite intent. The court explained that a "psychiatrist may look at what the defendant said and did to give an opinion whether the torching was done with intent to kill or hurt, but the factfinder can do this too; indeed, it is the factfinder's job to do it, not the expert's as a thirteenth juror." *Id.* at 101–02.

A year after issuing *Provost*, the supreme court in *State v. Chambers* quoted extensively from *Provost* and clarified that its holding was not limited to psychiatrists' opinions on mixed questions of law and fact. 507 N.W.2d 237, 239 (Minn. 1993). The *Chambers* court also dealt with an expert's opinion on whether the defendant had the requisite intent to kill. A pathologist had testified that based on his examination of the wounds, he formed an opinion with "reasonable medical certainty" that the wounds were "meant to cause the subject's death." *Id.* at 238. The supreme court held that the district court had abused its discretion by admitting this testimony over the defendant's objection, and it explained that

> [a] pathologist may appropriately testify to things such as the number and extent of the wounds, the amount of bleeding, whether the wounds were caused by a knife or a blunt instrument, whether a gunshot wound is a contact wound, whether the wounds could or could not have been the result of accident, the cause of death, and so forth, but the pathologist should not be allowed to make an "expert inference" of intent to kill from these matters. That is for the jury to do.

Id. at 239.

Interpreting a combination of common facts that bear uniquely on drug dealing is substantially different from interpreting facts that are commonly understood to indicate the intent to kill. The expert here did not invade the exclusive province of the jury when he explained the significance of the packaging and quantity of drugs and of the quantity and denomination of money that Martin possessed. A lay juror can readily infer without any help from a medical expert that an attacker intended to kill based on the number of stab wounds inflicted or the instrument used to inflict them. No expert is necessary or

helpful to inform a juror of the relationship between the quantity of wounds and the intent of the perpetrator. But the ordinary, law-abiding juror would generally lack knowledge about the quantity, packaging, and cost of illegal drugs, and how these factors relate to whether the possessor distributes rather than merely uses drugs.

Although Officer Regas's testimony related to the ultimate issue, he did not improperly invade the jury's role to decide intent to sell. The ultimate decision was left to the jury, and Officer Regas's opinion testimony properly provided a framework for the jury to weigh the facts bearing on that element.

Affirmed.