

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2008-CA-002121-MR

JAIME ERIC GUSMAN

APPELLANT

v. APPEAL FROM BOONE CIRCUIT COURT  
HONORABLE ANTHONY W. FROHLICH, JUDGE  
ACTION NO. 08-CR-00325

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: DIXON, MOORE, AND STUMBO, JUDGES.

STUMBO, JUDGE: Jaime Gusman appeals from his conviction on the charge of first-degree trafficking in a controlled substance. Gusman argues that he is entitled to a new trial because the trial court erred in allowing the Commonwealth Attorney to ask leading questions of its own witness, erred when it advised the Commonwealth about how to pose a certain question, and erred when it failed to enter a directed verdict. The Commonwealth argues there was no error and would

have us affirm the conviction. We find that there was no error in this case and affirm.

On April 12, 2008, Victor Velasquez was at home in the trailer he rented from Gusman. Gusman was at his girlfriend's house at the time. Luis Rendán was with Velasquez at the trailer. Eventually, two individuals came to the trailer looking for Gusman, purportedly to buy drugs. Velasquez then called Gusman. Gusman told Velasquez to meet him and pick up some drugs. Velasquez and Rendán went to Gusman's girlfriend's house. They waited outside in a vehicle until Gusman came out and gave Velasquez some drugs wrapped in white paper. Velasquez was to take some of the drugs to the two individuals who came to the trailer who would meet him at the Dixie Mini Mart and then take the rest home.

Two officers who were patrolling the area observed the meeting between Gusman and Velasquez and believed they had just witnessed a drug transaction. The officers followed Velasquez's vehicle to the Dixie Mini Mart where the white package was given to two individuals. This was also witnessed by the two officers.

After the vehicle being driven by Velasquez left the Dixie Mini Mart, the officers stopped it due to observed traffic violations. Velasquez did not have a driver's license and was arrested. Upon being arrested, he was searched and the officers found the remaining drugs in his possession. Velasquez eventually told the police that Gusman gave him the drugs.

Gusman was indicted by the Boone County Grand Jury on June 3, 2008, and was charged with trafficking in a controlled substance, first-degree. Gusman's trial began September 18, 2008.

At trial, the Commonwealth called Velasquez to testify. Velasquez could not speak English, so an interpreter was provided for him. Part of Velasquez's testimony is the basis for Gusman's first claim of error. As Velasquez was describing the events of April 12, 2008, he stated that "they told me to call him," meaning the two men told him to call Gusman. Gusman's counsel correctly objected to this statement as hearsay and the court agreed.

Through the interpreter, the Commonwealth attempted to explain to Velasquez that he could not testify about what other people said. The Commonwealth was attempting to get Velasquez to testify that he did call Gusman, but without saying the call was made at the direction of the two men. However, Velasquez continued stating that the two men told him to call Gusman. Gusman's counsel continued to object. There were multiple bench conferences, during which both counsel and the court discussed the language problem. At one point, the jury was removed and the interpreter tried to explain the hearsay rules to Velasquez. The jury returned to the courtroom, but Velasquez continued to state he called Gusman at the men's direction.

The Commonwealth then sought permission to ask a leading question in order to avoid the hearsay testimony. The trial judge did not permit the Commonwealth to ask the proposed question, but crafted a question that he

believed would elicit the appropriate testimony. In essence, the trial judge told the Commonwealth what question to ask. The question still elicited hearsay testimony. This is the basis for one of Gusman's claims of error.

Gusman argues that the trial court should not have helped the Commonwealth determine what questions to ask. We find this was not in error. The trial court was trying to move the proceedings along. We will caution though that the trial judge came close to becoming an advocate rather than an impartial referee of the proceedings. However, we do not believe the court strayed beyond its duty under KRE 611(a) to exercise control over to mode of interrogating witnesses effectively and without "needless consumption of time."

The Commonwealth Attorney eventually asked for and was granted a recess to research whether she could ask leading questions in this circumstance. Upon returning to court, the Commonwealth argued that KRE 611 and the unpublished case of *Malm v. Commonwealth*, 2008 WL 3890077 (Ky. 2008),<sup>1</sup> could allow some leading questions to be asked. The court agreed and permitted the Commonwealth to ask leading questions. The Commonwealth, using leading questions, was able to get testimony from Velasquez that did not contain hearsay evidence.

Gusman next argues that the trial court should not have allowed the Commonwealth to ask leading questions. We disagree. KRE 611 states:

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<sup>1</sup> This case is cited pursuant to CR 76.28(4)(c).

(a) Control by court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to:

- (1) Make the interrogation and presentation effective for the ascertainment of the truth;
- (2) Avoid needless consumption of time; and
- (3) Protect witnesses from harassment or undue embarrassment.

(b) Scope of cross-examination. A witness may be cross-examined on any matter relevant to any issue in the case, including credibility. In the interests of justice, the trial court may limit cross-examination with respect to matters not testified to on direct examination.

(c) Leading questions. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily leading questions should be permitted on cross-examination, but only upon the subject matter of the direct examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

“[A]llowing the use of leading questions on direct examination is within the discretion of the trial court and is not grounds for reversal unless there is an abuse of discretion and a shocking miscarriage of justice.” *Malm* at 8 (citing *Tamme v. Commonwealth*, 973 S.W.2d 13, 27 (Ky. 1998)). “The test for abuse of discretion is whether the trial judge’s decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999).

In *Malm*, one witness was not fluent in English and required a translator, as in the case at bar. The Kentucky Supreme Court found that “[t]he

language barrier was significant enough to allow the use of the leading questions in this case.” *Malm* at 8.

As in *Malm*, we do not believe it was an abuse of discretion or a shocking miscarriage of justice for the court to permit the Commonwealth to ask Velasquez leading questions. KRE 611(a) allows the trial court to determine the manner in which a witness is questioned. Trying to get Velasquez to answer this one question, without giving hearsay testimony, took close to an hour. The trial court was within its discretion to limit the amount of wasted time. Both KRE 611(c) and *Malm, supra*, support the judge’s decision to permit leading questions in order to develop the testimony of a witness who was experiencing trouble due to a language barrier. We therefore find no error.

At the conclusion of the Commonwealth’s proof, defense counsel moved for a directed verdict. Gusman argues that the only real evidence that he trafficked in drugs was in the form of unreliable evidence, namely testimony from Velasquez who had trouble understanding the questions, did not speak English, and was asked leading questions. We disagree.

On motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth. If the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty, a directed verdict should not be given. For the purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserving to the jury questions as to the credibility and weight to be given to such testimony.

On appellate review, the test of a directed verdict is, if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt, only then the defendant is entitled to a directed verdict of acquittal.

*Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991). “A reviewing court does not reevaluate the proof because its only function is to consider the decision of the trial judge in light of the proof presented.” *Id.* “Circumstantial evidence is sufficient to support a criminal conviction as long as the evidence taken as a whole shows that it was not clearly unreasonable for the jury to find guilt.” *Bussell v. Commonwealth*, 882 S.W.2d 111, 114 (Ky. 1994) (citing *Trowel v. Commonwealth*, 550 S.W.2d 530 (Ky. 1977)); *Benham, supra*.

In the case *sub judice*, the Commonwealth had the testimony of Velasquez who identified Gusman as the man who gave him the drugs, the testimony of Rendán who stated he saw Gusman give Velasquez the package that contained the drugs, and the testimony of the two police officers. When considering all this evidence in favor of the Commonwealth, it is clear that the trial court properly denied the motion for directed verdict.

For the foregoing reasons, we affirm Gusman’s conviction.

ALL CONCUR.

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