

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000142-MR

DAVID MODRZEJEWSKI

APPELLANT

v.

APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE GREGORY A. LAY, JUDGE
ACTION NO. 07-CR-00273

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, CHIEF JUDGE; CAPERTON, JUDGE; WHITE,¹ SENIOR JUDGE.

WHITE, SENIOR JUDGE: David Modrzejewski appeals from a judgment of the Laurel Circuit Court which sentenced him to serve a total of eight years after a jury found him guilty of three counts of trafficking in a controlled substance.

¹ Senior Judge Edwin M. White sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

Modrzejewski challenges the sufficiency of the evidence supporting his convictions. We affirm.

Modrzejewski and his co-defendant, Fred McCardle, were arrested as the result of a sting operation arranged by Charles Warren, a confidential informant working for Special Agent Gerald Hughes of the Drug Enforcement Administration. Warren telephoned McCardle, who was in Michigan, and told him that he wanted to buy a quantity of prescription pills. They agreed to a sale price of \$2,202 and planned to meet at a Wendy's parking lot in Laurel County. McCardle provided Warren with a description of the vehicle he would be driving. Warren negotiated the sale with McCardle and never spoke with Modrzejewski.

On the day that the sale was to take place, Agent Hughes had to attend to a family matter and arranged for Detective Billy Madden to take his place. When Modrzejewski and McCardle arrived at the Wendy's parking lot, Detective Madden and another detective were waiting. They spoke with Modrzejewski and McCardle and then seized a shaving kit from the rear floorboard of their vehicle. It contained various bottles of pills prescribed to Modrzejewski and McCardle. The pills prescribed to Modrzejewski included oxycodone, soma, and alprazolam.

Modrzejewski and McCardle were tried jointly before a jury. At trial, Madden testified about a statement given to him by Modrzejewski at the DEA office in Laurel County after the arrest. Modrzejewski told Madden that he was a

passenger in a car traveling to Laurel County for the purpose of selling prescription drugs to an unknown male. Modrzejewski also said that he was prescribed three Oxycontin tablets per day and that he was going to sell only thirty of them so that he could continue taking two per day himself.

The jury found Modrzejewski guilty of first-degree trafficking in a controlled substance (oxycodone), second-degree trafficking in a controlled substance (hydrocodone), and third-degree trafficking in a controlled substance (alprazolam). This appeal followed.

Modrzejewski argues that the trial court erred in denying his motions for a directed verdict of acquittal because the evidence was insufficient to support his convictions. Modrzejewski points to the following weaknesses in the Commonwealth's evidence: the informant Warren negotiated the drug buy solely with McCardle; the pills found in the vehicle at the Wendy's parking lot were legally prescribed to Modrzejewski and to McCardle; Modrzejewski's incriminating statement to Detective Madden was not recorded, nor did he write or sign a transcript of the statement; and Warren had misidentified McCardle and Modzrejewski in court. Furthermore, he argues that Warren had a motive to incriminate him. In addition to being paid \$200 to arrange the sale with McCardle, Warren testified that he had a pending trafficking charge in Whitley County and that he hoped his cooperation with the police would help him resolve that charge.

On a motion for directed verdict of acquittal, all fair and reasonable inferences are drawn in the Commonwealth's favor. *Commonwealth v. Benham*, 816 S.W.2d 186, 187

(Ky. 1991). However, judgment as to the credibility of witnesses and the weight of the evidence are left exclusively to the jury. *Id.*; see also *Commonwealth v. Smith*, 5 S.W.3d 126, 129 (Ky. 1999). On appellate review, we determine whether, under the evidence viewed as a whole, it was clearly unreasonable for the jury to have found the defendant guilty. *Commonwealth v. Sawhill*, 660 S.W.2d 3, 5 (Ky. 1983).

Fairrow v. Commonwealth, 175 S.W.3d 601, 609 (Ky. 2005).

Our review indicates that more than enough evidence was introduced to support Modrzejewski's conviction. Although Warren dealt only with McCardle in arranging the purchase and was unable accurately to identify either McCardle or Modrzejewski in court, Modrzejewski was nonetheless a passenger in the vehicle that McCardle had described to Warren and which arrived at the appointed sale location on the specified date. The evaluation of Warren's credibility was within the exclusive sphere of the jury, which was made fully aware through Warren's own testimony of his possible motive to incriminate Modrzejewski unfairly.

As to the physical evidence, although the pills recovered from the vehicle were legally prescribed to the two men, the drugs were of the variety and quantity necessary to complete the arranged transaction and could therefore constitute evidence of intent to sell. For example, Warren had arranged to purchase thirty-five oxycodone pills. McCardle had no oxycodone prescribed in his name, whereas Modrzejewski had eighty-six oxycodone pills prescribed in his

name. The sales transaction could not have been fulfilled without Modrzejewski's input.

The location of the pills was also significant. In *Dawson v. Commonwealth*, 756 S.W.2d 935, 936 (Ky. 1988), police searched a suspect's apartment and found drugs in two nightstands and under a foil ceiling. The Kentucky Supreme Court held that the latter location constituted evidence of intent to sell:

The fact that some of the controlled substances were in night stands and other easily discernible places but one substance was secreted and hidden in a cache in the ceiling is so incongruous as to justify a jury to believe that that particular substance was possessed, not for personal use, but for the purpose of sale.

Id. Similarly, it is highly unlikely that two acquaintances would keep prescription drugs intended only for their individual personal use commingled in the same container on the back floor of a vehicle. The fact that Modrzejewski's pills were found in the same shaving case as McCardle's prescriptions was incongruous enough for the jury to believe the medications were possessed for the purposes of sale.

As to Detective Madden's testimony about the highly incriminating statement made by Modrzejewski following his arrest, Modrzejewski has provided no reference to the record to indicate whether a timely objection preserved this alleged error for our review. An appellate court is "not at liberty to review alleged errors when the issue was not presented to the trial court for decision." *Henson v.*

Commonwealth, 20 S.W.3d 466, 470 (Ky. 1999); Kentucky Rules of Civil Procedure (CR) 76.12(4)(c)(v). Nor has Modrzejewski provided any citations to authority to support his argument regarding the statement. CR 76.12(4)(c)(v). Moreover, even if we were to review Madden's testimony regarding the statement, it would appear to be admissible as a statement against penal interest pursuant to Kentucky Rules of Evidence (KRE) 801A(b). Furthermore, such statements need not be recorded under the holding in *Brashars v. Commonwealth*, 25 S.W.3d 58, 62-63 (Ky. 2000).

For the foregoing reasons, the judgment of the Laurel Circuit Court is affirmed.

ALL CONCUR.

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