

Commonwealth of Kentucky
Court of Appeals

NO. 2010-CA-000043-MR

MARK COX

APPELLANT

v. APPEAL FROM CARTER CIRCUIT COURT
HONORABLE REBECCA K. PHILLIPS, JUDGE
ACTION NO. 07-CR-00059

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON AND NICKELL, JUDGES; ISAAC,¹ SENIOR JUDGE.

ISAAC, JUDGE: Mark Cox appeals from a jury verdict convicting him of first-degree trafficking in a controlled substance. He argues that he was entitled to a directed verdict. For the reasons stated below, we affirm.

On January 19, 2007, April Kiser, a confidential informant, met with officers from the drug task force in Carter Caves in Carter County, Kentucky, and

¹ Senior Judge Sheila R. Isaac sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

a decision was made that a controlled buy would be made by Kiser from her acquaintance, Mark Cox. Officer Chris Castle searched Kiser and did not find any money or drugs on her person. The officers fastened an electronic recording device on Kiser that would allow them to listen to the transaction in real time as well as record it. Kiser drove to Cox's residence and the officers followed her and parked nearby. Kiser purchased two pills for twenty-two dollars. Although no one was identified by name on the audio during the buy, Kiser later informed the officers that Cox was the person who sold her the pills.

Cox was indicted for first-degree trafficking in a controlled substance. At the close of the Commonwealth's case, Cox moved for a directed verdict asserting that all of the elements of the offense had not been proven and renewed the motion at the close of the evidence. The trial court denied the motions. During jury deliberations, the jury sent a question to the court, which read "[w]as April Kiser informed of the consequences of lying under oath? Before she came to the stand." The court answered with the agreement of the parties that "[a]ll witnesses testifying in court proceedings are administered the same oath. All witnesses should infer there are consequences for violating the oath." After further deliberation, the jury returned a guilty verdict. Cox received a sentence of ten years' imprisonment. This appeal followed.

Cox argues that he was entitled to a directed verdict because the evidence presented was not substantial and the jury openly questioned the credibility of Kiser's testimony. We disagree.

The standard of review for directed verdicts is well-established:

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, 817 S.W.2d 186, 187 (Ky. 1991).

Kiser presented direct evidence to prove each element of the charge offense. Cox has merely questioned the credibility of Kiser's testimony. As stated above, any issues regarding the credibility and weight of Kiser's testimony are committed solely to the province of the jury. The question the jury presented to the court only evidenced the discharge of the jury's duty to determine the credibility of witnesses. This Court is not permitted to substitute its view of the evidence for that of the jury. Cox was not entitled to a directed verdict of acquittal.

Accordingly, the judgment of the Carter Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Roy Alyette Durham
Assistant Public Advocate
Dept. of Public Advocacy
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Jack Conway
Attorney General of Kentucky

Heather M. Fryman
Assistant Attorney General
Frankfort, Kentucky