

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

CALVIN BASKIN

APPELLANT

VS.

NO. 2008-KA-1755-COA

STATE OF MISSISSIPPI

APPELLEE

BRIEF FOR THE APPELLEE

APPELLEE DOES NOT REQUEST ORAL ARGUMENT

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STATEMENT OF ISSUES

- I. BASKIN'S MOTION FOR DIRECTED VERDICT AT THE CLOSE OF THE STATE'S CASE WAS PROPERLY DENIED.
- II. THE STATE PRESENTED LEGALLY SUFFICIENT EVIDENCE TO SUPPORT THE JURY'S VERDICT WHICH WAS NOT AGAINST THE WEIGHT OF THE EVIDENCE.
- III. BASKIN'S MOTION TO SUPPRESS WAS PROPERLY DENIED.

STATEMENT OF FACTS

On November 15, 2007, Agents Michael Fowler and Al Fallin with the North Mississippi Narcotics Task Force met with confidential informant William Pickens to arrange a controlled buy of cocaine from Korbin Pickens, a known drug dealer. T. 94-95. At the pre-buy meeting, William's person and vehicle were searched. T. 95. William was also outfitted with an audio-visual recording device and given \$120 for the purchase of an eightball of cocaine. T. 95. Another C.I., Marcus Brooks, accompanied William and was also searched at the pre-buy meeting. T. 99.

When William and Marcus arrived at Korbin's house, they learned that Korbin did not have any cocaine to sell. T. 114, 138. Korbin was, however, kind enough to make some phone calls for the pair so that they could purchase cocaine elsewhere. T. 138. Korbin ultimately called Calvin Baskin and arranged for him to sell William \$50 worth of crack cocaine. T. 138. William, Marcus, and Korbin, along with an unidentified female they picked up along the way, then drove to Baskin's house. T. 138. Video evidence showed William purchase the crack cocaine from Baskin. T. 138, Exhibit 1. The video also showed Baskin bring William his change. T. 100,138, Exhibit 1.

William and Marcus delivered the crack cocaine and the leftover buy money to Agents Fowler and Fallin. T. 101. Korbin and Baskin were indicted for sale of a controlled substance. C.P. 1-2. Their trials were eventually severed, and Baskin was found guilty by a Chickasaw County Circuit Court jury of sale of crack cocaine. C.P. 39-41. He was sentenced to twenty years in the custody of the Mississippi Department of Corrections with fifteen years to serve and five suspended. C.P. 39-41.

SUMMARY OF ARGUMENT

The State presented legally sufficient evidence to prove beyond a reasonable doubt that Baskin sold the C.I. the crack cocaine that was sitting on Baskin's kitchen counter. Alternatively, even if the jury had not found that Baskin independently sold the drugs, they very well could have found Baskin guilty of aiding and abetting Korbin in the sale of crack cocaine.

The jury's verdict is not against the weight of the evidence. The jury was presented with William's testimony and video evidence which showed that Baskin sold William crack cocaine. The jury was also presented with Baskin's illogical version of events, that is, Korbin initially pretended that he had no crack to sell, then drove to Baskin's house to sell William crack and borrow \$50 from Baskin. The duty of assessing witness credibility and resolving conflicts in the evidence lies within the sole province of the jury. The jury faithfully carried out this exclusive duty, and found that the State's witnesses were more credible than Baskin.

The video of the transaction and the events leading up to the transaction contained no testimonial hearsay. As such, Baskin was not denied his constitutional right to cross-examine Korbin.

ARGUMENT

I. BASKIN'S MOTION FOR DIRECTED VERDICT AT THE CLOSE OF THE STATE'S CASE WAS PROPERLY DENIED.

At the close of the State's case, defense counsel moved for a directed verdict, arguing that the State had only shown that the transaction occurred in Baskin's home. T. 166-68. Defense counsel further argued that there was no proof that Baskin hand delivered the drugs to the C.I., or that Baskin made any money from the transaction. T. 166-68. Defense counsel admitted during the oral motion that the jury could infer from the evidence that Baskin gave the drugs to Korbin to sell the C.I., and further acknowledged that the video showed Baskin giving the C.I. \$50 in change, but claimed that there were numerous explanations for that portion of the transaction. T. 167-68. The trial court denied the motion, stating the following.

Court's of the opinion that a prima facie case has been made; that it's a question for the jury; that since the transaction occurred in Mr. Baskin's presence, since the testimony is that it was on the counter of Mr. Baskin's home, and the testimony shows that Mr. Baskin made change for the hundred dollars, it's a question for the jury and then motion is overruled.

T. 168.

"Motions to dismiss, motions for JNOV, and motions for directed verdict all challenge the legal sufficiency of the evidence." *Thames v. State*, 5 So.3d 1178, 1188-89 (¶32) (Miss. Ct. App. 2009) (quoting *Wright v. State*, 958 So.2d 158, 168(¶ 27) (Miss.2007)). In determining whether the State presented legally sufficient evidence to support a jury's verdict, all evidence supporting the guilty verdict must be accepted as true. *Wash v. State*, 931 So.2d 672, 673 (¶5) (Miss. Ct. App. 2006). Additionally, the State is given the benefit of all inferences which may reasonably be drawn from the evidence. *Id.* A reviewing court does not ask whether it believes that the State proved each element of the offense charged beyond a reasonable doubt. *Bush v. State*, 895 So. 2d 836, 843 (¶16)

(Miss. 2005). Instead, the relevant inquiry is whether any rational juror could so find. *Id.*

William testified that Baskin sold him the \$50 worth of crack cocaine. T. 138. William testified that when he walked in to Baskin's house, the crack was already packaged and sitting on Baskin's kitchen counter. T. 143. After William took the crack, Baskin went and made change, bringing William back \$50. T. 138. Even the uncorroborated testimony of a single witness is legally sufficient to support a jury's verdict. *Cousar v. State*, 855 So.2d 993, 998-99 (¶16) (Miss. 2003). Not only was William an eyewitness to the sale of cocaine, but also his testimony was corroborated by video evidence which was played for the jury. On the video, the jury heard William, outside the presence of Korbin, call Agent Fowler and tell him that Korbin was taking him to buy some crack. Exhibit 1 at approximately 11:15. Later in the video, after arriving at Baskin's house, the video shows Baskin introducing himself to William as "Skip." Exhibit 1 at approx. 42:48. The video then shows William picking up the crack cocaine from the kitchen counter saying, "Yeah, it's straight." Exhibit 1 at 43:00. Finally, the video shows Baskin bringing William his change as William tells Baskin, "Appreciate it man." Exhibit 1 at 43:30.

Baskin argues on appeal that neither William's testimony nor the video evidence proves that he sold the drugs. Baskin claims that it was actually Korbin who sold the drugs. A similar argument was made in *Miller v. State*, 980 So.2d 927, 930 (¶12) (Miss. 2008). In *Miller*, when a C.I. went to Miller's house for a controlled buy, the C.I. retrieved the crack which was sitting on a table, and Miller gave the C.I. his change. *Id.* at 928(¶5). On appeal Miller argued that the video evidence did not show a hand-to-hand transaction, and that someone else in the house could have sold the C.I. the drugs. *Id.* at 927 (¶12). The supreme court held that the jury was entitled to draw reasonable inferences from the evidence, and that it was reasonable for the jury to infer that Miller sold the drugs by placing them on the table because the evidence showed that the C.I. walked into Miller's

home with \$40 and walked out with crack cocaine and \$10 change that Miller had given him. *Id.* Likewise in the present case, when the State is given the benefit of all reasonable inferences which may be drawn from the evidence, it is clear that a reasonable juror could find that the State proved beyond a reasonable doubt that Baskin sold William the crack.

Additionally, the supreme court held in *Spann v. State*, “To prove sale of a controlled substance, the State need not prove that the defendant personally placed the substance in the hands of the buyer or that the defendant personally profited from its sale.” 970 So. 2d 135, 137-38 (¶9). In *Spann*, as in the present case, the defendant was given an aiding and abetting instruction. Even if the jury had believed Baskin’s outlandish story that Korbin drove to Baskin’s house to sell the drugs and borrow \$50 to make change for the transaction, while at the same time tricking the C.I. into thinking that Baskin was selling the drugs, the jury still could have found Baskin guilty of aiding and abetting or acting in concert with Korbin to sell the drugs. At the very least, Baskin provided the location for the sale and controlled the financial aspect the sale, making him guilty of aiding in the sale of a controlled substance.

Under either theory, the State presented legally sufficient evidence to support the jury’s verdict.

II. THE STATE PRESENTED LEGALLY SUFFICIENT EVIDENCE TO SUPPORT THE JURY'S VERDICT WHICH WAS NOT AGAINST THE WEIGHT OF THE EVIDENCE.

Both a motion to dismiss the indictment due to alleged insufficient evidence and motion for JNOV attack the legal sufficiency of the evidence. *Thames v. State*, 5 So.3d 1178, 1188-89 (¶32) (Miss. Ct. App. 2009). The State has already shown under the first issue that at the close of the State's case, legally sufficient evidence had been presented to support the jury's verdict.

Reviewing courts examine the evidence in the light most favorable to the verdict in determining whether a verdict is against the overwhelming weight of the evidence. *Bush v. State*, 895 So.2d 836, 844 (¶18) (Miss. 2005) (citing *Herring v. State*, 691 So.2d 948, 957 (Miss.1997)). Determination of witness credibility lies within the sole province of the jury. *Moore v. State*, 969 So.2d 153, 156 (¶11) (Miss. Ct. App. 2007). The jury is also responsible for resolving any conflicts in witnesses' testimony which may arise. *Id.*

Baskin's weight of the evidence argument pits his version of events against William's version, which was corroborated by video evidence. Baskin's case-in-chief consisted of Baskin's own testimony which was largely unintelligible, with the coherent portions of his testimony being illogical. Baskin testified to his participation in the sale with the following narrative.

[Korbin] called me on the 15th. He knowing me by my voice, how I talk, that I'm over there doing something, getting high. He's steadily calling me and saying like he want, telling me, he's thinking I've got something. He can tell by my voice. He's thinking I've got some more. Come on, Sell me some, like that right there.

I'm steady telling him no all the time; because I'm telling him if my want to sell some drugs, he would hurry up and get off the phone; Yeah, I can go get you some; but I'm steady telling him without me knowing. He's steady talking. I'm telling him no.

That's why he said, I might be by and all that stuff. He just pops up over there; and during that time, I was getting high off powder cocaine. That's why I was sniffing my nose.

When Kobrin come over there, Kobrin come in the house. He said, Oh, you're getting high. You know what I'm saying. He come over and said, Let me make this deal; and I'm high; so I ain't got nothing to do with hit. That's why he didn't bring the informant in my house when he first came there.

He askd me did I have change for a hundred dollars. I said, No, I don't think I got about \$50. He told me, I need to borrow \$50. I don't know what kind of sell or what he was fixing to sell or what he was doing. He was doing that. He done been to my house all the time. We got high together right there in my house. You know what I'm saying.

His dealing, I didn't know have nothing to do with it. He did that dealing; and he told me to let him have the \$50; so when the boy pulled out the hundred dollar bill, that's why I said, I'll go get change. I give him the 50, Kobrin; and I give Kobrin the hundred dollars as he went outside. I'm already high. That's why I was asking for a cigarette at the end of the film.

I give him the 100. He's supposed to be bringing the money back that he borrowed, 50 for keeping him and the informant and the girl from going back to the store. That's why I decided to give him change. He's supposed to bring my money back. I probably got it back in time from November to whenever they came and got me. I wasn't worried about the money. I know he wasn't going to do right for that day.

T. 174-75.

Baskin argues on appeal, as he did at trial, that he only loaned Korbin \$50, and Korbin was the one who sold William the drugs. Korbin, according to Baskin, just pretended that he had no drugs, came to Baskin's house to sell the drugs, tricked William into thinking that Baskin was the seller, and then borrowed \$50 from Baskin to make change which was given to William by Baskin. William, on the other hand, testified that Korbin had no drugs to sell, which was why Korbin arranged a buy from Baskin. T. 138. William testified that Korbin called someone named "Skip" for the crack, and upon arriving at Baskin's home, Baskin identified himself as Skip. T. 141, Exhibit 1 at approx. 42:48. William further testified that upon arrival, the crack was already packaged and sitting on Baskin's kitchen counter. T. 143. He paid Baskin for the drugs with a \$100 bill, and Baskin made change for him. T. 138, 143, 158.

The jury clearly found William and his version of events to be more credible than Baskin and his version of events. The jury exercised its exclusive right to determine the facts of the case. Because the verdict is not against the weight of the evidence and represents no unconscionable injustice, Baskin's conviction must be affirmed.

III. BASKIN'S MOTION TO SUPPRESS WAS PROPERLY DENIED.

Baskin claims that the trial court erred in denying his motion to suppress the video of the transaction because he was denied the opportunity to cross-examine Korbin. Baskin claims that this case is similar to *Clark v. State*, 891 So. 2d 136 (Miss. 2003). In *Clark*, Clark's accomplice refused to testify, and his prior statement to police in which he implicated Clark in an armed robbery was entered into evidence. *Id.* at 138 (¶6). The supreme court held that the admission of the accomplice's statement was erroneously admitted into evidence because it was clearly testimonial hearsay. *Id.* at 140 (¶16). However, the court went on to hold that the error was harmless in light of the overwhelming evidence of Clark's guilt. *Id.* at 143 (¶32). The present case is easily distinguishable from *Clark*. Although the video does contain Korbin's side of mostly inaudible telephone calls, no statement made by Korbin on the video constitutes testimonial hearsay.

The case of *Brown v. State*, 969 So. 2d 855 (Miss. 2007) is instructive. In *Brown*, a C.I. set up a controlled buy of narcotics from Elmer "Little Fudge" Armstrong. *Id.* at 857 (¶2). Armstrong placed the C.I. on a three-way call with two unidentified males to set up the purchase. *Id.* Later that day, the C.I. placed a call to the two unidentified men, and an agreement was made to meet at a Wal-Mart parking lot to complete the transaction. *Id.* at 858 (¶3). The phone call was recorded by law enforcement. *Id.* Two hours later, Derrick Brown and Derrick Black arrived at the Wal-Mart parking lot and sold the C.I. crack cocaine. *Id.* at (¶4). On appeal, this honorable Court reversed Brown's conviction, finding that the audiotape of the C.I.'s recorded telephone conversation prior to the sale was inadmissible hearsay which irreparably prejudiced Brown. *Id.* at 859 (¶¶8-9). On a petition for certiorari, the supreme court reversed, finding that the tape was not offered to show Brown's participation in the sale, but was instead offered to corroborate the testimony of the C.I. and law enforcement officers involved in the undercover buy. *Id.* at 861 (¶17). The *Brown* court also

explained why the tape did not contain hearsay statements.

The audiotape was not offered to show that Brown was involved in the pre-arrangement conversations, nor could it have been. A careful review of every word and sentence on the audiotape reveals no statement which the State needed to prove as true. The tape contains such utterances as, "Ain't got but two left" ... "I want it hard man" ... "Yeah. I'm with my bride but I'm going to be walking out where I can see you man." The State had no need to prove these statements, or any of the other statements on the audiotape, were true. Thus, the statements were not hearsay, and the trial court properly overruled Brown's hearsay object.

Id.

In the case *sub judice*, Baskin claims that he was impermissibly denied the right to cross-examine Korbin. However, as in *Brown*, the State did not offer the video to prove the truth of any statement made by Korbin in the video. Instead, the State offered the video simply to corroborate William's and Fowler's testimony. As such, the video did not contain hearsay, much less testimonial hearsay. Accordingly, Baskin was not denied his Sixth Amendment right to confront a witness against him.

CONCLUSION

For the foregoing reasons, the State asks this honorable Court to affirm Baskin's conviction and sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, La Donna Holland, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing **BRIEF FOR THE APPELLEE** to the following:

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This the 1st day of July, 2009.



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