Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2003-541

JUNE TERM, 2004

State of Vermont v. Matthew D. Reardon	}	APPEALED FROM: District Court of Vermont, Unit No. 2, Chittenden Circuit DOCKET No. 4999-8-02 CnCr Trial Judge: Hon. Ben W. Joseph

In the above-entitled cause, the Clerk will enter:

Defendant Matthew D. Reardon appeals from his conviction after a jury trial of felony possession of ecstacy in violation of 18 V.S.A. § 4235a(a)(2). He argues that the trial court erred in: (1) denying his motion to suppress; (2) denying his motion for judgment of acquittal; and (3) denying his motion for a new trial. We affirm.

The following facts are drawn from the trial court' s order denying defendant' s motion to suppress and from evidence presented at trial. In August 2002, at approximately 12:30 p.m., police and emergency medical workers were dispatched to a motel in Colchester. A motel desk clerk had complained that three guests would not wake up despite repeated calls to their room, banging on the door, and her entry into their room. The responding officer followed the clerk to the room, and twice knocked loudly on the door, and announced himself as a police officer. After receiving no response, the officer, who was concerned that the room' s occupants might be dead or injured, entered the room.

Upon entering the room, the officer found three men B two lying on beds, and one lying face down on the floor. None of the men moved when the officer entered, although the officer spoke to them in an effort to rouse them. The officer was able to rouse two of the men after shouting at them loudly and shaking the end of their beds. It took the officer approximately four minutes to wake all three men. While in the room, the officer observed evidence of drug use in plain view, including a A bong,@ dried marijuana stems, empty plastic bags, A blunts,@ and a blanket pushed up against the door, presumably to cover the odor of the marijuana. The officer smelled a strong odor of burnt marijuana in the room. The officer determined that the men had been passed out due to drug use and they did not require medical attention.

The officer asked the men if they had more drugs or drug paraphernalia on them or in their backpacks. The men identified their respective backpacks, but refused to allow the officer to search them. The officer seized the backpacks pending his application for a search warrant. After the men checked out of the room, the officer discovered thirty grams of cocaine, 119 ecstacy pills, $4000 in cash, and a pistol in the room' s safe. Shortly thereafter, defendant and the two other men were arrested. After obtaining a warrant to search defendant' s backpack, the officer found a bag with nineteen identical or similar mottled-colored pills, which the officer suspected were ecstacy. After waiving his Miranda rights, defendant admitted to the officer that the pills were ecstacy.

The nineteen pills taken from defendant' s backpack were sent to the Vermont Forensic Laboratory, where a forensic chemist determined their collective weight to be 3.798 grams. Following a microscopic examination of the pills, which revealed that they had similar markings, the chemist chemically tested a representative sample of the pills B two pills that collectively weighed .4 grams B and found that they contained ecstacy. The chemist testified that because all of

pills looked similar, it was standard protocol to test one of the pills, not every single pill.

Before trial, defendant moved to suppress the evidence obtained from the officer' s warrantless entry into his motel room. The court denied the motion, finding the officer' s entry justified under the emergency assistance exception to the Fourth Amendment warrant requirement. At the close of the State' s case, defendant moved for a judgment of acquittal, asserting that the State had not proved that he possessed two or more grams of ecstacy because it had tested only two of the pills found in his backpack and they did not amount to at least two grams of ecstacy. The court denied the motion, finding the evidence presented by the responding officer and the chemist sufficient to establish that defendant possessed two or more grams of ecstacy. The court did, however, sua sponte, instruct the jury on the lesser-included charge of simple possession. The jury found defendant guilty of felony possession. Defendant then moved for a new trial, arguing that the jury had engaged in speculation in finding that he possessed two grams or more of ecstacy because the State had only tested two of the nineteen pills to verify the presence of the drug. The court denied the motion. This appeal followed.

Defendant first challenges the trial court' s denial of his motion to suppress. He argues that the court erred in finding that an emergency justified the police officer' s warrantless entry into his motel room. According to defendant, the totality of the circumstances demonstrated that the officer did not have reasonable grounds to believe that there was either an emergency at hand or an immediate need for assistance so as to authorize entry into the motel room. In support of this assertion, he notes that the officer was able to rouse the men without the assistance of emergency personnel. He also maintains that the officer' s search was clearly intended to seize evidence of drug use that the officer and the motel employee had observed.

The resolution of a motion to suppress involves a mixed question of fact and law. State v. Simoneau, 2003 VT 83, & 14, 833 A.2d 1280. We accept the trial court' s findings of fact unless they are clearly erroneous. Id. The trial court' s conclusion as to whether the facts as found meet the relevant legal standard is a question of law, which we review de novo. See id.

To fall within the emergency exception to the Fourth Amendment search warrant requirement, the State needed to show that: (1) police had reasonable grounds to believe that there was an emergency at hand and that there was an immediate need for their assistance for the protection of life or property; (2) the search was not primarily motivated by intent to arrest and seize evidence; and (3) there was some reasonable basis, approximating probable cause, to associate the emergency with the place or area to be searched. State v. Mountford, 171 Vt. 487, 490 (2000). The application of this test requires an inquiry into the subjective motivation of police officers, and the trial court should be deferential in evaluating a police decision that intervention was necessary in response to an apparent emergency. Id. at 493.

Defendant argues that the emergency assistance exception is inapplicable because A the facts tend to show that the search by the officer was, in fact, primarily motivated by intent to arrest and seize evidence.@ Defendant challenges the court' s interpretation of the evidence but he has not established that any of the court' s findings are clearly erroneous. See Simoneau, 2003 VT 83, at & 14, 833 A.2d 1280; State v. Lawrence, 2003 VT 68, & 9, 834 A.2d 10 (mem.) (clearly erroneous standard appropriate because trial court is in best position to determine the weight and sufficiency of evidence presented). The court' s findings are supported by the record, and they support the court' s conclusion that the emergency assistance exception applied. As the court found, the occupants of the motel room failed to respond to their telephone, pounding on the door, or an entry and disturbance by the desk clerk. They similarly failed to respond to the officer' s knocking and shouting. Based on the officer' s thirteen years of experience, the court found it reasonable for him to believe that there were three people in one of the motel rooms that could be dead or dying. The trial court found no evidence to suggest that the officer was initially motivated by an intent to seize evidence or make arrests within the room. The trial court' s findings establish the applicability of the emergency exception, and we find no error in the court' s denial of defendant' s motion to suppress.

Defendant next argues that the court erred in denying his motion for judgment of acquittal because the State failed to prove that he possessed A two grams or more of one or more preparations, compounds, mixtures or substances containing Ecstacy.@ See 18 V.S.A. § 4235a(a)(2). Defendant asserts that the State' s evidence showed only that he possessed .4 grams of ecstasy, and thus the State' s failure to prove the essential element of weight necessitated acquittal.

When reviewing the trial court' s denial of a V.R.Cr.P. 29 motion for judgment of acquittal, we must determine A whether, taking the evidence in the light most favorable to the state and excluding modifying evidence, the state has produced evidence fairly and reasonably tending to show the defendant is guilty beyond a reasonable doubt.@ State v. Carrasquillo, 173 Vt. 557, 559 (2002) (mem.) (brackets, internal quotation marks, and citation omitted).

The evidence in this case fairly and reasonably tends to show that defendant was guilty of felony possession beyond a reasonable doubt. Defendant admitted to police that the nineteen pills in his backpack were ecstacy and that they belonged to him. The arresting officer testified that he was familiar with the appearance of ecstasy pills and that the seized pills resembled them. A forensic chemist testified that his microscopic examination of the pills revealed that each pill looked similar, and each had a marking on it that looked like the letter E. The chemist stated that it was not A standard protocol at the lab to test every single pill.@ He testified that he performed two separate tests on the pills to determine the presence of ecstacy. A A spot chemical test@ of one pill that had been randomly selected from a group made up of three of the seized pills indicated the presence of ecstacy. The chemist obtained a similar result when the same test was conducted with another pill from the second group of the remaining sixteen pills. The chemist testified that he also performed a gas chromatograph mass spectrometer test on a sample of the pills and found them to contain ecstacy. He testified that the total weight of the nineteen pills was 3.789 grams.

Defendant offers no legal support for his assertion that the State was required to show that it tested all of the pills to establish that he possessed two grams or more of ecstacy, and we find this argument without merit. Based on the evidence presented by the State, the jury could reasonably conclude that the untested pills, which were similar in appearance to the tested pills and were in the same package, all contained ecstacy. See State v. Paradis, 146 Vt. 345, 347 (1985) (proof of facts includes reasonable inferences properly drawn therefrom); see also, People v. Ohley, 303 N.E.2d 761, 766-67 (Ill. App. Ct. 1973) (where defendant delivered eighty-nine tablets of LSD at same time, and tablets were shown to be homogenous, and six randomly chosen tablets revealed presence of LSD, evidence was sufficient for jury to conclude that all tablets contained LSD); Woodford v. State, 752 N.E.2d 1278, 1283 (Ind. 2001) (testing of two out of nine rocks of cocaine sufficient to support conviction for dealing cocaine; it was within jury' s province to assess credibility of witnesses and weigh evidence); State v. Barnard, 772 A.2d 852, 857 (Me. 2001) (in absence of chemical analysis, other direct and circumstantial evidence can establish identity of drugs beyond a reasonable doubt, including testimony of witness who has experience based on familiarity with specific drug through law enforcement). We note that there was no evidence to suggest that the pills in defendant' s backpack did not contain ecstacy, and indeed, defendant admitted to police that they did contain the drug. The trial court did not err in denying defendant' s motion for judgment of acquittal.

Defendant raises essentially the same argument in support of his assertion that the court erred in denying his motion for a new trial. According to defendant, because the State only presented evidence that two of the nineteen tablets were tested for the presence of ecstacy, the jury had to speculate as to whether the remaining tablets contained ecstacy to find him guilty. Defendant asserts that, although the State' s expert testified that it was his protocol to examine only one pill from each batch, there was no testimony about how many pills or what percentage of the pills he was supposed to test. Defendant maintains that because ecstacy is a compound drug, the testing requirements should differ from those cases involving drugs such as cocaine, heroin, or marijuana.

A V.R.Cr.P. 33 motion for a new trial tests the sufficiency of all of the evidence presented at trial and raises the question whether the jury has performed its function of evaluating admittedly adequate evidence. State v. Cate, 165 Vt. 404, 413 (1996). A new trial based upon the weight of the evidence should be granted A only where the evidence preponderates heavily against the verdict and a serious miscarriage of justice would otherwise result.@ Id. at 413. A The disposition of a motion for a new trial is within the court' s discretion, and its decision will not be reversed unless defendant shows that [the court' s] discretion was either withheld or abused.@ Id.

As discussed above, the evidence in this case was sufficient for a jury to reasonably conclude that defendant possessed two grams or more of ecstacy. We therefore find no abuse of discretion in the court' s denial of defendant' s motion for a new trial.

Affirmed.

BY THE COURT:

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Jeffrey L. Amestoy, Chief Justice

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Marilyn S. Skoglund, Associate Justice

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Paul L. Reiber, Associate Justice