SUPREME COURT OF QUEENSLAND

CITATION:	*R v Wells* [2015] QCA 240
PARTIES:	**R** **v** **WELLS, Robert John Dennis** (appellant)
FILE NO/S:	CA No 110 of 2015 DC No 52 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	Appeal against Conviction
ORIGINATING COURT:	District Court at Hervey Bay – Unreported, 28 May 2015
DELIVERED ON:	24 November 2015
DELIVERED AT:	Brisbane
HEARING DATE:	9 November 2015
JUDGES:	Margaret McMurdo P and Gotterson JA and Applegarth J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**The appeal is dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL AND NEW TRIAL – VERDICT UNREASONABLE OR INSUPPORTABLE HAVING REGARD TO EVIDENCE – APPEAL DISMISSED – where the appellant was convicted of trafficking in and supplying a dangerous drug – where the appellant told police that he routinely stole the drugs from his father to whom they had been prescribed for pain relief – where the appellant had limited intellectual capacity – where evidence given by the appellant in a police interview about the quantity of drugs sold was submitted to be implausible – whether the verdict was unreasonable and not supported by the evidence *MFA v The Queen* (2002) 213 CLR 606; [2002] HCA 53, cited
COUNSEL:	N V Weston for the appellant G P Cash for the respondent
SOLICITORS:	Legal Aid Queensland for the appellant Director of Public Prosecutions (Queensland) for the respondent

[1] **MARGARET McMURDO P:** I agree with Applegarth J's reasons for dismissing this appeal against conviction.

[2] **GOTTERSON JA:** I agree with the order proposed by Applegarth J and with the reasons given by his Honour.

[3] **APPLEGARTH J:** The appellant was convicted after a short trial in the District Court of one count of trafficking in the dangerous drug oxycodone and one count of supplying that drug. The prosecution case depended on admissions made by the appellant to police on 19 February 2014 which, if true, proved its case. In essence, the appellant admitted to stealing tablets from his father every week and regularly selling them to others, including a Jay McKinnon. The count of supply related to his most recent admitted supply to McKinnon, which the appellant told police had occurred the previous Saturday night.

[4] Counsel for the appellant submits that the verdicts are unreasonable and not supported by the evidence. Particular reliance is placed on:

(a) the appellant's limited intellectual capacity;

(b) the absence of supporting evidence;

(c) what is submitted to be little by way of detail in the interview;

(d) what is submitted to be incorrect or implausible statements about the number of boxes of oxycodone the appellant supplied.

According to the appellant's counsel, if the appellant was unreliable in relation to the number of boxes he allegedly sold, this must have affected his reliability in general and, in the circumstances, it was not open to the jury to be satisfied beyond reasonable doubt that the appellant was guilty.[1]

[5] In reply, the respondent submits:

(a) the appellant's limited cognitive ability did not mean that his admissions were unreliable;

(b) the recorded police interview enabled the jury to assess the reliability of his evidence, and showed that the appellant was able to understand matters, protect his interests and give a detailed and plausible account of his activities;

(c) the statements made by the appellant were not contradicted by other evidence, and it is inherently unlikely that the appellant would make admissions about supplying oxycodone to others, including McKinnon, if he had not done so;

(d) there is some uncertainty about what the appellant meant when he said that he "would have sold three or four" boxes of tablets, but the evidence made it possible for him to amass tablets and sell them in the quantities he recalled;

(e) any unreliability in the appellant's recollection of having sold about three or four boxes during the relevant period does not necessarily affect the reliability of his other statements that he supplied oxycodone in the circumstances which he explained;

(f) those other statements proved the offences.

Facts

[6] The appellant was born in late 1993. At the relevant times he lived with his foster father and his foster father's wife at Hervey Bay.[2] The appellant's father was prescribed a number of medications, including the painkiller oxycodone, which was

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1 *MFA v The Queen* (2002) 213 CLR 606 at 615 at [25].

2 For ease of reference these individuals are referred to as the appellant's father and mother, and were referred to in those terms in the interview.

supplied by a local pharmacy regularly under the brand name Oxycontin. During part of the alleged trafficking period between 1 August 2012 and 1 June 2013, prescriptions were filled, on average, each fortnight, and the appellant's father was supplied with boxes containing 28 tablets, each containing 40 mg of oxycodone. There was evidence that the standard dose is two tablets per day, but the appellant told police that a box of 28 tablets was supposed to last his father a month.

[7] According to the appellant, his father's various medications were kept in canvas shopping bags in a bedroom, and each week the appellant's mother would place the medications that his father required each day into seven day medication containers that were kept on the fridge. Until the appellant's parents detected in mid-2013 that he was stealing Oxycontin tablets, the appellant either would take them from the seven day medication container or go into the bedroom and take them out of one of the boxes kept in the canvas shopping bags.

[8] In his 19 February 2014 interview, the appellant said that he had been stealing his father's Oxycontin tablets every week for about a year or a year and a half. He had been doing so to get some extra money and had been selling each tablet for between $25 and $35 per tablet, so that at any one time "someone can buy two, between two and five at a time, depending on how much I've got".

[9] The appellant gave detailed evidence about the circumstances under which he came to first supply McKinnon with tablets and the price at which he initially sold them. On occasions McKinnon would be supplied between two and five tablets "in one go". Sometimes McKinnon would pay for the tablets in "smokes or alcohol" rather than in cash.

[10] According to the appellant, he started supplying to other people after word spread. They would call him on his mobile phone and arrange a meeting. The appellant declined to identify these people. He explained that typically the tablets would be swapped for "cash in hand". When asked how regularly he was supplying to these people, the appellant responded, "Whenever they called me and whenever I had anything".

[11] The appellant told police if he had seven to fourteen pills to sell he could make anywhere between $200 to $300 in a day and "then that would all be blown on drugs and alcohol". He also would gamble the proceeds on "the pokies".

[12] Eventually, the appellant's father and mother found out what he was doing. The appellant was unemployed but was "getting all this money, pretty much every day", and his parents asked him how he came to have $150 in his back pocket. He initially told them that he was selling marijuana, but they realised that the appellant had been stealing his father's medication. This was "the last straw" in a strained relationship at the time, and the appellant went to New Zealand for five and a half months, before coming back to Australia in November 2013.

[13] When asked about the last time he had supplied oxycodone to McKinnon, the appellant said that it was the previous Saturday at around 7 pm in McKinnon's kitchen. He gave details of the transaction and explained that he gave McKinnon two 30 mg tablets, being the revised dosage his father was then prescribed.

[14] Fairly early in the interview, after telling police that he had sold 40 mg tablets for "anywhere between $25 to $35 a pill" the appellant continued:

> "Any one time or three, four hundred dollars a box."

The transcript which was marked for identification transcribes these words as:

> "Any one time or 3 for a hundred dollars a box."

Having listened to the recording, the transcript seems inaccurate and it makes little sense. He did not simply say "three for a hundred dollars", which would equate to about $33 a tablet. Later in the interview the police officer refers to what the appellant had stated earlier about his sale price per tablet and "then your three or four hundred dollars per box". The appellant seems to accept this suggestion.

[15] The following passage in the interview was relied upon by appellant's counsel at trial and on appeal as showing that the appellant's evidence was inaccurate and unreliable:

> "SCON FOSTER: And then your 3 or 4 hundred dollars per box?
>
> WELLS: Yep.
>
> SCON FOSTER: Yeah tell me as, how best you can remember how many times you would have made those--
>
> WELLS: Uh--
>
> SCON FOSTER: [INDISTINCT].
>
> WELLS: Boxes, I would have sold about three or four.
>
> SCON FOSTER: Mmhmm--
>
> WELLS: So that's between 12 and 16 hundred dollars there and then in any one day I can, if I had 7 to 14 pills to sell I could make anywhere between 2 to 3 hundred dollars.
>
> SCON FOSTER: Mmhmm.
>
> WELLS: A day.
>
> SCON FOSTER: Mmhmm.
>
> WELLS: I can make that in a day."

[16] The statement "Boxes, I would have sold about three or four" is ambiguous. I understand the appellant to mean that to the best of his recollection he sold a box containing as many as 28 tablets on three or four occasions, or at least that he sold the equivalent of three or four boxes. I do not understand him to mean that he sold three or four boxes on a particular occasion.

[17] The rest of the interview tends to suggest that the appellant stole tablets each week from either the medication container or the boxes, and generally did not sell entire boxes. The passage I have quoted refers to selling up to fourteen pills. Earlier parts of the interview refer to selling two or between two and five at a time "depending on how much I've got".

[18] On 19 February 2014 a detective visited the appellant's home in order to speak to him about the whereabouts of Jay McKinnon. The appellant was not suspected of supplying drugs. Without any prompting, he disclosed that he had recently supplied McKinnon with drugs. His parents were present at the home. The appellant was invited to attend the police station to talk further about the matter and he agreed to do so. He was asked whether he wanted a support person and that offer was declined. He voluntarily participated in a recorded interview.

[19] A pre-trial application to exclude this evidence was dismissed. In a comprehensive reserved judgment, Judge Reid, who heard substantial evidence about the appellant and the circumstances under which he came to be interviewed, rejected arguments that there had been non-compliance with the provisions of the *Police Powers and Responsibilities Act* 2000 (Qld). Part of his reasoning concerned the manner in which the appellant participated in the interview process and his apparent understanding of the questions being asked and of his rights. Judge Reid described the appellant's answers as "direct and responsive and his speech clear." According to Judge Reid, there was nothing to indicate to the interviewing officer that the appellant was not able to properly participate in the interview. In addition, Judge Reid saw nothing inherently unreliable in the record of interview and was not persuaded that the appellant was of such reduced capacity that he was unable to look after his own interests. He found no basis to exclude the initial conversation at the appellant's home or in the subsequent interview.

[20] The appellant originally appealed on the ground that Judge Reid erred in finding that the record of interview was admissible. However, this ground of appeal was abandoned.

The appellant's limited intellectual capacity

[21] The jury's assessment of the appellant's intellectual capacity, and its implications for the reliability of the appellant's admissions, was based on substantially less evidence than was before Judge Reid. The jury heard evidence from a psychologist who had seen the appellant as a client in 2013. On 4 March 2014, which post-dated his arrest, the Wechsler Adult Intelligence Scale test was administered and resulted in an intelligence quotient score of 76. This placed the appellant within the lowest five percentiles of males of his age. Expressed differently, the test results suggested that 95 out of 100 twenty year olds had a better general cognitive ability than him.

[22] The psychologist had been told that the appellant had ADHD and Asperger's, but was not in a position herself to diagnose either condition. She opined that the autism spectrum disorder diagnosis would make it difficult for the appellant to talk to strangers and that a person who has autism "finds it extremely anxiety-producing talking to strangers". She said that someone with a low IQ can live independently and have conversations with strangers, but will need support with things like budgeting. She gave no evidence that the appellant's low IQ or his reported conditions made statements of the kind which he gave to police unreliable.

[23] The jury had the advantage of watching and listening to the record of interview. The appellant did not show signs of extreme anxiety. He appeared no more anxious than one would expect a young person in his situation to be in such an interview. His answers showed that he understood the proposed interview process and his rights, including his right to have a support person present. He explained that he had dropped out of high school when repeating Grade 11. He was awarded two certificates after completing TAFE courses in retail and hospitality.

[24] The interview showed that the appellant had an apparently reliable recollection about matters of detail. In the course of the interview he asserted his right to decline to identify the other people to whom he had sold oxycodone. He spoke clearly and coherently. His answers were consistent.

[25] The appellant's limited intellectual capacity, coupled with the absence of supporting evidence, required caution on the part of the jury in deciding whether they accepted the truth of all, part or none of the admissions made by the appellant. However, the evidence about the appellant's limited intellectual capacity did not make his answers inherently unreliable.

The absence of supporting evidence

[26] Counsel for the appellant emphasises that there was no evidence which confirmed the appellant's admissions. For example, there was no evidence from the alleged purchasers of the tablets. However, the identity of only one of the alleged purchasers, McKinnon, was revealed. The police did not investigate the appellant's mobile telephone usage, and, in any event, the appellant's statement was that purchasers called him. He made no reference to text messages.

Matters of detail and the accuracy of those matters

[27] I am unable to accept the appellant's submission that he "gave little detail in his interview". The appellant further argues that such detail he did give is either incorrect or implausible. This submission focuses on the passage of the interview which I have earlier quoted. At trial, counsel for the appellant contended that in this passage the appellant was saying that he took three or four boxes on one occasion. This was said to create a reasonable doubt about the reliability and accuracy of what the appellant said in the record of interview, such that the jury would acquit. The appellant's counsel made a sound forensic choice at trial to focus on the three or four boxes issue.

[28] It was open to the jury to conclude that the reference to having "sold about three or four" boxes was ambiguous. It did not clearly mean that on one occasion he sold three or four boxes, each containing 28 tablets. In context, it probably meant that his best recollection was that he sold a box on three or four occasions, and on each occasion was paid $300 or $400 for the box, resulting in total proceeds from sales of boxes of somewhere between $1,200 and $1,600.

[29] If the jury understood the words "sold about three or four" to mean that the appellant sold a box containing 28 tablets on three or four occasions, then it might have questioned the reliability of that assertion in the light of the evidence that during part of the relevant trafficking period[3] the appellant's father was supplied, on average, one box per fortnight. Nevertheless, it was possible, based on the evidence that the appellant's father took one Oxycontin tablet a day, for the appellant to steal enough pills to be able to sell the equivalent of a box from time to time.

[30] The evidence about the appellant's father's rate of consumption of Oxycontin tablets, and the rate at which boxes with 28 tablets were supplied during part of the trafficking period, left open the possibility that the father's consumption was less than the quantity of tablets supplied, giving the appellant the opportunity to steal tablets each week. He had the opportunity to steal a few tablets, a strip of fourteen tablets or perhaps even a spare box on occasions. He had the opportunity to amass over a period of time enough tablets to sell 28 tablets or a box on some occasions. A recollection that he would have sold a box of tablets about three or four times was not implausible. It was possible, on the evidence, that he did so over an extended period. However, his recollection in that regard may have been unreliable, and the jury may have chosen not to accept the accuracy of his recollection about the number of boxes he sold.

[31] If the jury took the view that the appellant's statement about "three or four boxes" was inaccurate and unreliable, then it would have had cause to consider the reliability of other admissions he made. However, it was not necessary for the jury to be

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[3] The evidence of the pharmacist and documentary records of supplies related only to the period February 2013 to February 2014, only four months of which overlapped with the trafficking period of 1 August 2012 to 1 June 2013.

satisfied of the reliability of his recollection of having "sold about three or four" in order to be satisfied of the general reliability of his admissions.

[32] There was nothing implausible in the detailed account which the appellant gave about how he came to steal tablets every week and sold in quantities of between two and five at a time for "anywhere between $25 maybe $35 a pill". Apart from calling the pharmacist about supplies to the appellant's father, and calling the evidence of a psychologist, no other evidence was called on behalf of the appellant. There was no evidence contradicting his account of his domestic circumstances, the opportunity which he had to steal tablets in the way he described and that his theft was detected by his parents in mid-2013, after which he went to New Zealand.

Conclusion

[33] The statements made in the record of interview were detailed, internally consistent and not contradicted by other evidence. They were not implausible. The recording showed that the statements were made by someone who understood the questions he was being asked and who was able to answer them coherently.

[34] The prosecution case did not depend upon proof that the appellant sold 28 tablets in a box on any occasion. It was sufficient for the prosecution to prove that the appellant routinely sold much smaller quantities each week over a period of months. At best for the appellant, his statement about having sold three or four boxes was ambiguous and possibly unreliable. Any unreliability in his recollection about selling boxes and the number of times he did so did not necessarily render unreliable other parts of the interview in which the appellant admitted selling oxycodone tablets on a regular basis. Any possible unreliability in respect of the appellant's statement about three or four boxes did not prevent a jury from being satisfied, on the basis of his other admissions, that he had trafficked in oxycodone and supplied that drug to McKinnon the previous Saturday night. There was no apparent motivation for the appellant to make false admissions about these things. Applying the test in *MFA v The Queen*,[4] it was open to the jury to be satisfied beyond reasonable doubt as to the guilt of the accused on both counts.

[35] I would dismiss the appeal.

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[4] *MFA v The Queen* (2002) 213 CLR 606 at 615 at [25].