

RENDERED: April 10, 1998; 10:00 a.m.
NOT TO BE PUBLISHED

NO. 96-CA-2952-MR

JAMES WHEELER III

APPELLANT

V. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE JAMES E. KELLER, JUDGE
ACTION NO. 96-CR-0766

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION
AFFIRMING

* * * * *

BEFORE: BUCKINGHAM, COMBS and GARDNER, Judges.

GARDNER, JUDGE: James Wheeler (Wheeler) brings this direct appeal of the final judgment and sentence entered by the Fayette Circuit Court on October 22, 1996, sentencing him to ten years in prison on the felony charges of trafficking in a controlled substance in the first degree, Kentucky Revised Statute (KRS) 218A.1412, and being a persistent felony offender in the first degree (PFO I), following a jury verdict. After reviewing the record and the applicable law, we affirm.

On June 18, 1996, Danny Farris (Farris) was driving a truck in the Bluegrass-Aspendale section of Lexington in connection with his employment. On two or three occasions, a young black male

approached Farris while he was stopped on the side of the street. Farris noticed that the young man was holding a small plastic baggie containing what appeared to be cocaine. The young man asked Farris if he wanted something, and then informed Farris that he had it if Farris needed it. Farris later spotted Sergeant Mark Simmons (Simmons), a Lexington Police Officer, patrolling the area. Farris told Simmons that a light-skinned black male, who was wearing long, white baggy shorts and a tee shirt, had approached him and attempted to sell him cocaine. Farris also mentioned that the suspect appeared to have recently had a haircut because hair clippings were visible on the tee shirt.

After speaking with Farris, Simmons returned to the police station to obtain assistance in searching for the suspect. Lieutenant Steven Stanley (Stanley) returned with Simmons to the area. Officer Ed Hart (Hart), who was already in the area, also aided in the search. While riding in the police car, Stanley saw a person fitting the description of the suspect. Simmons recognized the suspect as Wheeler. The two officers exited their police vehicle and approached Wheeler. Wheeler apparently noticed them because he started walking in the opposite direction. Subsequently, Wheeler started running around a building. Simmons and Stanley chased him. They split up to go around the building; Stanley followed Wheeler and Simmons circled around the other side. Stanley watched Wheeler disappear into a grove of bushes near the back of the housing building. Once Simmons arrived from the other side of the building, the officers located Wheeler and arrested

him. They searched Wheeler and the area immediately around him but found no drugs. As they widened the search, Simmons observed a plastic baggie on a back porch a few feet from the bushes. The top portion of the plastic baggie was still untwisting and it contained numerous small white objects later identified as crack cocaine. In the meantime, Hart had arrived at the scene, and he secured the plastic baggie with its contents for evidence.

On August 12, 1996, the Fayette County Grand Jury indicted Wheeler on one felony count of first-degree trafficking in a controlled substance (cocaine) and one count of being a first-degree persistent felony offender. Wheeler was tried on September 23, 1996. The jury returned a guilty verdict on the trafficking offense. Wheeler waived jury sentencing and pleaded guilty to the PFO I count. The Commonwealth recommended a sentence of five years for trafficking in a controlled substance enhanced to ten years under the PFO I offense. On October 22, 1996, the trial court entered a final judgment sentencing Wheeler to serve a total of ten years in prison on the two offenses. This appeal followed.

Wheeler contends the trial court erred by denying his motions for a directed verdict at the close of the Commonwealth's evidence and at the close of the defendant's case¹. Wheeler

¹ We note that Wheeler presented evidence and testified himself following denial of his motion for directed verdict at the close of the Commonwealth's case. Consequently, he assumed the risk that his evidence would fill in any deficiency in the prosecution's case for purposes of a directed verdict motion, and he forfeited any claim of error by the trial court's denial of the initial motion for directed verdict. Cutrer v. Commonwealth, Ky. App., 697 S.W.2d 156, 159 (1985); Heflin v. Commonwealth, Ky. App., 689 S.W.2d 621, 622 (1985). Therefore, we will consider

identifies three areas where he alleges there was insufficient evidence to support the conviction: (1) the identification of Wheeler as the individual who approached Farris; (2) the connection between Wheeler and the cocaine found on the porch; and (3) the intent to traffick in cocaine, as opposed to mere possession.

In Commonwealth v. Benham, Ky., 816 S.W.2d 186 (1991), the Kentucky Supreme Court reiterated the standard for handling a motion for directed verdict. It stated:

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 credibility and weight to be given to such testimony.

Id., at 187. See also Commonwealth v. Sawhill, Ky., 660 S.W.2d 3 (1983). In addition, the standard for appellate review of a denial of a motion for directed verdict based on insufficient evidence dictates that if under the evidence as a whole it would not be clearly unreasonable for a jury to find the defendant guilty, he is not entitled to a directed verdict of acquittal. Benham, 816 S.W.2d at 187; Perdue v. Commonwealth, Ky., 916 S.W.2d 148, 160 (1996) cert. denied, ___ U.S. ___, 117 S. Ct. 151, 136 L. Ed. 2d 96 (1996). Moreover, a conviction may properly be based on circumstantial evidence when that evidence is of such character that reasonable minds would be justified in concluding that the defendant was guilty beyond a reasonable doubt. Baker v.

the entire trial evidence in reviewing the trial court's denial of a directed verdict.

Commonwealth, Ky., 860 S.W.2d 760 (1993); Bussell v. Commonwealth, Ky., 882 S.W.2d 111, 114 (1994) cert. denied, 513 U.S. 1174, 115 S. Ct. 1154, 130 L. Ed. 2d 1111 (1994) (circumstantial evidence is sufficient to support a criminal conviction as long as the evidence taken as a whole shows that it was not clearly unreasonable for the jury to find guilt.)

Wheeler first challenges the evidence identifying him as the person who approached Farris. However, Farris positively identified Wheeler at trial as the individual who approached him two or three times offering to provide drugs. Simmons testified that after giving Wheeler the Miranda warning, Wheeler asked the officer how they found him. Simmons told Wheeler that he had received information from a citizen that appellant had crack cocaine. Simmons testified that Wheeler said, "The man in the repo truck was the only one who" and then stopped talking. Farris was employed by a discount rental company and his job included retrieving rental items for lack of payment. Finally, Wheeler exactly fit the description of the suspect given to the police by Farris, including the unusual fact that he had hair clippings on his tee shirt from a recent haircut. Wheeler stated at trial that he had just had a haircut the day of the incident. The direct eyewitness and circumstantial evidence clearly pointed to Wheeler as the individual who approached Farris.

Wheeler's second argument involves the connection between him and the crack cocaine. Wheeler asserts that the police officers admitted not seeing him throw or drop the cocaine, that no

fingerprints were found on the plastic baggie and that Officer Hart could not recall seeing the baggie untwisting. The Commonwealth, however, presented evidence that the plastic baggie was found only a few feet from the bushes where Wheeler was hiding. All of the police officers and Wheeler himself testified that there was no other person in the immediate vicinity when the cocaine was found. The door and windows near the porch were closed. Simmons and Stanley stated the plastic baggie was still unfolding when they saw it on the porch, indicating it had been placed there recently. Simmons stated that it was very unusual to obtain fingerprints from a plastic bag because of the nature of the surface. Farris testified that he saw Wheeler holding a plastic baggie with cocaine as appellant approached him. There was sufficient evidence linking Wheeler to the plastic baggie containing the cocaine retrieved by the police.

Wheeler's final complaint concerns the sufficiency of the evidence to prove trafficking, as opposed to possession of cocaine. Wheeler points to the lack of money or a beeper found on his person. He contends the amount of the cocaine, 1.6 grams, is consistent with possession for personal use. Simmons, who had five years' experience in drug enforcement with over 100 drug arrests, testified that the plastic baggie containing the rocks of crack cocaine was consistent with the common method of packaging for street drug sellers or dealers. The officer indicated that the plastic baggie contained numerous portions of crack cocaine, which typically sold for \$20 a piece, and the amount in the baggie

exceeded that consistent with personal use. The testimony of police with drug enforcement experience is admissible as expert opinion on whether the appellant had drugs in his possession for sale and not personal use. Sargent v. Commonwealth, Ky., 813 S.W.2d 801, 802 (1991), (citing Kroth v. Commonwealth, Ky., 737 S.W.2d 680 (1987)). In addition, Farris testified that he believed Wheeler was attempting to sell him cocaine when Wheeler told him he had something if he needed it at the same time Farris observed Wheeler holding the plastic baggie containing the suspected cocaine. Wheeler's attempt to elude the police by fleeing also is evidence of a sense of guilt. See Chumbler v. Commonwealth, Ky., 905 S.W.2d 488, 496 (1995); Bush v. Commonwealth, Ky. App., 726 S.W.2d 716, 717 (1987) (noting that flight and evading arrest are evidence of consciousness of guilt).

In conclusion, the arguments raised by Wheeler generally involve disputed factual issues rather than a lack or absence of evidence. The appellate court does not reevaluate the evidence or substitute its judgment as to credibility of the witnesses for that of the trial court or the jury. See Commonwealth v. Jones, Ky., 880 S.W.2d 544, 545 (1994). The decision on whether to believe the defendant's or prosecutions's story of the case is an issue for the jury. See Webb v. Commonwealth, Ky., 904 S.W.2d 226, 229 (1995). Viewing the evidence as a whole and in the light most favorable to the Commonwealth, we find that there was sufficient evidence for a reasonable juror to believe that Wheeler was guilty of trafficking

in cocaine. Accordingly, the trial court did not err in denying Wheeler's motions for directed verdict.

For the foregoing reasons, we affirm the judgment of the Fayette Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Herbert T. West
Lexington, Kentucky

BRIEF FOR APPELLEE:

A. B. Chandler III
Attorney General

Michael Harned
Asst. Attorney General
Frankfort, Kentucky