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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-000598-MR

MARCEL CORTEZ JOHNSON — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE GARY D. PAYNE, JUDGE
ACTION NO. 00-CR-01182

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: MCANULTY, MILLER AND TACKETT, JUDGES.

MILLER, JUDGE: Marcel Cortez Johnson brings this appeal from a March 6, 2001 judgment of the Fayette Circuit Court. We affirm.

The Fayette County Grand Jury indicted appellant upon one count of trafficking in a controlled substance, first degree, with a firearm, Kentucky Revised Statutes (KRS) 218A.1412, KRS 418A.992. Pursuant to jury verdict, appellant was found guilty of the above offense and sentenced to ten years' imprisonment. This appeal follows.

Appellant contends the circuit court committed reversible error by denying his motion for directed verdict of

acquittal. In Commonwealth v. Benham, Ky., 816 S.W.2d 186, 187 (1991), the Supreme Court set forth our standard of review:

> 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.

Appellant specifically argues the Commonwealth failed to prove that he constructively possessed the cocaine, and that he had dominion and control over the firearms in the apartment. Appellant asserts that there was no evidence offered to show that he leased the apartment where the contraband was found, or that he was in close proximity to the contraband.

The evidence indicated that there were four grams of cocaine found in the apartment. It appears the cocaine and firearms were found in close proximity to two other individuals in the apartment, Mark Caldwell and Larry Shepard. Shepard testified that he gave money to a man in a gray T-shirt for crack cocaine. Upon serving the search warrant, appellant was the only man in the apartment wearing a gray T-shirt. Furthermore, Johnson admitted that one of the guns at the scene was his. Considering this evidence together, we are of the opinion that it would not have been clearly unreasonable for the jury to have found appellant guilty of trafficking in a controlled substance, first degree, with a firearm. Id. Thus, we think the directed verdict was properly denied.

Appellant also maintains the circuit court committed reversible error by admitting certain testimony of Sergeant Mark Simmons. Appellant believes the circuit court improperly allowed

Simmons to testify as an expert regarding narcotics and trafficking in same. Additionally, appellant asserts a denial of due process of law as the Commonwealth failed to give advance notice before trial of Simmons' testimony. Appellant specifically objects to the following statements by Simmons:

> 1. In his opinion, crack is the biggest problem in the (urban black) central sector of Lexington, and that 734 N. Broadway is in this sector. . . .
>
> 2. That crack sales happen at nighttime under cover of darkness, just like the case a (sic) bar. (Footnote omitted). . . .
>
> 3. That crack dealers often move a lot, therefore the lack of permanent indicators of residence is consistent with trafficking. . . .
>
> 4. That crack dealers often work in pairs, like Caldwell and the appellant. . . .
>
> 5. That although he has no medical training, it is his opinion that crack is very addictive. Simmons goes on to describe how the crack makes the user feel, though he does not relate the basis of this opinion. In fact he claims that a person is addicted after the first hit. . . .
>
> 6. That crack is purchased predominantly with a $20 bill, and the appellant had a lot of twenties on his person. . . .
>
> 7. That the presence of torn plastic baggies indicate (sic) trafficking. . . .
>
> 8. That bigger dealers do not use crack, which he says shows that Larry Shepard was a user and the appellant was a dealer. . . . (Footnote omitted).
>
> 9. Explained that crack on the table at front door is consistent with trafficking, even though he said crack

> is ready for sale when placed in a baggie. . . .
>
> 10. That the presence of a small amount of cocaine, like this case, indicates that a person is trafficking at the end of his cycle and is not indicative of personal use. . . .

Even if it were error to admit the above testimony, we cannot say that its admission affected a substantial right of appellant. Ky. R. Evid. (KRE) 103. Simply stated, we do not believe there exists a reasonable probability that absent the error the verdict of the jury would have been different. Weaver v. Commonwealth, Ky., 955 S.W.2d 722 (1997). Absent Simmons' testimony, there was ample evidence in the record to support appellant's conviction. We cite to the testimony of Shepard that he gave money to a man in a gray T-shirt, where appellant was the only man in the apartment wearing a gray T-shirt, and to appellant's admission that he owned one of the guns in the apartment. Upon the whole of the case, we must conclude that any error in admitting the above testimony of Simmons was merely harmless.

Appellant contends that the circuit court committed reversible error by allowing the Commonwealth to strike Juror 818 and Juror 836 in violation of Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed. 2d 69 (1986). In Batson, the United States Supreme Court held that it was unconstitutional for a prosecutor to preemptorily challenge a potential juror based solely upon race. In the case at hand, appellant maintains the Commonwealth struck Jurors 818 and 836 solely because they were African-American. The Commonwealth contended it struck Juror 836

because he approached the bench and informed the court and parties he did not feel comfortable judging others or sending someone to prison, and he did not want to perform this task himself.

As to Juror 818, the Commonwealth pointed out that this juror had written on his juror sheet that he had a problem with the idea of judging others because he was a child of God. We are of the opinion that the above reasons constitute a racially neutral basis for striking of the above jurors under Batson. As such, we conclude that the circuit court did not commit reversible error upon this issue.

For the foregoing reasons, the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

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