

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2002-CA-002305-MR

JERMAINE L. CHRISTIAN

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE LAURANCE B. VANMETER, JUDGE  
ACTION NO. 02-CR-00181

COMMONWEALTH OF KENTUCKY

APPELLEE

and

NO. 2002-CA-002306-MR

FELICIA DONISE HEARD

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT  
HONORABLE LAURANCE B. VANMETER, JUDGE  
ACTION NO. 02-CR-00181

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: BUCKINGHAM, COMBS, and DYCHE, Judges.

COMBS, JUDGE. Jermaine L. Christian and Felicia Donise Heard have appealed from the final judgments and sentences of the Fayette Circuit Court entered on October 29, 2002.<sup>1</sup> Following a joint jury trial, Christian was convicted of first-degree trafficking in a controlled substance, possession of drug paraphernalia, and being a second-degree persistent felony offender. He was sentenced to serve ten years in prison. Heard was convicted of possession of cocaine,<sup>2</sup> possession of marijuana, and possession of drug paraphernalia. Her one-year sentence was probated for a period of five years. We affirm.

On January 8, 2000, a confidential informant purchased crack cocaine (a form of powdered cocaine capable of being smoked) from a man identified as "Big Man" at an apartment in Lexington, Kentucky. Based on that transaction, police officers obtained a warrant to search the apartment. Detective Byron Smoot and eight officers under his direction entered the apartment and in the kitchen found Heard, to whom the apartment was leased. Christian was in the living room playing video games with two other men.

The officers seized numerous items from the apartment, including 4.4 grams of crack cocaine (discovered on top of a dresser in the appellants' bedroom), two baggies containing

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<sup>1</sup> Although their appeals have not been consolidated, this Court ordered that they be heard together.

<sup>2</sup> The final judgment incorrectly states that Heard was convicted of trafficking in a controlled substance.

marijuana, hand scales, digital scales, razor blades, and two cell phones. In the bedroom where the cocaine was located, the officers found men's clothing of sufficient size to fit Christian, a rather large man. They also found other items belonging to Christian in a safe in the bedroom as well as a significant amount of cash in Christian's trouser pocket. The appellants were arrested and indicted on charges of trafficking in cocaine and possession of marijuana and drug paraphernalia.<sup>3</sup>

All of the charges against the appellants were based on the items and information gathered during the search of the apartment. They were not charged with any crime resulting from the undercover drug purchase that had taken place immediately prior to the search. Consequently, the Commonwealth refused Heard's request to reveal the identity of the confidential informant whose tip served as the basis for the officers to seek the warrant to search the apartment. The court denied Heard's pre-trial motion seeking to compel discovery of his identity.

The appellants were tried on September 26, 2002. Christian did not testify. However, he attempted through his witnesses to establish that he did not reside with Heard and that he did not have anything to do with the drugs found in her apartment. His mother, Meltina Mulder, testified that Christian

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<sup>3</sup> The charge of possession of marijuana against Christian was dismissed prior to trial.

was living with her at the time of his arrest. Mulder also told the jury that she had given her son \$300 in cash that morning to buy himself some clothes and that his sisters had given him additional money for the same purposes.

Heard, who had no previous criminal record, told the jury that she and Christian had lived together for five years. Consistently with her statements to the officers who searched her apartment, she admitted that the marijuana and the hand scales seized from the apartment belonged to her. However, she denied having any connection with the cocaine. Heard claimed that she saw the cocaine on the dresser in the bedroom that she shared with Christian when she came home from work on the evening of their arrest and that she assumed it belonged to Christian.

The jury found Christian guilty of first-degree trafficking in a controlled substance. However, it believed Heard's testimony that she was not involved in the sale of cocaine and found her guilty of the lesser offense of possession. During the jury's deliberation in the PFO/sentencing phase, Christian moved for a mistrial after one of the juror's sent a note to the judge asking: "Would Jermaine like to say anything on his own behalf?" Christian argued that the juror had obviously ignored the court's instruction that no negative inference could be drawn from his decision not to

testify. Stating that the note was susceptible of several interpretations, the trial court denied the motion. No further admonition was requested.

The appellants were sentenced pursuant to the jury's recommendation. These appeals followed.

**No. 2002-CA-002305-MR**

Christian has raised three issues in his appeal. He argues: (1) that there is insufficient evidence to support his conviction for trafficking; (2) that the trial court abused its discretion in allowing a police officer to testify that the small amount of crack cocaine seized from the apartment was indicative of possession with intent to sell; and (3) that the trial court erred in denying his motion for a mistrial during the PFO/sentencing portion of the trial. We disagree that any error deprived Christian of his right to receive a fair trial.

Our standard in reviewing the sufficiency of the evidence to support a conviction is set out in Commonwealth v. Benham, Ky., 816 S.W.2d 186, 187 (1991), citing Commonwealth v. Sawhill, Ky., 660 S.W.2d 3 (1983), as follows:

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.

Christian attempted to distance himself from Heard and the contents of her apartment. Nonetheless, there was considerable evidence from which the jury could reasonably find that he did in fact live at the same address as his co-defendant and that he had control over the cocaine found in the bedroom. Heard testified that she and Christian lived together and that the cocaine did not belong to her. In addition, the police found clothes and other personal items belonging to Christian stored in the same bedroom where the cocaine was located. His driver's license listed Heard's address as his own. Therefore, it was not unreasonable for the jury to conclude that Christian resided in the apartment and that he had constructive possession of the cocaine.

Moreover, when he was searched, Christian -- who was unemployed -- had \$491 in cash in his pocket. That evidence, bolstered by the testimony of Sergeant Mark Simmons (to be discussed below), was sufficient to allow the jury to believe that Christian possessed the drug with the intent to sell or to distribute it to others. Thus, the trial court did not err in failing to direct a verdict of acquittal on the trafficking charge. Id.

Christian next argues that the trial court erred in allowing Sergeant Mark Simmons to testify that the cocaine seized from the apartment was of a quantity more likely to be consistent with trafficking than with personal use. In making this argument, Christian acknowledges the existence of several decisions holding that police officers may offer expert testimony on the issue of whether the quantity of drugs is indicative of trafficking as distinguished from mere personal use of the drug. See, Sargent v. Commonwealth, Ky., 813 S.W.2d 801, 802 (1991)(15 pounds of marijuana); Kroth v. Commonwealth, Ky., 737 S.W.2d 680, 681 (1987)(a "large quantity" of drugs); and Burdell v. Commonwealth, Ky., 990 S.W.2d 628 (1999)(cocaine with a "street value" of \$10,000).

Nevertheless, he argues that the minute amount of drugs seized during the raid on Heard's apartment -- less than 1/7<sup>th</sup> of one ounce -- set his case apart from those permitting such testimony as relevant and appropriate. He contends that if a police officer can testify that possession of a few grams of cocaine is indicative of trafficking, possession of any amount of the drug could support a trafficking conviction.

We apply the standard of abuse of discretion in reviewing the decision of a trial court as to whether to admit evidence. Mitchell v. Commonwealth, Ky., 908 S.W.2d 100, 103 (1995). We can find no abuse of discretion in the court's

ruling in this case. Christian offers no criticism with respect to Sergeant Simmons's qualifications as an expert in narcotics. Although the amount of crack cocaine was relatively small, it nonetheless had a street value of more than \$200. Moreover, in testifying that the drug was possessed for sale rather than for personal use, Sergeant Simmons based his opinion not only on its amount but also on several other factors: the discovery of a number of items used to weigh and package the drug; the amount of cash found in Christian's pocket; and, rather significantly, the fact that no pipe or other utensil was found in the apartment for ingesting the cocaine.

Finally, Christian argues that he was convicted and sentenced by a tainted jury. He bases this argument on the note sent by a juror to the judge during the PFO portion of the trial. In that note, the juror asked if Christian wanted to "say anything on his own behalf." Christian argues that the note reveals a prejudice against him for not testifying -- thereby implicating his rights to due process. He believes that he was convicted of a greater offense than his co-defendant (who did testify) because of the alleged prejudice concerning his silence.

In resolving this issue, we note a trial court wholly exercises discretion in denying a party's motion for a mistrial. Neal v. Commonwealth, Ky., 95 S.W.3d 843 (2003).



A mistrial is justified only when a "manifest necessity for such an action or an urgent or real necessity" appears in the record. *Skaggs v. Commonwealth, Ky.*, 694 S.W.2d 672, 678 (1985). It is within the trial judge's discretion whether a mistrial should be granted, and his decision should not be disturbed, absent an abuse of discretion.

Id. at 851-852.

The Commonwealth correctly argues that the trial court did not abuse its discretion in denying the motion for a mistrial. The note from the juror was sent at the PFO stage of the trial -- after the jury had determined Christian's guilt on the underlying charge of trafficking. Christian did not seek an appropriate admonition, and the jury recommended that Christian be given the minimum sentence -- an additional factor serving to negate the existence of an unfavorable inference as to his silence. Clay v. Commonwealth, Ky.App., 867 S.W.2d 200 (1993).

**NO. 2002-CA-002306-MR**

In her appeal, Heard argues that the trial court erred in making the following rulings: (1) refusing to order the Commonwealth to disclose the name of its confidential informant; (2) refusing to allow her to present evidence at trial of Christian's prior involvement with drugs; and (3) refusing to allow her to show that the police officers were looking for a

male when they executed the search warrant. We find no error to support reversal of the judgment.

Heard had attempted to obtain the name of the individual whose previous purchase of drugs led to the issuance of the warrant to search her apartment. She argued that the confidential informant could provide evidence to indicate that it was Christian who was dealing in drugs instead of her.

In Taylor v. Commonwealth, Ky., 987 S.W.2d 302, 304 (1999), the court addressed an order of a trial court protecting the identity of the Commonwealth's informant:

KRE<sup>4</sup> 508 provides the Commonwealth with a privilege to refuse to disclose the identity of an informant. Exceptions to the privilege occur when the disclosure is voluntary, when the informant is a witness and when the testimony of the informant is relevant to an issue. . . . The Kentucky rule in KRE 508 reflects the decision of the United States Supreme Court in *Roviaro v. United States*, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed.2d 639 (1957), which indicates that a proper balance regarding nondisclosure must depend on the particular circumstances of each case, taking into consideration the crimes charged, the possible defenses, the possible significance of the informer's testimony and other relevant factors. . . . In cases interpreting that rule, the courts uniformly held that where the evidence shows that an informant was merely a tipster who leads to subsequent independent police investigation which uncovers evidence of the crime, disclosure of the identity of the informant is not required. See, *Hargrave v. Commonwealth*, Ky., 724 S.W.2d 202 (1986) and

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<sup>4</sup> Kentucky Rules of Evidence.

*Schooley v. Commonwealth, Ky., 627 S.W.2d  
576 (1982).*

If the Commonwealth had provided his identity, the informant may have testified that he purchased cocaine from a male at Heard's address. Heard contends that such testimony would have resolved any question that the jury might have had concerning her involvement. However, such testimony would have not provided exculpatory evidence as to the charges for which Heard was actually being tried because those charges arose separately from the informant's activity, resulting from the subsequent investigation and search of her apartment rather than the drug sale that preceded the search. Since the informant was not a material witness to the crimes involving Heard, the trial court properly denied her motion to compel the Commonwealth to expose his identity. Id.

Heard next alleges that she was deprived of a fair trial by the court's refusal to allow her to introduce evidence that Christian had previously been convicted of trafficking in cocaine and that he was involved with drug court at the time of their arrest. She contends that Christian opened the door for such testimony when his mother testified that she had encouraged her son to stay away from Heard because -- in her opinion -- Heard was "trouble."

We conclude that the trial court did not abuse its discretion in not permitting Heard to present evidence of Christian's prior criminal acts. Any reference to Christian's participation in drug court would have directly violated the proscription in KRE 404(b) against admission of other crimes to prove bad character. See also, Billings v. Commonwealth, Ky., 843 S.W.2d 890 (1992).

Finally, Heard argues that the trial court erred in preventing her from establishing that the police officers who searched her apartment were actually looking for a male suspect. She states that this issue was preserved during her cross-examination of Detective Patrick. We find no error. Heard made no attempt to put the omitted testimony in the record by avowal. Thus, the issue has not been preserved for review. Additionally, Detective Patrick testified that although he was one of the team that participated in the search of Heard's apartment, he had not reviewed the search warrant and he did not know the individuals whom they were seeking. He could not remember whether Detective Smoot had given any description of the individuals in his briefing prior to the search. His testimony refutes Heard's supposition as to this unpreserved allegation of error.

The judgments in both appeals are affirmed.

ALL CONCUR.

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