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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001716-MR

JENNIFER HENSLEY CARR — APPELLANT

v.

APPEAL FROM WHITLEY CIRCUIT COURT
HONORABLE JERRY D. WINCHESTER, JUDGE
ACTION NO. 07-CR-00040

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT AND STUMBO, JUDGES; HENRY,[1] SENIOR JUDGE.

STUMBO, JUDGE: Jennifer Hensley Carr (hereinafter "Hensley") appeals from a Final Judgment and Sentence on Plea of Not Guilty rendered by the Whitley Circuit Court reflecting a jury verdict of guilty on one count of trafficking in marijuana, eight ounces or more. Hensley argues that the trial court erred in

[1] Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

denying her motion to suppress the marijuana found at her home, allowing hearsay evidence, denying her motion for a directed verdict and admitting into evidence photographs that were not relevant to the charges. For the reasons stated below, we affirm the Judgment on appeal.

On September 25, 2006, the Cabinet for Health and Family Services received an anonymous tip that Hensley was neglecting her children and using drugs in their home. Social worker Beth McAnnally contacted the Kentucky State Police, who later escorted McAnnally and social worker Angela Ballou to Hensley's home in Williamsburg, Kentucky.

After determining that Hensley was not home, Hensley's 14-year-old son came outside the home and invited the two state troopers and two social workers into the home. They followed the boy inside, where three other children were located (ages 12 and under). One of the troopers would later testify that he smelled a strong odor of marijuana. McAnnally observed that conditions inside the home were very poor, and she began taking pictures to document the condition. Thereafter, Hensley's 7-year-old child told the troopers and social workers that his parents kept marijuana in the bedroom.

The troopers and social workers then went to Hensley's bedroom, where they observed a plastic tub containing plastic bags. One of the troopers opened the plastic tub and bags, and found over one pound of marijuana and containers of marijuana seeds. Hensley later arrived home, and upon questioning, stated that the marijuana belonged to her and not her husband.

On April 9, 2007, the Whitley County grand jury indicted Hensley on one count of violating KRS 218A.1421, Trafficking in Marijuana over Eight Ounces but less than Five Pounds. The matter proceeded in Whitley Circuit Court, whereupon Hensley filed a motion to suppress on the day before trial was to commence on March 6, 2008. Hensley argued in support of the motion that the KSP troopers entered her home without her permission and without a warrant. She further argued that the marijuana was recovered as a result of a warrantless search and therefore should be suppressed. Hensley also maintained that a KSP laboratory report which analyzed the marijuana should also be suppressed.

The motion apparently was overruled,[2] and the matter proceeded to trial. At the conclusion of the trial, Hensley unsuccessfully moved for a directed verdict of acquittal. The jury then returned a verdict of guilty on the one count contained in the indictment, and Hensley was sentenced to three years in prison. Hensley was granted shock probation after less than one month in prison, and this appeal followed.

Hensley first argues that the trial court erred when it denied her motion to suppress the marijuana found during the search of her residence. The focus of her argument on this issue is that the marijuana was seized during an illegal entry and search of her home without a search warrant and without proper consent. She also maintains that no plain view or exigent circumstances exceptions existed to support a warrantless search. Hensley then notes that the

[2] Though the parties refer to the Order, it does not appear in the record.

purpose of the state troopers' presence at the home was to accompany the social workers and protect the workers' safety, not to execute a warrantless search. And finally, Hensley argues that children who have not reached the age of majority do not have the authority to give consent for the police to search a home, and in the instant case, even if the children did have such authority, that authority did not extend to the parents' bedroom. In sum, Hensley argues that the search of the bedroom was unlawful and that the marijuana should have been suppressed.

RCr 9.78 states that,

> If at any time before trial a defendant moves to suppress, or during trial makes timely objection to the admission of evidence consisting of (a) a confession or other incriminating statements alleged to have been made by the defendant to police authorities, (b) the fruits of a search, or (c) witness identification, the trial court shall conduct an evidentiary hearing outside the presence of the jury and at the conclusion thereof shall enter into the record findings resolving the essential issues of fact raised by the motion or objection and necessary to support the ruling. If supported by substantial evidence the factual findings of the trial court shall be conclusive.

In the matter at bar, no Order adjudicating Hensley's motion to suppress is contained in the record. Similarly, no Findings of Fact in support of the purported Order are set out in the record as required under the mandatory language of RCr 9.78. The record indicates that Hensley's Motion to Suppress was filed the day before trial commenced on March 6, 2008. No responsive pleading is contained in the record, apparently because the motion was adjudicated the morning of trial and before such a filing could be tendered. The digital video

recording of the trial proceeding shows the trial court acknowledging the motion before the trial commenced, and the Hon. Jerry D. Winchester, Judge, states that the matter will be heard outside the presence of the jury. The recording next shows the trial commencing later that morning. If the matter was ruled upon in chambers, no written Order adjudicating the motion appears in the record, and no Findings of Fact in support of the purported Order are contained in the record.

It is incumbent upon the Appellant to present the appellate court with a complete record. *Chestnut v. Commonwealth*, 250 S.W.3d 288 (Ky. 2008), citing *Steel Technologies, Inc. v. Congleton,* 234 S.W.3d 920, 926 (Ky. 2007). When the record is incomplete, we must assume that the omitted record supports the trial court. *Id*. "We will not engage in gratuitous speculation as urged upon us by appellate counsel, based upon a silent record." *Id.* The Kentucky Supreme Court stated in *Chestnut*, that

> In *Davis,*[3] this Court examined RCr 9.78 hearings on suppression motions and the standard for appellate review of such motions. The appellant in *Davis* claimed error, but the record lacked any transcript of the suppression hearing. *Id.* The Court stated that they would not entertain the appellant's claim of error, because she had failed to avail herself of CR 75.13. *Id.* at 949. Cr 75.13 allows an appellant to prepare a narrative statement "for use ... as a supplement to or in lieu of an insufficient electronic recording" of a suppression hearing. CR 75.13(1). The Court articulated:
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> > [a]ppellant has failed to show that the ruling below was not supported by substantial evidence. "In the absence of any showing to the contrary, we assume the correctness of the ruling by the trial court." It is the duty of a party attacking the sufficiency of evidence to produce a record of the proceeding and identify the trial court's error in its

[3] *Davis v. Commonwealth,* 795 S.W.2d 942, 948-949 (Ky. 1990).

> findings of fact. Failure to produce such a record precludes appellate review.
>
> *Id.* (quoting *Harper v. Commonwealth*, 694 S.W.2d 665, 668 (Ky. 1985)).
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> Here, Appellant has similarly failed to avail himself of CR 75.13. Moreover, Appellant has failed to provide this Court with a complete record for review. As such, we are bound to assume that the omitted record supports the decision of the trial court. *Thompson*, 697 S.W.2d at 145. Therefore, pursuant to RCr 9.78, the factual finding of the trial court would be conclusive.

In the matter at bar, just as in *Chestnut* and *Davis*, the record "lacks any transcript of the suppression hearing." *Davis v. Commonwealth*, 795 S.W.2d 942, 948-949 (Ky. 1990). Similarly, the "[f]ailure to produce such a record precludes appellate review." *Id*. This language is clear and unambiguous. Hensley was availed of the opportunity to seek Findings of Fact in support of the ruling by way of motion or, as the Court in *Chestnut* noted, to supplement the record with a narrative statement via CR 75.13. The record before us contains no stenographic transcript or electronic recording of the suppression hearing, nor Findings of Fact or narrative statement revealing the basis for the trial court's apparent ruling. Furthermore, the purported Order overruling her motion to suppress is not memorialized on the record or found on the digitally recorded trial proceeding. In accordance with the Kentucky Supreme Court's holding in *Chestnut*, "such a record precludes appellate review." *Chestnut* at 304.

Hensley next argues that the trial court erred when it permitted hearsay evidence from the social worker and state trooper regarding the minor

child's alleged statements regarding the location of the marijuana. She directs our attention to social worker McAnnally's statement - to which Hensley objected - that "Jacob who is the seven year old showed us where the pot was." Hensley's objection was overruled. She also argues that the court improperly allowed the hearsay of Trooper Bunch, who stated at trial that one of Hensley's children referred to the marijuana by saying "it's in there." Hensley maintains that these statements constituted hearsay testimony which should have been excluded, and that the trial court erred in failing to so rule.

We find no error on this issue. McAnnally did not testify as to what the child said. Rather, she stated what the child *did*. We cannot conclude that this testimony constitutes hearsay as defined by the Kentucky Rules of Evidence, to wit, a "statement, other than one made by the declarant while testifying at the trial or hearing, offered to prove the truth of the matter asserted." KRE 801(c). Conversely, the testimony of Trooper Bunch that the child said "it's in there" is indeed a statement. However, Hensley did not object to this testimony. Furthermore, even if the admission of this statement constitutes error, such error is harmless in light of McAnnally's prior testimony that the child showed the social workers and state troopers where the marijuana was. And in addition, after being contacted by the state troopers, Hensley returned home and admitted that the marijuana was hers. Accordingly, we find no error.

Hensley next argues that the trial court erred in failing to suppress her statements to the social workers and state troopers that the marijuana found at the

home belonged to her. She contends that she was "seized" by the troopers based on her reasonable belief that - after returning to the home - she was not free to leave. She also claims that the social workers threatened to take her children, and that her admission was merely part of an effort to protect her then-husband so that he would not be charged and could continue taking care of the children. The focus of her argument is that her admissions were obtained in violation of her right against self-incrimination, and that as such the trial court erred in failing to suppress the admissions at trial.

Hensley acknowledged in her written argument that while this issue was raised in her motion to suppress, she did not argue it at the suppression hearing and it was not ruled upon. And again, we note that the record is void of any transcript, electronic recording or narrative statement of the suppression hearing, nor does it even contain the Order overruling the motion to suppress. Based on *Chestnut*, *supra*, this leaves us nothing to review. In the alternative, Hensley maintains that this issue is properly characterized as palpable error, thus justifying the relief sought. We are not persuaded by this argument, as there is no evidence that Hensley was detained or under arrest when she first admitted to the possession of the marijuana. She voluntarily drove to her home after receiving a cell phone call that the social workers and state troopers were at her residence. In addition, the record indicates that Hensley first admitted possessing the marijuana while talking to a social worker who was not vested with the authority to detain or arrest Hensley. The burden rests with Hensley either to demonstrate that the trial court

erred in failing to suppress her admission, or to prove that the purported failure to suppress the evidence constituted palpable error. She has not met this burden, and as such we find no error on this issue.

Hensley's next argument is that the trial court erred when it denied her motion for a directed verdict. In support of this contention, Hensley maintains that the Commonwealth failed to prove an element of the offense of trafficking in a controlled substance, to wit, that Hensley either manufactured, distributed, dispensed, sold or transferred a controlled substance, or that she had the intent to do so. See generally, KRS 218A.010 (40). She claims that in the absence of any proof that she did traffic or intended to traffic in marijuana, the Commonwealth failed to prove its case and that she was entitled to a directed verdict.

We find no error on this issue. While Hensley correctly notes that the Commonwealth produced no evidence at trial regarding dates or times of alleged marijuana sales, no identified buyers or controlled buys, and no large sums of cash, etc., the jury may reasonably rely upon circumstantial evidence to reach a conclusion beyond a reasonable doubt that a defendant is guilty of a charged crime. *Graves v. Commonwealth*, 17 S.W.3d 858 (Ky. 2000). Similarly, intent may be inferred from circumstantial evidence. *McClellan v. Commonwealth*, 715 S.W.2d 464 (Ky. 1986). The primary evidence in support of the jury's determination that Hensley did traffic or intended to traffic in marijuana was the amount of the drug found in her possession. As the Commonwealth properly notes, evidence of a defendant's possession of a large quantity of marijuana is sufficient to overcome a

motion for a directed verdict, even in the absence of additional evidence that an actual transaction occurred and even if the drugs were not found on the defendant's person. A panel of this Court held in *Brown v. Commonwealth*, 914 S.W.2d 355, 356 (Ky. App. 1996) that,

> [h]ere the Commonwealth produced much more than a mere scintilla. Not only was the quantity of the drugs sufficient to put the matter before the jury (*see Dawson v. Commonwealth,* Ky., 756 S.W.2d 935 [1988]), but the quality of the drugs tested to be 99.9% pure. Lack of an actual transaction or proof of intent to sell was not fatal to the Commonwealth's case. *See Clay v. Commonwealth,* Ky. App., 867 S.W.2d 200 (1993), *and Jett v. Commonwealth,* Ky. App., 862 S.W.2d 908 (1993). Nor was it necessary for Ross to have drugs on his person. The matters of the weight of the evidence and the credibility of the witnesses were properly submitted to the jury. *Benham, supra.*

On a motion for directed verdict, the trial court must draw all fair and reasonable inferences from the evidence in favor of the Commonwealth, reserving to the jury all questions of credibility and weight of evidence. *See Commonwealth v. Benham,* 816 S.W.2d 186, 187 (Ky. 1991); *Commonwealth v. Sawhill,* 660 S.W.2d 3, 4 (Ky. 1983). "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." *Benham* at 187. "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." *Bussell v. Commonwealth,* 882 S.W.2d

111, 114 (Ky. 1994) (citing *Trowel v. Commonwealth,* 550 S.W.2d 530 (Ky. 1977); *Benham, supra*.

In the matter at bar, under the evidence as a whole it was not clearly unreasonable for the jury to find guilt. Evidence was adduced at trial that Hensley possessed, and admitted possessing, a plastic tub containing several ounces of marijuana. This evidence adequately demonstrates that it was not unreasonable for the jury to conclude that Hensley was guilty of the offense of Trafficking in Marijuana over Eight Ounces but less than Five Pounds. Accordingly, we find no error on this issue.

Lastly, Hensley argues that the trial court erred in failing to suppress photographs of the interior of her home which prejudiced the proceeding against her, and which were not provided to her until the morning of trial. She contends that the photographs, which showed the interior of the home to be full of garbage and in a state of disarray, was not relevant evidence and had no probative value. Since, in her view, the photos were prejudicial, inflammatory, repetitive and without probative value, the trial court committed reversible error in failing to exclude them from trial.

We are persuaded by Hensley's contention that most of the dozen or so photographs at issue were not relevant to the offense with which she was charged. The display of garbage and filth inside Hensley's home as shown in the photographs did nothing to further the Commonwealth's burden of demonstrating Hensley's guilt on the charged offense. Nevertheless, any error in the admission of

the photographs was harmless. RCr 9.24. Evidence was presented at trial sufficient to demonstrate Hensley's guilt beyond a reasonable doubt, and there is no reasonable basis for concluding that the outcome of the proceeding would have been different but for the photographs. As such, this issue does not merit reversal of her conviction.

For the foregoing reasons, we affirm the Judgment of the Whitley Circuit Court.

ALL CONCUR.

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