RENDERED: APRIL 24, 2020; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2019-CA-000568-MR

RANDALL F. WHITWORTH — APPELLANT

v.

APPEAL FROM CALDWELL CIRCUIT COURT
HONORABLE C.A. WOODALL, III, JUDGE
ACTION NO. 17-CR-00199

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; DIXON AND MAZE, JUDGES.

DIXON, JUDGE: Randall Whitworth appeals his judgment and sentence entered on April 3, 2019, by the Caldwell Circuit Court. Following review of the record, briefs, and law, we affirm.

FACTS AND PROCEDURAL BACKGROUND

On October 16, 2017, Detective Mike Lantrip and other officers with the Pennyrile Narcotics Task Force followed a confidential informant ("CI") to

Whitworth's residence. The CI gave Shane Parker a one-hundred-dollar bill provided to him and documented by the task force. Parker entered Whitworth's residence and returned to the CI with marijuana and methamphetamine. Det. Lantrip and other officers met with the CI while Det. Trent Fox continued surveillance of the residence.

When Det. Lantrip and two other detectives from the task force returned, Det. Fox informed them that over the course of approximately two hours, he had observed numerous vehicles arrive and individuals enter and exit the residence from its back door. The detectives decided to perform a "knock and talk" and approached Whitworth's back door which, based on Det. Fox's observations, appeared to be the main entrance of the house. None of the detectives were in uniform or had badges or guns displayed as they approached the residence.

Det. Lantrip knocked on the door, and David Oliver—a convicted felon who had previously worked with Det. Lantrip and Det. Fox—opened the door wide and stepped aside, saying nothing. The detectives stepped inside and smelled marijuana. They then moved to the kitchen area near the back door and saw digital scales, a marijuana pipe, and plastic bags containing marijuana.

Whitworth identified himself as the homeowner and was advised of his *Miranda*[1] rights by Det. Lantrip.

Det. Lantrip asked Whitworth for permission to search the residence. Whitworth consented, stating something to the effect of, "Why not, you've already got it." The detectives searched the remainder of the residence and discovered additional contraband. When the detectives searched Whitworth's person, they found the money from the controlled buy. Whitworth was arrested and charged with trafficking in a controlled substance, first offense;[2] trafficking in marijuana, more than eight ounces but less than five pounds, first offense;[3] and possession of drug paraphernalia.[4]

On January 24, 2018, Whitworth moved the trial court to suppress "any and all evidence seized as a result of the unlawful search made of his residence." The Commonwealth responded, and a suppression hearing was held. On June 1, 2018, the trial court entered its findings of fact, conclusions of law, and order denying Whitworth's suppression motion.

---

[1] *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

[2] Kentucky Revised Statues ("KRS") 218A.1412, a Class C felony.

[3] KRS 218A.1421, a Class D felony.

[4] KRS 218A.500(2), a Class A misdemeanor.

On February 26, 2019, the morning of trial, Whitworth's counsel orally moved the trial court to permit him to withdraw as Whitworth's counsel due to a potential conflict of interest as a result of his previous representation of Parker. The trial court heard arguments of counsel but verbally denied counsel's motion, finding no actual conflict existed.

Whitworth did not testify at trial, but Det. Lantrip, Det. Fox, and Oliver did. The jury found Whitworth guilty of all charges and recommended a total sentence of fifteen years' imprisonment. On April 3, 2019, the trial court entered the judgment and sentence, consistent with the jury's recommendations, and this appeal followed.

SUPPRESSION OF EVIDENCE

Whitworth's first assignment of error concerns the trial court's denial of his suppression motion. The standard of review of denial of a motion to suppress is two-fold: "[f]irst, the trial court's findings of fact are conclusive if they are supported by substantial evidence; and second, the trial court's legal conclusions are reviewed de novo." *Milam v. Commonwealth*, 483 S.W.3d 347, 349 (Ky. 2015) (citing *Commonwealth v. Marr*, 250 S.W.3d 624, 626 (Ky. 2008); RCr[5] 9.78[6]). "At a suppression hearing, the ability to assess the credibility of

[5] Kentucky Rules of Criminal Procedure.

[6] RCr 9.78 has since been renumbered and is now RCr 8.27.

witnesses and to draw reasonable inferences from the testimony is vested in the discretion of the trial court." *Pitcock v. Commonwealth*, 295 S.W.3d 130, 132 (Ky. App. 2009) (citing *Commonwealth v. Whitmore*, 92 S.W.3d 76, 79 (Ky. 2002)). "In conducting our review, our proper role is to review findings of fact only for clear error while giving due deference to the inferences drawn from those facts by the trial judge." *Perkins v. Commonwealth*, 237 S.W.3d 215, 218 (Ky. App. 2007) (citing *Whitmore*, 92 S.W.3d at 79). Herein, Whitworth does not take issue with the trial court's factual findings. Therefore, all factual findings are conclusive, and we review the legal conclusions *de novo*.

Whitworth contends the trial court erred in its conclusions of law because the detectives impermissibly entered the curtilage of his house, and subsequently his house, making any evidence seized fruit of the poisonous tree. *See Wong Sun v. United States*, 371 U.S. 471, 488, 83 S.Ct. 407, 417, 9 L.Ed.2d 441 (1963). The trial court made the following conclusions of law regarding whether the detectives impermissibly entered the curtilage of his residence:

> 1. It was axiomatic that warrantless searches of persons and houses are "per se" unreasonable, absent specifically established and well-delineated exceptions. [*Pace v. Commonwealth*, 529 S.W.3d 747, 753 (Ky. 2017), *as modified* (Sept. 28, 2017).] A "knock and talk" procedure is an appropriate police tool, subject to there being no violation of the curtilage of a person's house where an individual may reasonably expect to be treated as private as the home itself. [*Quintana v. Commonwealth*,] 276 S.W.3d 753 (Ky. 2008).

2. The Commonwealth has the burden of proving the exception to the requirement for a warrant. [*See Commonwealth v. Johnson*, 777 S.W.2d 876 (Ky. 1989).]

3. Generally speaking, the main entrance to a home has no expectation of privacy by the resident. A police officer who approaches the main entrance has the right to be there just as any member of the public might have.

4. While the [*Pace*] case dealt with and held that the back patio enjoyed the curtilage protection as did the back door, it was found not to be the main entrance, unlike the Whitworth residence. As stated in [*Quintana*] at page 759:

> [h]owever, it is also true that customary use of a door, such as side or back door, as primary access which is known by the officer, could make that door 'publicly accessible' in a given case.

5. The Whitworth back door on the day in question did not have curtilage protection and Mr. Whitworth had no reasonable expectation of privacy at the back door, with visitors using it as the main entrance, so the knock and talk at that location did not violate Mr. Whitworth's constitutional rights.

Concerning the right to privacy an individual possesses in their curtilage:

> The concept of curtilage began in common law, extending the same protection afforded the inside of one's home to the area immediately surrounding the dwelling. *United States v. Dunn*, 480 U.S. 294, 107 S.Ct. 1134, 94 L.Ed.2d 326 (1987). In *Oliver v. United States*, 466 U.S. 170, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984), the United States Supreme Court recognized that the Fourth Amendment protects the curtilage of a house, and the

area covered extends to that which an individual may reasonably expect to be treated as the home itself. In *Dunn*, the Supreme Court established four analytical, non-exclusive factors which should be applied to solve curtilage questions: the proximity of the area to the home, whether the area is included in an enclosure with the home, how the area is used, and the steps the resident has taken to prevent observation from the people passing by. Because there is no expectation of privacy for anything that can be observed from outside the curtilage, either by sight or other senses, the focus of a knock and talk analysis must be on the right of access to private property within the curtilage.

. . . .

Whether an officer is where he has a right to be when he does the knock and talk is defined by his limited purpose in going to the residence and the nature of the area he has invaded. There has been no finding of probable cause sufficient to grant a warrant, so the knock and talk is limited to only the areas which the public can reasonably expect to access. While there is a right of access for a legitimate purpose when the way is not barred, or when no reasonable person would believe that he or she could not enter, this right of access is limited. The resident's expectation of privacy continues to shield the curtilage where an outsider has no valid reason to go. Thus any part of the curtilage may be protected, including driveways, depending on the circumstances of each case. *United States v. Smith*, 783 F.2d 648 (6th Cir.1986). The back door of a home is not ordinarily understood to be publicly accessible, and thus could be subject to the curtilage rules where the front door would not be. *However, it is also true that customary use of a door, such as a side or back door, as primary access which is known by the officer, could make that door "publicly accessible" in a given case.* This highlights the importance of applying this analysis to the facts of each case.

Quintana, 276 S.W.3d at 757, 759 (emphasis added).

We have carefully reviewed the record and the law relevant to the present challenge and discern no error. Contrary to Whitworth's assertions, the detectives did not violate his reasonable expectation of privacy nor improperly invade the curtilage of his residence. Det. Fox observed numerous individuals access Whitworth's residence over the span of two hours solely through the back door. Thus, the trial court's finding that the back door was the primary access to Whitworth's residence was supported by substantial evidence. Likewise, the trial court's legal conclusion—that Whitworth had no reasonable expectation of privacy because the back door was the main entrance to the residence rather than part of its curtilage—was sound and based on prevailing binding precedent. There was no error.

Whitworth also contends the trial court erred in its conclusions of law because the detectives impermissibly entered and searched his house without consent. The trial court made the following conclusions of law regarding whether the detectives had consent to enter and search the residence:

> 6. Mr. Oliver opened the door to the officers and allowed them in. At that point, there was no search and therefore Defendant's cases on third party consent to search and joint authority are not applicable. A consent to enter is different from a consent to search.

7. Consent may be by non-verbal conduct. [*See Piercy v. Commonwealth*,] 303 S.W.3d 492, 497-98 (Ky. App. 2010).

8. [*Piercy*] at page 498 also addresses the requirements for the application of the plain view/smell doctrine:

> (1) the viewer or person detecting the odor had the right to be in position for the view or smell; (2) the viewer or person detecting the odor must have a lawful right to access the object or odor; and (3) the incriminating nature of the object or smell was immediately apparent to the viewer or person detecting the odor.

9. All three requirements of the plain view/smell doctrine were met by Detective Lantrip in the plain smell of the marijuana from the vestibule and the plain view of the contraband in the kitchen from the doorway to the kitchen.

10. The plain view/smell doctrine applies to the warrantless seizure of evidence, not to a warrantless search. [*Pace*, 529 S.W.3d at 755.]

11. A consent to search is an example of an exception to the requirement for a warrant. This is true for third party consent as well as owner/occupier consent. [*See Perkins*, 237 S.W.3d 215.]

12. A person's consent must be voluntary in view of the totality of the circumstances. [*Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973) and *Cook v. Commonwealth*, 826 S.W.2d 329 (Ky. 1992).]

13. Mr. Whitworth voluntarily consented for officers to search his residence.

> 14. Even a voluntarily given consent may be revoked, but as in [*Payton v. Commonwealth*, 327 S.W.3d 468 (Ky. 2010)], the Defendant did not clearly refuse and did not clearly revoke his consent.
>
> 15. Under the totality of the circumstances, the actions of the police officers at Defendant's residence on October 16, 2017, did not violate his constitutional rights.

We agree with the trial court's conclusion that the search here did not violate Whitworth's constitutional rights since Whitworth voluntarily gave consent to the search.

> It is well settled under the Fourth and Fourteenth Amendments that a search conducted without a warrant issued upon probable cause is 'per se unreasonable . . . subject only to a few specifically established and well-delineated exceptions.' It is equally well settled that one of the specifically established exceptions to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent.
>
> . . . .
>
> Our decision today is a narrow one. We hold only that when the subject of a search is not in custody and the State attempts to justify a search on the basis of his consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied. Voluntariness is a question of fact to be determined from all the circumstances, and while the subject's knowledge of a right to refuse is a factor to be taken into account, the prosecution is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent.

Schneckloth, 412 U.S. at 219, 248-49, 93 S.Ct. at 2043-44, 2059 (citations and footnote omitted). Here, we note Oliver was not in custody when he answered the door—opening it wide and moving aside—allowing the detectives to enter Whitworth's residence. We further observe that Whitworth was not in custody when he consented to the search of his residence.

Whitworth maintains that because Oliver did not say anything when the officers entered as soon as he opened the door, Oliver neither could, nor did, consent to the detectives' entry into Whitworth's residence. However, Oliver knew at least two of the detectives and they made no effort to coerce or deceive him to grant them entry. Nor was there demonstration of power or show of force to gain entry. Det. Lantrip simply knocked on the door and asked permission to speak with the owner of the residence. Oliver immediately obliged without hesitation or question, before inviting them into the house by opening the door wide and moving aside. Thus, the trial court was justified in concluding that Oliver consented for the detectives to enter the residence and that such consent was not coerced or unauthorized. *See Piercy*, 303 S.W.3d at 497; *United States v. Carter*, 378 F.3d 584, 587 (6th Cir. 2004) (consent to search may be given by non-verbal means, such as gesture or conduct). Moreover, Det. Fox testified that Oliver had told him he stayed at the residence, and Det. Fox had seen Oliver working on a vehicle in front of the residence. Thus, the evidence of record supports the trial

court's findings that the detectives acted reasonably in believing Oliver had sufficient control and apparent authority over the premises to give valid consent to their entry. *See Perkins*, 237 S.W.3d at 221. Moreover, Whitworth made no effort to object to the detectives' presence inside his residence. He did not rebuke Oliver for admitting the detectives, nor did he attempt to revoke the consent given by Oliver for the detectives to enter the residence.

Additionally, Whitworth argues that because he did not give the detectives permission to search his residence, a search warrant was required. However, the detectives lawfully entered the residence and observed contraband in plain view—an accepted exception to the requirement to obtain a warrant prior to conducting a search. There are three well-established exceptions to the warrant requirement:

> (1) the protective sweep exception fashioned in *Maryland v. Buie*, 494 U.S. 325, 110 S.Ct. 1093, 108 L.Ed.2d 276 (1990); (2) the emergency aid exception articulated in *Brigham City v. Stuart*, 547 U.S. 398, 126 S.Ct. 1943, 164 L.Ed.2d 650 (2006); and (3) the plain view exception delineated in *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). These three exceptions provide that the unreasonableness of a warrantless search can be overcome by "'the exigencies of the situation' [which may] make the needs of law enforcement so compelling that the warrantless search is objectively reasonable." *Mincey v. Arizona*, 437 U.S. 385, 393-394, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978). . . .
>
> . . . .

> The plain view exception to the warrant requirement is justified by the exigent need to preserve evidence that may otherwise be moved or destroyed. *See Coolidge*, 403 U.S. at 446, 91 S.Ct. 2022. The plain view exception applies "when the object *seized* is plainly visible, the officer is lawfully in a position to view the object, and the incriminating nature of the object is immediately apparent." [*Kerr v. Commonwealth*, 400 S.W.3d 250, 266 (Ky. 2013)] (citing *Horton v. California*, 496 U.S. 128, 136-37, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990)) (emphasis added). Unlike the exigencies outlined in the protective sweep and emergency aid exceptions, which are justified when conducting a warrantless search, the plain view doctrine only applies to the warrantless seizure of evidence. *Horton*, 496 U.S. at 135, 110 S.Ct. 2301. This exception cannot justify an otherwise unlawful intrusion just because it may bring the officers within plain view of evidence. *Id*.

Pace, 529 S.W.3d at 753-54, 755. Here, the detectives were lawfully in a position to view—and smell—the contraband which was in plain view, overcoming the requirement that a search warrant be obtained prior to its seizure. Det. Lantrip then requested to conduct a search of the remainder of the residence, and Whitworth voluntarily consented. Given the totality of the circumstances, the trial court did not err in concluding that Whitworth's consent to search the remainder of his residence was voluntary. *See Schneckloth*, 412 U.S. 218, 93 S.Ct. 2041. Review of the record indicates the Commonwealth established, by a preponderance of the evidence, the consent given by Whitworth was freely and voluntarily obtained without any threat or express or implied coercion. *Cook*, 826 S.W.2d at 331 (citing

United States v. Matlock, 415 U.S. 164, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974)). Therefore, the trial court did not err by denying Whitworth's motion to suppress.

CONFLICT OF INTEREST

Whitworth's next argument is that his defense counsel had a conflict of interest. An "actual conflict," for Sixth Amendment purposes, is a conflict of interest that adversely affects counsel's performance. *Mickens v. Taylor*, 535 U.S. 162, 171, 122 S.Ct. 1237, 1243, 152 L.Ed. 2d 291 (2002). Our Supreme Court has held:

> where an alleged conflict of interest is raised at or before trial, the standard set forth in *Holloway v. Arkansas*, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978), governs. Under *Holloway*, to prevail on a Sixth Amendment claim of denial of the right to conflict-free counsel where the conflict was raised at or before trial, a defendant need only show that a conflict of interest existed. *Id*. at 487-91, 98 S.Ct. 1173.

Samuels v. Commonwealth, 512 S.W.3d 709, 712 (Ky. 2017). Thus, the correct inquiry is whether Whitworth demonstrated that counsel had an actual conflict of interest.

Whitworth's counsel asserted that his former representation of Parker presented an "ethical issue" concerning his representation of Whitworth here. The trial court pointed out that the *potential* for a conflict of interest from counsel's representation of Parker and Whitworth existed during the entirety of those representations. Information that should have alerted counsel to a potential

conflict of interest was made available during discovery and discussed at the suppression hearing. Nevertheless, counsel contended that the Commonwealth's KRE[7] 404(b) notice, filed on February 21, 2019, that it intended to introduce evidence of the controlled buy pitted his clients against one another. However, Parker was neither a material witness nor designated or called as a witness at trial. Additionally, by counsel's admission, Parker's charges had already been resolved. The trial court correctly found there was no actual conflict of interest.

> As the Supreme Court has observed, our duty is:
>
> "not to enforce the Canons of Legal Ethics, but to . . . assure vindication of the defendant's Sixth Amendment right to counsel." [*Mickens*, 535 U.S. at 176, 122 S.Ct. 1237.] Indeed, the scope of the right to effective assistance of counsel under the Sixth Amendment is not dictated by state ethical rules. *See Nix v. Whiteside*, 475 U.S. 157, 165, 106 S.Ct. 988, 89 L.Ed.2d 123 (1986) ("[B]reach, of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of counsel."). So conduct that might lead to a conflict under our ethical rules will not necessarily lead to an unconstitutional conflict for Sixth Amendment purposes.

Samuels, 512 S.W.3d at 715. Because these issues were brought to the trial court's attention at a pretrial hearing, the court was able to inquire about the potential conflict and attempt to incorporate a solution to avoid perceived conflict, while

[7] Kentucky Rules of Evidence.

ensuring Whitworth received effective assistance of counsel. Moreover, SCR[8] 3.130 (1.16)(c) provides that "[w]hen ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation." Here no good cause was shown; therefore, the trial court did not abuse its discretion in denying counsel's motion to continue the trial or to allow him to withdraw because of the mere possibility of violating the professional rules of conduct where such continued representation would not, and did not, lead to an impermissible and unconstitutional actual conflict of interest. Simply put, Whitworth received the conflict-free counsel to which he was entitled under the Sixth Amendment.

JURY INSTRUCTIONS

Whitworth's final argument is that three instructional issues require reversal. Our standard of review for a trial court's ruling regarding jury instructions is for abuse of discretion. *Cecil v. Commonwealth*, 297 S.W.3d 12, 18 (Ky. 2009). It is the trial judge's duty to instruct the jury on the whole law of the case. *Taylor v. Commonwealth*, 995 S.W.2d 355 (Ky. 1999).

Whitworth contends it was error for the trial court to refuse to include the legal definition of marijuana in the jury instructions. The trial court found the legal definition of marijuana to be convoluted and concluded that which constitutes

[8] Rules of the Kentucky Supreme Court.

marijuana is common knowledge and does not require recitation of the legal definition. Nevertheless, Whitworth asserts failure to include this definition was error without further explanation or citation to legal authority to support his contention. "It is not our function as an appellate court to research and construct a party's legal arguments[.]" *Hadley v. Citizen Deposit Bank*, 186 S.W.3d 754, 759 (Ky. App. 2005). We will not search the record to construct Whitworth's argument for him, nor will we go on a fishing expedition to find support for his underdeveloped argument. "Even when briefs have been filed, a reviewing court will generally confine itself to errors pointed out in the briefs and will not search the record for errors." *Milby v. Mears*, 580 S.W.2d 724, 727 (Ky. App. 1979). Absent further explanation or legal authority to support this contention, we cannot say the trial court abused its discretion as to the jury instruction at issue.

Whitworth also maintains he was entitled to lesser included offenses instructions on the two trafficking counts. A lesser included offense instruction is required "only if, considering the totality of the evidence, the jury might have a reasonable doubt as to the defendant's guilt of the greater offense, and yet believe beyond a reasonable doubt that he is guilty of the lesser offense." *Houston v. Commonwealth*, 975 S.W.2d 925, 929 (Ky. 1998). Stated another way:

> a trial court is required to instruct the jury on affirmative defenses and lesser-included offenses if the evidence would permit a juror reasonably to conclude that the defense exists or that the defendant was not guilty of the

> charged offense but was guilty of the lesser one. *Fredline v. Commonwealth*, 241 S.W.3d 793 (Ky. 2007); *Fields v. Commonwealth*, 219 S.W.3d 742 (Ky. 2007). It is equally well established that such an instruction is to be rejected if the evidence does not warrant it. *Payne v. Commonwealth*, 656 S.W.2d 719 (Ky. 1983).

Harris v. Commonwealth, 313 S.W.3d 40, 50 (Ky. 2010).

Overwhelming evidence supported the jury's findings of trafficking and prevented a reasonable juror from concluding that Whitworth merely possessed marijuana and methamphetamine without an intent to sell. Such evidence included testimony that the quantities of marijuana and methamphetamine found at Whitworth's residence were larger than those typically seen by detectives for personal use or consumption, the discovery of two digital scales and packaging materials, numerous half-ounce and ounce portions of marijuana in individual baggies, and the controlled buy in which the marked money was found on Whitworth—evidence of the actual sale of marijuana and methamphetamine. Accordingly, we hold the trial court did not abuse its discretion in not giving the lesser included offenses instructions.

Whitworth's final complaint regarding the instructions given to the jury by the trial court is that the possession of drug paraphernalia instruction did not protect against a non-unanimous verdict. "Section 7 of the Kentucky Constitution requires a unanimous verdict reached by a jury of twelve persons in all criminal cases." *Wells v. Commonwealth*, 561 S.W.2d 85, 87 (Ky. 1978)

(citations omitted). The purpose and application of this rule has been discussed by the Supreme Court of Kentucky, which allows multiple theories of a single crime to be included in a single jury instruction. *Johnson v. Commonwealth*, 405 S.W.3d 439, 452 (Ky. 2013).

In *Johnson*, a mother was tried for the murder and criminal abuse of her infant son. *Id.* at 441. In support of the one count of criminal abuse against her, a forensic pathologist testified that the infant had two leg fractures which, based on the amount of healing that had occurred, were inflicted on two separate occasions. *Id*. at 446. One fracture happened around mid-September 2009, while the other occurred around the first week of October 2009. *Id*. The court found the instruction violated the defendant's right to a unanimous verdict because it required finding that the abuse that caused the fractures occurred "between the dates of August 28, 2009 and October 23, 2009[.]" *Id*. at 448. Both fractures could have independently qualified as criminal abuse. *Id.* However, the instruction did not require the jury to differentiate which of the two separate occurrences was the basis for the conviction. *Id*. The resulting guidance was that a defendant's right to a unanimous verdict is violated when a general jury verdict is based on an instruction including two or more separate instances of a criminal offense. *Id*. at 449.

Unlike *Johnson*, here we do not have conduct occurring on two different dates. "A 'combination' instruction permitting a conviction of the same offense under either of multiple alternative theories does not deprive a defendant of his right to a unanimous verdict, so long as there is evidence to support a conviction under either theory." *Cox v. Commonwealth*, 553 S.W.3d 808, 812 (Ky. 2018) (citations omitted). All twelve jurors unanimously agreed that Whitworth possessed some type of drug paraphernalia with the intent to either personally consume or sell the drugs. For the purposes of conviction, it matters not whether the jurors believed Whitworth intended to personally use the drugs or sell them. Thus, we are satisfied that Whitworth's right to a unanimous verdict was not violated by the jury instruction.

CONCLUSION

Therefore, and for the foregoing reasons, the judgment entered by the Caldwell Circuit Court is AFFIRMED.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Brandon N. Jewell
Frankfort, Kentucky

BRIEF FOR APPELLEE:

Andy Beshear
Attorney General of Kentucky

Stephanie L. McKeehan
Assistant Attorney General
Frankfort, Kentucky