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RENDERED: AUGUST 20, 2015
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2014-SC-000039-MR

KENNETH WAYNE GOBEN — APPELLANT

V.

ON APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE OLU ALFREDO STEVENS, JUDGE
NOS. 10-CR-000178 & 13-CR-002399

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

A jury found Kenneth Wayne Goben guilty of manufacturing methamphetamine, trafficking in a controlled substance in the first degree (methamphetamine), and being a persistent felony offender in the first degree (PFO I). Following the jury verdict, the court sentenced Goben to a total of thirty years' imprisonment. On appeal, Goben argues that he was denied his right to a speedy trial. He also argues that the trial court erred when it: denied his motion to remove three jurors for cause; denied his motion for a directed verdict as to the trafficking charge; refused to order the Commonwealth to disclose the identity of a confidential informant; failed to rule on his motion in *limine* and then denied his motion to take testimony by avowal; and refused to instruct the jury on the lesser-included offense of possession of a controlled substance. For the following reasons, we affirm.

I. BACKGROUND.

After receiving information from a reliable confidential informant that Goben was manufacturing methamphetamine at Sandra Conaster's house, Louisville Metro Police Narcotics Det. Steve Healey set up surveillance on December 9, 2009. While positioned with a view of the front of the residence, Det. Healey saw Goben leaving the house several times with garbage bags, which he took to the rear of the house. Thereafter, Conaster and Goben, who was carrying a black duffel bag, left the house and went to Goben's truck. Goben put the bag in the truck, and Conaster got into the truck on the passenger's side. Det. Healey then decided to end the surveillance, and he approached the truck, where he saw two one-pot-methamphetamine-reactionary vessels,[1] one in the black duffle bag and one on the seat by Conaster.

Det. Healy called for assistance and then took Conaster and Goben back into the house, arrested both Conaster and Goben, and read them their *Miranda*[2] rights. Goben then told Det. Healey that he had recently activated one of the vessels in the truck and volunteered to "kill it," *i.e.* to make it safe. Goben also told Det. Healy the methamphetamine lab and "all the items" were his and that Conaster was merely allowing him to use her house to manufacture methamphetamine.

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[1] A one pot reactionary vessel is a homemade devise, usually a plastic bottle, used to manufacture methamphetamine.

[2] *Miranda v. Arizona*, 384 U.S. 436 (1966).

During the search of Goben's truck, the black duffle bag, Conaster's house, and the garbage cans outside the house, officers found other evidence of manufacturing and trafficking including: a baggie containing three grams of methamphetamine; a digital scale; a scoop; small empty plastic baggies; pipes; rolling papers; acetone; salt; drain cleaner; automobile starting fluid; pseudoephedrine pills; battery casings with the lithium removed; plastic tubing; a coffee grinder containing pill residue; an aquarium pump; plastic bottles containing chemicals; and Coleman fuel. Police also took $429 in cash from Goben.

Based on the preceding evidence, a grand jury indicted Goben in January 2010, and the case was assigned to Division 8 of the Jefferson Circuit Court, with Judge Chauvin presiding. We note that Goben already had charges related to manufacturing methamphetamine pending in a case that had been assigned to Division 9 of the Jefferson Circuit Court, with Judge McDonald-Burkman presiding. The Division 8 and Division 9 cases were never consolidated; however, the record before us consists of documents and hearings that took place in both Divisions. To the extent possible, we limit our discussion herein to matters related to the Division 8 case, which, for reasons that are unclear from the record, was tried before Judge Stevens in Division 6. When necessary, and for the sake of clarity, we refer to the two cases by their initially assigned Division numbers. We set forth additional facts as necessary below.

II. STANDARD OF REVIEW.

Because the issues raised by Goben on appeal require us to apply different standards of review, we set forth the appropriate standard as we address each issue.

III. ANALYSIS.

A. Goben Was Not Denied His Right to a Speedy Trial.

Goben argues that he was denied his constitutional right to a speedy trial.

> The right to a speedy trial is guaranteed by both the Sixth Amendment of the United States Constitution and Section 11 of the Kentucky Constitution. When a speedy trial violation is raised on appeal, a reviewing court must consider four factors to determine if a violation occurred: (1) the length of the delay; (2) the reasons for the delay; (3) the defendant's assertion of his right to a speedy trial; and (4) prejudice to the defendant. *Barker v. Wingo,* 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972); *Bratcher v. Commonwealth,* 151 S.W.3d 332 (Ky. 2004). We must balance these factors by first considering each factor individually and then weighing them together. *Smith v. Commonwealth,* 361 S.W.3d 908 (Ky. 2012).

Goncalves v. Commonwealth, 404 S.W.3d 180, 198 (Ky. 2013) *cert. denied,* 134 S. Ct. 705, 187 L. Ed. 2d 567 (U.S. 2013). We address each of the *Barker* factors below.

1. Length of Delay.

The first step of the analysis is to determine if the delay between Goben's arrest and his trial was presumptively prejudicial. *Dunaway v. Commonwealth,* 60 S.W.3d 563, 569 (Ky. 2001). In making that determination we look at the

actual length of the delay and balance that time period against the complexity of the case. *Id.*

Goben was arrested in December 2009, and his trial began in October 2013, a nearly four-year delay. When he was arrested, Goben was in the process of manufacturing methamphetamine and admitted that he was doing so; therefore, although the charges were serious, this case was not particularly complex. However, from the record, it appears that Goben had at least two other cases pending when he was arrested, which created some procedural complexities related to coordinating resolution of all his pending cases. Those procedural complexities notwithstanding, a delay of nearly four years is presumptively prejudicial. That holding does not end our analysis, rather it triggers the need to look at the remaining three *Barker* factors. *Dunaway,* 60 S.W.3d at 569.

2. Reasons for the Delay.

The U.S. Supreme Court delineated three categories of reasons for delay: "(1) 'deliberate attempt to delay the trial in order to hamper the defense;' (2) a 'more neutral reason such as negligence or overcrowded courts;' and (3) 'a valid reason, such as a missing witness.'" *Dunaway,* 60 S.W.3d at 570 (citation omitted). To determine which category applies here, we undertake a brief review of the procedural steps taken.

As noted above, Goben was arrested in December 2009. He was indicted on January 21, 2010, as was Conaster, a co-defendant. Goben was initially represented by private counsel. However, that attorney withdrew in May 2010

because Goben would not follow his advice regarding a plea offer. Goben was then represented by a public defender, attorney John Mack; however, that representation ended because of a conflict within the public defender's office, which was also representing Conaster. Pursuant to court order, Goben was assigned conflict counsel, who also withdrew. Although it is not clear from the record, it appears that Goben may have retained counsel again at some point because the court noted in February 2012 the attorney in question had withdrawn. The court then re-appointed the public defender's office, which re-assigned the case to attorney Mack. In April 2012, Goben waived the conflict; however, just prior to a June trial date, Goben withdrew his waiver. The public defender's office had difficulty finding conflict counsel; however, at some point before mid-November 2013, trial counsel, attorney Doug Mory, entered the case. Following attorney Mory's appearance, the court scheduled several pre-trial conferences in the spring and summer of 2013, during which the parties indicated that they needed additional time to attempt to resolve the matter through a plea agreement.

Based on the preceding, it is clear that any delay was not deliberate or the result of negligence or overcrowding. Rather, the delay was the result of valid reasons: finding representation for Goben; discussing a plea agreement; and coordinating the three cases. Furthermore, the delays and multiple continuances were generally for the benefit of Goben or caused by his actions. Therefore, this factor weighs in favor of the Commonwealth.

3. *Assertion of Right to Speedy Trial.*

Goben asserted his right to a speedy trial by motion in May 2010 and reiterated his motion for a speedy trial in 2012. However, the assertion of that right must be weighed in light of Goben's other pre-trial conduct. *Dunaway*, 60 S.W.3d at 571.

As noted above, the delay in getting this matter to trial was primarily due to Goben's inability to retain and keep counsel. Goben did not object to the delays that resulted therefrom, nor did he object to delays that resulted from the parties' extensive plea negotiations. Therefore, this factor does not weigh in favor of either party.

4. *Prejudice.*

> Prejudice . . . should be assessed in the light of the interests of defendants which the speedy trial right was designed to protect. This Court has identified three such interests: (i) to prevent oppressive pretrial incarceration; (ii) to minimize anxiety and concern of the accused; and (iii) to limit the possibility that the defense will be impaired. Of these, the most serious is the last, because the inability of a defendant adequately to prepare his case skews the fairness of the entire system.

Barker v. Wingo, 407 U.S. 514 (1972) (footnote omitted).

Goben contends that he suffered from a large hernia throughout his pre-trial incarceration, and the only treatment he received was palliative, which caused him significant anxiety and concern. The court record, which is devoid of any medical records or reports, reflects that Goben first requested a medical release to receive treatment for his hernia in February 2012. At that time, the judge in Goben's Division 9 case granted Goben's motion. However, she noted that Goben also needed to convince the judge in his case Division 8 case to

grant a release, which that judge refused to do. In denying Goben's motion, the Division 8 judge indicated that he was reluctant to second guess medical personnel from the jail. Furthermore, that judge questioned how Goben, who stated that he had no insurance or assets, would be able to pay for treatment.

We understand that Goben may have felt that he was not receiving proper medical care and that could have caused anxiety and concern. However, there is no medical evidence in the record that Goben even had a hernia, let alone that the care he was receiving was inappropriate. Furthermore, Goben has not stated how this hernia, if it existed, and the treatment he received, if it was inappropriate, impeded his ability to present a defense. All we have in the record are Goben's conclusory statements, and "[c]onclusory claims about the trauma of incarceration, without proof of such trauma, and the *possibility* of an impaired defense are not sufficient to show prejudice." *Bratcher v. Commonwealth*, 151 S.W.3d 332, 345 (Ky. 2004) (emphasis in original). Thus, this factor weighs heavily in favor of the Commonwealth.

In conclusion, the only factor that favors Goben is the significant amount of time it took to bring this matter to trial. The other factors are either neutral or weigh in favor of the Commonwealth. Therefore, we hold that Goben was not denied his right to a speedy trial.

B. The Trial Court Did Err When It Refused to Remove Three Jurors for Cause.

> This Court has long recognized that '[a] determination as to whether to exclude a juror for cause lies within the sound discretion of the trial court, and unless the action of the trial court

> is an abuse of discretion or is clearly erroneous, an appellate court will not reverse the trial court's determination.'

Pendleton v. Commonwealth, 83 S.W.3d 522, 527 (Ky. 2002) (citations omitted).

When ruling on a motion to strike a juror for cause, the trial court must determine whether "there is reasonable ground to believe that a prospective juror cannot render a fair and impartial verdict on the evidence . . . ." RCr 9.36. The court must make that determination "based on the entirety of [the juror's] responses" and assess "both the content of all of the juror's responses, as well his demeanor and candor." *Little v. Commonwealth*, 422 S.W.3d 238, 242 (Ky. 2013), *reh'g denied* (Mar. 20, 2014) (citation omitted).

Goben moved to strike three jurors for cause - numbers 754375, 985096, and 985749, which we hereinafter refer to as jurors 75, 96, and 49. When his motions to strike were denied, Goben used peremptory challenges to remove the three jurors. He then identified which other jurors he would have removed with his peremptory challenges. One of those jurors served on the panel that found him guilty. Because the factual issues related to each juror differ, we address them separately below.

1. Juror No. 75.

During *voir dire* by the Commonwealth, Juror No. 75 stated that his nephew and brother-in-law were serving as police officers and that his brother had just retired from the police department. However, he stated that these familial relationships to police officers would not impede his ability to be fair. When questioned by Goben's attorney, Juror No. 75 stated that he did not

think he would be biased in favor of believing an officer rather than a lay witness; however, he admitted that he might have a subconscious bias.

Goben moved to strike Juror No. 75 for cause, arguing that Juror No. 75's admission of a possible subconscious bias rendered him unable to fairly participate. The Commonwealth argued that, despite Juror No. 75's admission of a possible subconscious bias, he stated several times that he could be fair. The court noted that "it is always difficult" to deal with issues related to a juror's subconscious since no one knows what goes on in the subconscious. According to the court, the issue is what transpires consciously in a juror's mind, and the court stated it would have been more concerned if Juror No. 75 had said he was certain he had no subconscious bias. Finally, the court noted that Juror No. 75 stated he could fairly evaluate the evidence and that a possible subconscious bias was not grounds to strike Juror No. 75 for cause.

The fact that Juror No. 75 has familial ties to law enforcement is not, by itself, grounds for disqualification. *Paulley v. Commonwealth*, 323 S.W.3d 715, 721 (Ky. 2010). Furthermore, the mere possibility of bias is not sufficient to mandate disqualification. The question is whether the possibility of bias "rose to the level of probability." *Whittle v. Commonwealth*, 352 S.W.3d 898, 901 (Ky. 2011).

> Without attempting a mathematical definition of "probability," this Court simply states that the task for the trial judge was to ascertain whether by "possibility," the juror meant "a real chance" or meant the theoretical notion that "anything is possible." The former equates to probability and requires the juror to be struck for cause; the latter denotes nothing more than theoretical speculation, which should not form the basis of any court action.

Id. As the trial court noted, what takes place in a person's subconscious is not the issue. It is what consciously occurs that is important. Juror No. 75 admitted that he could possibly have a subconscious bias, but he stated that any such subconscious bias would not impede his ability to be fair. In other words, he could consciously evaluate the evidence without bias. Viewing Juror No. 75's responses in their entirety, his statement that he might subconsciously have a bias falls within *Whittle's* "anything is possible" category rather than its "real chance" of occurring category. Thus, we cannot say that the trial court abused its discretion by denying Goben's motion to strike this juror.

2. Juror No. 96.

During questioning by Goben's counsel, Juror No. 96 stated that he believed letting a guilty person go free was worse than convicting an innocent person. When asked to elaborate, he said, "Well, you know, in my mind if you're - again you're giving us this information, I'm assuming the scenario you're presenting is the truth, but if someone's innocent, bad things happen, and it's bad, but to me it's worse if you did it and got away with it than - that's just how I feel." Goben's counsel did not pursue the issue further and moved to strike Juror No. 96 arguing that the juror's response about a guilty man going free was antithetical to the requirement to find guilt beyond a reasonable doubt. The Commonwealth argued that the question elicited the juror's opinion on one issue but that the juror also stated that he could follow the evidence and would require the Commonwealth to prove its case beyond a

reasonable doubt. The court found that Juror No. 96's answer may give an attorney reason to use a peremptory strike. However, the court stated that the answer did not rise to the level necessary to strike the juror for cause because there was little connection between the answer and the juror's ability to fairly judge the evidence or to apply the correct burden of proof.

Goben makes essentially the same argument on appeal, citing *Rodgers v. Commonwealth*, 314 S.W.3d 745, 750 (Ky. Ct. App. 2010) for support. However, Goben's reliance on *Rodgers* is misplaced because *Rodgers* involved a statement regarding the burden of proof made by the Commonwealth's attorney during closing argument, not a juror's response to a question during *voir dire*. *Id.* at 748. Furthermore, we agree with the trial court that a person's belief regarding the relative merits of jailing the innocent versus freeing the guilty may give a clue as to a juror's "leanings," but it does not mandate exclusion of the juror. Therefore, we cannot say that the trial court abused its discretion in denying Goben's motion to strike Juror No. 96 for cause.

3. Juror No. 49.

During *voir dire*, counsel for Goben told the jurors that the penalty range for manufacturing methamphetamine is 10 to 20 years' imprisonment and for trafficking methamphetamine it is 5 to 10 years. Juror No. 49 indicated that she thought the penalty for trafficking would be more than the penalty for manufacturing, and it should be 10 years. However, she indicated that she could be fair and did not state that she could not consider the full range of penalties.

Goben asked the court to strike Juror No. 49 for cause arguing that her belief that trafficking should carry a 10 year penalty would disqualify her as a juror. The court stated that the issue was whether Juror No. 49 could consider the entire range of sentencing possibilities, not her belief regarding the legitimacy of the sentencing scheme. The court then noted that Goben did not ask any follow-up questions of Juror No. 49 regarding her ability to consider the range despite her belief. Because the court determined there was insufficient follow-up questioning regarding what it believed to be the key issue, it denied Goben's motion.

On appeal, Goben argues that, once Juror No. 49 stated her belief that trafficking should result in a set 10 year penalty, there was nothing that could be done to rehabilitate her. We disagree.

The issue was not whether the juror believed the legislature had appropriately set the penalty for trafficking. The issue was whether the juror could consider the penalty scheme put in place by the legislature. Goben's counsel arguably established that Juror No. 49 disagreed with the penalty range, but he failed to establish that she could not or would not consider that range. Furthermore, the trial court's finding to the contrary notwithstanding, Goben's counsel did ask the panel whether "anyone would have a problem considering that [5 to 10 year] range." None of the panel members, including Juror No. 49, said that they would. Finally, we note that Juror No. 49 stated that she could be fair in considering what penalty to impose.

> [A] juror who has made answers which would otherwise disqualify [her] by reason of bias or prejudice may be rehabilitated by being

> asked whether [she] can put aside [her] personal knowledge, [her] views, or those sentiments and opinions [she] has already, and decide the case instead based solely on the evidence presented in court and the court's instructions.

Montgomery v. Commonwealth, 819 S.W.2d 713, 717 (Ky. 1991). However, a juror's ability to sit in judgment should not be based solely on her responses to these so-called magic questions. *Id.* at 718. Rather, the court must review the totality of the circumstances to determine if a juror is sufficiently impartial to serve. *Id.* That is what the trial court herein did. It determined, from the juror's responses in context, that, despite her disagreement with the appropriateness of the penalties, she had not expressed any hesitancy regarding her ability to apply the full range. Thus, we cannot say that the trial court abused its discretion when it denied Goben's motion to strike Juror No. 49 for cause.

C. The Court Did Not Err in Denying Goben's Motion for a Directed Verdict on the Trafficking Charge.

Det. Healey testified that he saw Goben take a black duffle bag from the house to Goben's truck. He also testified that various items were found in the black duffle bag, including an active one pot reactionary vessel, a digital scale, pipes, and a baggie containing methamphetamine. Goben objected to Det. Healey's testimony arguing that the Commonwealth had not established that Det. Healey had searched or even observed the search of the black duffle bag. The trial court overruled that objection noting that Goben could cross-examine Det. Healey on those issues. On cross-examination, Det. Healey admitted that

he had not searched or observed the search of the black duffle bag and that the only item he personally observed in that bag was the reactionary vessel.

At the conclusion of the Commonwealth's case, Goben moved for a directed verdict on all charges. In support of his motion, Goben argued that the Commonwealth had failed to prove that he was in actual or constructive possession of any methamphetamine or of any of the chemicals or equipment used to manufacture or traffic methamphetamine. The trial court overruled Goben's motion.

On appeal, Goben has abandoned his argument regarding the manufacturing charge; however, he continues to argue that he should have been granted a directed verdict on the trafficking charge. In support of his argument, Goben states that his trafficking conviction hinged on proof that he had possessed the contents of the black duffle bag. As he did at trial, Goben argues that the Commonwealth failed to lay a proper foundation regarding what was in the black duffle bag because none of the Commonwealth's witnesses testified that he had searched or observed the search of the black duffle bag. The Commonwealth admits that it might have "more definitely described exactly where each item was located in the truck;" however, it notes that Goben does not dispute that the items were found in his truck. Furthermore, it notes that the evidence, if not perfect, was sufficient to withstand a motion for directed verdict. We agree.

> On a 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 purposes 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 the credibility and weight to be given to such testimony. 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.

Commonwealth v. Benham, 816 S.W.2d 186 at 187 (Ky. 1991).

Goben's argument regarding the lack of an evidentiary foundation has some merit; however, it ignores Det. Healey's testimony that Goben stated that "all the items were his" and that the black duffle bag was in Goben's truck. Taking that testimony, in conjunction with the evidence seized, and viewing that evidence in the light most favorable to the Commonwealth, the court did not err in finding that the jury could conclude that Goben possessed the items found in the black duffle bag. Therefore, we hold that the court did not err in denying Goben's motion for directed verdict on the trafficking charge.

D. The Trial Court Properly Refused to Order Disclosure of the Identity of the Confidential Informant.

During a suppression hearing, Det. Healey stated that he began watching Conaster's house because he had received information from a confidential informant that Goben was manufacturing methamphetamine there. Prior to trial, the Commonwealth, in response to discovery, indicated that it would turn over information regarding the confidential informant when it received that information from Det. Healey. Approximately three weeks before trial, Goben filed a motion to disclose the identity of that confidential informant. The Division 8 judge, Judge Chauvin, signed an order requiring the Commonwealth

to disclose "any information regarding the confidential informant referred to in the discovery . . . ." On the first day of trial, before *voir dire*, Goben moved the Division 6 and trial judge, Judge Stevens, for an order enforcing Judge Chauvin's order. The Commonwealth argued that the discovery did not require it to reveal the informant's identity but only to advise Goben whether the informant was a confidential informant. Judge Stevens found that Judge Chauvin's order did not encompass disclosure of the identity of the informant. However, he permitted Goben and the Commonwealth to argue whether the informant's identity should be disclosed.

During an in-chambers hearing, Goben argued that the confidential informant had relevant evidence because his contention was that the evidence belonged to Conaster while Conaster contended it belonged to Goben. The Commonwealth argued that a mere allegation of relevance was not sufficient. Furthermore, it argued that the case against Goben depended on what was taken from the scene and what the investigating officers observed, not on what any informant had said or would say. Judge Stevens indicated that he believed that the confidential informant's identity might have some relevance; therefore, he asked the Commonwealth to give further explanation why the identity should not be disclosed. After consulting with Det. Healey, the Commonwealth's attorney stated that the informant's life was in danger. Based on the Commonwealth's assertion that the informant's life would be in danger if his identity were disclosed, Judge Stevens denied Goben's motion.

On appeal, Goben argues that the trial court's ruling prejudiced him in two ways. First, the court relied on the Commonwealth attorney's unsupported assertion that Det. Healey said the informant's life would be in danger, which deprived Goben of the opportunity to verify that assertion. Second, Det. Healey testified that he was investigating Goben "based on information [he] had," which "left the jury to speculate about the source of the detective's information." The Commonwealth continues to argue that Goben failed to show how the informant's identity was in any way relevant. For the reasons set forth below, we agree with the Commonwealth.

Kentucky Rule of Evidence (KRE) 508(a) provides that

> The Commonwealth of Kentucky and its sister states and the United States have a privilege to refuse to disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of a law to a law enforcement officer or member of a legislative committee or its staff conducting an investigation.

If the Commonwealth asserts the privilege, as it did here, and it appears that the informer may have relevant evidence, "the court shall give [the Commonwealth] an opportunity to make an in camera showing in support of the claim of privilege. The showing will ordinarily be in the form of affidavits, but the court may direct that testimony be taken if it finds that the matter cannot be resolved satisfactorily upon affidavits." KRE 508(c)(2).

Goben had the burden of establishing, as a threshold matter, that the identity of the confidential informant had some relevancy. Despite the trial court's finding to the contrary, he failed to meet that burden.

"'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." KRE 401. Goben's defense was two-fold: (1) the seized evidence belonged to Conaster; or (2) the Commonwealth failed to prove that the seized evidence belonged to Goben. He offered nothing to show that the confidential informant could provide any evidence that would make either of those facts more or less probable. Therefore, the trial court's finding to the contrary notwithstanding, Goben failed to establish that the confidential informant had any relavant evidence, and he was not entitled to the hearing provided for in KRE 508(c)(2).

Goben, as he did before the trial court, relies primarily on *Heard v. Commonwealth*, 172 S.W.3d 372 (Ky. 2005) as support for his argument. That reliance is misplaced. In *Heard,* the confidential informant made a controlled purchase at Heard's residence from a person known as "Big Man." Later that day, officers executed a search warrant at Heard's address and seized drugs and paraphernalia. Both Heard and Big Man were present when the residence was searched, both were arrested, and both claimed that the seized evidence belonged to the other. *Id.* at 373. At the "hearing" on Heard's motion to disclose the informant's identity, the judge stated that he had overruled a similar motion in a case previously and, "to be consistent," he denied Heard's motion. *Id.* This Court held that the trial court abused its discretion when, for the sake of consistency, it did not hold an in *camera* evidentiary hearing

regarding the motion. *Id.* 374. Therefore, this Court remanded the matter to the trial court with instructions for it to hold an evidentiary hearing. *Id.*

Heard is easily distinguishable from this case. Here, Conaster and Goben were initially co-defendants, like Heard and "Big Man." However, unlike Heard and "Big Man," who were tried together, Conaster accepted a plea deal three years before trial. In *Heard*, there was evidence that the confidential informant purchased drugs from "Big Man" at Heard's residence and that purchase formed the basis for the search warrant. Here, there was no evidence that the confidential informant purchased drugs from anyone, let alone Goben or Conaster. Furthermore, the basis for Goben's arrest was what Det. Healey observed, not what the confidential informant said or did. Thus, although both this case and *Heard* are similar on the surface, *Heard* has no application here.

E. The Court Granted Goben's Motion in *Limine* And It Did Not Abuse Its Discretion By Denying Goben's Motion to Take Testimony By Avowal.

During his opening statement, Goben's counsel said that he would be calling Conaster's boyfriend, Donny Decker, to testify. After the Commonwealth had rested, Goben's counsel asked for a bench conference to discuss Decker's anticipated testimony. Counsel stated that he believed Decker would testify that he had seen Conaster and Goben earlier in the day on December 9, 2010, and "there was no meth use, meth manufactur[ing] whatever going on." Counsel also stated that he wanted to elicit testimony from Decker that he lived with Conaster and that he had been charged with manufacturing methamphetamine by Det. Healey, which charge led to a

conviction. According to Goben's counsel, this testimony would support his theory that it was Conaster and Decker who were manufacturing methamphetamine at Conaster's house, not Goben. Furthermore, counsel implied that he believed Decker might have been the confidential informant, and he wanted to explore the possibility that Decker had somehow "maneuvered" things to implicate Goben. However, before he put Decker on the stand, counsel wanted to be certain he did not "open any doors" for the Commonwealth.

The Commonwealth noted that, because what Goben's counsel proposed would possibly place Decker in jeopardy, Decker would have to be advised of his rights before testifying. The Commonwealth agreed that Decker's testimony might support Goben's alternate perpetrator theory. However, any questions regarding Decker's possible actions as a confidential informant would run afoul of the court's ruling about disclosing the informant's identity. Finally, the Commonwealth stated that Decker's testimony might open the door to evidence regarding Goben's prior history of methamphetamine manufacturing.

The court stated that Goben was free to call whatever witnesses he chose; however, the court stated that the testimony could "go bad" quickly. Goben's counsel then moved for leave to examine Decker by avowal. The court stated that there was nothing to rule on regarding avowal testimony because it had not prohibited Goben from calling Decker as a witness. Thereafter, the following conversation between Goben's counsel and the court took place:

> Counsel: Then let me make sure of one more thing here, I routinely in cases, and especially criminal cases, especially

because opening the door is such an important part of this, approached and asked, and I guess you could couch this as a motion in *limine,* to prohibit the Commonwealth from bringing up Mr. Goben's record if I ask Mr. Decker the following, so my motion is that you prohibit them from bringing up Mr. Goben's record, if all I do is ask Donald Decker have you been convicted of manufacturing methamphetamine, yes?

Court: Well, because you include the "if," if you want me to prohibit something you tell me exactly what you want me to prohibit and you don't include an "if," if you want me to prohibit that, I would prohibit it. It's prohibited, but certain things happen, then that's out the window. You're prohibited from getting into his record right now I tell you, you can't get into it . . . unless . . . you see what I'm saying, so if you want, your motion in *limine* to prevent is granted, you can't get into that.

Counsel: Just so I'm clear, this'll be the last thing I say, unlike with the CI for example where we all get together at the same time and say, look, this ruling and that ruling means we can ask this and not ask this, etc. I'm really asking the court to do the same thing here and say here's the path we can walk on to keep us from opening the door, and you're declining to do that?

Court: I don't know what the testimony is, and it's not my job to keep us from opening the door, it's your job. My job is to make evidentiary rulings as I'm making them. You made your motion, I made it, and that's where it is. Okay?

Goben argues on appeal that the trial court erroneously refused to permit him to take Decker's testimony by avowal and erroneously failed to rule on his motion in *limine.* We address each issue separately below.

1. Avowal Testimony.

When a court excludes evidence, the proper method of preserving the issue is to make an offer of proof. KRE 103. However, an offer of proof, which can include avowal testimony, is not required when the court has not excluded any evidence. Goben's attorney stated that he intended to call Decker to testify, and the court stated that he was free to do so. Therefore, as the court

stated, there was no need for Goben to present Decker's testimony by avowal or for the court to rule on Goben's motion to take Decker's testimony by avowal.

2. Motion in Limine.

As we understand it, Goben is arguing that the court "would not rule on the defense's motion in *limine* regarding whether the defense's planned questioning of Decker would open the door to Mr. Goben's prior criminal history." That is not how we read this record.

As we read this record, the only motion in *limine* Goben made was to prohibit the Commonwealth from delving into Goben's criminal record if the only question Goben asked Decker was whether Decker had been convicted of manufacturing methamphetamine. The court granted that motion, stating that the parties were "prohibited from getting into his (meaning Goben's) record." However, as the court cautioned "things happen [and] then that's out the window" meaning that counsel's questions or Decker's testimony might open a door, which the court and the parties would then have to address. In essence, the court was telling Goben's counsel that it could not predict where Decker's testimony would lead; therefore, it could not make a blanket ruling prohibiting the Commonwealth from walking through any doors that Goben might open. We discern no error in the court's ruling.

F. The Court Did Not Err When It Denied Goben's Request for a Lesser-Included Offense Jury Instruction.

Goben asked the court to instruct the jury on possession as a lesser-included offense to trafficking. In support of his request, Goben argued that the jury could conclude that he was not trafficking because he had only a small

amount of methamphetamine in his possession; he had $429 in cash, which consisted primarily of four $100 bills;[3] no "drug notes;" and there had been no drug purchase. The Commonwealth objected to the instruction arguing that the only reasonable inference from the evidence was that Goben was trafficking. The court found that the evidence did not support a possession instruction, although it stated that Goben was free to argue "what he had in his possession and what the significance of it was."

> RCr 9.54(1) provides: "It shall be the duty of the court to instruct the jury in writing on the law of the case . . . ." Under this rule, "[a] defendant is entitled to an instruction on any lawful defense which he has. Although a lesser included offense is not a defense within the technical meaning of those terms as used in the penal code, it is, in fact and principle, a defense against the higher charge." *Slaven v. Commonwealth,* 962 S.W.2d 845, 856 (Ky. 1997) (citations omitted). We review a trial court's rulings regarding instructions for an abuse of discretion. *Johnson v. Commonwealth,* 134 S.W.3d 563, 569–70 (Ky. 2004).

Ratliff v. Com., 194 S.W.3d 258, 274 (Ky. 2006), *as modified* (July 28, 2006). "[A] trial court must give a lesser-included offense instruction '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.'" *Commonwealth v. Swift*, 237 S.W.3d 193, 195 (Ky. 2007) (footnote omitted).

KRS 218A.1412 provides that "A person is guilty of trafficking in a controlled substance in the first degree when he or she knowingly and unlawfully traffics in: . . . [t]wo (2) grams or more of . . . methamphetamine."

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[3] According to Goben, a drug trafficker would carry smaller denominations in order to make change.

"'Traffic' means to distribute, dispense, sell, transfer, or possess with intent to distribute, dispense, or sell methamphetamine." KRS 218A.1431(3).

The primary evidence supporting the trafficking charge, which was found in the black duffle bag, consisted of the scales, numerous empty baggies, a cutting agent, 3 grams of methamphetamine, pipes, and a measuring scoop. Because this evidence was found in one place, the jury could not have had a reasonable doubt that Goben possessed the indicia of trafficking while having no reasonable doubt that he possessed methamphetamine. Therefore, we hold that the trial court did not abuse its discretion when it denied Goben's request for a simple possession instruction.

IV. CONCLUSION.

For the foregoing reasons, we affirm.

All sitting. All concur.

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