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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000289-MR

DARRELL MCNEW — APPELLANT

v.

APPEAL FROM JACKSON CIRCUIT COURT
HONORABLE OSCAR G. HOUSE, JUDGE
ACTION NO. 08-CR-00022

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON AND VANMETER, JUDGES; LAMBERT,[1] SENIOR JUDGE.

DIXON, JUDGE: Appellant, Darrell McNew, was convicted in the Jackson Circuit Court of first-degree manufacturing methamphetamine and first-degree criminal conspiracy to manufacture methamphetamine. He was sentenced to a

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

total of ten years' imprisonment and appeals to this Court as a matter of right. Finding no error, we affirm.

On February 29, 2008, Kentucky State Police received a tip concerning the existence of a methamphetamine operation (meth lab) at the residence of Rick Witt in Jackson County, Kentucky. Upon arriving, Trooper Rob Morris, along with Jackson County Sheriff's deputies Lynn Goforth and Kevin Berry, discovered an active meth lab set up in a back bedroom of Witt's home. Present inside the house were Witt, his infant daughter, and another individual, Mickey Isaacs. However, Deputy Berry observed an individual run away from the house. Muddy footprints led to an outbuilding where Appellant was discovered. A search of Appellant's person revealed coffee filters containing a white powdery substance. Further, police found a black jacket inside Witt's residence containing two identification cards belonging to Appellant. Although he initially told police at the scene that he had left the jacket at Witt's a week earlier, at trial he denied ownership of the jacket.

On April 1, 2008, a Jackson County Grand Jury indicted Appellant, Witt and Isaacs, for first-degree manufacturing methamphetamine, first-degree possession of a controlled substance, possession of drug paraphernalia, and criminal conspiracy to manufacture methamphetamine. Prior to trial, Witt entered into a plea agreement with the Commonwealth whereby he was sentenced to eight years' imprisonment for criminal conspiracy to manufacture methamphetamine in exchange for his testimony against Appellant and Isaacs.

Following a December 2008 trial, a jury found Appellant guilty of the manufacturing and conspiracy charges and recommended sentences of ten years and five years respectively, to run concurrent for a total of ten years' imprisonment. The trial court entered judgment accordingly and this appeal ensued.

On appeal, Appellant first argues that the trial court erred in denying his motion for a directed verdict. Appellant contends that there was absolutely no evidence presented to support either the manufacturing or conspiracy charges. Rather, it is Appellant's position that Witt was solely responsible for the methamphetamine operation and Appellant just happened to be on the premises at the time the police arrived.

The standard of review for the denial of a directed verdict is set forth in the oft-cited *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991):

> [T]he 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 purpose 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.

For our purposes, "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." *Id.* (*Citing Commonwealth v. Sawhill*, 660 S.W.2d 3 (Ky. 1983)). *See also Beaumont v.*

Commonwealth, 295 S.W.3d 60 (Ky. 2009). Thus, "there must be evidence of substance, and the trial court is expressly authorized to direct a verdict for the defendant if the prosecution produces no more than a mere scintilla of evidence." *Benham*, 816 S.W.2d at 187-88. Again, however, "the weight of evidence and the credibility of the witnesses are functions peculiarly within the province of the jury, and the jury's determination will not be disturbed." *Jillson v. Commonwealth*, 461 S.W.2d 542, 544 (Ky. 1970); *Leigh v. Commonwealth*, 481 S.W.2d 75, 79 (Ky. 1972).

Appellant claims that the Commonwealth's case rested solely upon the testimony of Witt "who clearly had an incentive to accuse [Appellant]." While we disagree that the Commonwealth produced no other evidence, Appellant's argument is essentially an attack on Witt's credibility, a matter that is clearly "within the exclusive province of the jury." *Commonwealth v. Smith*, 5 S.W.3d 126, 129 (Ky. 1999). Furthermore, "[t]he testimony of even a single witness is sufficient to support a finding of guilt, even when other witnesses testified to the contrary if, after consideration of all the evidence, the finder of fact assigns a greater weight to that evidence." *Commonwealth v. Suttles*, 80 S.W.3d 424, 426 (Ky. 2002). Witt testified at trial that Appellant actively participated in the manufacturing operation, and that he even provided the pseudoephedrine for the methamphetamine.

In addition to Witt's testimony, the Commonwealth produced evidence that police found muddy footprints leading from the back of the house to

the outbuilding where Appellant was discovered; that Appellant was in possession of coffee filters having a white powdery substance on them; and that Appellant's jacket containing identification and a recent citation receipt was found in Witt's residence. Drawing all fair and reasonable inferences from the evidence in favor of the Commonwealth, but reserving to the jury questions as to the credibility of the witnesses, sufficient evidence was presented to withstand a directed verdict. *Benham*, 816 S.W.2d at 187.

Next, Appellant argues that the trial court erred in admitting prejudicial evidence in violation of KRE 402 and KRS 403. Specifically, Trooper Morris testified that he discovered two identification cards in a black jacket found during the search of Witt's house – one bearing Appellant's photograph and name and one with Appellant's photograph but bearing the name of Paul White. The defense objected, claiming the evidence was irrelevant and overly prejudicial. The trial court overruled the objection without further comment.

Under KRE 401, evidence is relevant if it has any tendency to render the existence of any consequential fact more or less probable, however slight that tendency may be. *Springer v. Commonwealth*, 998 S.W.2d 439, 449 (Ky. 1999); *Turner v. Commonwealth*, 914 S.W.2d 343, 346 (Ky. 1996); *Kroger Company v. Willgruber*, 920 S.W.2d 61, 67 (Ky. 1996). Further, KRE 402 provides:

> All relevant evidence is admissible, except as otherwise provided by the Constitutions of the United States and the Commonwealth of Kentucky, by Acts of the General Assembly of the Commonwealth of Kentucky, by these rules, or by rules adopted by the Supreme Court of

> Kentucky. Evidence which is not relevant is not admissible.

Nevertheless, relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of undue prejudice . . . ." KRE 403.

It is well-settled that a trial court ruling on the admission of evidence will not be overturned absent an abuse of discretion. *Commonwealth v. King*, 950 S.W.2d 807, 809 (Ky. 1997); *Partin v. Commonwealth*, 918 S.W.2d 219 (Ky. 1996), *overruled on other grounds* in *Chestnut v. Commonwealth*, 250 S.W.3d 288 (Ky. 2008). "A trial court abuses its discretion when it renders a decision which is arbitrary, unreasonable, unfair, or unsupported by legal principles." *Williams v. Commonwealth*, 229 S.W.3d 49, 51 (Ky. 2007).

We simply cannot agree with Appellant that the false identification card served no purpose other than to "show that [he] had a bad character." Indeed, not only were both cards probative of Appellant's presence at Witt's residence on the day in question, but the false card was also probative of whether Appellant was participating in the manufacture of the methamphetamine. Witt alleged that it was Appellant who supplied the pseudoephedrine or "Sudafed," the purchase of which requires a government-issued photo identification card. Certainly, an additional and false identification card would be helpful to one purchasing large quantities of pseudoephedrine. Finally, although the evidence was prejudicial to Appellant, as was all of the evidence presented by the Commonwealth, we do not find that its probative value was substantially outweighed by the danger of undue prejudice.

KRE 403. Accordingly, the trial court did not abuse its discretion in admitting the evidence.

Appellant next argues that the trial court erred in permitting Deputy Berry to testify during rebuttal that he found a citation receipt dated February 29, 2008, in Appellant's jacket. We would note that Appellant couches this issue not only as improper rebuttal evidence under RCr 9.42(e) but also as a discovery violation under RCr 7.24. However, as any alleged discovery violation was not raised in the trial court, we will not review such issue on appeal. *See Shelton v. Commonwealth*, 992 S.W.2d 849, 852 (Ky. App. 1998) ("An appellate court will not consider a theory unless it has been raised before the trial court and that court has been given the opportunity to consider the merits of the theory.")

RCr 9.42(e) provides: "The parties respectively may offer rebutting evidence, unless the court, for good reason in furtherance of justice, permits them to offer evidence in chief." Rebuttal evidence is unquestionably proper to refute a previously unanticipated argument made by another party. *Archer v. Commonwealth*, 473 S.W.2d 141, 143 (Ky. 1971). Moreover, a trial court is granted broad discretion in its determination on the admissibility of evidence in rebuttal under RCr 9.42. *Gilbert v. Commonwealth*, 633 S.W.2d 69, 70 (Ky. 1982); *Pilon v. Commonwealth*, 544 S.W.2d 228, 231 (Ky. 1976). Therefore, our standard of review from the admission of evidence is an abuse of discretion. *King*, 950 S.W.2d at 809.

Herein, defense counsel argued during a bench conference that the rebuttal testimony was improper because the defense had not made an issue of the jacket's contents. In overruling the objection, the trial court noted, "[Appellant] denied it was his coat and then they find something that identifies it as being his, then it would be proper for rebuttal." Deputy Morris thereafter testified for the limited purpose of explaining that the jacket contained a receipt indicating that Appellant had paid the fine for a traffic citation on the morning of February 29, 2008. As Appellant had previously denied the jacket was his, we cannot conclude that the trial court's decision to permit Deputy Morris's rebuttal testimony was arbitrary or unreasonable. Thus, no error occurred.

The judgment and sentence of the Jackson Circuit Court are affirmed.

ALL CONCUR.

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