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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-002288-MR

DANNY L. WOLFENBARGER — APPELLANT

v.

APPEAL FROM FLEMING CIRCUIT COURT
HONORABLE STOCKTON B. WOOD, JUDGE
ACTION NO. 08-CR-00038

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING IN PART, REVERSING IN PART,
AND REMANDING

** ** ** ** **

BEFORE: TAYLOR, CHIEF JUDGE; CLAYTON AND WINE, JUDGES.

WINE, JUDGE: Danny L. Wolfenbarger brings this appeal from a December 4, 2008, judgment of the Fleming Circuit Court following a jury verdict finding him guilty of manufacturing methamphetamine or complicity to manufacture

methamphetamine, and first-degree possession of a controlled substance. We affirm in part, reverse in part, and remand to the trial court.

On March 3, 2008, police officers visited Wolfenbarger's residence to investigate a report that Billy Ritchie was manufacturing methamphetamine at the residence. When police officers informed Wolfenbarger of the purpose for their visit, Wolfenbarger consented to a search of his mobile home. The search produced several items utilized in the manufacture of methamphetamine. The items were stored under a sink in a non-operational bathroom and included the following: two bottles of drain cleaner, two 2-liter plastic bottles, one bottle of liquid fire, coffee filters, rubber gloves, zip-lock bags, vice grips, metal pliers, meat tenderizing hammer, iodized salt, prescription bottle with no label containing pseudoephedrine residue, and two blue plastic funnels containing methamphetamine residue.

Wolfenbarger was indicted by the Fleming County Grand Jury for the offenses of manufacturing methamphetamine and first-degree possession of a controlled substance. Following a jury trial, Wolfenbarger was convicted of manufacturing methamphetamine (Kentucky Revised Statute ("KRS") 218A.1432), or complicity to manufacture methamphetamine ("KRS 502.020"), and first-degree possession of a controlled substance ("KRS 218A.1415"). The trial court sentenced Wolfenbarger to a total of ten years' imprisonment. This appeal followed.

Wolfenbarger contends that his conviction for manufacturing methamphetamine and possession of methamphetamine violates the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution, Section 13 of the Kentucky Constitution, and KRS 505.020.[1] Wolfenbarger specifically argues that the controlled substance/methamphetamine he was convicted of possessing was the same methamphetamine used to support the manufacturing conviction; i.e., the methamphetamine residue found on the two blue plastic funnels. Wolfenbarger believes use of the same controlled substance (methamphetamine) to support both convictions is constitutionally prohibited as it violates double jeopardy.

It is well established that double jeopardy is violated when an individual is convicted of possessing the same methamphetamine that also supports the charge of manufacturing methamphetamine. *Beaty v. Com*., 125 S.W.3d 196 (Ky. 2003). Thus, the same methamphetamine must support the charge of manufacturing methamphetamine and possession of a controlled substance (methamphetamine) to offend double jeopardy.

In this case, Wolfenbarger was not convicted of manufacturing methamphetamine because he actually manufactured methamphetamine under KRS 218A.1432(1)(a); rather, Wolfenbarger was convicted of manufacturing

[1] As the double jeopardy issue was not preserved for appellate review, we will review it pursuant to the precepts of *Sherley v. Commonwealth*, 558 S.W.2d 615, 618 (Ky. 1977), *overruled on other grounds by Dixon v. Commonwealth*, 263 S.W.3d 583 (Ky. 2008). In *Sherley*, the Court held that "failure to preserve this issue for appellate review should not result in permitting a double jeopardy conviction to stand." *Id*. at 618.

methamphetamine based upon his possession of two or more chemicals or items used to manufacture methamphetamine with intent to manufacture under KRS 218A.1432(1)(b). KRS 218A.1432 provides:

> (1) A person is guilty of manufacturing methamphetamine when he knowingly and unlawfully:
>
> (a) Manufactures methamphetamine; or
>
> (b) With intent to manufacture methamphetamine possesses two (2) or more chemicals or two (2) or more items of equipment for the manufacture of methamphetamine.

Succinctly stated, the possession of methamphetamine charge against Wolfenbarger was supported by the methamphetamine found on the two blue plastic funnels. On the other hand, the manufacturing methamphetamine charge was supported by the other items used to manufacture methamphetamine seized from Wolfenbarger's residence. As such, Wolfenbarger's conviction for manufacturing methamphetamine and possession of methamphetamine did not violate the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, Section 13 of the Kentucky Constitution, or KRS 505.020.

Wolfenbarger next contends that the trial court erred by refusing to instruct the jury on the lesser included offense of criminal facilitation. Specifically, Wolfenbarger asserts he was entitled to a jury instruction for facilitation because the evidence presented at trial was sufficient to support a finding of guilt upon the charge of facilitation to manufacture methamphetamine. KRS 502.020(1) defines complicity as follows:

> (1) A person is guilty of an offense committed by another person when, with the intention of promoting or facilitating the commission of the offense, he:
>
> (a) Solicits, commands, or engages in a conspiracy with such other person to commit the offense; or
>
> (b) Aids, counsels, or attempts to aid such person in planning or committing the offense; or
>
> (c) Having a legal duty to prevent the commission of the offense, fails to make a proper effort to do so.

KRS 506.080(1) defines criminal facilitation as follows:

> A person is guilty of criminal facilitation when, acting with knowledge that another person is committing or intends to commit a crime, he engages in conduct which knowingly provides such person with means or opportunity for the commission of the crime and which in fact aids such person to commit the crime.

Because the definitions of complicity[2] and facilitation[3] are comparable, our Courts have previously analyzed how the two interrelate. In *Thompkins v. Commonwealth,* 54 S.W.3d 147 (Ky. 2001), the Supreme Court noted the difference between the two statutes is dependent upon the defendant's state of mind.

> Under either statute, the defendant acts with knowledge that the principal actor is committing or intends to commit a crime. Under the complicity statute, the defendant must intend that the crime be committed; under the facilitation statute, the defendant acts without such intent. Facilitation only requires provision of the means or opportunity to commit a crime, while

[2] KRS 502.020(1).

[3] KRS 506.080(1).

> complicity requires solicitation, conspiracy, or some form of assistance. Facilitation reflects the mental state of one who is "wholly indifferent" to the actual completion of the crime.

Id. at 150 (internal citations omitted).

In *Dixon v. Commonwealth*, 263 S.W.3d 583, 586 (Ky. 2008), the Kentucky Supreme Court held:

> When confronted with a situation in which a defendant requests an instruction on facilitation, a trial court must consider that "[a]n instruction on facilitation as a lesser-included offense of complicity 'is appropriate if and only if on the given evidence a reasonable juror could entertain reasonable doubt of the defendant's guilt of the greater charge, but beyond a reasonable doubt that the defendant is guilty of the lesser offense.'" We reject any notion that a facilitation instruction must always accompany a complicity instruction. Rather, a lesser-included instruction, such as facilitation, may be given "only when supported by the evidence." And since facilitation and complicity require different mental states, an instruction on facilitation is necessary only if the evidence supports the existence of both mental states.

(Internal citations omitted.) *See also Commonwealth v. Day*, 983 S.W.2d 505, 509 n.2 (Ky. 1999) ("Generally, criminal facilitation is a lesser included offense when the defendant is charged with being an accomplice to an offense, not the principal offender.").

The distinction between the complicity and facilitation statutes therefore rests on the state of mind of the defendant. *Webb v. Commonwealth*, 904 S.W.2d 226, 228 (Ky. 1995). In *Webb*, the Supreme Court held that it was error not to instruct on criminal facilitation when the defendant had testified at trial to

giving his girlfriend a ride in his car knowing that she was in the process of a drug transaction, but that he did not intend for her to commit the crime. *Id*. at 229. Although here Wolfenbarger did not testify as to his state of mind at the time of the crime, the circumstantial evidence which was sufficient to support a finding by the jury that the defendant was guilty of being a complicitor to the manufacturing of methamphetamine (which would include a finding that Wolfenbarger intended for the crime to be committed) could also support a finding of facilitation. Under the facts of this case, it is plausible the jury could have either found that there was sufficient evidence that the defendant intended the manufacture of methamphetamine since the evidence confiscated from Wolfenbarger's home was easily accessible by the defendant, or that Wolfenbarger may have supplied the chemicals, utensils, or even a safe location, with no intention of personally manufacturing the methamphetamine, rather merely assisting another, thus justifying an instruction for the offense of facilitation.

Wolfenbarger's next contention is that reversible error occurred by the introduction of statements made by Billy Ritchie and Lonnie Ritchie through the testimony of Officer Anderson and Officer Kinder, respectively. Wolfenbarger contends the testimony of Officer Anderson and Officer Kinder was hearsay which was admitted in violation of the Confrontation Clause of the Sixth Amendment to the United States Constitution and §11 of the Kentucky Constitution. Wolfenbarger specifically objects to testimony by Officer Anderson that Billy Ritchie admitted to Anderson that he had "cooked" methamphetamine several

times at Wolfenbarger's residence and to the testimony of Officer Kinder that Billy Ritchie's mother told Kinder that Billy was manufacturing methamphetamine at Wolfenbarger's residence.

Every criminal defendant possesses a constitutional right to cross-examine witnesses at trial. *See Davenport v. Com.*, 177 S.W.3d 763 (Ky. 2005). A violation of the constitutional right to confront witnesses has been held subject to the harmless error enunciated analysis in *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, A.L.R.3d 1065, 17 L.Ed.2d 705 (1967). *See Gill v. Com*., 7 S.W.3d 365 (Ky. 1999); *Taylor v. Com*., 175 S.W.3d 68 (Ky. 2005). Before a "constitutional error can be held harmless, the [reviewing] court must be able to declare a belief that it was harmless beyond a reasonable doubt." *Gill*, 7 S.W.3d at 368, *citing Chapman*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). To ascertain whether admission of such evidence was harmless beyond a reasonable doubt, the reviewing court must determine whether exclusion of such evidence would have affected the outcome. *Taylor*, 175 S.W.3d 68.

The controlling cases of *Davis v. Washington*, 547 U.S. 813, 126 S.Ct. 2266, 165 L.Ed.2d 224 (2006); *Heard v. Commonwealth*, 217 S.W.3d 240 (Ky. 2007); and *Rankins v. Commonwealth*, 237 S.W.3d 128 (Ky. 2007), delineate the difference between testimonial and non-testimonial statements. While non-testimonial statements do not violate the Confrontation Clause, testimonial statements do. *Davis* sets out the distinction as follows:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Davis v. Washington, 547 U.S. 813, 822, 126 S.Ct. 2266, 2273-74, 165 L.Ed.2d 224 (2006).

There is no doubt that Billy Ritchie's statements to Officer Anderson were testimonial. Anderson testified on rebuttal that Ritchie admitted he cooked methamphetamine several times at Wolfenbarger's residence. Ritchie was questioned in an effort to facilitate a criminal prosecution. Wolfenbarger was subsequently indicted, prosecuted, and ultimately convicted as a complicitor to the charge of manufacturing methamphetamine. But for Ritchie's statement, the jury would have been required to speculate whether methamphetamine was being manufactured in Wolfenbarger's residence.[4]

As for the testimony of Officer Kinder regarding Lonnie Ritchie's statement this court must review the admission of the evidence for palpable error which allows relief if manifest injustice occurred, as this issue was not preserved for appeal. Kentucky Rules of Criminal Procedure ("RCr") 10.26 and Kentucky Rules of Evidence ("KRE") 103(e). "To discover manifest injustice, a reviewing court must plumb the depths of the proceeding . . . to determine whether the defect

[4] Although various items and chemicals used to manufacture methamphetamine were found, no lay witness testified they ever saw methamphetamine.

in the proceeding was shocking or jurisprudentially intolerable." *Martin v. Commonwealth*, 207 S.W.3d 1, 4 (Ky. 2006).

Lonnie Ritchie's statement to Officer Kinder was a statement made to a police officer regarding criminal activity. Based on this statement to Officer Kinder the police went to Wolfenbarger's residence and did the search of his residence which resulted in finding the evidence used against Wolfenbarger. "[H]earsay is no less hearsay because a police officer supplies the evidence." There is not an investigative hearsay exception to the hearsay rule. *Sanborn v. Commonwealth*, 754 S.W.2d 534, 541 (Ky. 1988). The Court in *Sanborn* explained this type of hearsay as follows:

> Its relevancy does not turn on whether the information asserted tends to prove or disprove an issue in controversy, but on whether the action taken by the police officer in response to the information that was furnished is an issue in controversy. The information from other persons in the possession of a police officer at the time he makes an arrest is irrelevant to any issue of guilt or innocence in the trial of a criminal case. Such information may become relevant in a criminal case if the legality of the arrest is at issue.

Id. at 541. Here there is no issue as to the legality of the arrest of Wolfenbarger, and there was no limiting instruction given to the jury indicating that the evidence was not to be used for the truth of the matter asserted. As such, the jury was free to take this evidence for the truth of the matter and infer that Lonnie Ritchie's son was cooking methamphetamine at Wolfenbarger's home. The only evidence in this case that indicates methamphetamine was actually being manufactured on Wolfenbarger's premises were the statements of Billy and Lonnie Ritchie.

Without this evidence the jury would have been required to speculate whether methamphetamine was manufactured at Wolfenbarger's residence and what role, if any, the defendant actually had in this process. By allowing this evidence, the jury was allowed to hear from the person who actually cooked the methamphetamine and his mother without the defendant being allowed to cross examine and expose any possible prejudice these individuals may have had against the defendant. The jury was allowed to take these statements at face value. Therefore, Lonnie Ritchie's statement were not harmless beyond a reasonable doubt and did result in a manifest injustice to Wolfenbarger.

For the foregoing reasons, the judgment of the Fleming Circuit Court is affirmed in part and reversed in part, and is remanded to the trial court for proceedings consistent with this opinion.

CLAYTON, JUDGE, CONCURS.

TAYLOR, CHIEF JUDGE, CONCURS IN PART, DISSENTS IN PART, AND FILES SEPARATE OPINION.

TAYLOR, CHIEF JUDGE, CONCURRING IN PART AND DISSENTING IN PART. I concur with the majority opinion with the exception that I do not believe the trial court committed reversible error by failing to tender a jury instruction upon the offense of criminal facilitation to commit manufacturing methamphetamine or by admitting the hearsay testimony of Officers Anderson and Kinder.

As concerns the jury instruction upon facilitation, it is well-established that a jury instruction upon a lesser-included offense is only appropriate where it is supported by the evidence. *Sanborn v. Com.*, 754 S.W.2d 534 (Ky. 1988). The distinction between criminal facilitation and intentional complicity has been eruditely explained as follows:

> Knowing assistance or encouragement constitutes the offense of criminal facilitation. The offense is committed when the defendant both knows of another's intent to commit a crime and knows that his own conduct is providing the other person with the means or opportunity to commit the crime. Unlike intentional complicity where the accomplice has some personal interest in the successful commission of an offense, a criminal facilitator assists a criminal venture toward which he is indifferent. . . . (Footnotes omitted.)

10 Leslie W. Abramson, *Kentucky Practice Substantive Criminal Law §* 3:6 (2009-2010). Succinctly stated, "[f]acilitation reflects the mental state of one who is 'wholly indifferent' to the actual completion of the crime." *Perdue v. Com.*, 916 S.W.2d 148, 160 (Ky. 1995); *see also*, *Thompkins v. Com.*, 54 S.W.3d 147 (Ky. 2001).

To support the facilitation instruction in this case, Wolfenbarger points to evidence that he was inebriated and was unaware that methamphetamine was being manufactured at his residence. However, the evidence at trial indicated that the items used to manufacture methamphetamine were found under a sink in Wolfenbarger's residence. Thus, the items were stored in a location easily accessible by Wolfenbarger. Moreover, when the items were seized by the police,

Wolfenbarger was present at the residence, but Ritchie was not present. And, it is untenable to believe that Wolfenbarger was in a state of persistent and profound intoxication so as to be rendered totally unaware of such an activity as manufacturing methamphetamine in a mobile home. Given the evidence in this case, it is simply implausible that Wolfenbarger was "wholly indifferent to the actual completion of the crime [manufacturing methamphetamine]" when the methamphetamine was being manufactured at his own home. *Thompkins v. Com.*, 54 S.W.3d 147, 150 (Ky. 2001). With there being no evidentiary foundation to support the facilitation instruction, the jury was required to decide the case on the evidence presented, not imaginary scenarios. *See id.* Accordingly, I do not believe the trial court erred by failing to instruct the jury upon facilitation.

As to the admission of the hearsay testimony of Officers Anderson and Kinder, I believe any error was merely harmless. KRE 103. The evidence presented at trial against Wolfenbarger was substantial. A review of that record reveals that numerous items utilized to manufacture methamphetamine, including two blue plastic funnels containing methamphetamine residue were stored under a bathroom sink in Wolfenbarger's residence. From this evidence alone, the jury could reasonably find that Wolfenbarger "knowingly and unlawfully, with the intent to manufacture methamphetamine possesses (2) two or more chemicals or . . . items of equipment for the manufacture of methamphetamine" or complicity thereto and that he knowingly and unlawfully possessed methamphetamine. Indeed, it is unnecessary that there be direct evidence that Wolfenbarger

manufactured methamphetamine; e.g., direct testimony by an individual that witnessed Wolfenbarger manufacture methamphetamine. Circumstantial evidence is sufficient. In this case, there was substantial circumstantial evidence that Wolfenbarger manufactured or acted in complicity with another to manufacture methamphetamine and that he possessed methamphetamine. Thus, the admission of Officer Anderson and Officer Kinder's testimony would not have affected the outcome of the trial, and any error resulting therefrom was merely harmless. *Crane v. Com.*, 726 S.W.2d 302 (Ky. 1987). As such, I perceive no reversible error.

Moreover, the majority concludes that admission of Officer Anderson's and Officer Kinder's hearsay testimony constituted reversible error because there was no other evidence that methamphetamine was manufactured at Wolfenbarger's residence and the jury was left to "speculate" whether such occurred at the residence without such hearsay. However, this statement is incorrect. The evidence recovered from the residence included actual methamphetamine residue found on the blue plastic funnel. It is clear that this funnel harbored methamphetamine residue and had been used to successfully manufacture same. As the blue funnel along with other equipment and chemicals used to manufacture methamphetamine were seized from Wolfenbarger's residence, the jury could have reasonably inferred from this evidence that methamphetamine was manufactured at Wolfenbarger's residence. As such, the admission of Officer Anderson's and Officer Kinder's testimony concerning the manufacturing of methamphetamine at

Wolfenbarger's residence amounted to harmless error. It simply constituted cumulative evidence demonstrating that methamphetamine was manufactured at Wolfenbarger's residence.

Accordingly, I would affirm Wolfenbarger's judgment of conviction.

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