IMPORTANT NOTICE

NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

RENDERED: APRIL 20, 2006
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL
DATE 5-11-06 [illegible]

2005-SC-0289-MR

MONTY KIM TURNER APPELLANT

APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE R. JEFFREY HINES, JUDGE
V. NO. 03-CR-00477-002

COMMONWEALTH OF KENTUCKY APPELLEE

MEMORANDUM OPINION OF THE COURT

Affirming

A McCracken Circuit Court jury convicted Appellant, Monty Kim Turner, of Unlawful Possession of a Methamphetamine Precursor, Complicity to Possession of Anhydrous Ammonia in an Unapproved Container with Intent to Manufacture Methamphetamine, Use/Possession of Drug Paraphernalia, Second or Subsequent Offense, and being a Persistent Felony Offender in the First Degree. For these crimes, Appellant was sentenced to a total of twenty-five years imprisonment. Appellant now appeals to this Court as a matter of right. Ky. Const. § 110(2)(b). For the reasons set forth herein, we affirm Appellant's convictions.

On November 4, 2003, McCracken County Sheriff's Deputy Sgt. John Parks responded to a complaint of suspicious activity at Appellant's residence. When Sgt. Parks arrived at the residence, he observed three men carrying duffle bags. The three men looked toward the officer when he shined his spotlight on them. A few seconds later, two of the men ran away in opposite directions. Sgt. Parks later identified Appellant as one of the men who ran away. Michael Burgess, the only man who did not flee, also identified Appellant as one of the individuals who was with him at the scene that night.

When deputies arrived at Appellant's residence, three vehicles were parked in the driveway. Pursuant to a search warrant encompassing the residence, the vehicles, and the grounds, police recovered equipment and ingredients for manufacturing methamphetamine, including coffee filters, strainers, Liquid Fire, camp fuel, a folding stove, a cooking pan, containers and tubing, nineteen lithium batteries with the casings stripped off, 7.9 ounces of ground pseudoephedrine powder (approximately 11,095 pills), and a camouflage-painted fire extinguisher containing anhydrous ammonia. Police also found paraphernalia used to smoke both methamphetamine and marijuana, a Lorcen .380 semiautomatic pistol, a propane tank that had been retrofitted, an empty fire extinguisher canister that was identical to the one containing anhydrous ammonia, but with parts removed and unpainted, and a Wal-Mart receipt for the purchase of a coffee grinder, folding stove, plier set, siphon pump, poly spoons[1], and a CD case.

Using the Wal-Mart receipt, police obtained surveillance video that showed Appellant and another co-defendant, Danny York, purchasing the items listed on the receipt just hours before they were confronted by Sgt. Parks. The surveillance video

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[1] This is the designation listed on the actual receipt.

also showed Burgess accompanying Appellant and York to the door, but not entering the store.

Three weeks later, Appellant and York were arrested at another location. On the day of trial, Michael Burgess pled guilty to all charges against him without the benefit of a plea agreement. After entering his guilty plea, he was called by the Commonwealth to testify. Burgess stated that on the evening of November 3, 2003, he met Appellant and York at Appellant's residence. The trio went to Wal-Mart around 11:00 p.m. that evening and then returned to the residence. Just prior to Sgt. Parks' arrival in the early morning hours of November 4, 2003, the men were coming out of the residence and Appellant was carrying a duffel bag. When Sgt. Parks shined his flashlight on them, Appellant and York ran in opposite directions. Burgess denied having seen the container of anhydrous ammonia prior to trial, but said that he smelled it upon returning from Wal-Mart. He claimed that he merely drove Appellant and York to Wal-Mart as a favor, and was not aware of the purpose of the trip.

Both York and his girlfriend testified that he was not at the scene the night Sgt. Parks confronted the three men. York stated that he and Appellant had been staying out-of-state after gun shots had been fired into Appellant's residence. According to York, Burgess came to the out-of-state residence where Appellant and York were staying. Although Appellant and York were suspicious of Burgess as having been involved in the shooting of Appellant's residence, York testified that they were friendly with Burgess in order to glean more details about the shooting. Burgess asked York and Appellant if they would go to Wal-Mart and purchase some supplies for him as he could not go himself because he had recently been caught shoplifting at the store. York testified that he and Appellant went with Burgess and purchased the supplies as part of

their attempt to get information about the shooting. Burgess later returned Appellant and York to the place where they were staying. York stated that he spent the rest of the night at the out-of-state residence and that Appellant left with his sister.

Appellant absconded sometime during the trial. His attorney, nonetheless, called several witnesses on Appellant's behalf. One witness, Roger Atkins, was Appellant's neighbor and testified about the drive-by shooting at Appellant's residence. According to Atkins, Appellant told him after the shooting that he was going to Illinois. Appellant asked Atkins to keep an eye on his residence while he was gone. On the night in question, Atkins testified that a vehicle approached too closely to his residence. When he looked out the window, he saw two unidentified skinheaded men on Appellant's property. At this point, Atkins claimed that he called 911 to report the suspicious activity. However, the Commonwealth later introduced evidence indicating that a female called 911 that night to report suspicious activity. In rebuttal, Captain Hayden testified that Atkins called him repeatedly during the investigation because he was concerned about Appellant having a methamphetamine lab right next door to him.

Appellant's sister and her friend testified that Appellant was in Illinois the night Sgt. Parks confronted the three men at Appellant's residence in Kentucky. They stated that Appellant was staying with his sister because somebody shot into his residence. Additional evidence may be developed as necessary to address specific arguments set forth within the opinion.

The jury convicted Appellant on the charges set forth above. Appellant submits a multifarious assortment of arguments alleging errors which he claims entitle him to a new trial. We find no reversible or palpable error after identifying and reviewing each allegation.

I. JURY INSTRUCTIONS

Appellant first contends the jury was tendered incorrect and incomprehensible instructions as to Unlawful Possession of a Methamphetamine Precursor, KRS 218A.1437, and Complicity to Possession of Anhydrous Ammonia in an Unapproved Container with Intent to Manufacture Methamphetamine, KRS 250.489. Appellant concedes that this alleged error is unpreserved, and thus, asks for review under the palpable error standard. RCr 10.26.

Other than a complaint that the instructions are too complicated and incomprehensible, Appellant fails to identify any error on the face of the instructions. Instructions as a whole will be found sufficient if they "are couched in language that presents to the jury the correct issues in such form that an ordinarily intelligent person may comprehend them and the questions they submit . . . ." Kelley v. Commonwealth, 300 Ky. 136, 144, 187 S.W.2d 796, 800 (1945). After evaluating both the instructions tendered by the trial court and the corresponding statutes, we find no palpable error.

Appellant next claims prejudice because interlineations were on the face of Jury Instruction #10. Jury Instruction #10 described Facilitation to Unlawful Possession of a Methamphetamine Precursor.[2] On the face of the instructions, the name Michael Burgess is incorrectly typed as the principal who Appellant allegedly facilitated in possessing the precursor. At trial, the trial judge scratched out Burgess' name and substituted Danny York's name as the principal. Appellant contends that the corrected instructions are overly confusing since Burgess' name can still be discerned underneath the handwritten scratch outs. Appellant further argues that the instructions fail to

[2] This crime was submitted as a lesser-included offense to Complicity to Unlawful Possession of a Methamphetamine Precursor.

instruct on the whole law of the case since the jury could have believed that Appellant intended to facilitate Burgess and not York.

First, we reject Appellant's argument that the trial court's interlineations were overly confusing to the jury. Trial courts are given wide latitude to correct instructions by handwritten interlineations and juries are presumed to understand the same. See Foley v. Commonwealth, 942 S.W.2d 876, 885 (Ky. 1996); Standard Oil Co. v. Hagan, 309 Ky. 767, 770-71, 218 S.W.2d 969, 971 (1949). The trial court's interlineations were not prejudical to Appellant.

We also reject Appellant's argument that the facilitation instruction failed to instruct the jury on the whole law of the case. The facilitation instruction was submitted as a lesser-included offense to Complicity to Possession of a Methamphetamine Precursor. The complicity charge only alleged complicity between York and Turner. Thus, there were no grounds for alleging Burgess as a principal in the lesser-included offense.

Appellant next alleges that Instruction #2, entitled Presumption of Innocence, was flawed to Appellant's substantial prejudice. We disagree. First, even if the instruction was flawed, it did not cause Appellant substantial prejudice when viewed in the context of the entire instructions. Second, the instruction was submitted by Appellant himself, and thus, he can hardly complain now if it appears flawed in hindsight. We find any error to be harmless.

Appellant alleges the jury should have been instructed on the lesser-included offense of Facilitation to Possess Anhydrous Ammonia in an Improper Container with Intent to Manufacture Methamphetamine. However, the Commonwealth points out that not only did Appellant fail to request a Facilitation instruction for this charge in his

tendered jury instructions, he also failed to object to its absence at trial. Accordingly, Appellant is precluded from raising this issue on appeal. RCr 9.54(2).

Appellant alleges the jury should have been instructed on the lesser-included offense of Possession of Anhydrous Ammonia in an Unapproved Container. "Although a trial judge has a duty to prepare and give instructions on the whole law of the case, including any lesser-included offenses which are supported by the evidence, that duty does not require an instruction on a theory with no evidentiary foundation." Houston v. Commonwealth, 975 S.W.2d 925, 929 (Ky. 1998).

In this case, the circumstances do not support an inference of simple Possession of Anhydrous Ammonia in an Unapproved Container. Rather, in addition to possessing the anhydrous ammonia, Appellant was observed possessing and transporting most of the ingredients necessary for manufacturing methamphetamine, including over 11,000 pills worth of ground up pseudoephedrine and batteries with the casings stripped off. Upon confrontation by police, Appellant immediately fled. Moreover, Appellant's residence was littered with paraphernalia related to ingesting methamphetamine. Appellant did not live or work on a farm and further gave no explanation for simultaneously possessing nearly all the ingredients necessary for processing methamphetamine. Rather, Appellant simply denied being present at the scene that night and possessing these things. Under these circumstances, there is no evidentiary support for the jury to infer that Appellant simply possessed anhydrous ammonia in an unapproved container without a further intent to use that product to manufacture methamphetamine. Thus, Appellant was not entitled to the lesser-included instruction.

II. Sufficiency of the Evidence

Appellant claims the evidence was insufficient for submission of the charges of Possession of a Methamphetamine Precursor and Complicity to Possession of Anhydrous Ammonia in an Unapproved Container with Intent to Manufacture Methamphetamine to the jury. He contends that both of these crimes include intent to manufacture methamphetamine as an essential element of the offense[3] and that intent to manufacture methamphetamine requires proof of either (1) a finished product (i.e. methamphetamine) or (2) possession of all the chemicals or all the equipment necessary for manufacturing methamphetamine. In this case, Appellant had yet to manufacture actual methamphetamine and was missing merely two of the dozen or so items thought necessary for processing raw materials into methamphetamine.

For various reasons which are too obvious and elementary to entertain in this opinion, the least of which includes the fact that manufacturing methamphetamine pursuant to KRS 218A.1432 is not under consideration in this case, we find Appellant's argument to be without merit. See, e.g., Mills v. Commonwealth, 996 S.W.2d 473, 490 (Ky. 1999) ("intent can be inferred from the act itself and the surrounding circumstances"). The evidence was more than sufficient to submit the charges of Possession of a Methamphetamine Precursor and Complicity to Possession of Anhydrous Ammonia in an Unapproved Container with Intent to Manufacture Methamphetamine to the jury.

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[3] Actually, Unlawful Possession of a Methamphetamine Precursor requires intent to use a drug product (in this case, pseudoephedrine) as a precursor to manufacturing methamphetamine or other controlled substance. KRS 218A.1437.

III. Double Jeopardy

Appellant claims his convictions for Possession of a Methamphetamine Precursor and Complicity to Possession of Anhydrous Ammonia in an Unapproved Container with Intent to Manufacture Methamphetamine subject him to double jeopardy. We disagree. "Double jeopardy does not occur when a person is charged with two crimes arising from the same course of conduct, as long as each statute 'requires proof of an additional fact which the other does not.'" Commonwealth v. Burge, 947 S.W.2d 805, 809 (Ky. 1996) (quoting Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306, 309 (1932)). The statutes in this case clearly require proof of an additional fact which the other does not, and thus, Appellant's argument is without merit.

IV. Improper Verdicts

Appellant contends he is entitled to a new trial because the jury returned seemingly inconsistent verdicts against himself and his co-defendant, York. Both were convicted of complicity to aid the other in the Possession of Anhydrous Ammonia in an Unapproved Container with Intent to Manufacture Methamphetamine. Appellant acknowledges that verdicts need not be consistent so long as there is sufficient evidence to support each verdict. Commonwealth v. Harrell, 3 S.W.3d 349, 351 (Ky. 1999). We reject Appellant's suggestion that we overrule this case. Accordingly, Appellant's conviction for Possession of Anhydrous Ammonia in an Unapproved Container with Intent to Manufacture Methamphetamine is proper as there was sufficient evidence to support it.

Appellant also argues, somewhat distortedly, that the above verdicts violate his right to a unanimous verdict. Suffice it to say, this argument is without merit.

V. Evidentiary Issues

Appellant argues that Sgt. Parks' in-court identification of Appellant should have been suppressed because Sgt. Parks initially identified Appellant from a single mug shot. Appellant concedes that this error is unpreserved and requests palpable error review. Upon review, we find no palpable error because the totality of the circumstances indicate that Sgt. Parks' in-court identification of Appellant was reliable despite the presumed suggestiveness of the single mug shot photograph. Moore v. Commonwealth, 569 S.W.2d 150, 153 (Ky. 1978).

Burgess identified the two men that fled upon being confronted by Sgt. Parks. Sgt. Parks examined photographs of both Appellant and York shortly after Burgess' identification. Sgt. Parks testified that he was confident in his identification of Appellant because he got a very good look as Appellant was the first person upon whom he shined the flashlight. These facts and others convince us that admission of the in-court identification was reliable and did not require suppression.

Appellant next argues the trial court erred in denying a mistrial when Sgt. Parks inadvertently mentioned that he initially identified Appellant from a "jail photo." Appellant contends the jury was irretrievably tainted by this single reference because it implies that Appellant has a criminal history/bad character. The trial court offered to admonish the jury but Appellant refused on the grounds that the admonition would repeat the information to the jury. Even presuming that Sgt. Parks' inadvertent reference to a "jail photo" was improper, we find that such an inadvertent and isolated reference does not rise to the level of manifest necessity requiring a mistrial. Gosser v. Commonwealth, 31 S.W.3d 897, 906 (Ky. 2000) (mistrial should be declared when "the ends of substantial justice cannot be attained without discontinuing the trial").

VI. The Jury Panel

Appellant contends the jury was unduly prejudiced during *voir dire* by comments made by a panel member stricken for cause. Appellant concedes the issue is unpreserved and requests palpable error review. For the reasons set forth below, we find no palpable error.

When answering questions during *voir dire*, Juror #257, who was a police officer, described methamphetamine as a very dangerous drug that can "get you hooked the first time you use it." When asked about his ability to be impartial, he acknowledged knowing Captain Jon Hayden, stating "I've known Jon [Hayden]. I've known him for years. In my opinion, if he says it, it's gospel." While character evidence concerning a victim or witness is generally inadmissible, its inadvertent admission in situations such as this is typically harmless. Captain Hayden was not the officer who identified Appellant at the scene, but rather he merely collected evidence from the scene. Viewing the circumstances in their entirety shows the comments made by Juror #257 were inconsequential in light of the entire *voir dire* process and subsequent trial. The trial court striking Juror #257 mitigated the effect of any error by indicating to the jury that they may not bring preconceived notions of a witness' truthfulness into the trial. In totality, we find no palpable error.

VII. Newly Discovered Evidence

Sgt. Parks confronted Appellant, Burgess, and York in the early morning hours of November 4, 2003, which was a Tuesday. Appellant's sister attempted to provide Appellant with an alibi by testifying that Appellant was spending the night with her in Illinois when Sgt. Parks confronted the three men in Kentucky. She testified that while she did not remember the exact date, she was certain he stayed with her the night

before she saw Appellant and York on a television news feature called *The Fugitive File*. In rebuttal, Captain Hayden testified that *The Fugitive File* always airs on Thursday nights and not Wednesday nights.

Upon discovering evidence proving that *The Fugitive File* actually airs on Wednesdays and not Thursdays, as attested to by Captain Hayden, Appellant and York moved for Judgment Notwithstanding the Verdict (JNOV) or in the alternative, a new trial. Prior to a hearing on the matter, York withdrew from the motion. At the hearing, the Commonwealth and Appellant both conceded that while *The Fugitive File* does indeed air on Wednesdays, Appellant and York were not actually featured on the program until a week or so after the crime, on November 12, 2003.

Appellant claims this "newly discovered" evidence entitles him to a new trial. In Caldwell v. Commonwealth, 133 S.W.3d 445 (Ky. 2004), this Court stated:

> Whether to grant a new trial on the basis of newly discovered evidence is largely within the discretion of the trial judge, and the standard of review is whether there has been an abuse of discretion. The evidence must be of such decisive value or force that it would, with reasonable certainty, change the verdict or probably change the result if a new trial was granted.

Id. at 454 (citations omitted). Since this new evidence does nothing to strengthen the weight of his sister's testimony, there is absolutely no decisive value or force to it. Moreover, mere impeachment of Captain Hayden is not sufficient grounds to grant Appellant a new trial. There was no abuse of discretion by the trial court in this instance.

Appellant further contends the trial court impermissibly premised its decision not to grant a new trial on an affidavit submitted by Captain Hayden which stated that Appellant had, in fact, confessed to the crimes upon being apprehended after the trial. Since we have already set out independent grounds which support the trial court's

decision, Appellant's claim is moot. Kentucky Farm Bureau Mutual Ins. Co. v. Gray, 814 S.W.2d 928, 930 (Ky. App. 1991) ("we, as an appellate court, may affirm the trial court for any reason sustainable by the record").

Finally, Appellant claims that the incorrect testimony offered by Captain Hayden regarding the days the program aired was prosecutorial misconduct. Appellant presents no evidence whatsoever to suggest that the prosecutor knew that Captain Hayden's testimony was incorrect, and accordingly, we reject Appellant's argument as having no merit. See Commonwealth v. Spaulding, 991 S.W.2d 651 (Ky. 1999).

VIII. Ineffective Assistance of Counsel

Appellant alleges several grounds on which he claims a deprivation of effective assistance of counsel. These grounds include allegations that (1) Appellant was not given a preliminary hearing within ten (10) days of arraignment as required by RCr 3.10; (2) Appellant's appointed counsel waived his right to have the preliminary hearing within ten (10) days without Appellant's consent; (3) Appellant initially had three (3) attorneys over the span of about three weeks; (4) Appellant should have been released on bond four months sooner than he actually was released; (5) Appellant did not have adequate time to prepare a defense; and (6) Appellant was never informed of his RCr 8.30 right to have separate counsel.

After reviewing the briefs and the record, we find Appellant's arguments are unavailing. The record establishes that Appellant, in fact, had separate and independent counsel from that of his co-defendants. Furthermore, the record shows that Appellant's trial counsel was in place and receiving pleadings for at least nine and a half months prior to trial, thus giving Appellant and his counsel sufficient continuity and time for trial preparation. None of the reasons listed by Appellant, individually or

collectively, establish either deficient or prejudicial conduct by Appellant's attorneys. See Gall v. Commonwealth, 702 S.W.2d 37 (Ky. 1985).

IX. Conclusion

In sum, when the errors alleged by Appellant are reviewed in light of the entire record, we find the trial court did not abuse its discretion or commit any errors, either individually or collectively, which rise to the level of reversible or palpable error. Appellant received a fair trial in this case.

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

All concur.

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