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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: MARCH 18, 2010
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2009-SC-000119-MR

JAMES E. TIPTON — APPELLANT

V.

ON APPEAL FROM MEADE CIRCUIT COURT
HONORABLE BRUCE T. BUTLER, JUDGE
NO. 08-CR-00004

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, James Tipton, was found guilty by a Meade Circuit Court jury of manufacturing methamphetamine. Appellant was sentenced to twenty (20) years imprisonment. He now appeals his conviction as a matter of right. Ky. Const. § 110(2)(b).

I. Background

After receiving a tip that Appellant had purchased pseudoephedrine and was preparing to manufacture methamphetamine, Detective Seelye of the Meade County Sheriff's Office located Appellant in a truck driven by Ricky Bennett. After pulling over the two for expired registration tags, Detective Seelye noticed a large duffle bag inside the vehicle. When Seelye inquired about the duffle bag, Appellant admitted that it contained items necessary for

manufacturing methamphetamine. Both men were arrested at the truck and Appellant surrendered other raw chemicals associated with methamphetamine production.

Police later executed a search warrant on Appellant's residence where they found additional incriminating items, including evidence of past methamphetamine production. A search was also conducted of Appellant's truck-bed camper located behind his mobile home where police discovered numerous methamphetamine-related items and chemicals, some of which tested positive for methamphetamine. Police also noticed that the ceiling of the camper was stained with red phosphorous. Appellant admitted that he had cooked the drug approximately twenty times in the camper.

Appellant was indicted for manufacturing methamphetamine and was later jointly tried with Ricky Bennett and his wife, Ester Bennett. At the conclusion of trial, the jury found Appellant guilty of manufacturing methamphetamine. He was sentenced to twenty years imprisonment. On appeal, Appellant raises two principal allegations of error in his underlying trial: 1) that the Commonwealth improperly commented on his right to remain silent during closing argument; and 2) that the trial court erroneously admitted prior acts evidence. For the reasons that follow, we affirm Appellant's conviction.

II. Analysis

A. Comment on Right to Remain Silent

Appellant first argues that his conviction must be reversed because the Commonwealth improperly commented upon his failure to testify at trial. Having reviewed the comments in context, we find no error and thus cannot agree.

During Ricky Bennett's closing argument, his defense counsel emphasized Appellant's guilt and also read from portions of the trial court's jury instructions, arguing that the Commonwealth's evidence was insufficient to support a conviction. In particular, his defense counsel contended that the Commonwealth had failed to prove that Bennett knowingly possessed items used to manufacture methamphetamine.

Approximately twenty minutes later, the Commonwealth, in closing, stated the following:

> A defendant is presumed to know the natural and logical consequences of their actions. The defendants got up here and say, well, they were talking about the knowledge requirement. As you read in the instructions, a defendant has a right to remain silent. They are not compelled to testify and the fact they didn't testify cannot be used as an inference of guilt or prejudice them in any way. Defendants are never required to testify, so how does the Commonwealth meet its burden on those mental states?

Defense counsel for Bennett immediately objected and argued that the Commonwealth had committed reversible error by commenting on their silence. Appellant joined the objection, requested an admonition and, alternatively,

moved for a mistrial. In response, the Commonwealth argued that it had simply quoted the jury instructions and that she was going to inform the jury that the knowledge and intent requirements could be inferred from the circumstances because it is impossible to "get inside a defendant's head and know."[1] The trial court overruled Appellant's objection, denied his request for an admonition and the Commonwealth continued, concluding: "The Commonwealth can never get inside the defendant's head with respect to the mental state that we're talking about here, knowledge, intent, those sorts of things. You infer knowledge and intent from the evidence, the objective evidence."

It is, of course, true that the Fifth Amendment of the United States Constitution provides that "no person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. In *Griffin v. California*, 380 U.S. 609 (1965), the United States Supreme Court held that "[a]n important corollary to that right is that neither a prosecutor nor a trial judge may comment upon a criminal defendant's failure to testify."[2] *Spalla v. Foltz*, 788 F.2d 400, 403 (6th Cir. 1986) (*citing Griffin*, 380 U.S. at 609); *see also Griffin*, 380 U.S. at 614 ("We . . . hold that the Fifth Amendment, in its

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[1] The trial court's jury instructions reflected RCr 9.54(3), ordering the jury that a "[a] Defendant is not compelled to testify and the fact that the Defendant did not testify in this case cannot be used as an inference of guilt and should not prejudice him in any way."

[2] In *Baxter v. Palmigiano*, 425 U.S. 308 (1976), the Court further explained the holding in *Griffin*, stating that it "prohibits the judge and prosecutor from suggesting to the jury that it may treat the defendant's silence as substantive guilt." *Accord Portuondo v. Agard*, 529 U.S. 61, 69 (2000) ("*Griffin* prohibited comments that suggest a defendant's silence is 'evidence of guilt.'").

direct application to the Federal Government and in its bearing on the States by reason of the Fourteenth Amendment, forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt."); *see also* KRE 511(a). If a reviewing court determines that a reference did improperly comment on the defendant's decision to remain silent, its effect, being constitutional error, must be harmless beyond a reasonable doubt to avoid reversal. *Chapman v. California*, 386 U.S. 18, 26 (1967).

Moreover, it should be noted that "the rule set forth in *Griffin* applies to indirect as well as direct comments on the failure to testify." *Spalla*, 788 F.2d at 403; *see also Ragland v. Commonwealth*, 191 S.W.3d 569, 589 (Ky. 2006). As we explained in *Ragland*, "[h]istorically, courts drew distinctions between 'direct' comments upon a defendant's failure to testify, which were usually held to be improper and prejudicial, and 'indirect' comments, which were usually found not to warrant reversal." 191 S.W.3d at 590 (*citing Moore v. State*, 669 N.E.2d 733, 740 (Ind. 1996); *State v. Neff*, 978 S.W.2d 341, 344 (Mo. 1998)). Yet, we continued,

> [n]ow, . . . "a less formalistic rule" . . . governs such inquiries, and it is generally accepted that a comment violates a defendant's constitutional privilege against compulsory self-incrimination only when it was manifestly intended to be, or was of such character that the jury would necessarily take it to be, a comment upon the defendant's failure to testify . . . ,
>
> or invited the jury to draw an adverse inference of guilt from that failure.

Id. at 590-91 (internal citations omitted); *see also Robinson*, 485 U.S. at 31-32 (1988) ("The Court of Appeals and respondent apparently take the view that any 'direct' reference by the prosecutor to the failure of the defendant to testify violates the Fifth Amendment as construed in *Griffin*. We decline to give *Griffin* such a broad reading.").

Turning to Appellant's case, in context, *see Ragland*, 191 S.W.3d at 590 ("[T]he context of the statement at issue here – and specifically, the fact that it was in response to defense argument – is critical to its interpretation."), *Robinson*, 485 U.S. at 33 ("[A] reference to the defendant's failure to take the witness stand may, in context, be perfectly proper."), *United States v. Young*, 470 U.S. 1, 11 (1985) ("[A] criminal conviction is not to be lightly overturned on the basis of a prosecutor's comments standing alone, for the statements or conduct must be viewed in context."), the Commonwealth's comments did not invite the jury to draw an adverse inference of Appellant's guilt and were not manifestly intended to be, or were of such a character that the jury would necessarily take them to be, a comment upon his failure to testify because they were fairly responsive to defense argument and simply explained the jury instructions and applicable law. *See Hall v. Vasbinder*, 563 F.3d 222, 233 (6th Cir. 2009) ("When the prosecutor goes no further than to take defense counsel up on an invitation, that conduct will not be regarded as impermissibly calculated to incite the passions of the jury."); *Ragland*, 191 S.W.3d at 590 (*citing State v. Ball*, 675 N.W.2d 192, 200 (S.D. 2004)). Indeed, it appears that

the primary purpose in referencing the defendants' silence here was to explain how the Commonwealth could, nevertheless, prove the requisite mens rea in the absence of any direct proof as Bennett's defense counsel had just argued. *See Robinson*, 485 U.S. at 33-34 ("'The central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence,' . . . it is important that both the defendant and the prosecutor have the opportunity to meet fairly the evidence and arguments of one another.") (citations omitted). Accordingly, we find no error.

B. Prior Acts Evidence

Appellant next argues that the trial court erred in admitting certain prior acts evidence pursuant to KRE 404(b), contending that it was not relevant or probative but highly prejudicial. Prior to trial, Appellant moved to exclude all prior acts evidence and now asserts that it was error for the trial court to admit: his admission that he had previously manufactured methamphetamine twenty times; evidence of red phosphorous stains on the ceiling of his camper; and, evidence of prior methamphetamine labs found in and around his residence. We do not find that the trial court abused its discretion in this regard. *See Matthews v. Commonwealth*, 163 S.W.3d 11, 19 (Ky. 2005) (abuse of discretion standard) (*citing Partin v. Commonwealth*, 918 S.W.2d 219, 222 (Ky. 1996)); *see also Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999) ("The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.")

(citation omitted).

Pursuant to KRE 404(b)(1), "[e]vidence of other crimes, wrongs, or acts [is] not admissible for the purpose of proving action in conformity therewith on a particular occasion, except . . . [i]f offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Yet, even if offered for some other permissible purpose, this Court has held that three inquiries must be separately addressed before the prior acts evidence may be admitted: (1) it must be relevant to a purpose other than to prove his criminal disposition; (2) it must be sufficiently probative; and (3) its potential for undue prejudice cannot substantially outweigh its probative value. *Bell v. Commonwealth*, 875 S.W.2d 882, 888-91 (Ky. 1994) (*citing* Robert G. Lawson, *The Kentucky Evidence Law Handbook*, § 2.25 (II) (3d ed. 1993)); *Matthews v. Commonwealth*, 163 S.W.3d 11, 19 (Ky. 2005).

In *Young v. Commonwealth*, this Court held that testimony indicating that the defendant had taught the witness how to manufacture methamphetamine was admissible for a purpose other than to show criminal

propensity – namely, to show the defendant's knowledge and intent.[3] 25 S.W.3d 66, 70-71 (Ky. 2000). As was the case in *Young*, we believe that the evidence here was highly relevant to whether Appellant knew how to manufacture methamphetamine and that the nature of the evidence, when taken with his own admission, was extremely probative of his intent to manufacture methamphetamine. Given its clear probative value, we do not believe the trial court erred in concluding that its probative value was not substantially outweighed by the risk of undue prejudice.

III. Conclusion

Therefore, for the above stated reasons, we hereby affirm Appellant's conviction and sentence.

All sitting. All concur.

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[3] We note that the defendant in *Young* was similarly charged with violating KRS 218A.1432, which, in pertinent part, reads:

> (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.
>
> (2) Manufacture of methamphetamine is a Class B felony for the first offense and a Class A felony for a second or subsequent offense.

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