RENDERED: APRIL 9, 2004; 2:00 p.m.
NOT TO BE PUBLISHED

MODIFIED: APRIL 23, 2004; 2:00 p.m.

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-002283-MR

WILLIE LEON FARTHING — APPELLANT

v.

APPEAL FROM UNION CIRCUIT COURT
HONORABLE TOMMY W. CHANDLER, JUDGE
ACTION NOS. 01-CR-00018 AND 01-CR-00019

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING IN PART AND
REVERSING IN PART

** ** ** ** **

BEFORE: JOHNSON, KNOPF AND McANULTY, JUDGES.

JOHNSON, JUDGE: Willie Leon Farthing has appealed from the final judgment and sentence entered by the Union Circuit Court on October 15, 2002, which convicted him of manufacturing methamphetamine by complicity,[1] two counts of possession of a controlled substance in the first degree by complicity,[2] and

[1] Kentucky Revised Statutes (KRS) 218A.1432 and KRS 502.020.

[2] KRS 218A.1415 and KRS 502.020.

possession of drug paraphernalia by complicity.[3] Having concluded that the evidence submitted at trial was insufficient to support Farthing's conviction on one of the counts of possession of a controlled substance in the first degree by complicity, we reverse in part. Having further concluded (1) that the evidence submitted at trial was sufficient to support Farthing's remaining convictions; (2) that the jury instruction under which Farthing was convicted of manufacturing methamphetamine by complicity did not constitute a palpable error or result in a manifest injustice; and (3) that the trial court did not err by consolidating the indictments for trial, we affirm in part.

Sometime prior to November 1, 2000, Kentucky State Police Trooper Christopher Armbrust received information indicating that methamphetamine was being manufactured in an apartment located above the Trading Post in Morganfield, Union County, Kentucky. On November 1, 2000, Trooper Armbrust and several officers from the Morganfield Police Department executed a search warrant for the apartment. The search revealed several items of contraband commonly associated with the manufacture of methamphetamine. Conrad Wolf and Angie Luko were present in the apartment when the search took place and they were both transported to the Morganfield Police Department after the

[3] KRS 218A.500 and KRS 502.020.

search was completed.[4] Shortly thereafter, Wolfe provided a written statement implicating himself and Farthing. Specifically, Wolfe stated that "[he] and Willie [Farthing] were making crank together" and that "they did it outside their apartment."[5] Consequently, Farthing was arrested on November 11, 2000.

On January 16, 2001, Officer Daniel Christopher Tolman of the Morganfield Police Department was patrolling the Legion Park area of Morganfield when he observed Farthing sitting in a parked car with two other individuals. Officer Tolman approached the vehicle[6] and informed Farthing that he had a warrant for his arrest.[7] Shortly thereafter, Officer Tolman placed Farthing under arrest and escorted him to his police cruiser. Officer Tolman then proceeded to search the vehicle for contraband. Officer Tolman discovered a pack of rolling papers, a Mason jar covered with white residue, and a container of aluminum foil in the rear compartment of the car.[8] Officer Tolman also found a set of scales in a coat that belonged to

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[4] The record is unclear as to whether Wolfe and Luko were placed under arrest at this point.

[5] Wolfe further stated that Luko was just visiting his apartment the night they were arrested and that "she had no knowledge of what was there."

[6] Farthing was sitting in the front passenger seat, Jacqueline Springer was sitting in the driver's seat, and Conrad Wolfe was sitting in the rear seat.

[7] The arrest warrant was not related to the November 1, 2000, incident.

[8] The car, which Officer Tolman described as a two-door Ford Probe, belonged to Springer's mother.

Wolfe. Shortly thereafter, Officer Jason Corbitt and Officer DeWayne Jackson of the Morganfield Police Department arrived on the scene. Farthing, Wolfe and Springer were then transported to the Morganfield Police Department, where Springer provided a statement implicating Wolfe and Farthing in the crime of manufacturing methamphetamine. Springer stated that Wolfe and Farthing had manufactured methamphetamine on several occasions. Springer further stated that she drove Wolfe and Farthing to one of their labs earlier that evening where they picked up the Mason jar that was found in the car. Springer then escorted several officers from the Morganfield Police Department to an isolated area along Peter Cruz Road in Union County, Kentucky, where they discovered several items commonly associated with the manufacture of methamphetamine.

On March 6, 2001, Farthing was indicted by a Union County grand jury and charged with one count of manufacturing methamphetamine by complicity, one count of trafficking in a controlled substance in the first degree by complicity,[9] and one count of possession of drug paraphernalia by complicity with respect to the November 1, 2000, incident. The grand jury also returned an indictment against Farthing charging him with one count of manufacturing methamphetamine and one count of possession of a controlled substance with respect to the January

[9] KRS 218A.1412 and KRS 502.020.

16, 2001, incident.[10] Farthing was arraigned on January 14, 2002, and he pled not guilty to all the crimes for which he was charged.[11] On May 30, 2002, the trial court entered an order consolidating the indictments for trial.[12] Farthing's case was tried before a Union County jury on August 26, 2002.

Trooper Armbrust was the first witness to testify at trial. Trooper Armbrust explained that he had significant training and experience in the investigation and detection of methamphetamine labs. Trooper Armbrust testified that he was the lead officer with respect to the November 1, 2000, search of the apartment located above the Trading Post. Trooper Armbrust explained that the items seized during the search were consistent with the "Nazi Dope Method" of manufacturing methamphetamine, which is prevalent in Western Kentucky. In addition, Trooper Armbrust described the items that were seized during the search and he explained the significance of each item in the manufacturing process.[13] Trooper Armbrust testified that the corrosion on several of the items was likely caused by the

[10] The manufacturing charge concerned the items that were found along Peter Cruz Road.

[11] The apparent delay between the filing of the indictments and Farthing's arraignment can be accounted for by the fact that Farthing fled the jurisdiction prior to his initial arraignment, which was set for March 12, 2001. Farthing was arrested in Oklahoma in December 2001, after which he waived extradition to Kentucky.

[12] Farthing objected to having the indictments consolidated for trial.

[13] The items seized during the search were then entered into evidence.

process of manufacturing methamphetamine. Trooper Armbrust further testified that several of the items contained white residue. Trooper Armbrust stated that Wolfe and Luko were present during the search and that they were both transported to the Morganfield Police Department after the search was performed. Trooper Armbrust explained that after they arrived at the Morganfield Police Department, Wolfe provided a written statement implicating himself and Farthing.[14] Trooper Armbrust testified that Wolf informed him that "Willie [Farthing] was the one that showed him how to make meth."

On cross-examination, Trooper Armbrust testified that the "meth lab" discovered during the November 1, 2000, search lacked anhydrous ammonia, a critical ingredient in the manufacturing process. Trooper Armbrust further testified that no amount of anhydrous ammonia was discovered during the search.

Wolfe testified on direct examination that he was living with his brother in the apartment located above the Trading Post on November 1, 2000. Wolfe stated that Farthing was not living with him at the time. Wolfe further testified that he never manufactured methamphetamine with Farthing. Wolfe admitted that he provided the police with a written statement

[14] According to Trooper Armbrust, Luko was unresponsive at this point. In addition, Trooper Armbrust testified that he informed Wolfe of his Miranda rights prior to initiating questioning. See Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), rehearing denied, 385 U.S. 890, 87 S.Ct. 11, 17 L.Ed.2d 121 (1966).

implicating Farthing, however, he claimed that the "whole purpose of [the statement] was to get Angie Luko . . . out of trouble."[15] Wolfe contended that he tried to tell the police that everything at the apartment belonged to him but that they did not believe him. Wolfe further testified that the Mason jar, the set of scales, and the aluminum foil that was seized when Farthing was arrested on January 16, 2001, belonged to him. Wolfe claimed that he had the Mason jar with him when he met Springer and Farthing that evening. Wolfe testified that he pled guilty to the same offenses for which Farthing was charged and that he received an 11-year sentence.

On cross-examination, Wolfe stated that he never manufactured methamphetamine with Farthing. Wolfe testified that he was told Angie would "get out of trouble" if he provided a statement implicating Farthing. Wolfe also stated that Springer drove him to pick up the supplies he used to manufacture methamphetamine on several occasions.

Officer Tolman testified concerning the events that transpired on January 16, 2001. Officer Tolman testified that he observed Farthing sitting in a parked car with two other individuals in the Legion Park area of Morganfield. Officer Tolman explained that he approached the vehicle and informed Farthing that he had a warrant for his arrest. Officer Tolman

[15] The statement Wolfe provided at the Morganfield Police Department was entered into evidence.

stated that he engaged in brief conversation with Farthing, after which he placed him under arrest. Officer Tolman explained that he then proceeded to search the vehicle for contraband. Officer Tolman stated that he discovered a pack of rolling papers, a Mason jar covered with white residue,[16] and a container of aluminum foil in the rear compartment of the car. Officer Tolman also stated that he found a set of scales in a coat that Wolfe claimed belonged to him. Officer Tolman testified that after several additional officers arrived at the scene, Farthing, Wolfe and Springer were transported to the Morganfield Police Department. Officer Tolman explained that while at the Morganfield Police Department Springer provided a statement implicating Wolfe and Farthing in the business of manufacturing methamphetamine. According to Officer Tolman, Springer claimed that she had been to several labs where Wolfe and Farthing manufactured methamphetamine. Officer Tolman testified that Springer then escorted several officers from the Morganfield Police Department to an isolated area along Peter Cruz Road where they discovered several items commonly associated with the manufacture of methamphetamine.

Springer also testified that she saw Farthing, who she claimed was her ex-boyfriend, and Wolfe manufacture methamphetamine on at least one occasion. Springer further

[16] David Wayne Hack, a drug chemist employed by the Kentucky State Police, testified that the Mason jar contained methamphetamine.

testified that she drove Farthing and Wolfe to purchase supplies that they used to manufacture methamphetamine on several occasions. Springer stated that Farthing and Wolfe were both involved in the manufacturing process. Springer further stated that Farthing was living with Wolfe in the apartment above the Trading Post on November 1, 2000. In fact, Springer testified that Farthing was present when the apartment was searched. She claimed that Farthing escaped detection by hiding behind a refrigerator and that she picked him up after the police left.

Farthing testified in his own defense and denied that he had manufactured or sold methamphetamine on any occasion.[17] Farthing admitted that he had smoked methamphetamine on several occasions with Wolfe and Springer. Farthing insisted, however, that he never lived with Wolfe in the apartment located above the Trading Post. Farthing further testified that he never purchased supplies with Springer and Wolfe for the purpose of manufacturing methamphetamine. Farthing stated that Luko is his fiancé. Farthing did not renew his motion for a directed verdict of acquittal at the close of the evidence.

The jury convicted Farthing of manufacturing methamphetamine by complicity, possession of a controlled substance in the first degree by complicity, and possession of drug paraphernalia by complicity with respect to the November 1,

[17] Farthing moved for a directed verdict of acquittal at the close of the Commonwealth's case. His motion was denied.

2000, incident.[18] The jury also convicted Farthing of possession of a controlled substance in the first degree with respect to the January 16, 2001, incident.[19] On October 15, 2002, the trial court entered its final judgment and sentence of imprisonment. The trial court sentenced Farthing to ten years' imprisonment on the conviction for manufacturing methamphetamine by complicity, and one year on each conviction for possession of a controlled substance in the first degree by complicity.[20] The trial court ordered the sentences to be served consecutively for a total of 12 years. This appeal followed.

Farthing raises the following issues on appeal: (1) whether the evidence introduced at trial was insufficient to support his conviction for manufacturing methamphetamine by complicity with respect to the November 1, 2000, incident; (2) whether the evidence introduced at trial was insufficient to support his conviction for possession of a controlled substance in the first degree by complicity with respect to the November 1, 2000 incident; (3) whether the jury was improperly instructed on the charge of manufacturing methamphetamine by complicity;

[18] The jury acquitted Farthing of the trafficking charge with respect to the November 1, 2000, incident and convicted him of the lesser-included offense of possession.

[19] The jury acquitted Farthing of the manufacturing charge with respect to the January 16, 2001, incident.

[20] As recommended by the jury, the trial court ordered no punishment on the conviction for possession of drug paraphernalia by complicity. Pursuant to KRS 532.110(1)(a) any sentence on this misdemeanor conviction would have to run concurrently with the felony sentences.

(4) whether the trial court erred by consolidating the indictments for trial; and (5) whether the trial court abused its discretion by preparing the final judgment and sentence prior to the sentencing hearing. We will address the arguments advanced by Farthing seriatim.

As previously discussed, Farthing moved for a directed verdict of acquittal at the close of the Commonwealth's case-in-chief, but he failed to renew the motion at the close of all the evidence. It is well-established that "in order to preserve an insufficiency-of-the-evidence allegation for appellate review, '[a] defendant must renew his motion for a directed verdict, thus allowing the trial court the opportunity to pass on the issue in light of all the evidence[.]'"[21] Thus, Farthing has failed to preserve his insufficiency of the evidence argument for appellate review. Nevertheless, Farthing urges us to review this issue for palpable error pursuant to RCr[22] 10.26.[23] Since a conviction based on insufficient evidence would undoubtedly

[21] Schoenbachler v. Commonwealth, Ky., 95 S.W.3d 830, 836 (2003)(quoting Baker v. Commonwealth, Ky., 973 S.W.2d 54, 55 (1998)).

[22] Kentucky Rules of Criminal Procedure.

[23] RCr 10.26 provides as follows:

> A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

deprive a criminal defendant of substantial due process rights,[24] we will review Farthing's insufficiency of the evidence argument under the standard articulated in Commonwealth v. Benham:[25]

> On 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 purpose of ruling on the motion, the trial court must assume that the evidence for the Commonwealth is true, but reserve[e] 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 is the defendant entitled to a directed verdict of acquittal.[26]

KRS 218A.1432 details the offense of manufacturing methamphetamine. The statute provides, in relevant part, as follows:

> (1) A person is guilty of manufacturing methamphetamine when he knowingly and unlawfully:

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[24] See Schoenbachler, 95 S.W.3d at 837 n.10 ("'[a]ppellee argues that these [insufficiency of the evidence] errors are not preserved for our review since appellant made no motion for a directed verdict at any point during the trial. Ordinarily, we would agree with appellee, but a conviction in violation of due process constitutes "[a] palpable error which affects the substantial rights of a party" which we may consider and relieve though it was insufficiently raised or preserved for our review'")(quoting Perkins v. Commonwealth, Ky.App., 694 S.W.2d 721, 722 (1985)).

[25] Ky., 816 S.W.2d 186 (1991).

[26] Schoenbachler, supra at 837 (quoting Benham, supra at 187).

> (a) Manufactures methamphetamine; or
>
> (b) Possesses the chemicals or equipment for the manufacture of methamphetamine with the intent to manufacture methamphetamine.[27]

In Kotila v. Commonwealth,[28] the Supreme Court of Kentucky held that the language "the chemicals or equipment" permits a conviction under KRS 218A.1432(1)(b) only if the defendant possesses "all of the chemicals or all of the equipment necessary to manufacture methamphetamine."[29]

Farthing faces an arduous task in attempting to convince this Court that the evidence introduced by the

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[27] As previously discussed, Farthing was convicted of manufacturing methamphetamine by complicity. KRS 502.020 details the elements of complicity. The statute provides, in pertinent part, 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.

[28] Ky., 114 S.W.3d 226 (2003).

[29] Id. at 237. The trial court in the case sub judice did not instruct the jury on KRS 218A.1432(1)(a), effectively granting a directed verdict of acquittal on that issue. Id. at 236. "The proscription against double jeopardy precludes retrial of the same offense after a directed verdict of acquittal." Id. at n.1 (citing Commonwealth v. Mullins, Ky., 405 S.W.2d 28, 30 (1966)).

Commonwealth at trial was insufficient to support his conviction for manufacturing methamphetamine by complicity.[30] Farthing places a great deal of emphasis on Trooper Armbrust's testimony that no amount of anhydrous ammonia was discovered during the search that took place on November 1, 2000. Farthing neglects to mention, however, that Trooper Armbrust also testified that the corrosion on several of the items seized during the search was likely caused by the process of manufacturing methamphetamine, which necessarily entails the use of anhydrous ammonia.[31] The Commonwealth was not required to establish that anhydrous ammonia was present when the search was performed in order to convict Farthing of manufacturing methamphetamine by complicity under KRS 218A.1432(1)(b). The Commonwealth was only required to establish that Farthing possessed anhydrous ammonia and the other chemicals necessary to manufacture methamphetamine in the recent past,[32] or that "with the intention of promoting or

[30] See Benham, 816 S.W.2d at 187.

[31] Trooper Armbrust further testified that the odor of Ether was emanating from the apartment. Ether is a critical ingredient in the manufacture of methamphetamine via the "Nazi Dope Method."

[32] See Varble v. Commonwealth, Ky., 125 S.W.3d 246, 254 (2004)("[t]estimony that the odor of anhydrous ammonia was emanating from the two air tanks and that the discoloration of the brass fittings was likely caused by exposure to anhydrous ammonia was circumstantial evidence that Appellant had, in fact, possessed anhydrous ammonia in the recent past")(citing United States v. Morrison, 207 F.3d 962, 966 (7th Cir. 2000)). We recognize that there are several different methods for manufacturing methamphetamine. See Kotila, 114 S.W.3d at 236. As previously discussed, however, Trooper Armbrust explained that the items seized during the search were consistent with the "Nazi Dope Method" of manufacturing methamphetamine, which entails the use of anhydrous ammonia.

facilitating the commission of the offense, he . . . engaged in a conspiracy . . . to commit the offense; or [a]ide[d], counsel[ed], or attempt[ed] to aid [another] in planning or committing the offense[.]"[33] The Commonwealth introduced a written statement provided by Wolfe which implicated Farthing and Springer testified that she had witnessed Farthing and Wolfe manufacture methamphetamine on at least one occasion. In addition, Springer verified that Farthing was living with Wolfe in the apartment above the Trading Post on November 1, 2000.[34] While Farthing certainly raised legitimate arguments at trial concerning the credibility of Wolfe and Springer, it is well-settled that credibility and weight of the evidence issues are matters that are within the exclusive province of the jury.[35] In sum, we are persuaded that the evidence introduced by the Commonwealth was sufficient to induce a reasonable juror to believe beyond a reasonable doubt that Farthing was guilty of manufacturing methamphetamine by complicity under KRS 218A.1432(1)(b) with respect to the November 1, 2000, incident.[36]

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[33] KRS 502.020(1).

[34] Springer's testimony also placed Farthing at the apartment during the search.

[35] See Commonwealth v. Smith, Ky., 5 S.W.3d 126, 129 (1999).

[36] Farthing also claims that "there was no testimony that the equipment recovered at the scene was sufficient to manufacture methamphetamine." While we acknowledge that the Commonwealth's expert did not specifically testify that Farthing possessed "all" of the equipment necessary to manufacture methamphetamine, we are persuaded that a reasonable juror could conclude from

Although the Commonwealth's case is based largely on circumstantial evidence, it is well-established that "'[c]rimes may be proved entirely by circumstantial evidence[.]'"[37]

We now turn to the question of whether the evidence was sufficient to support Farthing's conviction for possession of a controlled substance in the first degree by complicity with respect to the November 1, 2000, incident. As previously discussed, Trooper Armbrust testified that several of the items found in the apartment contained white residue. Farthing contends that since the Commonwealth failed to have the residue tested and failed to introduce any evidence as to the nature of the substance, there was insufficient evidence to support the conviction. We agree. The Commonwealth failed to introduce any evidence whatsoever demonstrating that the white residue found on several of the items was in fact methamphetamine. The manufacture of methamphetamine involves several chemicals, the combination of which produces methamphetamine. In addition, the process often involves the use of various cutting agents.[38] In

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Trooper Armbrust's description of the items seized on November 1, 2000, and his testimony concerning the significance of each item in the manufacturing process that the equipment was sufficient to accomplish the task. See Kotila, 114 S.W.3d at 236-37.

[37] United States v. Robinson, 161 F.3d 463, 471 (7th Cir. 1998)(quoting United States v. Townsend, 924 F.2d 1385, 1390 (7th Cir. 1991)). See also Graves v. Commonwealth, Ky., 17 S.W.3d 858, 862 (2000); and McRay v. Commonwealth, Ky.App., 675 S.W.2d 397, 399 (1984).

[38] In fact, Trooper Armbrust testified that he seized a certain quantity of a substance commonly used as a cutting agent during the manufacturing process.

sum, we simply cannot conclude that the evidence introduced by the Commonwealth was sufficient to allow a reasonable juror to find that the white residue was in fact methamphetamine. Consequently, we must reverse Farthing's conviction for possession of a controlled substance in the first degree with respect to the November 1, 2000, incident.

Farthing next contends that the jury was improperly instructed on the charge of manufacturing methamphetamine by complicity. The particular instruction under which Farthing was convicted provided as follows:

> INSTRUCTION NO. 1
>
> You will find the Defendant, Willie Leon Farthing, guilty of Manufacturing Methamphetamine by Complicity under this Instruction if, and only if, you believe from the evidence beyond a reasonable doubt, all of the following:
>
> A. That in Union County, Kentucky, on or about November 1, 2000, and before the finding of the indictment herein, he, alone or in complicity with another, possessed chemicals or equipment used in the manufacture of methamphetamine;
>
> AND
>
> B. That he intended to use the chemicals or equipment to manufacture methamphetamine.[39]

[39] Complicity was defined as follows:

> INSTRUCTION NO. 6 -- DEFINITIONS

Farthing contends this instruction was erroneous pursuant to Kotila, supra, as it did not require the jury to find beyond a reasonable doubt that he, alone or in complicity with another, possessed all of the chemicals or all of the equipment necessary to manufacture methamphetamine. While Farthing concedes that he failed to preserve this issue for appellate review by objecting to the instruction that was given to the jury,[40] he nevertheless urges us to review this issue as a palpable error pursuant to RCr 10.26.

"A palpable error is one which affects the substantial rights of a party and relief may be granted for palpable errors only upon a determination that a manifest injustice has resulted from the error. This means, upon consideration of the whole case, the reviewing court must conclude that a substantial possibility exists that the result would have been different in order to grant relief."[41] For an error to be palpable, it must

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> Complicity -- means that 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 solicits, commands, or engages in a conspiracy with such other person to commit the offense, or aids, counsels, or attempts to aid such person in planning or committing the offense.

[40] See, e.g., Blades v. Commonwealth, Ky., 957 S.W.2d 246, 249 (1997) ("a party cannot assign error to instructions unless that party 'makes a specific objection to the giving or failure to give an instruction before the court instructs the jury, stating specifically the matter to which he objects and the ground or grounds of his objection'" (quoting Chumbler v. Commonwealth, Ky., 905 S.W.2d 488, 499 (1995)). See also RCr 9.54(2).

[41] Partin v. Commonwealth, Ky., 918 S.W.2d 219, 224 (1996).

have been "easily perceptible, plain, obvious and readily noticeable."[42]

However, when new precedent has changed the law, it is impossible for an appellate court to hold the trial court's action in applying the previous case law to have been palpable error. A new decision should not be applied retroactively unless the issue was properly preserved for appellate review.[43] As the Superior Court of Pennsylvania has stated in a similar context, "in determining whether a party should be given the benefit of retroactive application of a change in the law upon a particular issue, the controlling question is whether the reasoning of the new decision was urged as the basis for relief in the trial court by that party[.]"[44] As previously discussed, Farthing failed to object at trial to the instruction that was given in the case sub judice. Thus, not only was any error not palpable, but also no manifest injustice has occurred.[45]

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[42] Burns v. Level, Ky., 957 S.W.2d 218, 222 (1998) (citing Black's Law Dictionary (6th ed. 1995).

[43] Id. Farthing's case was pending on direct review when Kotila was decided.

[44] Commonwealth v. McMillan, 545 A.2d 301, 308 (Pa.Super.Ct. 1988) (citing Commonwealth v. Hernandez, 446 A.2d 1268, 1271 (Pa. 1982)). See also Smith v. State, 598 So.2d 1063, 1066 (Fla. 1992) ("[t]o benefit from the change in law, the defendant must have timely objected at trial if an objection was required to preserve the issue for appellate review").

[45] Farthing cites Griffith v. Kentucky, 479 U.S. 314, 328, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987), for the proposition that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past." Farthing's reliance on Griffith is misplaced, however, as Griffith applies

Farthing next asserts that the trial court erred by consolidating the indictments in the case sub judice for trial. We disagree. Pursuant to RCr 6.18 and RCr 9.12, a trial court may join offenses for trial which are similar in character or are based on the same acts connected together or constituting parts of a common scheme or plan.[46] A decision to join or sever charges for trial is within the sound discretion of the trial court and will not be disturbed on appeal absent a "'showing of a clear abuse of discretion and prejudice to the defendant.'"[47] "A significant factor in identifying such prejudice is the extent to which evidence of one offense would be admissible in a trial of the other offense."[48]

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only to rules of criminal procedure that are grounded on the United States Constitution. See, e.g., People v. Sexton, 580 N.W.2d 404, 410 (Mich. 1998); Farbotnik v. State, 850 P.2d 594, 602 (Wyo. 1993); and People v. Carrera, 777 P.2d 121, 142 (Cal. 1989). Cf., Smith, 598 So.2d at 1066 (adopting Griffith for all new rules regardless of whether the new rule is of constitutional origin provided that the issue was preserved for appellate review). The Supreme Court of Kentucky's holding in Kotila turned on the Court's interpretation of KRS 218A.1432(1)(b). See Kotila, 114 S.W.3d at 237 ("[w]hether a conviction under [KRS 218A.1432(1)(b)] requires possession of all (as opposed to any) of the chemicals or equipment necessary to manufacture methamphetamine under some manufacturing process is a matter of statutory construction" [emphasis original]). Simply put, Kotila was decided on state law grounds. Consequently, we are not bound by Griffith.

[46] See Harris v. Commonwealth, Ky., 556 S.W.2d 669, 670 (1977). RCr 9.16 provides that a trial court must grant separate trials if it appears that a joinder of offenses would be prejudicial to the defendant.

[47] Cannon v. Commonwealth, Ky., 777 S.W.2d 591, 597 (1989)(quoting Seay v. Commonwealth, Ky., 609 S.W.2d 128, 131 (1981)).

[48] Rearick v. Commonwealth, Ky., 858 S.W.2d 185, 187 (1993)(citing Spencer v. Commonwealth, Ky., 554 S.W.2d 355 (1977)).

We are persuaded that the evidence relative to the November 1, 2000, incident would have been admissible in a separate trial concerning the January 16, 2001, incident. This evidence would have been admissible, not as Farthing mischaracterizes it, as proof of criminal disposition, but rather, as proof of a similar course of conduct or common scheme or plan.[49] Consequently, we cannot conclude that the trial court abused its discretion by consolidating the indictments in the case sub judice for trial.

In closing, Farthing contends that the trial court abused its discretion by preparing the final judgment and sentence in his case prior to the sentencing hearing. This argument merits little attention as Farthing has failed to produce any evidence whatsoever indicating that the trial court prepared the final judgment and sentence prior to the sentencing hearing.

Based on the foregoing reasons, Farthing's conviction for possession of a controlled substance in the first degree by complicity with respect to the November 1, 2000, incident is reversed and his remaining convictions are affirmed.

[49] All of the offenses for which Farthing was tried were closely related in character, circumstance and time. See Commonwealth v. Collins, Ky., 933 S.W.2d 811, 816 (1996)("this Court has held that joinder is proper where the crimes are closely related in character, circumstance and time" [citations omitted]). With the exception of the misdemeanor paraphernalia charge, all of the offenses for which Farthing was tried involved the manufacture, trafficking, or possession of methamphetamine. In addition, each offense involved Farthing's alleged accomplice, Conrad Wolfe.

ALL CONCUR.

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