RENDERED: FEBRUARY 22, 2008; 10:00 A.M.
NOT TO BE PUBLISHED

SUPREME COURT ORDERED NOT PUBLISHED: AUGUST 13, 2008
(FILE NO. 2008-SC-0209-D)

Commonwealth of Kentucky

Court of Appeals

NO. 2005-CA-002179-MR

PAUL E. NASH — APPELLANT

v.

APPEAL FROM GRAYSON CIRCUIT COURT, DIVISION II
HONORABLE ROBERT A. MILLER, JUDGE
ACTION NO. 04-CR-00062

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION AND ORDER
AFFIRMING

** ** ** ** **

BEFORE: KELLER AND TAYLOR, JUDGES; HENRY,[1] SENIOR JUDGE.

HENRY, SENIOR JUDGE: After a trial by jury, Paul E. Nash was convicted of possession of anhydrous ammonia in an unapproved container with the intent to

[1] Senior Judge Michael L. Henry, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

manufacture methamphetamine[2] and possession of drug paraphernalia.[3] He was sentenced to thirteen years' imprisonment. He brings four issues to our attention in this appeal. He first argues that the trial court should have suppressed certain evidence because a search of his residence and surrounding grounds exceeded the scope of the warrant. Second, he claims the trial court committed reversible error when it allowed a witness to offer evidence of Nash's bad character. Third, he contends that the trial court committed reversible error by failing to direct a verdict in his favor. Finally, he argues that the trial court should have defined the term "approved container" for the jury. We affirm as to all four issues.

On February 10, 2004 Detective Danny Payne went to Nash's residence to serve him with an indictment warrant. After being advised of his rights Nash informed the detective that he had hidden two grams of methamphetamine in an old house next to his trailer. Police obtained a warrant to search Nash's residence as well as "any and all outbuildings and/or any and all vehicles, on the premises, including junk vehicles." The search warrant noted the presence of "numerous old junk vehicles"at Nash's premises. Nash's trailer was situated toward the front of the property, with the old house where the methamphetamine was found behind the trailer. Hundreds of junked cars were scattered throughout the property. A driveway or path led from near Nash's trailer to a field filled with junked automobiles. During the search, numerous items used to manufacture methamphetamine were found on Nash's premises. Hidden in the trunk of a car in the

[2] Proscribed by Kentucky Revised Statutes (KRS) 250.489(1) and 250.991(2).

[3] Proscribed by KRS 218A.500(2).

field was an air tank that had been illegally modified to accept, and which contained, anhydrous ammonia. A witness identified the air tank as belonging to Nash.

Nash moved to suppress the introduction of the modified air tank into evidence. He argued that the search of the field behind his trailer exceeded the scope of the search warrant. In fact, the old house and the field adjacent to Nash's premises where some of the junked cars were stored was owned by Otis Moon, an elderly gentleman who had given Nash permission to use the land to store junked automobiles. Moon was called as a witness for the Commonwealth at the suppression hearing. He testified that he owned the property where the junked vehicle containing the anhydrous tank was located and that although there was no written lease or rental agreement, he had given Nash verbal permission to store the junked vehicles on his property. After Moon's testimony the court asked counsel for Nash whether the defense would claim a possessory interest in the property. Realizing that Nash had no standing to object to the search unless he claimed a possessory interest, counsel agreed that he did assert such an interest.

Section 10 of the Kentucky Constitution requires that places to be searched must be described "as nearly as may be." The description requirement of the section "is satisfied by a description of such certainty as to reasonably identify the premises to be searched." *Commonwealth v. Smith,* 898 S.W.2d 496, 500 (Ky. App. 1995). The section's minimum specificity requirements are intended to prevent intrusions by the police on the property of strangers to the process. *Id.* But even if a search exceeds the scope of the warrant, the search is not necessarily illegal provided the police reasonably believed at the time of the search that the place searched was identified by the warrant.

Maryland v. Garrison, 480 U.S. 79, 88, 107 S.Ct. 1013, 1018-1019, 94 L.Ed.2d 72 (1987).

In *Garrison,* police officers entered two doors of a third floor apartment building believing at the time there was a single apartment on that floor. By the time they determined there were actually two apartments, they had already discovered illegal drugs in Garrison's apartment even though it was not the subject of the search warrant. The Supreme Court enunciated a "need to allow some latitude for honest mistakes that are made by officers in the dangerous and difficult process of making arrests and executing search warrants." *Id.* 480 U.S. at 87, 107 S.Ct. at 1018.

The situation in the current case is very similar. The search warrant obtained by Detective Payne in this case authorized a search of "the Paul E. Nash residence" at 1004 South Sadler Lane, Leitchfield, Grayson County, Kentucky, and "any and all outbuildings and/or any and all vehicles, on the premises, including junk vehicles." Because a roadbed or path led directly from Nash's trailer to the field of junked cars nearby, and because the warrant noted the proliferation of junked cars on the premises and authorized a search of those vehicles, officers reasonably believed that they were searching within the delineated scope of the warrant. There is substantial evidence in the record that the officers' mistake was reasonable given the circumstances. The findings of the trial court, being supported by substantial evidence, are conclusive. Kentucky Rules of Criminal Procedure (RCr) 9.78; *Smith v. Commonwealth,* 181 S.W.3d 53, 58 (Ky. App. 2005). Although we found no Kentucky case that has specifically extended the holding of *Garrison* beyond the multi-unit dwelling scenario involved in that case and in *Smith*, the reasoning of those cases applies with equal force here.

Suppression of the modified air tank was not required and the trial court did not err by declining to suppress that evidence.

Nash next questions whether certain testimony of Sammy Garlinger, an acquaintance of Nash, was a violation of Kentucky Rules of Evidence (KRE) 404(b). That rule prohibits testimony "to prove the character of a person in order to show action in conformity therewith." *Id.* Evidence of that type may be admissible however "[i]f offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident . . . ." KRE 404(b)(1). That exception is limited and the evidence is allowed "only if its probative value on that issue outweighs the unfair prejudice with respect to character." *Bell v. Commonwealth,* 875 S.W.2d 882, 889 (Ky. 1994)(citation omitted).

Garlinger was allowed to testify that the modified air tank belonged to Nash; that it contained anhydrous ammonia; that anhydrous ammonia is used to manufacture methamphetamine and that Nash used it for that purpose. The potential violation of KRE 404(b) comes from the statement that Nash used the modified air tank containing anhydrous ammonia in order to manufacture methamphetamine. Nash denied ownership of the air tank. The Commonwealth elicited Garlinger's testimony in order to show that Nash possessed the anhydrous ammonia in the modified air tank with the intent to manufacture methamphetamine, as required by the enhanced penalty provisions of KRS 250.991(2).

"In determining the admissibility of other crimes evidence, three inquires need to be separately addressed: (1) relevance, (2) probativeness, and (3) prejudice." *Matthews v. Commonwealth,* 163 S.W.3d 11, 19 (Ky. 2005). We may not disturb a trial

court's decision to admit evidence absent an abuse of discretion. *Id.* "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." KRE 401. Relevant evidence may be excluded if its probativeness is substantially outweighed by, among other things, the danger of undue prejudice. KRE 403. Using the *Matthews* analysis, evidence of Nash's use of the anhydrous ammonia in the tank to manufacture methamphetamine was highly relevant to and directly probative of Nash's intent to manufacture methamphetamine with the tank's contents. The probative value of Garlinger's testimony greatly outweighed any danger of unfair prejudice. It has been observed many times that all evidence tending to prove a defendant's guilt is prejudicial, at least from the defendant's viewpoint. It does not necessarily follow that such prejudice is undue, or that it is unfair. There was no error.

Nash's third argument is that he was entitled to a directed verdict. We disagree.

> 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.

Commonwealth v. Benham, 816 S.W.2d 186, 187 (Ky. 1991).

On appeal, Nash argues that because the air tank was found on adjacent property and there was no connection or nexus between the air tank and the other drug paraphernalia, a directed verdict was required.

Our standard of review when we examine a motion for directed verdict is "if under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt

. . . ." *Id.* at 187. Nash owned the vehicle containing the modified air tank. A path led from Nash's property to the vehicle's location. Garlinger testified that Nash owned the air tank, that the air tank contained anhydrous ammonia and that anhydrous ammonia is used in the manufacturing of methamphetamine. It was clearly reasonable for a juror to believe that Nash possessed the modified air tank; that it contained anhydrous ammonia and that his intent was to manufacture methamphetamine. The trial court correctly denied the motion for a directed verdict.

Nash's final issue on appeal is his contention that the trial court should have provided the statutory definition of an "approved container" to the jury. The trial court found that the Commonwealth presented unrefuted proof that the air tank neither met the requirements for an approved anhydrous ammonia container, nor contained the required markings for such a container. Because no factual question was presented regarding that issue for the jury to determine, the trial court reasoned that it was unnecessary to give an instruction defining the term.

Nash was convicted of violating KRS 250.489(1), which states that "[i]t shall be unlawful for any person to knowingly possess anhydrous ammonia in any container other than an approved container." KRS 250.482(4) defines "approved container" as "a container for anhydrous ammonia which meets or exceeds the requirements of the Federal law or regulation for the storage and handling of anhydrous ammonia." Even though KRS 250.489 is outside the purview of KRS 250.482, we have held that the definition given there applies to the offense proscribed by KRS 250.489. *Commonwealth v. Kerr,* 136 S.W.3d 783, 785 (Ky. App. 2004).

The Commonwealth responds that "approved container" is a term that is commonly understood by the average juror and the trial court is not required to provide definitions for such terms, *citing Commonwealth v. Hager,* 35 S.W.3d 377 (Ky. App. 2000). Here one of the elements of the crime of which Nash was convicted charged that he possessed anhydrous ammonia in a container "other than an approved container." The Commonwealth is required to prove each element of an offense beyond a reasonable doubt. *Thacker v. Commonwealth,* 194 S.W.3d 287, 289 (Ky. 2006). While it is true that the words "approved" and "container" are not technical terms, we doubt that an average juror asked to define the term "approved container" would respond by quoting KRS 250.482(4). We must agree that Nash's request for the instruction should have been granted in the interest of ensuring that the jury "determine[] the essential elements of the offense . . . ." *Thacker* at 291.

With this said, however, we have no doubt that the trial court's refusal to give an instruction defining "approved container" in this case was harmless error. Kentucky Rules of Criminal Procedure (RCr) 9.24; *see Thacker* at 291. Nash's brief indicates that the only danger articulated by Nash's trial counsel stemming from the court's refusal to define the term was that the jury might imagine that any container could be an approved container. As the Commonwealth's brief points out, such speculation by the jury would actually inure to Nash's benefit. Further, since Nash contended that the container was not his, the definition was only marginally material to his defense. The only evidence presented at the trial concerning the characteristics of the container was the Commonwealth's proof that the tank did not meet the legal requirements of an "approved container." Given this state of affairs we find no possibility, much less a substantial one,

that the outcome of the case would have been different but for the error. *Thacker* at 291; *Commonwealth v. McIntosh,* 646 S.W.2d 43, 45 (Ky. 1983). Being certain as we are that Nash's substantial rights were not affected by the trial court's failure to give an instruction defining the term "approved container," we are required by RCr 9.24 to disregard the error.

Finally, we briefly comment on the state of the record in this case. Portions of the testimony were not available for review because of a mistake made during the trial. The machines used to videotape the testimony were turned off during portions of the testimony. Nash properly supplemented the missing record with a narrative statement pursuant to Kentucky Rules of Civil Procedure (CR) 75.13. We have treated the narrative statement as if it were the exact testimony while considering the issues presented in this appeal. On June 8, 2007, Nash filed a motion seeking to schedule oral arguments in this case and address any issues or concerns of this Court regarding the narrative statement. As we found the provided narrative statement sufficiently clear and complete to allow us to conduct a thorough review of all the issues presented, that motion is now denied as moot.

The judgment of the Grayson Circuit Court is affirmed.

ALL CONCUR.

ENTERED: February 22, 2008

/s/ Michael L. Henry
SENIOR JUDGE, COURT OF APPEALS

BRIEF FOR APPELLANT:

Dennie Hardin
Bowling Green, Kentucky

BRIEF FOR APPELLEE:

Gregory D. Stumbo
Attorney General of Kentucky

Bryan D. Morrow
Assistant Attorney General
Frankfort, Kentucky