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**Commonwealth of Kentucky
Court of Appeals**

NO. 2009-CA-001895-MR

ELMER OAKLEY APPELLANT

v. APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE JOHN KNOX MILLS, JUDGE
ACTION NO. 09-CR-00004

COMMONWEALTH OF KENTUCKY APPELLEE

OPINION
AFFIRMING

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BEFORE: ACREE, LAMBERT AND THOMPSON, JUDGES.

ACREE, JUDGE: Following a conviction for manufacturing methamphetamine,¹ Elmer Oakley presents two grounds of appeal to this Court: (1) that the circuit court erroneously declined to instruct the jury on a lesser offense, facilitation of

¹ The appellant was also convicted of possession of a controlled substance (methamphetamine) and possession of drug paraphernalia. No arguments regarding these convictions have been presented on appeal.

manufacturing methamphetamine; and (2) that he was entitled to a directed verdict on the charge that he manufactured methamphetamine because the Commonwealth presented no evidence that he intended to do so. Finding no error, we affirm.

Facts and procedure

Following an anonymous tip that there was a strong chemical odor at an apartment complex in London, Kentucky, members of the Kentucky State Police (KSP) and the London Police Department (LPD) began an investigation. Upon tracing the odor to the second floor of the complex, Sergeant Gary Proffitt of LPD and Officer Steve Walker of KSP eventually arrived at the apartment of Elmer and Margie Oakley.

The police officers knocked on the door, and Elmer answered. He consented to the investigators' request to search his apartment. That search revealed evidence which led the investigators to believe Elmer had been manufacturing methamphetamine in his home. The incriminating physical evidence included: (1) a duffel bag in the bedroom closet containing nine bottles of lye drain opener, seven bottles of ether starter fluid, coffee filters, funnels, and plastic tubing; (2) items in the living room including glass and plastic containers, aluminum foil, a fifty-pound bag of ammonium nitrate fertilizer, straws, foil, and more coffee filters; and (3) a stained coffee filter found in the bathroom which was later determined to contain pseudoephedrine residue. Officers also observed smoke and a strong chemical odor.

Elmer informed the police officers that the duffel bag was not his, but that he was holding it for someone else. Elmer refused to tell the police the name of the bag's owner.

With the assistance of counsel, Elmer entered a plea of not guilty and proceeded to trial. A jury convicted him of manufacturing methamphetamine, a crime codified at Kentucky Revised Statutes (KRS) 218A.1432. This appeal followed.

Elmer now asserts the circuit court erred in failing to instruct the jury on facilitation, in light of the evidence presented and his theory of the case. He also contends there was no evidence to support the conclusion that he intended to manufacture methamphetamine, and he was therefore entitled to a directed verdict.

Elmer was not entitled to a jury instruction on facilitation of manufacturing methamphetamine

“Alleged errors regarding jury instructions are considered questions of law that we examine under a *de novo* standard of review.” *Hamilton v. CSX Transportation, Inc.*, 208 S.W.3d 272, 275 (Ky. App. 2006) (citing *Reece v. Dixie Warehouse and Cartage Co.*, 188 S.W.3d 440, 449 (Ky. App. 2006)).

In support of his argument that the jury should have been instructed on the lesser offense of facilitation of manufacturing methamphetamine, Elmer has recited the axiom that “[a] defendant is entitled to an instruction on any lawful defense that he has.” (Appellant’s brief, p.12 (citations omitted)). This is true; however, the trial court is not required to instruct a jury on a defense or theory

which is not supported by evidence presented at trial. *See Brinegar v. Commonwealth*, 285 Ky. 400, 147 S.W.2d 1037, 1039 (1941) (citations omitted).

In the case *sub judice*, the circuit court committed no error because there was no evidence supporting a facilitation charge.

The General Assembly has defined 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.

KRS 506.080(1). Stated differently, “[c]riminal facilitation occurs when a defendant, with no intent to promote or commit the crime itself, provides the means or opportunity for another to do so.” 1 Cooper, *Kentucky Instructions to Juries (Criminal)* §10.26, cmt. (5th ed. 2010).

Elmer has identified certain evidence in support of his argument that a jury could have found him guilty of only criminal facilitation. This evidence consists entirely of the testimony of his wife Margie, who stated that all the materials used to manufacture methamphetamine which were found in the apartment, except the unused coffee filters, belonged to a neighbor named Jason. Margie also testified that Elmer had agreed to hold the materials for Jason, that Jason routinely entered and exited the apartment at will, and that she had never seen Jason make methamphetamine in the apartment.

However, merely storing methamphetamine components and manufacturing equipment for another cannot amount to facilitation to manufacture methamphetamine because it involves providing neither the means nor the opportunity to commit the underlying crime. It does not rise to the level of assistance which was contemplated by the drafters of the statute or which is reflected in case law.²

For example, a defendant would be entitled to a facilitation instruction where there was evidence that he sold “large quantities of sugar and malt to illegal distillers with knowledge of their illegal intentions.” KRS 506.080, cmt. (1974). Similarly, Elmer would be entitled to such an instruction if there was evidence that he had sold to Jason the methamphetamine components or manufacturing equipment with knowledge that Jason intended to make methamphetamine; without the proper ingredients and other supplies, it would have been impossible for the illegal distiller to make alcohol, or for Jason to make methamphetamine. Accordingly, Elmer would have provided Jason with the means necessary to make the drug. Elmer presented no such evidence.

The evidence also did not support a conclusion that Elmer was merely providing Jason with a place to manufacture the drug. *See Johnson v. Commonwealth*, 134 S.W.3d 563, 569-70 (Ky. 2004). There was no evidence that Jason, rather than Elmer, had manufactured methamphetamine in Elmer’s

² In *Houston v. Commonwealth*, the Supreme Court suggested evidence that a defendant was merely “guarding” marijuana and cocaine belonging to another might warrant an instruction on facilitation to possession of or trafficking in drugs. 975 S.W.2d 925, 929-30 (Ky. 1998). We believe the same is not true when a defendant is accused of manufacturing an illicit substance.

apartment. In fact, Margie testified that she had never witnessed Jason manufacturing methamphetamine there, and Elmer offered no other evidence which supported that he had done so.

Accordingly, Elmer was not eligible for a facilitation instruction because there was no evidence that he provided the means or opportunity for another to commit a crime, rather than committing the criminal act himself.

Elmer was not entitled to a directed verdict on the charge of manufacturing methamphetamine

Elmer next contends he was entitled to a directed verdict of acquittal on the charge of manufacturing methamphetamine because there was no evidence he intended to do so. The Commonwealth disagrees.

First, however, the Commonwealth correctly notes that Elmer's motion for a directed verdict was general in nature; he did not argue that lack of evidence entitled him to a directed verdict. Our Supreme Court has "held that insufficiently specific motions for directed verdict do not preserve sufficiency of the evidence challenges for appeal and that in such cases the appropriate standard of review is not the "any rational juror" standard from [*Commonwealth v. Benham*[, 816 S.W.2d 186 (Ky. 1991)] but the palpable error standard of RCr 10.26."

Quisenberry v. Commonwealth, 336 S.W.3d 19, 35 (Ky. 2011). In this case, as in *Quisenberry*, the outcome is the same under either standard of review, and because the record is neither unwieldy nor complicated, we have chosen to proceed under the ordinary standard.

A circuit court should deny a motion for directed verdict if, based upon the fair and reasonable inferences drawn in the Commonwealth's favor, "the evidence is sufficient to induce a reasonable juror to believe beyond a reasonable doubt that the defendant is guilty[.]" *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991). On appeal, "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 the defendant is entitled to a directed verdict of acquittal." *Id.*

A defendant can be found guilty of manufacturing methamphetamine under two circumstances, namely, when the evidence establishes: (1) that he has actually manufactured methamphetamine; or (2) that "[w]ith intent to manufacture methamphetamine [he has possessed] two (2) or more chemicals or two (2) or more items of equipment for the manufacture of methamphetamine." KRS 218A.1432. The jury in Elmer's case was instructed under the latter theory.

Although Elmer does not dispute that the police found him in possession of at least two ingredients and/or items of equipment used for the manufacture of methamphetamine, he denies that the Commonwealth presented evidence that he intended to use those ingredients to manufacture the drug. More specifically, he contends the testimony that the duffel bag containing methamphetamine components belonged to Jason means the jury could not have found Elmer intended to use those components to manufacture the drug. Elmer also notes that several items that would have been necessary for the manufacture of

methamphetamine were not found in his home and that there was no evidence of an active lab in his home at the time the police conducted their search.

Elmer's argument properly acknowledges that a defendant's intent can be surmised from the circumstances. *Anastasi v. Commonwealth*, 754 S.W.2d 860, 862 (Ky. 1988) ("Intent can be inferred from the actions of an accused and the surrounding circumstances. The jury has wide latitude in inferring intent from the evidence." (citation omitted)). His argument fails, however, to account for the statutory provision which expressly denotes what constitutes evidence of intent:

"Intent to manufacture" means any evidence which demonstrates a person's conscious objective to manufacture a controlled substance or methamphetamine. *Such evidence includes but is not limited to statements and a chemical substance's usage, quantity, manner of storage, or proximity to other chemical substances or equipment used to manufacture a controlled substance or methamphetamine[.]*

KRS 218A.010(15) (emphasis added).

There was significant evidence presented at trial that the common usage of a number of items found in Elmer's home is for the manufacturing of methamphetamine. The two police investigators and an expert witness for the Commonwealth, Zach Bryson, testified that many products found in Elmer's apartment are commonly used to create the series of chemical reactions which produces methamphetamine. These included ammonium nitrate fertilizer, ether (found in the starter fluid), lye (found in the drain cleaner), and pseudoephedrine (traces of which were found on used coffee filters). The same witnesses also

testified that other equipment frequently used to store, collect, and transfer chemicals at various points during the manufacturing process were located in the Oakley residence. Those included glass and plastic containers, funnels, plastic tubing, and coffee filters.

Further, Bryson testified that finding this combination of materials in the same home led him to conclude that a methamphetamine lab had been in operation on the premises.

In light of the quantity and nature of the items found in Elmer's home, it was reasonable under KRS 218A.010(15) for the jury to conclude that Elmer intended to manufacture methamphetamine. He was therefore not entitled to a directed verdict.

Conclusions

The circuit court did not err in declining to instruct the jury on criminal facilitation to manufacturing methamphetamine or to enter a directed verdict of acquittal. Accordingly, we affirm.

ALL CONCUR.

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