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Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001272-MR

BRENDA JORDAN WOODEN — APPELLANT

v. APPEAL FROM GRAYSON CIRCUIT COURT
HONORABLE BRUCE T. BUTLER, JUDGE
ACTION NO. 12-CR-00041

COMMONWEALTH OF KENTUCKY — APPELLEE

AND NO. 2013-CA-001673-MR

JAMES K. VANMETER — APPELLANT

v. APPEAL FROM GRAYSON CIRCUIT COURT
HONORABLE BRUCE T. BUTLER, JUDGE
ACTION NO. 12-CR-00043

COMMONWEALTH OF KENTUCKY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: J. LAMBERT, STUMBO, AND THOMPSON, JUDGES.

LAMBERT, J., JUDGE: A jury in the Grayson Circuit Court convicted appellants James VanMeter and Brenda Wooden of manufacturing methamphetamine in a joint trial with Wooden's husband, Phildon Wooden. VanMeter was additionally convicted of possession of methamphetamine, possession of drug paraphernalia, and possession of marijuana. Wooden and VanMeter both appealed separately, and the Commonwealth moved to consolidate the two appeals. This Court subsequently ordered the appeals to be consolidated for consideration on the merits, and we issue a single opinion affirming the judgments of the Grayson Circuit Court.

On March 13, 2012, Kentucky State Trooper Seth Lee received a call from the Cabinet for Health and Family Services (hereinafter "CHFS")[1] alleging drug activity at 4638 Brandenburg Road involving the Woodens. Trooper Lee accompanied a worker from CHFS to investigate the welfare of the Woodens' children at that address.

Trooper Lee arrived at the address in the afternoon, where VanMeter was present along with the Woodens. Trooper Lee explained why he was present and asked to search the premises, but VanMeter denied the request. Trooper Lee

[1] CHFS is incorrectly referred to throughout the parties' briefs in *Wooden v. Commonwealth*, 2013-CA-001272-MR, as the "Cabinet for Human Resources" or "CHR."

subsequently determined that Phildon Wooden had an outstanding warrant, placed him under arrest, and found a methamphetamine pipe in his wallet.

Trooper Lee contacted Detective Kevin Henderson, a narcotics detective with the state police, to ask if he knew of the Woodens or VanMeter. Det. Henderson indicated that he had heard their names in the course of conversations with a confidential informant and ran a MethCheck on all three individuals. The resulting Kentucky All-Schedule Prescription Electronic Reporting System (KASPER) report indicated that all three had recently purchased pseudoephedrine products.

Det. Henderson joined Trooper Lee at the residence and was informed by Trooper Lee that VanMeter did not want the property searched. When asked by Det. Henderson, VanMeter denied ownership of the property, stating he had sold the residence to the Woodens. VanMeter stated that he was in the process of moving out of the home, and Phildon Wooden said that he and his wife were moving in.

Det. Henderson obtained a search warrant, read the warrant to all the parties, and proceeded to search the premises. The search revealed multiple items commonly used in the manufacture of methamphetamine, including plastic tubing, ammonium nitrate, liquid fire, Morton salt, Drain Out, wire cutters, a grinder, and an HCl generator hose that later tested positive for methamphetamine. Other items discovered included a methamphetamine pipe, a tin containing marijuana, and a marijuana grinder. In a burn barrel outside the premises, the officers found

pseudoephedrine blister packs, an HCl generator, several batteries with the lithium removed, and a can of Coleman fuel.

VanMeter and Wooden, along with her husband, were arrested, indicted, and tried by a jury in the same action. Both appellants were convicted of manufacturing methamphetamine. VanMeter was additionally convicted of possession of methamphetamine, possession of drug paraphernalia, and possession of marijuana. Wooden was sentenced to ten years' imprisonment for the manufacturing conviction, and VanMeter was sentenced to consecutive sentences for a total of ten years' imprisonment. These appeals now follow.

Both appellants claim error in the admission of Det. Henderson's testimony as well as the trial court's order denying a directed verdict. Wooden also alleges that the trial court improperly admitted other alleged hearsay testimony, improperly excluded Wooden's drug test results, and allowed the Commonwealth attorney to engage in alleged misconduct. VanMeter separately argues error in the trial court's decision to deny separate trials, the trial court's finding that the search warrant was valid, the alleged use of his refusal to consent to a search being used against him at trial, his impeachment by the Commonwealth with the KASPER report, and the trial court's failure to include a lesser-included offense to manufacturing methamphetamine in the jury's instructions.

COMMON ISSUES

1. **Detective Henderson's Testimony**

Det. Henderson testified that he had previously heard the names of the appellants from a confidential informant. Wooden and VanMeter objected that this testimony was hearsay, but the trial court overruled their objections, stating that the testimony fell within the exception described in *Sanborn v. Commonwealth*, 754 S.W.2d 534 (Ky. 1988), *overruled on other grounds by Hudson v. Commonwealth*, 202 S.W.3d 17, 22 (Ky. 2006).

Sanborn states that "a police officer may testify about information furnished to him only where it tends to explain the action that was taken by the police officer as a result of this information *and* the taking of that action is an issue in the case." *Id.* at 541 (emphasis in original). The relevancy of such hearsay turns only "on whether the action taken by the police officer in response to the information that was furnished is an issue in controversy." *Id.* The Supreme Court further explains this analysis as follows:

> The information from other persons in the possession of a police officer at the time he makes an arrest is irrelevant to any issue of guilt or innocence in the trial of a criminal case. Such information may become relevant in a criminal case if the legality of the arrest is at issue.

Id.

Although the trial court correctly applied the first part of the *Sanborn* analysis by determining that Det. Henderson's testimony tended to explain his actions, the testimony fails to satisfy the second *Sanborn* factor and should have been excluded by the trial court as inadmissible hearsay. The legality of the actions taken by Det. Henderson was not in issue. The Commonwealth contends

that Det. Henderson's statements explain why he continued the investigation and why he obtained a MethCheck on Wooden and VanMeter, but neither was critical to proving the Commonwealth's case. Although there was significant discussion of the admissibility of the MethCheck documents at trial, at no point were Det. Henderson's actions regarding the continuation of the investigation or the MethCheck in question.

This error, however, did not affect the substantial rights of the appellants. The harmless error rule requires this Court to "disregard any error or defect in the proceeding that does not affect the substantial rights of the parties." Kentucky Rules of Criminal Procedure (RCr) 9.24. The case of *Abernathy v. Commonwealth*, 439 S.W.2d 949, 952 (Ky. 1969), *overruled in part on other grounds by Blake v. Commonwealth*, 646 S.W.2d 718 (Ky. 1983), restates this standard by explaining that "[i]f upon a consideration of the whole case this court does not believe there is a substantial possibility that the result would have been any different, the irregularity will be held nonprejudicial."

The record indicates that no such possibility exists here. Det. Henderson's hearsay statements were not critical to proving an ultimate fact in the case, and the jury was able to consider other evidence that could have justified their decision to convict had this testimony been excluded. VanMeter admitted to ownership of the methamphetamine pipe, marijuana, and drug paraphernalia. Both VanMeter and Wooden were present at a residence where a search uncovered numerous items used in the methamphetamine manufacturing process. Testimony also suggested

that the appellants may have been familiar with the methamphetamine manufacturing process. The totality of the evidence indicates that, even had the trial court excluded the hearsay statements of Det. Henderson, there was no substantial possibility that the result would have been different. Therefore, the introduction of Det. Henderson's testimony was harmless error.

2. Directed Verdict

At the close of the Commonwealth's case, and again at the conclusion of the presentation of all the evidence, appellants moved for a directed verdict. The trial court denied these motions, and appellants claim error on appeal. Review of a denial of a directed verdict is limited to a determination of whether, "under the evidence as a whole, it would be clearly unreasonable for a jury to find guilt[.]" *Commonwealth v. Benham*, 816 S.W.2d 186, 187 (Ky. 1991) (citing *Commonwealth v. Sawhill*, 660 S.W.2d 3 (Ky. 1983)). "A reviewing court does not reevaluate the proof because its only function is to consider the decision of the trial judge in light of the proof presented." *Benham*, 816 S.W.2d at 187.

Here, the evidence as a whole indicates that a finding of guilt was not unreasonable. Kentucky Revised Statutes (KRS) 218A.1432(1) outlines the elements of the crime of manufacturing methamphetamine,[2] and the Commonwealth produced evidence that, on its face, supported the presence of each element. The residence at which appellants were found contained multiple items

[2] "(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." KRS 218A.1432(1).

used for manufacturing methamphetamine, and VanMeter was in the process of selling the house to the Woodens. The testimony at trial also supported an inference that Wooden may have known about the process of manufacturing methamphetamine.

The appellants' characterizations of the facts in their arguments focus primarily on conflicting evidence that was presented to the jury. However, the presence of conflicting evidence relates to credibility and cannot be grounds for granting a directed verdict. *See Benham*, 816 S.W.2d at 187. Based on the evidence as a whole, it was not clearly unreasonable for a jury to find appellants guilty, and the trial court properly denied their motions for a directed verdict.

BRENDA WOODEN

1. **Trooper Lee's Testimony**

Trooper Lee testified at trial that he received a complaint from CHFS that stated where the Woodens' children lived as well as the possibility that drugs were present. Wooden failed to object to this testimony at trial, and she now asks this Court to review the decision to admit under the palpable error standard. "The palpable error rule allows reversal for an unpreserved error only when 'manifest injustice has resulted from the error.'" *Elery v. Commonwealth*, 368 S.W.3d 78, 98 (Ky. 2012) (quoting RCr 10.26). This requires the "probability of a different result or error so fundamental as to threaten a defendant's entitlement to due process of law. . . . When an appellate court engages in a palpable error review, its focus is on what happened and whether the defect is so manifest, fundamental and

unambiguous that it threatens the integrity of the judicial process." *Martin v. Commonwealth,* 207 S.W.3d 1, 3–5 (Ky. 2006).

Wooden argues that the statements were impermissible hearsay and should have been excluded because no exceptions applied. However, Wooden fails to show that error in the admission of Trooper Lee's testimony was "so manifest, fundamental and unambiguous" that the integrity of the judicial proceeding below was threatened. *Id.* at 5. The jury was presented with substantial evidence that Wooden was present at and in the process of purchasing the residence, that multiple items used in methamphetamine manufacturing were on the premises, and that Wooden understood at least part of the process for manufacturing methamphetamine. That she lived at the home and was a drug user were reasonable inferences the jury might have made from evidence other than Trooper Lee's statements, even had they been excluded. Therefore, the trial court did not commit a palpable error in allowing Trooper Lee's testimony.

2. Trial Court Properly Excluded Drug Test Results

Wooden attempted to introduce the results of a drug test taken immediately after her arrest through the testimony of Pam Gonterman, a worker at the medical center where Wooden's blood was drawn. The Commonwealth objected that the phlebotomist was not present to testify as to the source of the lab results, and therefore no proper foundation was laid for its introduction under Kentucky Rules of Evidence (KRE) 901.

We review for abuse of discretion. "[A]buse of discretion is the proper standard of review of a trial court's evidentiary rulings." *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000).

KRE 901(a) states that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." The Kentucky Supreme Court in *Rabovsky v. Commonwealth*, 973 S.W.2d 6 (Ky. 1998), discusses in detail how the requirements of KRE 901(a) apply to blood samples.

> [A] chain of custody is required for blood samples or other specimens taken from a human body for the purpose of analysis. . . . [I]t is unnecessary to establish a perfect chain of custody or to eliminate all possibility of tampering or misidentification, so long as there is persuasive evidence that "the reasonable probability is that the evidence has not been altered in any material respect." Gaps in the chain normally go to the weight of the evidence rather than to its admissibility.

Id. at 8–9 (citations omitted) (quoting *United States v. Cardenas*, 864 F.2d 1528, 1532 (10th Cir. 1989)).

Wooden failed to provide any evidence relating to the chain of custody of the blood sample used to generate the report she sought to enter. None of the witnesses through which she attempted to introduce the results were able to verify that the blood sample used to generate the drug test results belonged to Wooden. Accordingly, the exclusion of the report was proper.

Wooden argues that the trial court's ruling prevented her from presenting a complete defense, and she is entitled to reversal under *Holmes v. South Carolina*, 547 U.S. 319, 126 S. Ct. 1727, 164 L.Ed.2d 503 (2006). Under *Holmes*, the right to present a complete defense "is abridged by evidence rules that infring[e] upon a weighty interest of the accused and are arbitrary or disproportionate to the purposes they are designed to serve." *Id.*, 547 U.S. at 324, 126 S. Ct. at 1731 (internal quotations omitted). "In determining whether an exclusion is 'disproportionate,' other courts have weighed 'the importance of the evidence to an effective defense, [and] the scope of the ban involved,' against any prejudicial effects the rule was designed to guard against." *Dennis v. Commonwealth*, 306 S.W.3d 466, 474 (Ky. 2010) (citations omitted) (quoting *White v. Coplan*, 399 F.3d 18, 24 (1st Cir. 2005)).

Wooden fails to demonstrate how the balance between the importance of the evidence and the scope of the ban leans toward inclusion here. The scope of the ban under KRE 901(a) is narrow; Wooden simply failed to introduce the evidence through the appropriate testimony. Wooden attempted to introduce the report through the testimony of Det. Henderson and Gonterman rather than through the phlebotomist who actually performed the test. The opportunity to present her defense was thwarted only by Wooden's own tactical decision. Therefore, the trial court did not abuse its discretion when it excluded the results of the drug test.

3. No Commonwealth Attorney Misconduct

Wooden also seeks to cast the Commonwealth's introduction and characterization of the evidence discussed above as prosecutorial misconduct. Wooden admits in her brief that she did not properly preserve the issue at trial and asks for palpable error review under RCr 10.26. *See supra*.

Wooden's claims that the Commonwealth engaged in prosecutorial misconduct by offering or objecting to certain evidence are without merit. "Issues involving the admission of evidence or testimony, when ruled upon by the trial court, do not constitute prosecutorial misconduct." *Stopher v. Commonwealth*, 57 S.W.3d 787, 806 (Ky. 2001). The Commonwealth offered the testimony of the police officers and objected to the introduction of the drug test results. Each side had an opportunity to present their arguments and interpretations of law to support their respective stances. The trial court then made decisions to admit or exclude each item of evidence as it deemed appropriate. This process is an essential component of our adversarial system, and the Commonwealth's participation in that process by offering or objecting to certain evidence does not constitute misconduct under *Stopher* and other relevant case law.

Wooden also claims error in the Commonwealth's discussion and characterization of the evidence in its closing argument based on the Commonwealth's reference to alleged inadmissible hearsay as well as purported attempts to mislead the jury. The Kentucky Supreme Court's decision in *Hannah v. Commonwealth*, 306 S.W.3d 509, 518 (Ky. 2010), *superseded on other grounds by statute, as recognized in Commonwealth v. Hasch*, 421 S.W.3d 349 (Ky. 2013),

provides guidance in determining whether a prosecutor has engaged in misconduct in his or her closing arguments. "If this Court (first) determines that a prosecutor engaged in misconduct in closing argument, reversal is required where 'the misconduct is "flagrant" *or* if each of the following three conditions is satisfied: (1) Proof of defendant's guilt is not overwhelming; (2) Defense counsel objected; and (3) The trial court failed to cure the error with a sufficient admonishment to the jury.'" *Id.* (quoting *Matheney v. Commonwealth*, 191 S.W.3d 599, 606 (Ky. 2006) (emphasis in original)). Furthermore, "opening and closing arguments are not evidence and prosecutors have a wide latitude during both. 'A prosecutor may comment on tactics, may comment on evidence, and may comment as to the falsity of the defense position.'" *Stopher*, 57 S.W.3d at 805–06 (quoting *Slaughter v. Commonwealth*, 744 S.W.2d 407, 412 (Ky. 1987)).

The Commonwealth's closing statements were not improper under *Hannah* and *Stopher*. The Commonwealth's discussion of evidence during its closing argument included no misconduct. Wooden complains that the Commonwealth improperly made inferences about the nature of Trooper Lee's visit to the residence, about the nature of Wooden's drug use, and about Wooden's witness testifying regarding records that were ultimately not introduced as evidence. All of these were based on evidence in the record, and the Commonwealth's comments about evidence were all permissible under *Stopher*. Since the Commonwealth did not engage in misconduct in its closing argument, no

further analysis under *Hannah* is warranted, and Wooden is not entitled to relief on this issue.

JAMES VANMETER

1. Separate Trials

At trial, the Commonwealth moved to consolidate VanMeter's case with that of the Woodens, and the trial court ordered consolidation over VanMeter's objection. VanMeter argues on appeal that the consolidation and subsequent presentation of antagonistic defenses by the defendants caused prejudice supporting a reversal.

The rule regarding separate trials for defendants is outlined in RCr 9.16.[3] "If it appears that a defendant or the Commonwealth will be prejudiced by a joinder of offenses or defendants for trial, RCr 9.16 requires the trial court to grant separate trials or to provide whatever other relief justice necessitates." *Hardin v. Commonwealth*, 437 S.W.2d 931, 933 (Ky. 1968), *superseded by statute as stated in Colwell v. Commonwealth*, 37 S.W.3d 721, 724 (Ky. 2000). An order granting

[3] RCr 9.16 was deleted and RCr 8.31, the current version of this rule, became effective January 1, 2015. RCr 8.31 provides as follows:

> If it appears that a defendant or the Commonwealth is or will be prejudiced by a joinder of offenses or of defendants in an indictment, information, complaint or uniform citation or by joinder for trial, the court shall order separate trials of counts, grant separate trials of defendants or provide whatever other relief justice requires. A motion for such relief must be made before the jury is sworn or, if there is no jury, before any evidence is received. No reference to the motion shall be made during the trial. In ruling on a motion by a defendant for severance the court may order the attorney for the Commonwealth to deliver to the court for inspection in camera any statements or confessions made by the defendants that the Commonwealth intends to introduce in evidence at the trial.

separate trials under RCr 9.16 "requires a showing of prejudice." *Sebastian v. Commonwealth*, 623 S.W.2d 880, 881 (Ky. 1981). "Severance under RCr 9.16 is a matter within the discretion of the trial court, and there should be no reversal except for abuse of such discretion." *Boggs v. Commonwealth*, 424 S.W.2d 806, 808 (Ky. 1966) (citation omitted).

The Kentucky Supreme Court's case of *Bratcher v. Commonwealth*, 151 S.W.3d 332 (Ky. 2004), addresses the effect that antagonistic defenses among multiple defendants has on the court's determination of whether to allow consolidation or order separate trials. The court stated that "'the allegation that there are antagonistic defenses is only one of the factors for the trial judge to consider.' . . . [T]he existence of antagonistic defenses alone, absent some other showing of prejudice, is not enough to require reversal." *Id.* at 341 (quoting *Foster v. Commonwealth*, 827 S.W.2d 670, 679 (Ky. 1991)).

VanMeter's claim that he and the Woodens presented antagonistic defenses is not enough to support his argument that the trial court should have ordered separate trials. VanMeter fails to demonstrate any additional factors beyond the presence of antagonistic defenses that might show the existence of unfair prejudice due to the consolidation. Furthermore, his claim that his co-defendants' attorneys acted as extra prosecutors is "simply a reiteration of the antagonistic defenses claim[.]" *Id.* Therefore, the trial court did not abuse its discretion by ordering the trials to be consolidated.

2. Search Warrant

After Det. Henderson arrived on the scene and performed a MethCheck on VanMeter and the Woodens, he filed an affidavit to obtain a search warrant for the residence. In the affidavit, Det. Henderson asserted that VanMeter had purchased pseudoephedrine two times in the fifteen-day period prior to the date of the affidavit and Phildon Wooden had purchased pseudoephedrine once in the prior thirty days. A comparison of the affidavit with the KASPER report reveals that Det. Henderson appears to have misstated the extent of VanMeter's pseudoephedrine purchases, as he had only made one purchase in the prior forty days. VanMeter argues that this error amounts to a material misstatement that should have invalidated the search warrant. This issue was not preserved at trial, and VanMeter requests review for palpable error under RCr 10.26. *See supra.*

The Kentucky Supreme Court has stated the test for determining whether to suppress evidence obtained through an unconstitutional search warrant as follows:

> When a defendant attacks the fruit of a search warrant based on the premise that the information supplied to the issuing magistrate is inaccurate, he . . . is required to show that: (1) the affidavit contains intentionally or recklessly *false* statements, and (2) the affidavit, purged of its falsities, would not be sufficient to support a finding of probable cause.

Hayes v. Commonwealth, 320 S.W.3d 93, 101 (Ky. 2010) (emphasis in original).

VanMeter fails to show that, had the error made by Det. Henderson in the affidavit been omitted, there was "probability of a different result or error so fundamental as to threaten a defendant's entitlement to due process of law."

Martin v. Commonwealth, 207 S.W.3d 1, 3 (Ky. 2006). Even had the statement been omitted, the affidavit would have supported a finding of probable cause to search the premises. The affidavit stated that CHFS received a complaint for child endangerment due to suspicious activity on the premises, including reports of visitors who would go into the backyard with adults while leaving their children in the driveway. A search of Phildon Wooden, who was present at the residence, uncovered a methamphetamine pipe. Therefore, even had the erroneous statement been omitted, the affidavit would have supported a finding of probable cause to search the premises, and there was no palpable error here.

3. **Use of Refusal to Consent to Search at Trial**

VanMeter next argues that his assertion of his Fourth Amendment right to refuse a search of the residence was improperly used as evidence of his guilt at trial. This issue was not preserved, and VanMeter asks for palpable error review under RCr 10.26. *See supra*.

The Kentucky Supreme Court held in *Deno v. Commonwealth*, 177 S.W.3d 753, 762 (Ky. 2005), that the prosecution may not present a defendant's refusal to consent to a search as evidence of guilt. However, the Court has also recognized that such evidence may be used for purposes other than to imply guilt. In *Coulthard v. Commonwealth*, 230 S.W.3d 572 (Ky. 2007), the Court distinguished *Deno*, noting that when "determining whether a constitutional right has been burdened impermissibly, it is also appropriate to consider the legitimacy of the challenged governmental practice." *Id.* at 582 (quoting *Jenkins v. Anderson*,

447 U.S. 231, 238, 100 S.Ct. 2124, 2129 (1980)). The appellant in *Coulthard* argued that his Fourth Amendment rights were violated when the prosecution introduced evidence that he had refused to have his fingerprints sampled. *Id.* "Appellant's refusal to consent to fingerprint sampling was relevant for purposes other than to simply penalize him for the exercise of a legal privilege. Rather, the government utilized this evidence for the legitimate purposes of rebuttal and impeachment of a self defense claim advanced by Appellant at trial." *Id.*

Here, the evidence of VanMeter's refusal to consent to a search was introduced by the Commonwealth to support their claim that VanMeter exercised a degree of control and dominion over the premises. This evidence was "probative for some purpose other than to simply penalize the defendant for exercising a constitutional right.[]" *Id.* at 584. All three defendants disclaimed ownership of the property, and constructive possession of the methamphetamine manufacturing materials discovered at the premises was a key issue in the prosecution's case. Evidence of VanMeter's refusal to consent to a search of the residence was fairly admitted for rebutting VanMeter's claim that the house and its contents were not in his possession. Therefore, the facts in this case do not demonstrate a violation of VanMeter's constitutional rights, and the trial court did not commit a palpable error when it allowed the introduction of this evidence.

4. Impeachment with KASPER Report

During his cross-examination, VanMeter testified that he suffered from heart failure from May 2012 to May 2013 and was prescribed six medications

to treat his condition. In response, the Commonwealth produced a KASPER report from that period that indicated VanMeter had had no prescriptions during that time period. On appeal, VanMeter argues that this use of the report to impeach his testimony was improper. As he did not object during the trial, VanMeter asks for palpable error review under RCr 10.26. *See supra*.

The Commonwealth concedes in its brief that this use of the report appears to have violated KRE 608(b).[4] VanMeter argues that the implication that the prosecution made by introducing the KASPER report is directly refuted by the record, but the introduction of the report did not rise to the level of palpable error. The Commonwealth had already established its case in chief, including evidence that VanMeter was located at a residence, which he may have owned, that contained numerous items used in the manufacture of methamphetamine. The jury heard enough evidence to support finding beyond a reasonable doubt that VanMeter had constructive possession of multiple items used in the manufacture of methamphetamine. VanMeter's impeachment on a collateral issue did not create the probability of a different result "so fundamental" that VanMeter's entitlement

[4] Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than the conviction of a crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness: (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified. No specific instance of conduct of a witness may be the subject of inquiry under this provision unless the cross-examiner has a factual basis for the subject matter of his inquiry. KRE 608(b).

to due process was threatened. *See Martin*, 207 S.W.3d at 3. The prejudice VanMeter may have experienced due to the erroneous introduction of the KASPER report did not rise to the level of a defect "so manifest, fundamental and unambiguous that it threatens the integrity of the judicial process[,]" *id.* at 5, and he is not entitled to relief on this issue.

5. **Lesser-included Offense Instruction**

Finally, VanMeter argues that the evidence submitted at trial supported instructing the jury on the lesser-included offense of possession of a methamphetamine precursor. VanMeter tendered an instruction on the lesser-included offense at trial, but he was overruled.

"It is always the duty of the trial court to instruct a jury on lesser-included offenses when it is so requested and it is justified by the evidence." *Martin v. Commonwealth*, 571 S.W.2d 613, 615 (Ky. 1978). However, "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) (citations omitted). "An instruction on a lesser included offense is required only if, considering the totality of the evidence, the jury might have a reasonable doubt as to the defendant's guilt of the greater offense, and yet believe beyond a reasonable doubt that he is guilty of the lesser offense." *Id.*

In the Kentucky Supreme Court's case of *Rawls v. Commonwealth*, 434 S.W.3d 48 (Ky. 2014), the appellant was convicted of manufacturing methamphetamine and argued on appeal that the "mere presence of

pseudoephedrine at the scene of his arrest entitled him to an instruction on possession of a precursor." *Id.* at 54. The court reasoned:

> There is no dispute that possession of a precursor can be a lesser-included offense of manufacturing methamphetamine, but this does not remove the requirement . . . that a lesser-included instruction is only appropriate when "the jury might have a reasonable doubt as to the defendant's guilt of the greater offense, and yet believe beyond a reasonable doubt that he is guilty of the lesser offense."

Id. (quoting *Houston*, 975 S.W.2d at 929). In deciding that the appellant was not entitled to an instruction on the lesser-included offense, the Court then stated that although pseudoephedrine was found at the scene of the arrest, "the presence of the drug alone cannot be viewed in a vacuum and must be viewed in conjunction with the other evidence[,]" noting that there was "substantial evidence showing that Rawls had manufactured methamphetamine and was in possession of a number of chemicals . . . and pieces of equipment[.]" *Id.*

VanMeter argues that because pseudoephedrine blister packs were found at the residence, a jury could have reasonably acquited him of the manufacturing charge while finding him guilty of the lesser-included offense. However, the pseudoephedrine blister packs found at the scene were discovered in a burn barrel along with lithium batteries and an HCl generator, which are items commonly used to manufacture methamphetamine. Under this proof, no reasonable jury would have found VanMeter guilty of possession of a precursor but not guilty of manufacturing. Because the other manufacturing items were

found in the same location as the pseudoephedrine blister packs, the only reasonable choice for the jury here was "all or nothing." *See id.* Accordingly, VanMeter was not entitled to an instruction of possession of a methamphetamine precursor.

Based on the foregoing, the judgments of the Grayson Circuit Court are affirmed.

STUMBO, JUDGE, CONCURS.

THOMPSON, JUDGE, CONCURS AND FILES SEPARATE OPINION.

THOMPSON, JUDGE, CONCURRING: I concur in the result regarding upholding Brenda Wooden's conviction, but write separately to express that I would dissent if trial counsel had properly requested the admission of Wooden's drug test report.

Some additional background is needed regarding the timeline of the alleged methamphetamine manufacture, how the drug test report was produced and why trial counsel failed to move for its introduction into evidence. On March 13, 2002, (two days after Wooden's husband purchased Sudafed and four days after Wooden purchased Sudafed) Wooden, her husband and VanMeter were arrested for manufacturing methamphetamine following execution of a search warrant. On March 14, 2002, pursuant to a court order, Wooden was taken in shackles to the Twin Lakes Regional Medical Center (Twin Lakes) for a blood draw to screen for seven drugs, including amphetamine. Her sample was processed by Lab Corp. and

a report detailing the results was submitted to Twin Lakes. The drug test report indicated Wooden tested negative for all drugs.

At trial, Wooden's counsel called Pam Gonterman, the director of health information and records custodian at Twin Lakes, who verified counsel's copy of Wooden's drug test report was the same as that contained in Wooden's medical records. The Commonwealth objected to the anticipated attempt to admit this record into evidence through Gonterman.

During the bench conference that followed, trial counsel indicated she was not seeking to admit the drug test report at this time and would seek to admit the results of the report through the testimony of her next witness, a lab technician apparently employed by Lab Corp. The Commonwealth objected to this anticipated course of action, arguing: (1) the Commonwealth had not been given discovery of the drug screen results; (2) the results would be inadmissible unless trial counsel called the phlebotomist who drew Wooden's blood; and (3) the test results were irrelevant because it did not screen for methamphetamine, but only for amphetamine.

Trial counsel argued the Commonwealth produced the drug test report in discovery and she had also submitted the drug test report as an attachment to a bond motion. She also argued the tests results were relevant because methamphetamine would be detected by an amphetamine screen as indicated by the testimony of the Commonwealth's lab technician on cross-examination. The Commonwealth disagreed that its lab technician's testimony revealed how

methamphetamine would be processed by an amphetamine blood screen. The trial court questioned why the results of this drug screen were relevant when Wooden was not being charged with use, and she could manufacture methamphetamine without being a user.

In response, trial counsel stated she could establish relevance but did not want to reveal her trial strategy to the Commonwealth and, therefore, requested to confer with the trial court alone in chambers. The trial court granted trial counsel's request. In chambers, trial counsel explained she was not seeking to admit the report for the purpose of showing a negative blood test for methamphetamines, but to establish Wooden complied with medical orders. Wooden had previously been prescribed and taken amphetamines for dieting purposes, but stopped taking them as instructed.

Trial counsel explained the phlebotomist was not a necessary witness, and she did not want the jury to hear Wooden's blood was drawn pursuant to court order while she was in shackles. Trial counsel argued she did not have a chain of custody issue because the defendant had the right to present evidence for a complete defense. The trial court stated trial counsel needed to prove it was Wooden's blood by subpoenaing the person who drew her blood and if counsel could not prove the chain of custody from Wooden's body to the lab, the court would probably rule in the Commonwealth's favor.

Following the conference, trial counsel finished her examination of Gonterman without asking for the drug test report to be admitted into evidence.

Trial counsel did not call the lab technician as a witness. Accordingly, the trial court never made a ruling on the admissibility of the report.

During closing argument, the Commonwealth tried to establish the Woodens and VanMeter were actively involved in manufacturing methamphetamine at the trailer where they were all living. Regarding Wooden, the Commonwealth referenced previous testimony that Trooper Lee responded to a call from the Cabinet for Health and Family Services (Cabinet) that the Wooden children were around drug activity at the trailer location, Detective Henderson testified he had heard the Woodens were active in the drug scene, Wooden had previously purchased Sudafed with some frequency and very recently as indicated by a MethCheck, a search of the trailer showed it contained everything needed to manufacture methamphetamine, and items found there tested positive for methamphetamine.

The Commonwealth focused particularly on Wooden's admission that she might test positive for methamphetamine because she drank a Coke and there was a coffee filter in the bottom. The Commonwealth argued that this statement established Wooden knew coffee filters were used in the manufacture of methamphetamine, expected methamphetamine to be present in the filter and used this method to consume the last remaining amount of methamphetamine. Trial counsel's objection to this statement as not in evidence was overruled as a reasonable inference.

The Commonwealth then reviewed Wooden's case, arguing if Wooden no longer had a prescription for amphetamines to lose weight, it would make sense for her to use methamphetamines for this purpose instead.

Finally, the Commonwealth presented its theory of the case, that all the defendants had a methamphetamine party and each brought some ingredients to VanMeter's place, made the methamphetamine together, consumed it and then burned the evidence. This theory implied this "party" was held very close in time to the defendants' arrest because the Woodens purchased Sudafed two and four days before their arrest. The Commonwealth argued the reason officers failed to find much methamphetamine during their search was "because it all went up their noses."

Under these circumstances, where trial counsel never moved for admission of the drug test report showing Wooden tested negative for amphetamines, there is no ruling by the trial court for us to reverse. However, I believe if trial counsel had properly moved for admission of these test results and the trial court excluded them, we would be obligated to reverse because Wooden had a right to have this highly probative and reliable report admitted into evidence.

Some of the circumstantial evidence implicating Wooden consisted of so called investigative hearsay, specifically Detective Henderson's testimony that a confidential informant stated the Woodens were active in the drug scene and Trooper Lee's testimony that he responded to a Cabinet call that the Wooden children were around drug activity. While I dislike that the Commonwealth used

evidence that was inadmissible to argue Wooden's guilt in its closing argument, I agree that Detective Henderson's testimony was harmless and Trooper Lee's testimony did not constitute palpable error where there was other probative evidence to support the jury's verdict. However, I remain troubled by the majority's accurate observation in making this ruling that the jury could infer Wooden was a drug user from other properly admitted evidence. Under these circumstances, it was even more vital to Wooden's defense that the jury see the negative drug test report.

The drug test report was properly admissible as a medical record pursuant to Kentucky Revised Statutes (KRS) 422.300, Kentucky Rules of Evidence (KRE) 803(6) and KRE 902(11). While a chain of custody must also be established for the admissibility of blood samples, this chain need not be perfect or eliminate all possibility of tampering or misidentification. *Ross v. Commonwealth*, 455 S.W.3d 899, 912 (Ky. 2015); *Rabovsky v. Commonwealth*, 973 S.W.2d 6, 8 (Ky. 1998). Even a test result from insecurely kept evidence is still admissible where there is no evidence of tampering. *Hunt v. Commonwealth*, 304 S.W.3d 15, 29 (Ky. 2010); *Thomas v. Commonwealth*, 153 S.W.3d 772, 781-82 (Ky. 2004). Where the evidence supports the conclusion that samples were properly tested in accordance with standard procedures, this is sufficient for admissibility. *Allen v. Kentucky Horse Racing Auth.*, 136 S.W.3d 54, 60 (Ky.App. 2004); *Mollette v. Kentucky Personnel Bd.*, 997 S.W.2d 492, 496 (Ky.App. 1999). Where there is an attempt to

establish the chain of custody, "[g]aps in the chain normally go to the weight of the evidence rather than to its admissibility." *Rabovsky*, 973 S.W.2d at 8.

The Commonwealth's objection to admitting the drug test report was based on trial counsel's failure to establish a chain of custody as a matter of form, rather than based on any fear of tampering or misidentification of Wooden's blood sample. Hospitals routinely draw blood for drug tests and have practices to ensure the correct identification of the sample to the patient so that patients' ailments may be accurately diagnosed. Under these circumstances, had trial counsel properly established part of the chain through the court order requiring testing and the testimony of Gonterman and a Lab Corp. technician, I believe the drug test report should have been admitted.

The drug test report was highly relevant to Wooden's motive or lack thereof to manufacture methamphetamine.

> The existence of motive is indicative of the probability of guilt as the absence of motive is indicative of innocence, so that any relevant fact is admissible which tends to prove a motive on the part of the accused for committing the crime with which he is charged; and where the evidence of guilt is circumstantial, such proof is of great importance and may be decisive.

Canada v. Commonwealth, 281 Ky. 641, 136 S.W.2d 1061, 1064 (1940). The drug test report was relevant because if there was evidence that Wooden had used methamphetamine that would be relevant to prove a she had a motive to manufacture it. *Fulcher v. Commonwealth*, 149 S.W.3d 363, 379 (Ky. 2004). Therefore, the negative drug test report was relevant to negate such a motive.

Additionally, the Commonwealth's closing statement made the results of the drug test report highly probative where it conflicted with the Commonwealth's theory that all the defendants manufactured the methamphetamine together and then consumed it. A lack of use would tend to support a defense theory that while Wooden may have been aware of the nefarious undertaking of methamphetamine manufacture in her home and associate with known drug users, she did not participate in such activities.

Accordingly, I concur.

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